

[Cite as *State v Kiger*, 2004-Ohio-530.]

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
HENRY COUNTY**

STATE OF OHIO

CASE NUMBER 7-03-03

PLAINTIFF-APPELLEE

v.

OPINION

DOLORES L. KIGER

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: February 9, 2004

ATTORNEYS:

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BRYANT, J.

{¶1} Defendant-Appellant, Dolores L. Kiger, appeals a judgment of the Henry County Common Pleas Court, convicting her of two counts of aggravated vehicular homicide and one count of aggravated vehicular assault. Kiger claims that the trial court erred in sentencing her to maximum and consecutive sentences. After reviewing the record, we find that the trial court's findings were supported by sufficient evidence. Therefore, we overrule Kiger's assignments of error and affirm the decision of the trial court.

{¶2} In June of 2002, an intoxicated Kiger caused an automobile accident when she ran a stop sign and struck a car driven by Teresa Bilow. The accident killed Kiger's only passenger and Teresa's ten year old daughter, Cassandra Bilow. Additionally, both Teresa and her other daughter, Abby Bilow, suffered severe injuries. Because of the accident, Abby had to endure extensive hospitalization and surgery.

{¶3} Kiger was arrested and indicted on four counts including one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1), a second degree felony, one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2), a third degree felony, one count of aggravated vehicular assault in violation of R.C. 2903.08(A)(1), a third degree felony, and one count of operating a motor vehicle while under the influence of alcohol in violation of R.C.

4511.19(A)(1), a first degree misdemeanor. Eventually, a plea bargain was reached between Kiger and the State. Kiger agreed to plead no contest to both of the vehicular homicide charges and the vehicular assault charge and the state agreed to drop the operating a motor vehicle while under the influence of alcohol charge. The trial court accepted Kiger's no contest plea and held a sentencing hearing.

{¶4} At the sentencing hearing, the trial court considered all of the available evidence including, victim impact statements, the pre-sentencing investigation report, and Kiger's own remarks. It then thoroughly examined, on the record, the required statutory factors pertaining to second and third degree felonies. For all three counts, the trial court sentenced Kiger to serve the maximum available sentence. This resulted in Kiger receiving a term of eight years incarceration for violating R.C. 2903.06(A)(1), five years for violating R.C. 2903.06(A)(2), and five years for violating R.C. 2903.08(A)(1). Further, the trial court ordered Kiger to serve all three of these sentences consecutively, giving Kiger a total sentence of eighteen years imprisonment.

{¶5} From this judgment and sentence Kiger appeals presenting two assignments of error for our review. Because both assignments of error deal with Ohio felony sentencing guidelines, we will use the standard of review set forth below to review both assignments of error.

Standard of Review

{¶6} The structure of Ohio felony sentencing law provides that the trial court's findings under R.C. 2929.03, 2929.04, 2929.11, 2929.12, 2929.13, and 2929.14, determines a particular sentence. *State v. Martin* (1999), 136 Ohio App.3d 355, 362, 736 N.E.2d 907. Compliance with the aforementioned sentencing statutes is required. *Id.* Accordingly, the trial court must set forth the statutorily mandated findings and, when necessary, articulate on the record the particular reasons for making those findings. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473, at paragraph one and two of the syllabus.

{¶7} An appellate court may modify a trial court's sentence only if it clearly and convincingly finds either (1) that the record does not support the sentencing court's findings or (2) that the sentence is contrary to the law. R.C. 2953.08(G)(2); see, also, *Martin*, 136 Ohio App.3d at 361. Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54, citing *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118. It requires more evidence than does a finding by a preponderance of the evidence, but it does not rise to the level of a finding beyond a reasonable doubt. *Id.* An appellate court should not, however, simply substitute its judgment for that of the trial court, as the trial court is "clearly in the better position to judge the defendant's dangerousness and to ascertain the effect of the crimes on the victims." *State v. Jones* (2001), 93 Ohio St.3d 391, 400, 754 N.E.2d 1252.

Assignment of Error I
The trial court erred in imposing the maximum sentence.

{¶8} In her first assignment of error, Kiger asserts that the trial court erred in imposing the maximum sentence. She claims that the evidence presented at trial was insufficient to support the trial court's determination that the maximum sentence was appropriate.

{¶9} When a trial court imposes a prison term in a felony case it must impose the shortest term mandated unless, “[t]he court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or *will not adequately protect the public from future crime by the offender.*” R.C. 2929.14(B)(2) (emphasis added). A court is allowed to impose the maximum prison term authorized only if they make one of several findings, one of which is the finding that the offender poses the greatest likelihood of committing future crimes. R.C. 2929.14(C).

{¶10} During the sentencing hearing, the trial court closely examined the recidivism factors listed in R.C. 2929.12(D) and (E). Several of the more likely to recidivate factors in R.C. 2929.12(D) were discussed by the trial court at the sentencing hearing. One such factor was Kiger's extensive prior criminal record. Previous to the accident herein, Kiger had been convicted for driving under the influence of alcohol on seven separate occasions. Kiger had also previously been convicted of driving with a suspended license and breaking and entering. Furthermore, the court discussed the fact that Kiger had not responded well to

sanctions in the past. None of the less likely to recidivate factors of R.C. 2929.12(E) were apparent from the evidence.

{¶11} Accordingly, the trial court found that Kiger was likely to recommit crimes in the future. The court then found that because recidivism was likely, to impose the shortest prison term would not adequately protect the public. Therefore, the trial court imposed the maximum available sentence for each crime.

{¶12} Having reviewed the record, we can not find clear and convincing evidence that the trial court's sentence was unsupported by the record or contrary to the law. The crimes that Kiger committed were not only dangerous and reckless, but demonstrated a pattern of abuse and lawlessness that makes recidivism highly likely. The trial court went through all of the proper factors on the record at the sentencing hearing, and the evidence supports its findings. Therefore, Kiger's first assignment of error is overruled.

Assignment of Error II

The trial court's imposition of consecutive sentences is disproportionate to the seriousness of the Appellant's conduct and to the danger the appellant poses to the public.

{¶13} In her second assignment of error, Kiger contends that the trial court erred in finding that her sentences should run consecutively. She claims that the evidence before the court was insufficient to support the trial court's judgment.

{¶14} R.C. 2929.14(E)(4) allows a trial court to impose consecutive sentences if it finds:

that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive

sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶15} Herein, the trial court made specific findings on the record that consecutive sentences were necessary to protect the public from future crime and that the consecutive sentences were not disproportionate to the seriousness of Kiger's conduct. We have already discussed the trial court's findings regarding the likelihood of Kiger to commit future crimes, and found those supported by the record. Therefore, we must only decide whether the trial court's finding that consecutive sentences were not disproportionate to the seriousness of Kiger's conduct is supported by the record and made according to the law.

{¶16} Kiger engaged in driving a car while under the influence of alcohol. Because of her actions, two people, including a ten year old girl, are dead. Additionally, Kiger caused Teresa and Abby Bilow severe emotional and physical damage. Kiger's actions were part of a pattern of alcohol abuse and drunken driving. Furthermore, she seemed to show little or no genuine remorse for her actions. Having reviewed the entire record and the evidence that was before the court, we find that the trial court's finding that consecutive sentences were not disproportionate to Kiger's crime was properly made and supported by the record. Therefore, we overrule Kiger's second assignment of error.

{¶17} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

SHAW, P.J., and CUPP, J., concur.