

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 14AP-697
Plaintiff-Appellant,	:	(C.P.C. No. 13CR-2725)
v.	:	
	:	(REGULAR CALENDAR)
Bruce Clark,	:	
	:	
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on March 31, 2015

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*Ron O'Brien*, Prosecuting Attorney, and *Laura R. Swisher*, for appellant.

*Scott & Nolder Co., LPA*, and *Joseph E. Scott*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiff-appellant, State of Ohio ("the state"), appeals from a judgment of the Franklin County Court of Common Pleas imposing a prison sentence on defendant-appellee, Bruce Clark ("appellee"), pursuant to his guilty plea. For the reasons that follow, we reverse and remand for resentencing.

{¶ 2} Appellee was charged with two counts of aggravated vehicular assault, a felony of the second degree and a felony of the third degree, and operating a motor vehicle while under the influence of alcohol, a misdemeanor of the first degree. Ultimately, on June 17, 2014, appellee pled guilty to a stipulated lesser-included offense of aggravated vehicular assault, a felony of the third degree, and the remaining charges were dismissed.

{¶ 3} At the August 7, 2014 sentencing hearing, the trial court imposed a mandatory prison sentence of one year with an additional discretionary three years for a

total of four years. The trial court indicated that it was imposing the sentence pursuant to R.C. 2903.08 and that, contrary to the state's assertion, the court did not believe the statute required the entire prison sentence to be mandatory. The court stated:

THE COURT: \* \* \* Now, I want to go through the statute and give my own interpretation to this.

It is absolutely correct that under 2903.08, the aggravated vehicular assault statute under subsection (D)(1) it reads:

The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(1) of this section, which is, I believe, the section that is involved in this case.

Okay. And Mr. McGrath nodded his head saying, yes, judge, that's the one we indicted him on.

MR. MCGRATH: That's correct. Yes, sir.

THE COURT: All right. Fair enough.

All right. Now, the court, obviously intends to follow the statute and impose a mandatory term of imprisonment on Mr. Clark. However, I do not read the statute as saying that the entire sentence has to be mandatory time. Certainly, that because there is such a wide range of sentencing from, I think, what starts at 9 months or 12 months and it goes in increments of 6 months all the way up to 60 months or 5 years --

MR. MCGRATH: Correct.

THE COURT: \* \* \* The second thing is that it is this court's firm belief that when you have a situation where someone is an admitted alcoholic, a strong alcoholic, and who if he's just warehoused for a period of time is not getting the things that he needs or even the opportunity to get them, I think that that puts a hole in the justice system, that really shouldn't be there.

So I would also note under 2901.04(A) except as otherwise provided -- and I don't see either (C) or (D) in a fast reading applying, but except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining

offenses or penalties shall be strictly construed against the state and liberally construed in favor of the accused.

In other words \* \* \* it would seem to me that there is no statutory prohibition against me saying, all right, some of this is mandatory, as it must be and should be, some of it can be discretionary, because that way if a defendant does well on judicial release and I would want to get them some treatment, I'm in a position to do that, which I think is important to protect the community at large in addition to helping the defendant. \* \* \*

\* \* \*

So as I indicated before, I'll just phrase it this way, though, now. I will impose a mandatory sentence of one year with a discretionary added to that of three years for a total sentence of four years.

\* \* \*

And so the sentencing entry, although it will read that the sentence totals four years, the mandatory aspect of it is a year.

(Aug. 7, 2014 Tr. 14-17.) The August 8, 2014 judgment entry indicated that the court imposed the following sentence:

Forty-Eight (48) months to be served at the OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS. Said sentence to be served concurrent to Case No. 13CR-5533. \* \* \* The Court will consider judicial release after 1 year but it is not promised; if the Defendant is released on judicial release and completes Community Control successfully, court costs and fines will be suspended with a 1 year mandatory sentence and 3 years discretionary.

{¶ 4} The state appeals from the trial court's judgment, assigning one error for this court's review:

THE TRIAL COURT IMPROPERLY IMPOSED A HYBRID PRISON TERM IN SPITE OF THE STATUTORY REQUIREMENT OF A MANDATORY PRISON TERM.

{¶ 5} In its sole assignment of error, the state argues that the trial court erred imposing a "hybrid" sentence, which consists of both mandatory and discretionary prison

time. In support, the state points to *State v. Ware*, 141 Ohio St.3d 160, 2014-Ohio-5201, wherein the Supreme Court of Ohio recently opined:

No sentencing statute allows a court to divide a singular "mandatory prison term" into a hybrid of mandatory and discretionary *sub*-terms. R.C. 925.03(C)(4)(e) unambiguously requires a unitary "prison term" that is "mandatory," and R.C. 2929.13(F)(5) instructs that a court "shall not reduce" that term through judicial release. To override these legislative commands would require judicial improvisation in a legal system in which "[c]rimes are statutory, as are the penalties therefor, and the only sentence which a trial court may impose is that provided for by statute." *Colegrove v. Burns*, 175 Ohio St. 437, 438, 195 N.E.2d 811 (1964). The trial court had "no power to substitute a different sentence for that provided for by statute." *Id.*

(Emphasis sic.) *Id.* at ¶ 17.

{¶ 6} The state acknowledged that the statute at issue was a drug offense; whereas, in this case, appellee pled to aggravated vehicular assault. Notwithstanding, the state argues that *Ware* controls because the mandatory prison term language at issue in *Ware* is similar to the mandatory prison term language at issue here. The state also points to the court's admonition in *Ware* that, "[e]ven if [the trial court] wanted to grant judicial release in the future, R.C. 2929.13(F)(5) explicitly prohibited it from doing so." *Id.* at ¶ 14. The state argues that the same analysis would be applicable to R.C. 2929.13(F)(4) which applies to felony violations, including R.C. 2903.08, aggravated vehicular assault. The state submits that the trial court's judgment should be reversed and remanded for a new sentencing hearing.

{¶ 7} Based on the reasoning of *Ware*, appellee concedes that the hybrid sentence imposed by the trial court was improper. In this case, the court agrees.<sup>1</sup>

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<sup>1</sup> The Seventh District Court of Appeals recently applied the reasoning in *State v. Ware*, 141 Ohio St.3d 160, 2014-Ohio-5201, to a sentence imposed for conviction of aggravated vehicular homicide pursuant to R.C. 2903.06. R.C. 2903.06, like R.C. 2903.08, is one of the felony offenses listed in R.C. 2929.13(F)(4). "Reading R.C. 2903.06 and *Ware* together, the entire prison term was mandatory; the only discretion the trial court had when sentencing Tarleton was how many years that mandatory prison term would be. The State could not offer, and Tarleton could not knowingly and intelligently accept, a plea agreement based upon a proposed hybrid sentence that was a legal impossibility." *State v. Tarleton*, 7th Dist. No. 13 BE 17, 2014-Ohio-5820, ¶ 24.

{¶ 8} Accordingly, we sustain the state's sole assignment of error. We reverse the judgment of the Franklin County Court of Common Pleas and remand this case for resentencing in accordance with law and consistent with this decision.

*Judgment reversed and remanded with instructions.*

LUPER SCHUSTER and HORTON, JJ., concur.

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