

[Cite as *State v. Gleckler*, 2010-Ohio-496.]

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-03-021
- vs -	:	<u>OPINION</u> 2/16/2010
GEORGE L. GLECKLER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS  
Case No. 08-CR-00720

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, Kevin T. Miles, 123 N. Third Street, Batavia, OH 45103-3033, for plaintiff-appellee

James A. Dearie, Charles H. Rittgers, 12 East Warren Street, Lebanon, OH, 45036, for defendant-appellant

**YOUNG, J.**

{¶1} Defendant-appellant, George Gleckler, appeals his conviction and sentence in the Clermont County Court of Common Pleas for aggravated vehicular homicide and operating a vehicle under the influence of alcohol.

{¶2} In September 2008, appellant was indicted on two counts of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), second-degree felonies, and

one count of operating a vehicle with a blood alcohol concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath (OVI) in violation of R.C. 4511.19(A)(1)(d), a first-degree misdemeanor. The charges stemmed from an incident that occurred mid-morning on August 27, 2008, wherein appellant, while driving a 38,000 pound dump truck in an intoxicated state, ran a red light at the intersection of State Route 28 and State Route 132 and broadsided a minivan occupied by Wesley and Doris Robinson. Wesley Robinson died at the scene of the crash. Doris Robinson died a few hours later. Both had suffered extensive and severe injuries. A breath test taken by appellant resulted in a BAC reading of .139. Appellant had consumed eight beers the night before, and six to seven beers between 7 a.m. and 10 a.m. on the morning of the accident.

{13} In February 2009, appellant entered a plea of no contest to all three counts; he was found guilty as charged by the trial court. Following a sentencing hearing and the submission by trial counsel of a sentencing memorandum, the trial court sentenced appellant on March 25, 2009 to seven years in prison on each count of aggravated vehicular homicide, to be served consecutively (for a total of 14 years in prison), and to 180 days in jail on the OVI count, to be served concurrently. The trial court also ordered appellant to pay a \$250 fine, court costs, and restitution.

{14} Appellant appeals, raising two assignments of error.

{15} Assignment of Error No. 1:

{16} "APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING PRETRIAL PROCEEDINGS, DURING APPELLANT'S PLEA HEARING, AND DURING APPELLANT'S SENTENCING HEARING, IN VIOLATION OF

APPELLANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER SECTION 10 OF ARTICLE I OF THE OHIO CONSTITUTION."

{17} Appellant argues he received ineffective assistance of counsel before his plea and at the plea and sentencing hearings. Specifically, appellant asserts defense counsel was ineffective for (1) failing to file a motion to suppress; (2) allowing appellant to enter a plea of no contest without appellant receiving any benefit in return; (3) failing to present any mitigating evidence at the sentencing hearing, other than a short apology by appellant; (4) instead, submitting a prehearing sentencing memorandum with damaging contents, and making a damaging oral statement on behalf of appellant at the sentencing hearing.

{18} To establish ineffective assistance of counsel, appellant must show that trial counsel's performance was both deficient and prejudicial. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052. Trial counsel's performance will not be deemed ineffective unless the defendant shows that "counsel's representation fell below an objective standard of reasonableness," *id.* at 688, and that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Id.* at 694. "A defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other." *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, citing *Strickland* at 697. Any questions regarding the ineffectiveness of counsel claim must be viewed in light of the evidence against the defendant. *State v. Stojetz*, Madison App. No. CA2002-04-006, 2002-Ohio-6520, ¶22. Further, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the

proceeding." *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, fn. 1, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.

Failure to File a Motion to Suppress

{¶19} "Failure to file a suppression motion does not constitute per se ineffective assistance of counsel." *Madrigal* at 389. "The Sixth Amendment right to effective assistance of counsel does not require trial counsel to file a motion to suppress evidence where none of the defendant's constitutional rights were violated. Nor is trial counsel required to file a meritless motion to place it on the record to avoid a charge of ineffective assistance." *State v. Hamilton*, Clermont App. No. CA2002-04-044, at 7, 2002-Ohio-560. (Internal citations omitted.)

{¶10} Judicial scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689. We find that appellant fails to overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* A reviewing court is not permitted to use the benefit of hindsight to second-guess the strategies of trial counsel. *State v. Hoop*, Brown App. No. CA2004-02-003, 2005-Ohio-1407, ¶20. Even debatable trial strategies and tactics do not constitute ineffective assistance of counsel. *Id.* However, even assuming arguendo that trial counsel should have filed a motion to suppress, we find that appellant cannot meet the prejudice prong of *Strickland*, that is, there exists "a reasonable probability that absent [appellant's counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland* at 695. Even without the BAC reading, the evidence against appellant was compelling. Trial counsel was therefore not ineffective for failing to file a motion to suppress.

No Contest Plea

{¶11} Appellant cites *State v. Underwood* (May 7, 1999), Meigs App. No. 98CA11, 1999 WL 301637, which held that "[a]n attorney, who advises his client to plead guilty as charged when the client receives no benefit at all in exchange therefor, could possibly be deemed to have failed in his duty to competently represent his client. However, \*\*\* the benefit a defendant receives as a result of pleading guilty is not necessarily reflected by the penalty ultimately imposed on him. We find that we must consider the totality of the circumstances surrounding the plea in determining whether the appellant received any benefit in exchange for the plea." *Id.* at \*3.

{¶12} We find that appellant was not denied effective assistance of counsel with regard to his no contest plea. Judicial scrutiny of counsel's tactical decisions, including relative to a no contest plea, must be highly deferential. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶85. Trial counsel may have reasonably believed that by entering a no contest plea before the trial judge, appellant obtained the benefit of mitigation evidence, namely remorse and a no contest plea. See *id.* at ¶86. Further, there was compelling evidence of appellant's guilt. Had the case gone to trial (an alternative suggested by appellant), the factfinder would have heard a detailed account of all of the facts and circumstances surrounding the crash, including the extensiveness and gravity of the victims' fatal injuries and the fact one of the victims' children drove through the crash scene on their way to the hospital. By contrast, the no contest plea essentially permitted appellant to proceed on a relatively brief, cold, and sanitized record of the events.

#### Sentencing Hearing

{¶13} Appellant first argues trial counsel was ineffective for failing to present

any mitigating evidence at the sentencing hearing, other than a short apology by appellant. We disagree.

{¶14} The presentation of mitigating evidence is a matter of trial strategy. *State v. Keith*, 79 Ohio St.3d 514, 530, 1997-Ohio-367; *State v. Cossack*, Mahoning App. No. 08 MA 161, 2009-Ohio-3327, ¶36. Prior to the sentencing hearing, trial counsel filed a sentencing memorandum with the trial court; attached to the memorandum were several letters from friends, relatives, and businessmen, as well as a letter from counsel for appellant's company. The letters referred to appellant's long record of outstanding service and dedication to his family, business, and community. During the hearing, trial counsel told the court that the "letters speak volumes about [appellant] far more than anything that I could ever articulate to this Court." Trial counsel's statement to the court and appellant's apology both strongly emphasized appellant's deep remorse and the fact appellant was taking full responsibility for his conduct.

{¶15} Appellant next argues trial counsel was ineffective for making a statement on his behalf that was damaging. Excerpts from trial counsel's oral statement as listed in appellant's brief include statements such as "[appellant] is not an inherently evil or bad person," "[the victims] did nothing to deserve their ultimate fate," and "his conduct resulted in two people's loss of life."<sup>1</sup>

{¶16} However, upon a review of trial counsel's statement to the court *in its entirety*, it is evident that the statement was based on the tactical decision to show

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1. We wish to point out that one statement attributed to trial counsel was misquoted. According to appellant's brief, trial counsel told the trial court that "[appellant] put [himself] in a position where unfortunately this type of tragic result can occur." The correct statement was "when alcohol becomes involved in one's life for whatever reason – and we do not offer this as an excuse – one puts themselves in a position where unfortunately this type of tragic result can occur."

the court appellant's deep remorse and guilt and his decision to take full responsibility for his conduct and the accident. In addition, trial counsel's statement to the court related the difficulty of those cases where alcohol is involved. As trial counsel pointed out, were it not for appellant's alcoholism and its tragic consequences, "we would look at him and say, He's lead a pretty good life. He's lead a responsible life. [A] good hardworking salt of the earth type of a fellow." Trial counsel also referred to appellant's work ethics and the letters submitted on his behalf which spoke "volumes about him." We cannot say that trial counsel's oral statement to the court in its entirety was damaging to appellant or constituted ineffective assistance of counsel.

{¶17} Finally, appellant argues trial counsel was ineffective for submitting with his sentencing memorandum a damaging letter from appellant's substance abuse counselor and for writing an unflattering description of appellant in the memorandum. We disagree.

{¶18} As with trial counsel's oral statement to the trial court, the excerpts selected by appellant from trial counsel's memorandum and the counselor's letter only illustrate one side, the negative one, of the message conveyed. When read *in their entirety* however, neither trial counsel's memorandum nor the counselor's letter are damaging to appellant. Rather, they offer a balanced analysis of appellant's character and his struggle with alcoholism and the accident. While trial counsel described appellant as "kind of a crusty old codger, \*\*\* [u]pon further inspection, however, [appellant] is a very caring person, his sense of charity runs deep. His concerns for others, particularly his employees and family is paramount." The memorandum also describes appellant as a hard working, honest and ethical businessman, and refers to his guilt and remorse, his concern for the victims' family

and his own family, his acknowledgement he is an alcoholic, and his active participation in treatment

**{¶19}** The counselor's letter is at times very critical of appellant and uses unflattering or harsh terms to describe appellant's attitude during the first weeks of treatment. However, the letter also refers to appellant taking responsibility for his actions; his willingness to take "whatever consequence is sanctioned;" his regular attendance at AA meetings; the fact he has softened tremendously; and his belief he only has one purpose in life: to tell his story whether he is incarcerated or not, in the hopes of touching another life in a positive way. The letter also relates the counselor's belief that appellant "will continue with AA and with sobriety throughout the rest of his life," and "will share his story, as a mean old curmudgeon who does not tolerate ignorance."

**{¶20}** In light of all of the foregoing, we find that appellant did not receive ineffective assistance of counsel before his no contest plea or at the plea and sentencing hearings. Appellant's first assignment of error is overruled.

**{¶21}** Assignment of Error No. 2:

**{¶22}** "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY SENTENCING HIM TO NEARLY THE MAXIMUM SENTENCE ON TWO COUNTS OF AGGRAVATED VEHICULAR HOMICIDE AND THEN RUNNING THE SENTENCES CONSECUTIVELY."

**{¶23}** Appellant argues that the trial court erred by sentencing him to consecutive and nearly maximum prison terms on the aggravated vehicular homicide counts, and by imposing court costs in the sentencing entry when it did not impose them at the sentencing hearing.



{¶24} In *State v. Foster*, 109 Ohio St. 1, 2006-Ohio-856, the Ohio Supreme Court severed unconstitutional provisions of Ohio's felony sentencing statutes and held 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." *Id.* at ¶100. Following *Foster*, appellate review of felony sentencing is controlled by the two-step procedure outlined by the supreme court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. First, we must "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Id.* at ¶4. If this first prong is satisfied, the trial court's decision is then reviewed for an abuse of discretion. *Id.* An abuse of discretion is more than an error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

#### Nearly Maximum Sentences

{¶25} Appellant was sentenced to seven years in prison on each count of aggravated vehicular homicide, to be served consecutively. Under R.C. 2929.14(A)(2), the prison term for a second-degree felony ranges from two to eight years.

{¶26} Appellant argues that given (1) his long record of outstanding service to his family, business, and community as evidenced by the letters attached to trial counsel's sentencing memorandum; (2) the fact he has virtually no criminal record; (3) the trial court's improper application of R.C. 2929.12(D)(4), the recidivism factor concerning whether the offender has demonstrated a pattern of substance abuse;

and (4) the trial court's overemphasis on the type and weight of the vehicle driven by appellant, the trial court abused its discretion when it sentenced him to such a lengthy prison term.

{¶27} Applying *Kalish*, we first find that the trial court's sentence is not clearly and convincingly contrary to law. In its judgment entry, the trial court expressly stated it "considered \*\*\* the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code Section 2929.12." The trial court properly applied postrelease control and sentenced appellant to a term within the permissible range for the offense. See *Kalish* at ¶18; *State v. Kessel*, Butler App. No. CA2009-05-144, 2010-Ohio-46.

{¶28} We further find the trial court did not abuse its discretion in ordering appellant to serve 14 years in prison for his aggravated vehicular homicide convictions. It is evident from the record that the trial court gave careful and substantial deliberation to the relevant statutory considerations. As permitted under R.C. 2929.12, the trial court also considered relevant nonstatutory factors. The trial court reviewed a presentence investigation report and the letters submitted on behalf of appellant and the victims. The trial court considered appellant's short criminal record, his "deep remorse," and found him to be a good person, a hard working blue collar type individual, and a wonderful family member who unfortunately had allowed alcohol to take over his life.

{¶29} The trial court also considered the fact appellant, while impaired, was driving a 38,000 pound dump truck at the time of the accident, compared to the 3,800 pound minivan driven by the victims (a ten fold difference in weight), and noted that

"a vehicle can be tantamount to a loaded weapon." While the court noted several times the type of vehicle appellant drove that morning, it did not overemphasize the sheer weight of the truck. Rather, the trial court emphasized the seriousness of appellant's conduct that day in driving a heavy commercial vehicle on local roads during morning business hours while impaired.

**{¶30}** With regard to R.C. 2929.12(D)(4), we find the trial court properly applied it as a factor showing that recidivism was likely. Pursuant to R.C. 2929.12(D)(4), recidivism is likely if "[t]he offender has demonstrated a pattern of \*\*\* alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the \*\*\* alcohol abuse." It is undisputed, and the trial court readily acknowledged, that appellant recognized his alcohol abuse and within days of the accident voluntarily sought and underwent treatment to address his alcohol abuse.

**{¶31}** Nonetheless, given the fact that (1) appellant's alcohol problem has been glaring throughout his life (he is 55 years old); (2) although appellant successfully completed a rehabilitation program in 1991, he relapsed a year after his discharge; (3) appellant describes himself as an alcoholic who has abused alcohol on a daily basis throughout his life; (4) prior to the crash that killed the victims, appellant had consumed eight beers the night before and six to seven beers before 10 a.m. the next morning; and (5) despite the crash, appellant did not stop drinking alcohol but consumed alcohol on two different occasions (he could not recall the specific dates), the trial court did not abuse its discretion in sentencing appellant to 14 years in prison for the aggravated vehicular homicide convictions. R.C. 2929.12(D)(4) "does not prevent [a trial] court, in the exercise of its discretion, from giving more weight to the

abuse problem's role in the immediate offense and criminal history, effects upon the victim and defendant, and duration, than the defendant's recent acknowledgment thereof or attempts at treatment." *State v. McNeal*, Allen App. No. 1-01-158, 2002-Ohio-2981, ¶66.

### Consecutive Sentences

{¶32} Next, appellant argues that the trial court erred when it imposed consecutive sentences without applying R.C. 2929.14(E)(4) and 2929.41(A). These statutory provisions, which required judicial fact-finding before imposition of consecutive sentences, were held to be unconstitutional in *Foster* and were severed from Ohio's felony sentencing statutes by the supreme court. Nonetheless, appellant argues that a recent United States Supreme Court decision, *Oregon v. Ice* (2009), \_\_\_ U.S. \_\_\_, 129 S.Ct. 711, invalidated the reasoning in, and overruled *Foster*, with respect to the imposition of consecutive sentences. As a result, R.C. 2929.14(E)(4) and 2929.41(A) are not unconstitutional and must be applied before a trial court imposes consecutive sentences. We disagree.

{¶33} In *Ice*, the United States Supreme Court upheld an Oregon statute permitting judicial fact-finding in the imposition of consecutive sentences. The Supreme Court held that the Sixth Amendment to the United States Constitution is not violated when states permit judges, rather than juries, to make the findings of facts necessary for the imposition of consecutive, rather than concurrent, sentences for multiple offenses. *Id.* at 716-720.

{¶34} As we have already held, the "United States Supreme Court did not expressly overrule *Foster* in the *Ice* decision. Unless or until *Foster* is reversed or overruled, we are required to follow the law and decisions of the Ohio Supreme

Court." *State v. Lewis*, Warren App. Nos. CA2009-02-012, CA2009-02-016, 2009-Ohio-4684, ¶10 (internal citation omitted); *State v. Montgomery*, Clermont App. No. CA2009-01-004, 2009-Ohio-5073, ¶9. While the Ohio Supreme Court has acknowledged *Ice*, it has not yet addressed the application of *Ice* to *Foster*. See *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478; *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147.

{¶35} The trial court therefore did not err in imposing consecutive sentences without applying R.C. 2929.14(E)(4) and 2929.41(A).

#### Court Costs

{¶36} Finally, appellant argues the trial court erred by imposing court costs in the sentencing entry when it did not impose them at the sentencing hearing, in violation of Crim.R. 43(A) (the rule requires the defendant's presence at all stages of the criminal proceedings, including the imposition of sentence).

{¶37} R.C. 2947.23 requires trial courts to include "in the sentence the costs of prosecution and render a judgment against the defendant for such costs." Imposition of court costs is therefore mandatory. A conflict exists among appellate courts as to whether a trial court may impose court costs in its sentencing entry when it did not impose them at the sentencing hearing. The Eighth, Tenth, and Eleventh Appellate Districts have vacated and remanded sentences based upon a trial court's failure to impose court costs in the defendant's presence, relying on Crim.R. 43(A). See *State v. Tripplett*, Cuyahoga App. No. 87788, 2007-Ohio-75; *State v. Smoot*, Franklin App. No. 05AP-104, 2005-Ohio-5326; and *State v. Peacock*, Lake App. No. 2002-L-115, 2003-Ohio-6772.

{¶38} By contrast, the Second, Third, and Fifth Appellate Districts have held

that due to the mandatory nature of court costs under R.C. 2947.23, a trial court is not required to impose them at the sentencing hearing. See *State v. Powell*, Montgomery App. No. 20857, 2006-Ohio-263; *State v. Joseph*, Allen App. No. 1-07-50, 2008-Ohio-1138; and *State v. Persinger*, Morrow App. No. 08-CA-14, 2009-Ohio-5849. The Fourth Appellate District has held both ways. See *State v. Green*, Scioto App. No. 08CA3233, 2009-Ohio-5199 (violation of Crim.R. 43[A]); *State v. Throckmorton*, Highland App. No. 08CA17, 2009-Ohio-5344 (no violation of Crim.R. 43[A]).

**{¶39}** The issue is currently pending before the Ohio Supreme Court. See *State v. Joseph*, 118 Ohio St.3d 1504, 2008-Ohio-3369 (certifying the following question: "May a trial court impose court costs pursuant to R.C. 2947.23 in its sentencing entry, when it did not impose those costs in open court at the sentencing hearing?"). We have not yet ruled on this issue.

**{¶40}** We choose to follow the holdings of the Second, Third, and Fifth Appellate Districts on this issue, and thus hold that in light of a trial court's mandatory duty to impose court costs as part of a defendant's sentence, a trial court need not advise the defendant at the sentencing hearing that court costs will be included as part of his sentence. Obviously, the better practice would be to inform a defendant at the sentencing hearing that he will be subject to the costs of prosecution. However, because of the mandatory nature of the imposition of court costs, we decline to rule that the failure to do so constitutes reversible error under Crim.R. 43(A). The trial court therefore did not err in ordering appellant to pay court costs.

**{¶41}** Appellant's second assignment of error is overruled.

**{¶42}** Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.