

[Cite as *State v. Clarke*, 2018-Ohio-176.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105746

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSHUA CLARKE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-612002-A

BEFORE: S. Gallagher, P.J., Blackmon, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: January 18, 2018

ATTORNEY FOR APPELLANT

John Joseph Dowell
The Goldberg Law Firm, L.L.C.
323 W. Lakeside Avenue, Suite 450
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: John D. R. Kirkland
Assistant Prosecuting Attorney
Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶1} Appellant Joshua Clarke appeals the sentence imposed by the trial court.

Upon review, we affirm.

{¶2} Appellant was charged under a six-count indictment. He ultimately entered a plea of guilty to the following charges: amended Count 1, aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a), a high-tier felony of the third degree; Count 3, unauthorized use of a motor vehicle in violation of R.C. 2913.03(A), a misdemeanor of the first degree; Count 4, driving under the influence of alcohol or drugs in violation of R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree; and Count 5, criminal damaging in violation of R.C. 2909.06(A)(1), a misdemeanor of the first degree. Counts 2 and 6 were nolle.

{¶3} The charges arose from a motor vehicle accident in which appellant was operating a F-250 pickup truck that crossed the center line and collided with a car driven by the victim. Appellant had cannabinoids and benzodiazepine in his system, and he had taken his employer's truck without permission. He was not injured in the accident. The victim suffered serious physical harm, including facial lacerations and fractures, collapsed lungs, two broken ribs, a dislocated right ankle, and three fractures in her leg.

{¶4} At the sentencing hearing, the judge heard from the assistant prosecutor and permitted the victim's mother to read an impact statement written by the victim, who was present in the courtroom. The statement detailed the extent of the victim's injuries and

the impact upon her since the accident. The victim's mother then was permitted to address the court. The victim's mother discussed prior family tragedies involving impaired drivers, as well as the pain her daughter endured from the injuries she sustained. Photographs depicting the victim's injuries were submitted.

{¶5} Defense counsel addressed the court and expressed mitigating factors. It was represented that appellant had certain unfortunate experiences and he self-medicated with marijuana and was given Xanax by some friends to help him forget about things. Defense counsel acknowledged that appellant did not recall anything until being in the police station after the incident. Although appellant did not have any prior felony convictions, he did have a history of traffic violations, including for driving while under suspension. Appellant addressed the court, accepted responsibility, and expressed remorse.

{¶6} The trial court indicated that it had reviewed the presentence investigation report and taken into consideration the remarks made to the court. The trial court commented upon the nature of the offense and the serious physical and psychological damage to the victim.

{¶7} The trial court sentenced appellant to a prison term of four years on Count 1, and six months on each of the remaining counts, with all counts to be served concurrent with each other. The trial court advised appellant of postrelease control and ordered restitution. Appellant's driver's license was suspended for ten years.

{¶8} Appellant timely filed this appeal. Under his first assignment of error, appellant claims as follows: “The trial court unreasonably relied on the irrelevant statements of [the] victim’s mother at the sentencing hearing.”

{¶9} In conducting a felony sentencing hearing, R.C. 2929.19(A) allows for “the offender, the prosecuting attorney, the victim or the victim’s representative * * * and, with the approval of the court” any other person” to “present information relevant to the imposition of sentence in the case.” Pursuant to R.C. 2929.19(B), “the court, before imposing sentence, shall consider the record, any information presented at the hearing by any person pursuant to division (A) * * *, the presentence investigation report * * *, and any victim impact statement made pursuant to [R.C. 2947.051].”

{¶10} In this case, the trial court had discretion under R.C. 2929.19(A) to allow the victim’s mother to present information relevant to the imposition of sentence in the case, including the impact of the offense on the victim’s family. *See State v. Battigaglia*, 6th Dist. Ottawa Nos. OT-09-009 and OT-09-010, 2010-Ohio-802, ¶ 26. Furthermore, “[t]he trial court is presumed to have considered only relevant, material and competent evidence in determining the sentence unless it affirmatively appears to the contrary.” *Id.*, citing *State v. Houston*, 6th Dist. Erie No. E-03-059, 2004-Ohio-6462, ¶ 11. Here, there is no indication that the trial court considered anything other than information relevant to the imposition of sentence in arriving at its sentencing decision. It is apparent from the trial court’s comments that it gave considerable weight to the nature of the offense and the

harm inflicted upon the victim in reaching its sentencing decision. Appellant's first assignment of error is overruled.

{¶11} Under the second assignment of error, appellant claims that the sentence imposed by the trial court was contrary to law. Appellant argues that the sentence imposed does not comport with the requirements of R.C. 2929.11, that the sentence does not reflect consideration of the seriousness and recidivism factors set forth in R.C. 2929.12, and that the record does not support the sentence imposed.

{¶12} Pursuant to R.C. 2953.08(G)(2), "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, 21. A sentence is not clearly and convincingly contrary to law "where the trial court considers the purposes and principles of sentencing under R.C. 2929.11 as well as the seriousness and recidivism factors listed in R.C. 2929.12, properly applies post-release control, and sentences a defendant within the permissible statutory range." *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 10.

{¶13} In this case, the trial court sentenced appellant within the applicable statutory range. Before imposing sentence, the trial court stated on the record that it had reviewed the presentence investigation report and considered the oral statements made to the court, which would have included defense counsel's statement concerning mitigating

factors. Also, the trial court's journal entry of sentence states, "[t]he court considered all required factors of the law. The court finds that prison is consistent with the purpose of R.C. 2929.11." The trial court was not required to make any findings in support of the factors contained in R.C. 2929.11 or 2929.12. *See, e.g., State v. Gay*, 8th Dist. Cuyahoga No. 103641, 2016-Ohio-2946, ¶ 23. Appellant has not affirmatively shown that the trial court failed to consider R.C. 2929.11 and 2929.12.

{¶14} The trial court commented upon the serious nature of the offense and the harm to the victim. The record also reflected appellant had "a lot of traffic tickets, particularly for driving while under suspension." Although appellant disagrees with the court's focus on the seriousness factors, a trial court retains broad discretion to determine the weight to assign a particular statutory factor. *See State v. Arnett*, 88 Ohio St.3d 208, 215, 2000-Ohio-302, 724 N.E.2d 793. Appellate courts are to afford deference to a trial court's broad discretion in making sentencing decisions. *State v. Rahab*, 150 Ohio St.3d 152, 2017-Ohio-1401, 80 N.E.3d 431, ¶ 10.

{¶15} Further, contrary to appellant's argument, the trial court properly imposed postrelease control. Postrelease control is only mandatory "[f]or a felony of the third degree that is an offense of violence and is not a felony sex offense." R.C. 2967.28(B)(3). Because appellant was not convicted of an offense of violence, the trial court gave the proper advisement on a discretionary period of postrelease control of up to three years.

{¶16} Upon our review, we are unable to determine by clear and convincing evidence that the record does not support the sentence imposed or that the sentence is otherwise contrary to law. Appellant's second assignment of error is overruled.

{¶17} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed. The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR