[Cite as *State v. Schwieterman*, 2009-Ohio-2304.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MERCER COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 10-08-17**

v.

NICHOLAS R. SCHWIETERMAN, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Mercer County Common Pleas Court
Trial Court No. 08-CRM-022

Judgment Affirmed

Date of Decision: May 18, 2009

APPEARANCES:

John A. Poppe and Eric J. Allen **for Appellant**

Matthew K. Fox **for Appellee**

WILLAMOWSKI, J.

{¶1} The defendant-appellant, Nicholas Schwieterman, appeals the judgment of the Mercer County Common Pleas Court sentencing him to an aggregate prison term of 24 years. On appeal, Schwieterman contends that his sentence violates the Eighth Amendment protection against cruel and unusual punishment, and that the trial court erred by imposing consecutive and non-minimum sentences. For the reasons set forth herein, the judgment of the trial court is affirmed.

{¶2} The parties have stipulated to the following facts:

> **On or about March 15, 2008, at approximately 2:15 a.m. Deputies from the Mercer County Sheriff's Office were dispatched to an injury collision at the intersection of County Road 716A and Brockman Road in Mercer County, Ohio. When they arrived on scene, they observed a grey Pontiac Bonneville off the road in the northwest corner of the intersection. It was severely damaged and the rear end of the vehicle had collided with the utility pole located in the field at the northwest corner of the intersection. They further observed a red Pontiac Grand Prix in a field further northwest of the grey Bonneville. The red Pontiac Grand Prix was also severely damaged. The investigation revealed that the 1996 Pontiac Bonneville was traveling westbound on Brockman Road when it failed to yield the right-of-way and/or stop for the stop sign that controls the intersection of 716A and Brockman Roads. The Bonneville collided with the red 1995 Pontiac Grand Prix which had been traveling northbound on County Road 716A at the time of the collision. The Pontiac Grand Prix was being operated by Jordan Moeller and passengers in the vehicle were Jordan Diller, Bradley Roeckner and Jordan Goettemoeller. All four occupants in the Pontiac Grand Prix died as a proximate result of the collision.**

> **Deputies approached two male individuals identified as Nicholas Schwieterman and Kyle Schmitmeyer. They both had blood shot eyes and strong odors of alcohol on or about their persons, also Nicholas Schwieterman[’s] speech was slurred and he was hard to understand. They both initially denied they were driving the Bonneville, they were both read Miranda rights and were both transported to Coldwater Community Hospital/Mercer Health. Upon questioning Schwieterman at the hospital he admitted he was the driver of the motor vehicle and Schmitmeyer also identified Schwieterman as the driver. Schwieterman consented to a blood draw and urine sample after being read the BMV 2255 form. The blood sample was submitted to the Ohio State University Medical Center Clinical Laboratories for forensic testing on March 15, 2008. Mr. Schwieterman was arrested for Aggravated Vehicular Homicide and transported to the Mercer County Jail.**
>
> **The Ohio State University Medical Center Clinical Laboratories completed [its] analysis of the blood sample and conclude[d] that Mr. Schwieterman had a concentration of one hundred thirty-four thousands (0.134) of one percent by weight per unit volume of alcohol in Schwieterman’s whole blood.**
>
> **The Ohio State University Medical Center Clinical Laboratories completed [its] analysis of the urine sample collected from Mr. Schwieterman after the crash. The test concluded the Defendant possessed 7990 ng/ml of Cocaine in his urine. The test also concluded that the Defendant possessed 48 ng/ml of THC in his urine.**

Stipulation of Facts on No Contest Plea, Oct. 9, 2008.

{¶3} On April 7, 2008, the Mercer County Grand Jury indicted Schwieterman on the following charges: four counts of involuntary manslaughter, violations of R.C. 2903.04(A), first-degree felonies; one count of possession of drugs, a violation of R.C. 2925.11(A), (C)(4)(a), a fifth-degree felony; four counts

of aggravated vehicular homicide, violations of R.C. 2903.06(A)(1)(a), (B)(1)(2)(a), second-degree felonies; one count of operating a motor vehicle while under the influence of alcohol or drugs of abuse, a violation of R.C. 4511.19(A)(1)(a), (G)(1)(a)(i), a first-degree misdemeanor; one count of operating a motor vehicle while under the influence of alcohol or drugs of abuse, a violation of R.C. 4511.19(A)(1)(b), (G)(1)(a)(i), a first-degree misdemeanor; four counts of aggravated vehicular homicide, violations of R.C. 2903.06(A)(2)(a), (B)(1)(3), third-degree felonies; and one count of trafficking in drugs, a violation of R.C. 2925.03(A)(1), (C)(4)(a), a fifth-degree felony.[1] At arraignment on April 10, 2008, Schwieterman pled not guilty to each charge.

{¶4} On May 5, 2008, Schwieterman filed a motion to suppress evidence. The state filed a response, and both parties filed post-hearing memoranda. On July 16, 2008, the court denied the motion. The state filed a motion for change of venue on July 31, 2008, which Schwieterman moved to strike on August 8, 2008. The court granted Schwieterman's motion to strike on August 11, 2008.

{¶5} On October 9, 2008, a waiver of constitutional rights prior to entering pleas of no contest, which Schwieterman had signed, was filed. The

[1] Schwieterman had previously been indicted by the Mercer County Grand Jury on ten counts in Mercer County Common Pleas Court case number 08-CRM-016. The indictment in that case was dismissed following the state's receipt of toxicology results, which indicated the presence of cocaine and marijuana in Schwieterman's blood and urine on the morning of March 15, 2008. A special session of the grand jury was conducted, and the above referenced indictment was filed in Mercer County Common Pleas Court case number 2008-CRM-022, which is before us on appeal.

parties filed the stipulation of facts on no contest plea, which was quoted above, and a written negotiated plea agreement was filed. Schwieterman pled no contest to four counts of involuntary manslaughter, one count of possession of drugs, and one count of operating a motor vehicle while under the influence of alcohol or drugs of abuse ("OMVI"). The state agreed to, and did, dismiss the remaining counts of the indictment. On October 20, 2008, the court filed its judgment entry finding Schwieterman guilty on the charges to which he had pled no contest.

{¶6} Schwieterman filed a sentencing memorandum on November 10, 2008, and on November 12, 2008, the trial court held a sentencing hearing. Based solely on the pre-sentence investigation report, the court made preliminary determinations under R.C. 2929.12 that the victims and their families had suffered serious physical and psychological harm; that Schwieterman had been adjudicated delinquent as a juvenile; and that Schwieterman showed genuine remorse. Schwieterman presented testimony from Roberta Donovan, a mental health counselor at Foundations Behavioral Health Services, his life-long friend, Sarah Hein, and his father, Robert Schwieterman.

{¶7} Donovan testified that Schwieterman was on suicide watch at the Mercer County Jail when she had her first correspondence with him. At that time, "some of the first comments out of his mouth were 'Oh, my God' which he repeatedly said. He also made comments of 'just shoot me.' 'Someone get rid of

me.' 'I am going to have a heart attack.' 'I am fucking dead' and 'I'm going to be all by myself for a long time.' 'Get rid of me. I will pay you.'" Sentencing Tr., Jan. 2, 2009, at 9:19-24. Donovan stated that Schwieterman was crying and scared, and she observed that his emotions were "heart-felt." Id. at 10. Donovan stated that she continued to provide counseling services to Schwieterman after he was released on bond, and he had never missed a session with her. Id. at 12. Schwieterman told Donovan that he wanted to apologize to the victims' families, and he wanted to schedule speaking engagements to tell others his story and about the victims. Id. at 14. Donovan stated that she found Schwieterman to be different from her typical clients because he openly shared his feelings with her. Id. at 15. She also believed that Schwieterman's expressed feelings were genuine; that his feelings were for the victims and not self-pity; and that he could benefit the community because he was willing to accept the consequences of his actions and was willing to try to make a difference. Id. at 14-15.

{¶8} On cross-examination, Donovan testified about Schwieterman's alcohol and drug abuse. Schwieterman reported that he began drinking alcohol at age 15, using marijuana at age 20, and using cocaine during his senior year of high school. Id. at 21-22. Schwieterman later told her that his drug habits formed in the following order: alcohol, nicotine, marijuana, and cocaine. Id. at 23.[2]

[2] The pre-sentence investigation report supported the latter statement. However, alcohol abuse began at age 15, and drug abuse began while Schwieterman was in high school.

Schwieterman disclosed that he would drink alcohol on Thursday nights and during the weekends; that he used marijuana once per week; and that he used cocaine once per month. Id.

{¶9} The next defense witness was Sarah Hein, Schwieterman's life-long friend and neighbor. Hein testified that she and Schwieterman were close to each other and described a sibling-like relationship. Id. at 27. Hein told the court that Schwieterman was very hurt by the collision and would trade places with any of the victims if he could. Id. at 29. Hein testified that Schwieterman cried about the collision, and she believed that his tears were for the victims and not out of self-pity. Id. Hein also indicated Schwieterman's desire to make presentations after he had served his sentence. Id. at 30. On cross-examination, Hein testified that she had seen Schwieterman and his family praying for the victims and their families, and that she had been surprised when she learned the frequency of his drug use. Id. at 36.

{¶10} Finally, Schwieterman's father, Robert, testified that he had been aware of his son's "partying." Id. at 44. Robert had known that Schwieterman worked when it was time to work and partied when it was time to party. Id. Robert stated that he had never talked to Schwieterman about underage drinking because his father had never talked about it with him and because "it's the social system in this area." Id. at 45. Robert discussed his son's emotional state since

the collision, indicating that Schwieterman had been inconsolable and wished he could have been the one to die instead of the victims. Id. at 49.

{¶11} On cross-examination, Robert admitted he had been aware of Schwieterman's juvenile adjudication, which was for an alcohol-related offense, and he had also been aware of Schwieterman's conviction for criminal damaging. Id. at 51. However, Robert indicated that Schwieterman's juvenile adjudication made him more secretive about his alcohol use, and he downplayed the facts of the misdemeanor conviction while demonstrating that Schwieterman had accepted responsibility for the act, had served his sentence, had been offered a job upon his completion of community service. Id. Robert believed his son's remorse to be genuine. Id. Robert testified that Schwieterman was always concerned about his appearance and only wore pressed shirts. Id. at 53. He also stated that he had not been aware of Schwieterman's drug usage, and that Schwieterman had been able to keep his drug use a secret from the entire family. Id. at 46; 54.

{¶12} Defense counsel then spoke on Schwieterman's behalf. Counsel asked the victims' families to forgive Schwieterman for his failure to apologize earlier. Counsel indicated that Schwieterman had wanted to apologize to the victims' families since the collision, but he had not done so on counsel's advice. Counsel also expressed concern that the community had a serious alcohol and drug abuse problem. Counsel stated that he was shocked to learn how common alcohol

abuse was in the community; that bars were openly serving alcohol to people under the age of 21; and that the community seemed to view drinking and driving as an acceptable practice. Counsel noted that the community had been supportive of Schwieterman until the toxicology reports had been released and revealed Schwieterman's cocaine use. Counsel noted Schwieterman's genuine remorse for the collision, and his desire to begin speaking engagements.

{¶13} Counsel requested that the court impose a prison term of between eight and twelve years. Counsel told the court that a harsh sentence would simply send Schwieterman to prison, and the community would forget him. However, if the court was reasonable in sentencing, Schwieterman would be able to return to the community and be scorned by residents who would recognize him and remember the crimes he had committed. A more reasonable sentence would serve as a "wake up call" to the young people of the community that alcohol abuse and drinking and driving are not acceptable.

{¶14} Schwieterman also made a statement in which he first said that he had made the worst decision of his life on March 15, 2008. Schwieterman apologized to the families and indicated that "[n]ot a day will go by the rest of my life that I don't think of those four boys and the great lives that were taken that night." Id. at 67. Schwieterman stated that his "decision to get behind the wheel while under the influence was, you know, a horrible, horrible mistake." Id. at 68.

Schwieterman told the court that a day will never pass that he does not think about the victims, and he hoped that one day he would be able to give presentations that might prevent even one person from making the same decisions he had made. Id. Schwieterman ended his statement by asking that the victims' families some day find peace and forgive him. Id. at 68-69.

{¶15} Representatives from each of the victims' families were given the opportunity to speak. Their readings were emotional and described the effects of losing their children in such an abrupt manner. Several parents described their dead sons' bodies at the hospital following the collision and how they had held their sons' bodies for hours. One of the fathers described having been dispatched to the scene of the collision as a first-responder and being apprehended by his colleagues to prevent him from finding his deceased son in the wreckage. Several siblings testified about their losses, and parents talked about how other siblings had been affected; several smaller children waking with nightmares and other small children sleeping in their deceased brother's bed each night.

{¶16} Finally, the assistant prosecutor spoke on behalf of the state of Ohio and requested a "lengthy and significant sentence." Id. at 122. The state addressed Ohio's sentencing statutes, and focused on Schwieterman's concern with appearances, his ability to hide drug use from his family and Hein, and his lack of remorse. The state noted Schwieterman's statements, which had been

recorded when he was transported by law enforcement from the hospital to the county jail and which were played during the hearing. In particular, the state focused on Schwieterman's statements about his life being over and his asking law enforcement to end his life. Id. at 114. The state believed that, contrary to other witnesses' opinions, such statements demonstrated self-pity rather than concern for the victims and their families.

{¶17} After a short recess, the court proceeded to sentence Schwieterman to four, consecutive six-year prison terms for the involuntary manslaughter convictions. The court also imposed a one-year prison term for the possession of drugs conviction and six months in the county jail for the OMVI conviction. The court ordered those sentences to be served concurrently with the sentences imposed for the involuntary manslaughter convictions for an aggregate prison term of 24 years. The court filed its judgment entry of sentence on November 14, 2008. Schwieterman appeals the judgment of the trial court, raising two assignments of error for our review.

Assignment of Error No. 1

> **The trial court violated Appellant's Eighth Amendment, made applicable to the states by the Fourteenth Amendment[,] right against cruel and unusual punishment by sentencing him to a term of twenty four years in prison.**

Assignment of Error No. 2

The trial court erred in imposing consecutive non-minimum sentences on the appellant.

{¶18} In the first assignment of error, Schwieterman contends that the aggregate sentence, not the individual sentences, violates the Eighth Amendment protection against cruel and unusual punishment. Specifically, Schwieterman claims that the aggregate sentence is grossly disproportionate to sentences imposed in similar cases. In his appellate brief, Schwieterman cited to three cases he claims involved similar facts and convictions.

{¶19} The Supreme Court of Ohio considered a similar argument in *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073. Hairston pled guilty to four counts of aggravated robbery, three counts of aggravated burglary, four counts of kidnapping, all with firearm specifications, and three counts of having a weapon while under disability. Id. at ¶ 7. At sentencing, the court imposed maximum, consecutive sentences for each offense, including the firearm specifications, which resulted in an aggregate prison term of 134 years. Id. at ¶ 9. Hairston appealed his sentence, arguing that the aggregate sentence constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Section 9, Article I of the Ohio Constitution.

{¶20} Beginning its analysis of Hairston's proposition of law, the court wrote:

> **In *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 715 N.E.2d 167, we applied Justice Kennedy's Eighth Amendment analysis in his concurring opinion in *Harmelin v. Michigan* (1991), 501 U.S. 957, 997, 111 S.Ct. 2680, 115 L.Ed.2d 836. We quoted with approval his conclusion that "'[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.'" *Weitbrecht,* 86 Ohio St.3d at 373, 715 N.E.2d 167, quoting *Harmelin,* 501 U.S. at 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (Kennedy, J., concurring in part and in judgment). We further emphasized that "'only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality'" may a court compare the punishment under review to punishments imposed in Ohio or in other jurisdictions. Id. at 373, 715 N.E.2d 167, fn. 4, quoting *Harmelin,* 501 U.S. at 1005, 111 S.Ct. 2680, 115 L.Ed.2d 836 (Kennedy, J., concurring in part and in judgment).**
>
> **With respect to the question of gross disproportionality, we reiterated in *Weitbrecht* that "'[c]ases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person,'" and furthermore that "'the penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community.'" Id. at 371, 715 N.E.2d 167, quoting *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 70, 30 O.O.2d 38, 203 N.E.2d 334, and citing *State v. Chaffin* (1972), 30 Ohio St.2d 13, 59 O.O.2d 51, 282 N.E.2d 46, paragraph three of the syllabus.**

Hairston, at ¶ 13-14. The court noted that Ohio's felony sentencing scheme had been designed to focus the sentencing courts on one offense at a time. Id. at ¶ 16, quoting *State v. Saxon,* 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, at ¶ 8-9. The court relied on several circuit court opinions in determining that the Eighth Amendment proportionality test is inapplicable to aggregate prison terms.

Id. at ¶ 17, citing *United States v. Aiello* (C.A. 2, 1988), 864 F.2d 257; *Hawkins v. Hargett* (C.A. 10, 1999), 200 F.3d 1279; *Pearson v. Ramos* (C.A. 7, 2001), 237 F.3d 881; *United States v. Schell* (C.A. 10, 1982), 692 F.2d 672.

{¶21} The court held that:

> **for purposes of the Eighth Amendment and Section 9, Article I of the Ohio Constitution, proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively. Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment.**

Id. at ¶ 20. The court went on to review the individual sentences and found each sentence to be within the pertinent statutory range. Id. at ¶ 21-23. The court cited its prior holdings that "trial courts have discretion to impose a prison sentence within the statutory range for the offense," and that "'[a]s a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.'" Id. at ¶ 21, citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at paragraph seven of the syllabus; quoting *McDougle v. Maxwell*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334, citing *Martin v. United States* (C.A. 9, 1963), 317 F.2d 753; *Perpendrea v. United States* (C.A. 9, 1960), 275 F.2d 325; *United States v. Rosenberg* (C.A. 2, 1952), 195 F.2d 583.

{¶22} For a first-degree felony, a trial court may sentence an offender to three, four, five, six, seven, eight, nine, or ten years in prison. R.C. 2929.14(A)(1).

The individual sentences of six years for each first-degree felony offense were within the valid statutory range. This court is bound by the precedent of the Supreme Court of Ohio. Section 3(B)(2), Article IV, Ohio Constitution. As such, we hold that neither the aggregate prison term of 24 years nor the individual sentences violate the Eighth Amendment protection against cruel and unusual punishment.

{¶23} We note that Schwieterman referenced three other cases to support his argument that his sentence was disproportionate to sentences imposed on others for similar offenses. Although the defendants in each of those cases had been intoxicated and driving, none of those defendants were convicted of involuntary manslaughter. In *State v. Neace*, (Mar. 1, 2000), 3d Dist. No. 10-99-07, the defendant was apparently convicted of aggravated vehicular homicide, a violation of R.C. 2903.06(A)(1), which is a second-degree felony. The defendant killed two people when he wrecked the boat he had been operating while intoxicated. The court sentenced Neace to serve two, consecutive, three-year prison terms. In *State v. Reinhart*, 3d Dist. No. 15-06-07, 2007-Ohio-2284, this court reversed the defendant's conviction for aggravated vehicular homicide based on a faulty indictment. Finally, in *State v. Kiger*, 3d Dist. No. 7-03-03, 2004-Ohio-530, the defendant was sentenced to two, consecutive, eight-year prison terms for killing two victims in a collision after he operated a vehicle while

intoxicated. Again, Kiger's convictions were for aggravated vehicular homicide, second-degree felonies.

{¶24} Schwieterman pled no contest to and was found guilty on four counts of involuntary manslaughter, first-degree felonies. He received a six-year prison term on each count. In reviewing first-degree involuntary manslaughter cases, we have found sentences ranging from five years to ten years. *State v. Luke*, 3d Dist. No. 1-06-103, 2007-Ohio-5906; *State v. Cole*, 3d Dist. No. 4-07-05, 2007-Ohio-4485; *State v. Hairston*, 3d Dist. No. 1-06-92, 2007-Ohio-2988; *State v. Daniels*, 3d Dist. No. 12-06-15, 2007-Ohio-2281; *State v. Ramos*, 3d Dist. No. 4-06-24, 2007-Ohio-767; and *State v. Shoemaker*, 3d Dist. No. 14-06-12, 2006-Ohio-5159. Schwieterman selected "comparable" cases based on the defendants having operated motor vehicles while intoxicated. None of those cases involved defendants who were also under the influence of illegal drugs. Furthermore, none of those defendants were convicted for the same crimes as Schwieterman. While none of the defendants convicted of involuntary manslaughter had killed their victims by operating a motor vehicle while intoxicated, they were each convicted of first-degree felony involuntary manslaughter. The first assignment of error is overruled.

{¶25} In the second assignment of error, Schwieterman contends that the trial court failed to discuss recidivism or mitigation at the sentencing hearing. He

claims that the trial court engaged in no discussion concerning his genuine remorse, and that the trial court exhibited an "absolute disregard for the mitigation in this matter."

{¶26} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Supreme Court of Ohio addressed the appropriate standard of review for appeals based on R.C. 2929.11 and 2929.12. In *Kalish*, seven jurists agreed that the trial court's consideration of R.C. 2929.11 must be reviewed to determine if it is clearly and convincingly contrary to law. If the judgment entry survived that test, a minority of jurists would then review the trial court's consideration of R.C. 2929.11 for an abuse of discretion. As to R.C. 2929.12, seven jurists agreed that the trial court's journal entry must be reviewed to determine if the trial court considered R.C. 2929.12. Such initial determination would be under the clearly and convincingly contrary to law standard. If the trial court considered the R.C. 2929.12 factors, then the majority would apply an abuse of discretion standard to determine if the factors were supported by competent and credible evidence.

{¶27} Under R.C. 2929.11(A), a trial court must consider the overriding principles and purposes of felony sentencing: to protect the public from future crimes by the offender and others and to punish the offender. *State v. Montgomery*, 3d Dist. Nos. 3-08-10, 3-08-11, 2008-Ohio-6182, at ¶ 11; *State v. Scott*, 3d Dist. No. 6-07-17, 2008-Ohio-86, at ¶ 49, citing *State v. Foust*, 3d Dist.

No. 3-07-11, 2007-Ohio-5767, at ¶ 27. In this case, as to the principles and purposes of felony sentencing, the court stated:

> **It is important that the court not be swayed by public opinion or by sympathy in pronouncing sentence in this case and instead that the court remain focused on the Ohio law governing criminal sentencing. Sentencing law in Ohio requires that the court focus on two primary objectives that were referred to by counsel today: first, punishment of the defendant, and secondly, protection of the public. That protection of the public objective goes beyond just protecting the public in sentencing from similar acts by a particular defendant. Sentencing should be focused on protecting the public from similar acts by others in the future.**
>
> **The defendant will be sentenced this afternoon because of the choices that he made that led up to his criminal conduct. He is responsible for those choices and he must be held accountable, keeping in mind those two primary purposes of sentencing: his punishment and the protection of our community.**
>
> **Every person is responsible for his or her own choices and accountable for the consequences those choices bring about. And we, as a community here in Mercer County, cannot deny that each one of us bears some responsibility for our young people such as the defendant making bad choices that bring about similar consequences.**
>
> **When the youth of Mercer County continue to make bad choices that involve consuming alcohol and driving motor vehicles or consuming other mind-altering drugs, as much as those who make those choices are directly responsible and must be held accountable, we cannot deny our own influence on our own youth. When we as adults do not confront those issues, we condone those choices either by our own inaction or worse yet, by the examples that we provide our youth from our own bad choices. Every decision each of us makes affects not only us but also, as we can see from today, our entire community and in that effect, the world around us.**

> **What sentencing law is not focused on doing is making victims whole. All of us know that and some of the victims acknowledged that, because in this case that's impossible. As much as we Americans rely on our legislators to make the laws and our law enforcement officers to enforce them and judges to interpret, apply, and follow them, we also should recognize that the law man creates is woefully inadequate to make victims whole or repair any loss suffered by them as a result of another's conduct.**
>
> **That is why criminal law requires that the court focus only on punishment of the defendant and protection of the public. As we know, this is not a case in which a life sentence may be imposed. But everyone in this courtroom, specifically including those family members of the victims and the family members of the defendant, will suffer the consequences of the defendant's actions for the rest of their lives. It is up to all of us to choose how we will personally respond to this situation and live out the rest of our lives in our community in light of what's happened and brought this case to the court, whether we choose to make good decisions and set good examples in the future.**
>
> **This court, having sworn under oath to follow our sentencing law, will not attempt to somehow soften the impact on those affected by this defendant's criminal conduct but instead will only focus on the requirements of the law to punish the defendant and protect the public. Having focused on those two principles and considered all the information that the court has received to the extent that that information is relevant and material to the court following and applying the law, the court will now proceed to pronounce sentence upon the defendant.**

Sentencing Tr., at 124-127.

{¶28} The court must also contemplate the seriousness of the offender's conduct under R.C. 2929.12(B) and (C), and the likelihood of recidivism under R.C. 2929.12(D) and (E). The record is clear that the trial court did consider those

factors. At the beginning of the hearing, the court indicated that it had reviewed the pre-sentence investigation report. Id. at 5. Based on that review, the court found:

> **that the victims and their families have suffered serious physical and psychological harm. With regard to the likelihood of recidivism, the court finds that the defendant was previously adjudicated once a delinquent and has appeared to the investigating officer who did the investigation and prepared the report to be genuinely remorseful. Those are the preliminary findings subject to further hearing in this case.**

Id. at 5-6. Prior to imposing sentence, the court noted that it had considered the sentencing memorandum filed by Schwieterman, the information provided at hearing, the pre-sentence investigation report, and the separate written statements of the victims' family members. Id at 122-123. The court also acknowledged "receipt of a box of hundreds of cards and letters of support and encouragement sent to and received by the defendant during the pendency of this case, most of which have been reviewed by the probation officer who did the presentence investigation" and the probation officer's written summary of those comments. Id. at 124. After its discussion of the principles and purposes of felony sentencing, the court stated that its preliminary findings would be the findings of the court. Id. However, the court did note the misdemeanor criminal damaging conviction. Id.

{¶29} In regard to the court's consideration of R.C. 2929.11 and 2929.12, we cannot find that the sentences imposed are clearly and convincingly contrary to

law, nor can we find an abuse of discretion. Contrary to Schwieterman's assertions, the trial court did consider the mitigating factors, even if it did not specifically discuss the factors. Furthermore, contrary to Schwieterman's assertions, the court did recognize his genuine remorse, as evidenced by the court's specific finding under R.C. 2929.12(E)(5).

{¶30} In considering whether the trial court erred by imposing the chosen sentences, we must also turn to guidance from the Supreme Court of Ohio. In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the court severed sections of Ohio's sentencing scheme consistent with the holding of the United States Supreme Court in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. The court specifically noted that trial courts "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster*, at paragraph seven of the syllabus. As to the specific sentence imposed for each offense, the court's sentence of six years on each first-degree felony offense was within the statutory sentencing range. R.C. 2929.14(A)(1). As stated above, the court did give reasons for its sentences, even though it was not required to. Finally, the trial court ordered consecutive sentences to be served only on the involuntary manslaughter convictions. The OMVI and possession of drugs convictions were

ordered to be served concurrently with the involuntary manslaughter convictions. Such sentences achieve the principles and purposes of felony sentencing and do not demean the seriousness of Schwieterman's conduct. On this record, we cannot hold that the sentences are clearly and convincingly contrary to law, nor can we hold that the trial court abused its discretion. The second assignment of error is overruled.

{¶31} The judgment of the Mercer County Common Pleas Court is affirmed.

Judgment Affirmed

ROGERS and SHAW, J.J., concur.

/jlr