

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 09-CA-28
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-715
v.	:	
	:	
CHRISTOPHER J. MILLER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 14th day of May, 2010.

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DONOVAN, P.J.

{¶ 1} Christopher J. Miller appeals from his conviction and sentence following a guilty plea to one count of failure to stop after an accident in violation of R.C. 4549.02.

{¶ 2} In his sole assignment of error, Miller contends the trial court erred in

imposing a statutory maximum five-year prison sentence for his offense, which was a third-degree felony because the accident resulted in a death. In particular, Miller claims the sentence is contrary to law and constitutes an abuse of discretion.

{¶ 3} A pre-sentence investigation report reflects that twenty-four-year-old Miller and two female companions, Heather Wickline and Rhonda Boone, were drinking at a bar shortly before the accident. According to records attached to the PSI, surveillance cameras recorded Miller and his companions arriving at the bar at approximately 11:20 p.m. on December 15, 2007. A surveillance camera log, prepared as part of an Ohio State Highway Patrol investigation, describes what occurred after Miller and his friends entered the bar:

{¶ 4} “12/15/07 @ 23:22 hours – Mr. Miller, Ms. Boone, and Ms. Wickline all walk through door and sit at bar. * * *

{¶ 5} “12/15/07 @ 23:24 hours – Mr. Miller paid bartender. He received a brown bottle, brown colored, and appeared to be ‘Beer.’

{¶ 6} “* * *

{¶ 7} “12/15/07 @ 23:32 hours – Mr. Miller has second bottle of ‘Beer’ placed in front of him.

{¶ 8} “12/15/07 @ 23:33 hours – The blonde female bartender (the only one observed behind the bar) pours a large bottle (2 pours) into a glass and sets i[t] down in front of Ms. Wickline. It also appears that Ms. Boone places money on the bar, paying for the drink.

{¶ 9} “* * *

{¶ 10} “12/15/07 @ 23:42 hours – Mr. Miller takes last drink from original

'Beer' bottle and places it on the outer lip of the bar for the bartender to remove.

{¶ 11} "12/15/07 @ 23:43 hours – Mr. Miller takes left hand and moves what appears to be a glass (view slightly obstructed by black object believed to be a purse). He takes the glass and appears to be using a straw to take a drink. He puts that glass down and takes his right hand and grabs another glass and takes a drink (tilting his head back). He then puts each glass down in front of Ms. Wickline. Each time he does this he keeps looking at her, she is talking to another man to her left side so she is not looking at Mr. Miller.

{¶ 12} "12/15/07 @ 23:46 hours – Mr. Miller takes his right hand and takes glass in front of Ms. Wickline while she is looking at him, and takes a drink.

{¶ 13} "12/15/07 @ 23:50 hours – Mr. Miller takes a glass with right hand and an unknown object with his left hand. He places the object from left hand to his mouth first then takes a drink with glass from right hand. Places glass down somewhat in front of Ms. Wickline then wipes mouth with right hand.

{¶ 14} "12/15/07 @ 23:54 hours – Mr. Miller get[s] bartender's attention and hands glass to bartender.

{¶ 15} "12/15/07 @ 23:55 hours – Bartender places same glass back in front of Ms. Wickline after walking to side of bar out of view and talking with a man standing across from cash register. Ms. Wickline appears to be 'stirring' straw in glass.

{¶ 16} "12/16/07 @ 00:00 hours – Mr. Miller is seen picking up one glass with his left hand and taking a drink then picking up a different glass with his right hand and also takes a drink from it (tilts head back).

{¶ 17} “12/16/07 @ 00:01 hours – Mr. Miller repeats what he does above by taking another drink, one with using his left hand to grab the glass and another drink by using his right hand to lift a different glass. He puts each glass down, one in front of Ms. Wickline. He then is seen lifting a can and putting it between him and Ms. Wickline. It is believed the can is used for cigarettes/ashes.

{¶ 18} “ * * *

{¶ 19} “12/16/07 @ 00:07 hours – Mr. Miller gets the bartender’s attention and she pours a drink into a glass in front of him. He takes the glass and puts it down in front of him.

{¶ 20} “12/16/07 @ 00:08 hours – Mr. Miller takes left hand and takes drink from glass (straw) then takes right hand and picks up small glass and takes drink (tilts head) and puts that glass down in front of where Ms. Wickline was sitting. She was not there at time (walked away with Ms. Boone prior to Mr. Miller getting glass from bartender). Mr. Miller appears to be attempting to give ‘Beer’ bottle sitting in front of him back to bartender. She doesn’t take it.

{¶ 21} “12/16/07 @ 00:11 hours – Ms. Wickline takes drink from glass and sets back down. Mr. Miller takes same glass and also takes drink and sets back down same spot.

{¶ 22} “12/16/07 @ 00:19 hours – Mr. Miller is observed, standing and taking a long drink of his 2nd ‘Beer’ bottle. He doesn’t appear to finish it before he puts down on the bar and all three subjects gather their personal items, put jackets on, and walk towards the exit. They are not seen again inside the bar.”

{¶ 23} After Miller and his companions left the bar, he drove his pick-up truck

down a rural stretch of Gerlaugh Road in Clark County, striking and killing a pedestrian, Audrey Williams, who earlier had left the same bar on foot. An investigation revealed that Williams had been walking in the roadway as evidenced by a lack of footprints in the snow-covered edges of the road.¹ Miller did not stop at the scene of the accident. Instead, he proceeded to his sister's house. He came forward and reported the incident to police the following afternoon. In a subsequent interview, Miller denied alcohol being a factor. He claimed to have been the "designated driver" that night and to have consumed only a little more than one beer. Miller also professed not to have known that he had hit a person. He explained that he had swerved to avoid a car making a wide turn. As he was passing the vehicle, he heard a "thud" and thought he had hit a deer.

{¶ 24} The PSI report indicates that Miller's criminal record included a DUI conviction on January 31, 2007. His record also included a December 10, 2007 conviction for disobeying a police officer. The facts underlying that offense included the discovery of an open container of alcohol in Miller's vehicle. In addition, Miller had been indicted for felonious assault in April 2007. That incident involved a bar fight in which he allegedly punched another man and broke his jaw. The felonious assault charge against Miller ultimately was dismissed for reasons not apparent on the record.

¹Miller asserts on appeal, as he did in his sentencing memorandum, that Williams had a blood-alcohol content of .24 and that she was killed instantly. We have found no evidence in the record to support these allegations. We note, however, that the State does not dispute the allegations, which apparently are based on a coroner's report that is not before us. For purposes of our analysis, we will accept as true Miller's uncontested claim that Williams was intoxicated and that she died instantly.

{¶ 25} At the sentencing hearing, the trial court expressed its belief that Miller had waited fourteen hours to come forward in the present case because he was under the influence of alcohol. The trial court rejected Miller's argument that he had consumed less than two bottles of beer. It noted that the surveillance camera had recorded him "drinking out of both hands." That evidence gave the trial court "a pretty strong theory as to why [Miller] didn't stop after [he] collided with Mrs. Williams." The trial court also found similarities between the present case and Miller's 2007 conviction for disobeying a police officer. At the sentencing hearing, Miller admitted that he had been stopped for speeding in that case with an open container in his car and alcohol on his breath. As in the present case, he had fled the scene and turned himself in the following day, giving himself enough time for any alcohol to dissipate from his body.

{¶ 26} Near the end of the sentencing hearing, the trial court addressed Miller and made the following remarks:

{¶ 27} "You had a heck of a 2007. It all started with an OVI out of Fairborn. So I know right off the bat you have a problem with alcohol and getting behind the wheel of a car after having consumed alcohol. And then in April of '07, about three months later, you broke a guy's jaw at a bar.

{¶ 28} "* * *

{¶ 29} "There was alcohol involved. You were indicted for that offense, but it was later dismissed. But there was no question that you punched a guy and it really wasn't self-defense. You were upset with him because he was flirting with your girlfriend.

{¶ 30} “But we don’t need to go into the facts of that case. That sheds light on the fact that your alcohol problem was escalating to some extent.

{¶ 31} “And then in September of ‘07 is when this incident happened where the officer tried to pull you over and you fled from him.

{¶ 32} “And then on December 16th you killed somebody while driving a vehicle after drinking. You can try to minimize it as much as you want.

{¶ 33} “What’s interesting about that is that on December 16th when you killed Mrs. Williams, that was six days after you were sentenced in Municipal Court for this incident where you fled from police, and you were still under indictment for felonious assault because that case wasn’t dismissed until about a month later.

{¶ 34} “So when I look at what’s going on here, I see a young man that is completely out of control. Four run-ins with the law in one year, all of which were alcohol related; and now you stand before this Court somehow shocked that you caused the death of another person.

{¶ 35} “So consistent with your prior behavior I believe the evidence in this case is overwhelming that you didn’t stop after you hit Mrs. Williams because you had alcohol in your system. You went home.

{¶ 36} “You found out— You either knew at the time or you found out shortly thereafter that you had struck a person and that you had killed her.

{¶ 37} “You waited for several hours before confronting law enforcement so the alcohol would wear off because you knew you had a prior OVI.

{¶ 38} “You knew that you had this felonious assault problem, and you knew you had the problem with disobeying the police, so you had no choice but to wait until

the alcohol wore off.

{¶ 39} “So you can tell me that you were crying all night and didn’t know what to do, but it’s evident to me that you were stalling so that the alcohol wouldn’t be detected in your system.

{¶ 40} “Meanwhile, while you’re stalling there is a victim dying on the side of the road that you didn’t bother to try to help.

{¶ 41} “It’s the order of the Court that the defendant be sentenced to five years in the Ohio State Penitentiary; a three-year driver’s license suspension and court costs.”

{¶ 42} Miller’s sole argument on appeal is that the trial court erred in imposing a maximum prison sentence. When reviewing a felony sentence after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, we first must consider whether the trial court complied with all applicable rules and statutes in imposing the sentence to determine whether it is contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶15-17. If a sentence is not clearly and convincingly contrary to law, it is reviewed for an abuse of discretion. *Id.*; see, also, *State v. Knisley*, Montgomery App. No. 22897, 2010-Ohio-116, ¶75.

{¶ 43} In the present case, Miller first argues that his sentence is clearly and convincingly contrary to law. In support, he appears to contend the trial court failed to consider the principles and purposes of sentencing in R.C. 2929.11 or the seriousness and recidivism factors in R.C. 2929.12. Although the trial court did not specifically cite either statute during the sentencing hearing, its judgment entry stated that it had “considered the record, oral statements, any victim impact statement and

presentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and [had] balanced the seriousness and recidivism factors [under] Ohio Revised Code Section 2929.12.” Because a trial court speaks only through its journal entries, Miller’s sentence is not contrary to law merely because the trial court failed to cite either statute during the sentencing hearing. *State v. Cave*, Clark App. No. 09-CA-6, 2010-Ohio-1237, ¶10. “Furthermore, even if there is no specific mention of those statutes in the record, ‘it is presumed that the trial court gave proper consideration to those statutes.’” *Id.*, quoting *Kalish*, *supra*, at n.4. We note too that Miller’s five-year sentence is within the statutory range for a third-degree felony. See R.C. 2929.14(A)(3). Therefore, we have no basis for concluding that the sentence is contrary to law.

{¶ 44} Miller’s more substantial argument appears to be that the principles and purposes of sentencing and the seriousness and recidivism factors, when properly applied, do not support a five-year sentence. This is another way of saying that the trial court’s sentence is an abuse of discretion. See, e.g., *State v. Rollins*, Champaign App. No. 08CA003, 2009-Ohio-899, ¶11 (“The crux of Defendant’s argument is not that the trial court failed to consider the applicable statutory sentencing factors, but rather that in doing so the court abused its discretion * * *.”); *State v. Jerkovic*, Lake App. No. 2009-L-001, 2009-Ohio-4618, ¶19 (“In support of his assignment of error, Mr. Jerkovic does not allege the trial court failed to meet the first prong of the *Kalish* test-i.e., that it failed to apply the appropriate laws in arriving at his sentence. Rather, he urges that the trial court abused its discretion in balancing the seriousness and recidivism factors, R.C. 2929.12.”). A trial court abuses its

discretion in sentencing when the sentence it imposes is grossly unsound, unreasonable, or unsupported by the evidence. *Cave*, *supra*, at ¶12.

{¶ 45} In support of his argument, Miller highlights certain facts that he contends militate against the seriousness of his crime or against the likelihood of recidivism. He also suggests that a lesser sentence would satisfy the principles and purposes of sentencing. He stresses that he was not speeding, that the road was unlit, and that the intoxicated victim was walking in the roadway with her back to traffic. He repeats his claim that he thought he hit a deer. Miller also contends he contacted his lawyer in the morning after discovering the victim's death and presented himself to the police. He takes issue with the trial court's belief that he was under the influence of alcohol, or at least that he feared he was, and waited for the alcohol to dissipate before contacting police. Miller insists that the bar surveillance tapes clearly show him drinking less than two bottles of beer. He further points out that he was not indicted for vehicular homicide. Regarding his prior run-ins with the law, Miller notes his lack of any prior felony convictions. He also claims the felonious assault charge against him was dismissed because the complainant admitted that someone else had broken his jaw. Miller additionally argues that the victim in the present case was killed instantly. He points out that he was apologetic to the victim's family and that he has undergone counseling to deal with the death. Finally, Miller suggests that the trial court may have been unduly influenced by remarks in impact statements it considered, particularly references to the subject of drunken driving.

{¶ 46} Some of the facts Miller cites potentially do weigh against the seriousness of his offense or against the likelihood of recidivism. The fact that he

was not speeding, for instance, is a relevant consideration. Also relevant is the fact that the victim earlier had left the same bar on foot and was walking in the dark roadway with her back to traffic. Other relevant seriousness or recidivism factors weighing in Miller's favor include the fact that he had no prior felony convictions, that he appeared apologetic and remorseful, and that his act of fleeing, in and of itself, did not contribute to the victim's death if she died instantly.

{¶ 47} On the other hand, in considering the statutory sentencing factors, the trial court was not required to believe his assertion that he thought he hit a deer. The trial court plainly was skeptical, suggesting that he "either knew at the time or [he] found out shortly thereafter that [he] had struck a person and that [he] had killed her." Based on the information before it, the trial court also acted within its discretion in rejecting Miller's claim that he had consumed no more than two bottles of beer. In addition to the beer, the bar surveillance camera log depicts Miller engaging in conduct that reasonably can be interpreted as consuming several shots and/or mixed drinks over a relatively short time. In light of this evidence, and in assessing the seriousness of Miller's offense, the trial court acted within its discretion in believing that he left the scene of the accident and waited to turn himself in because he wanted the alcohol in his system to dissipate. While it is true that Miller was not charged with vehicular homicide, the trial court was not required to believe his claim that alcohol played no role in his behavior.²

²In *State v. Bowser*, Montgomery App. No. 08-CR-1203, 2010-Ohio-951, ¶15, we recently recognized that "[t]he evidence the court may consider [at sentencing] is not confined to the evidence that strictly relates to the conviction offense because the court is no longer concerned * * * with the narrow issue of guilt." To the contrary, "it is well-established in Ohio law that the court may consider information beyond that strictly

{¶ 48} In evaluating the statutory sentencing considerations, the trial court also acted within its discretion in placing significant weight on Miller's other recent alcohol-related incidents. As the trial court noted, not long before he struck and killed the victim in this case, he (1) obtained a DUI conviction, (2) fled from police after being pulled over with an open container of alcohol in his vehicle and waited until the next day to turn himself in, and (3) received an indictment for felonious assault in connection with a bar fight. Although Miller claims on appeal that he did not break the victim's jaw in the bar fight, he admitted during the sentencing hearing below that he did.

{¶ 49} Having reviewed the record, we find no abuse of discretion in the trial court's imposition of a five-year prison sentence. The trial court made clear the basis for its sentence, and its conclusions are supported by the information before it. We find Miller's sentence to be reasonable under the circumstances.

{¶ 50} In a final argument, Miller contends the trial court violated R.C.

related to the conviction offense. For example, the statute governing the contents of a PSI report simply says, 'the officer making the report shall inquire into *the circumstances of the offense* and the criminal record, social history, and present condition of the defendant.'" Id. at ¶16, quoting R.C. 2951.03(A) (emphasis added). In *Bowser*, we recognized that a sentencing court may consider "facts that support a charge of which the offender is ultimately acquitted," "allegations of crimes for which the offender is never prosecuted," or facts supporting a charge that is dismissed under a plea agreement. Id. at ¶16-17. In order to take such facts into account at sentencing, a trial court reasonably must find them to be true "based on the evidence presented at the [sentencing] hearing and the information in the PSI report." Id. at ¶18. In the present case, the information presented at Miller's sentencing hearing reasonably supports a finding that he fled the scene of the accident because he was under the influence of alcohol and waited for the alcohol to dissipate before contacting police. This is true regardless of the fact that Miller avoided a vehicular homicide charge. Id. at ¶21 ("[B]ased on how the court perceives true facts in a case, it may believe that the offender committed a crime other than, or in addition to, the one to which he pleaded.").

2929.11(B) by failing to impose a sentence that was “consistent with sentences imposed for similar crimes committed by similar offenders.” In support, he cites other cases involving defendants who failed to stop after an accident that caused a death. Miller contends these cases demonstrate that his sentence is out of step with sentences other offenders have received.

{¶ 51} We have addressed the issue of sentencing consistency before, recognizing “that trial courts are limited in their ability to address the consistency mandate, and appellate courts are hampered in their review of this issue, by the lack of a reliable body of data upon which they can rely.” *State v. York*, Champaign App. No. 2009-CA-03, 2009-Ohio-6263, ¶13 (internal citations omitted). “[A]lthough a defendant cannot be expected to produce his or her own database to demonstrate the alleged inconsistency, the issue must at least be raised in the trial court and some evidence, however minimal, must be presented to the trial court to provide a starting point for analysis and to preserve the issue for appeal.” *Id.*

{¶ 52} When the consistency issue is not raised in the trial court, a defendant cannot argue on appeal “that the sentence imposed by the trial court was inconsistent with those imposed on similar offenders.” *Id.* In the present case, Miller failed to raise the consistency issue at sentencing and did not present any evidence below about similar offenders and their sentences. As a result, he has forfeited his ability to raise the issue on appeal. *Id.*; see, also, *State v. Cantrell*, Champaign App. No.2006 CA 35, 2007-Ohio-6585, ¶10-14; *Rollins*, *supra*, at ¶16.

{¶ 53} Based on the analysis set forth above, we overrule Miller’s assignment of error and affirm the judgment of the Clark County Common Pleas Court.

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GRADY and FROELICH, JJ., concur.

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