

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

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NUMBER 3-2000-14

v.

WILLIAM H. BLACK

OPINION

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed in part, reversed in part and cause remanded.

DATE OF JUDGMENT ENTRY: November 15, 2000.

ATTORNEYS:

**SHAWN R. DOMINY
Attorney at Law
Reg. #0068108
6877 North High Street, Suite 201
Worthington, OH 43085
For Appellant.**

**RUSSELL B. WISEMAN
Prosecuting Attorney
Reg. #0012058
P.O. Box 509
Bucyrus, OH 44820
For Appellee.**

HADLEY, P.J. The defendant-appellant, William H. Black, appeals the decision of the Crawford County Court of Common Pleas, finding him guilty of one count of involuntary manslaughter. The appellant also appeals the maximum sentenced imposed by the trial court. For the following reasons, we affirm the decision of the trial court in part and reverse in part.

The pertinent facts and procedural history in this matter are as follows. On September 13, 1999, the appellant was traveling westbound on Charles Street in Galion, Ohio when his white van struck a moped driven by Dr. Mark Boulden. As a result of the collision, Dr. Boulden was thrown from the vehicle and suffered fatal injuries. He died the following day in the hospital. On October 12, 1999, the appellant was indicted on one count of involuntary manslaughter, a felony of the third degree. A jury trial was held in this matter on April 3 through April 6, 2000.

At the trial, the State provided the testimony of Leslie Hollingshead. Hollingshead testified that he had been following the appellant's white van for several miles and that the appellant had been driving erratically, repeatedly swerving on and off the road. Hollingshead further testified that he saw the appellant's van go off the berm of the road at least two feet and hit the moped driven by the victim. After the collision the appellant did not stop and Hollingshead followed him until he was able to force the appellant to pull over in

a nearby laundry mat parking lot. After getting out of their vehicles, Hollingshead confronted the appellant about what had just happened and the appellant indicated that he was experiencing brake problems.

The State also produced the testimony of Jeffrey Poffenbaugh. Poffenbaugh testified that he was eastbound on Charles Street at the time of the collision. While he did not witness the collision, he heard a loud crash and when he looked up he saw the victim flying through the air. He also testified that he saw a white van off the road, real close to the mailbox. James Wise, the owner of the property on which this incident occurred, testified that at approximately 3:00 PM he looked out his window and noticed the victim and the moped sitting stationary in his driveway. A couple of minutes later, Wise heard a crash and when he looked out the window a second time he saw a white van in his driveway and the victim flying through the air towards the neighbors' yard.

Patrolman Kevin Ullom of the Galion Police Department also testified for the State. Ptrl. Ullom testified that he was dispatched to the laundromat parking lot to investigate the accident. Upon arriving at the parking lot, he encountered the appellant and Mr. Hollingshead. The appellant told the officer that the right front brakes on his van were not working properly and when he applied the brakes, they caused the van to swerve to the right.¹ At that time, Ptrl. Ullom asked the

¹ A service technician, Shawn Livingston, inspected the appellant's van shortly after the accident. Livingston testified that the brakes on the van were in proper working order.

appellant to perform various field sobriety tests. The appellant was asked to perform the one leg stand, finger-to-nose test, and the walk-and-turn test. The appellant performed all the tests poorly, which led the officer to conclude that he was impaired. The appellant was then asked to submit to a breathalyzer, which he did and the result was .000, indicating that the appellant had no alcohol in his system. Upon further inquiry, the appellant told the officer that he was taking a variety of prescription drugs. Three empty prescription drug bottles were recovered from the appellant's van, one of which indicated that it "may cause drowsiness. * * * Use care when operating a car or dangerous machinery." This encounter between the appellant and Ptrl. Ullom was recorded by a video camera mounted in the officer's car and the video was shown to the jury in its entirety.

In his defense, the appellant presented the testimony of several witnesses who testified that prior to the accident, the victim had been riding his moped on Charles Street at a very slow rate of speed and that they had to swerve to pass him. The appellant testified that he never saw the victim and the first he was aware that he had hit something was when he saw a tire come up over his windshield. The appellant also admitted that while he had been prescribed four different drugs by two different doctors, he didn't always take the recommended dosages because he did not like the side effects.

At the conclusion of the evidence, the jury found the appellant guilty of one count of involuntary manslaughter. On May 5, 2000, the trial court sentenced the appellant to the maximum sentence of five years imprisonment. It is from these judgments that the appellant now appeals, asserting three assignments of error.

Assignment of Error No. 1

The court erred by permitting the State to play a videotape of the defendant not disclosed to the defendant in discovery until after the trial began.

The appellant contends that the trial court erred in refusing to exclude certain evidence in this case as the State failed to comply with the discovery rules. For the following reasons, we disagree.

The evidence in question is a videotape recorded by a camera mounted in Ptrl. Ullom's car. The video shows Ptrl. Ullom administering the field sobriety tests to the appellant. It also contains conversations between the officer and the appellant, as well as the officer and Leslie Hollingshead, concerning the accident. While the appellant filed a demand for discovery in October of 1999, the videotape was not originally disclosed to the appellant as part of the State's file. It appears from the record that the Prosecutor did not become aware of the tapes existence until after the trial had commenced.

The police department first discovered and turned over the videotape to the prosecution after the conclusion of the first day of trial. The parties had both

given their opening statements and the testimony of Leslie Hollingshead had been heard before the court concluded for the day. The prosecutors were made aware of the tape when they returned to their offices and they immediately notified the appellant's counsel and the court. The trial court heard arguments concerning the admissibility of the tape the next morning. The appellant contended that the tape must be per se excluded as a discovery violation. In the alternative, the appellant's counsel requested a reasonable delay in order to prepare legal arguments concerning the admissibility of the contents of the tape.² The State argued that the court had discretion in the matter and suggested that granting a continuance would be an appropriate sanction. Upon review of the situation, the trial court granted the appellant a twenty-two hour continuance to allow himself and his counsel to further review the tape and prepare any legal arguments they may have had concerning its admissibility. After the continuance, the appellant renewed his objection and asked the trial court to exclude the tape due to the late disclosure. The trial court overruled the appellant's objection and allowed the tape to be played to the jury.

When a discovery violation occurs, the appropriate sanction is generally left to the discretion of the trial court. Crim.R. 16(E)(3); *State v. Scudder* (1994), 71 Ohio St.3d 263, 268. Crim.R. 16(E)(3) states the following:

² When asked how long of a continuance he felt would be required, the appellant's trial counsel indicated that at least one day would be necessary to adequately prepare.

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule * * *, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed or it may make such other order as it deems just under the circumstances.

The Ohio Supreme Court has held that a trial court does not abuse its discretion when admitting the testimony of an undisclosed witness if (1) the failure to provide discovery was not willful, (2) foreknowledge of the statement would not have benefited the defendant in the preparation of the defense, and (3) the defendant was not prejudiced by the admission of the evidence. *State v. Heinsh* (1990), 50 Ohio St.3d 231, 236; *State v. Terry* (1998), 130 Ohio App.3d 253, 260. This standard of review applies equally to other evidence not properly disclosed by the state but admitted at trial. *Scudder*, 71 Ohio St.3d at 269.

It appears from the record and the briefs submitted in this matter that the appellant is not contending that the late disclosure was due to the willful conduct of the prosecution. Rather, the appellant argues that he has met the second and third prongs of the test and is therefore entitled to have the videotape excluded from evidence.

The second prong of the *Heinsh* inquiry asks whether foreknowledge of the tape would have benefited the appellant in the preparation of his defense. The appellant contends that had he been aware of the tape, he would have addressed

the tape in his opening statements to “take the sting out of the tape,” sought to have the quality of the tape improved, and been better prepared to explain his statements regarding the victim’s location, the mechanical problem with his vehicle, and his performance on the field sobriety tests. The tape was disclosed to the appellant on the afternoon of April 3. The appellant didn’t testify until three days later and he offered virtually no explanation for the statements that he made to the officer (that the victim was off the road) or for his poor performance on the field sobriety tests. He also no longer contended that his van was experiencing brake problems. The appellant has failed to demonstrate to this Court how prior knowledge would have changed his defense. The appellant’s contentions seem to suggest that had he known of the tape’s existence sooner, his story would have been different. The appellant had adequate opportunity to explain to the jury his recollection of the accident and the contents of the tape. Therefore, the appellant has failed to satisfy the second prong of the *Heinish* test.

The third prong of the test requires the appellant to show that he was prejudiced by the admission of the videotape. The appellant argues that due to the incriminating nature of the tape, the tape’s poor quality, and the undue influence put on the tape by the trial court, he was denied a fair trial.

It is undisputed that the contents of the videotape are very incriminating. The appellant makes statements to the officer admitting that his van swerved off

the road and he is shown having a difficult time completing any of the field sobriety tests. This however, does not rise to the level of prejudicial. The tape simply recorded the facts, as they existed in this case. The contents of the tape are consistent with the testimony given by both Ptrl. Ullom and Leslie Hollingshead. Additionally, the appellant's contentions concerning the tape's quality and the attention drawn to the tape by the court are both unfounded. As the appellant had failed to show how this undisclosed tape prejudiced his defense, it cannot be said that the trial court abused its discretion by admitting the videotape into evidence.

Accordingly, the appellant's first assignment of error is overruled.

Assignment of Error No. 2

The defendant's conviction was against the manifest weight of the evidence.

The appellant contends that the guilty verdict returned by the jury was against the manifest weight of the evidence and convicting him of involuntary manslaughter was a manifest miscarriage of justice. For the following reasons, we disagree.

In determining whether a verdict is against the manifest weight of the evidence, a court of appeals must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v.*

Thompkins (1997), 78 Ohio St.3d 380, 386. Weight of the evidence concerns the “inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.” *Id.* A court of appeals reversing the judgment of the trial court on the basis of weight of the evidence acts as a thirteenth juror who rejects the factfinder’s resolution of the conflicting testimony. *Id.* at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31. Appellate courts reverse on the ground of manifest weight only in exceptional cases “where the evidence weighs heavily against the conviction.” *State v. Mendoza* (March 31, 2000), Hancock App. No. 5-99-46, unreported, citing *Thompkins*, 78 Ohio St.3d at 389.

In the case at bar, the jury found the appellant guilty of one count of involuntary manslaughter, i.e. that the appellant caused the death of another as a proximate result of operating a motor vehicle without reasonable control and/or while maintaining an assured clear distance. The evidence in this case revealed that several witnesses saw the appellant’s van leave the road and strike the moped on which the victim was sitting, which was sitting stationary in a private driveway. There is clearly evidence to support the verdict in this matter and it cannot be said that the jury’s verdict created a manifest miscarriage of justice.

Accordingly, the appellant’s second assignment of error is overruled.

Assignment of Error No. 3

The court erred by imposing the maximum sentence for the defendant's offense.

The appellant was found guilty of one count of involuntary manslaughter, a felony of the third degree. The trial court sentenced him to five years imprisonment for this charge, the maximum term allowed by law. The appellant contends that the trial court's decision to impose the maximum sentence is not supported by the facts contained in the record and is contrary to law. For the following reasons, we agree.

The Ohio felony sentencing law requires a trial court to make various findings before it may properly impose a sentence. With regard to those findings, this Court had repeatedly held that "it is the trial court's findings under R.C. 2929.03, 2929.04, 2929.11, 2929.14, and 2929.19, which in effect determine a particular sentence and a sentence unsupported by these findings is both incomplete and invalid. *State v. Bonanno* (June 24, 1999), Allen App. Nos. 1-98-59 and 1-98-60, unreported; see, also *State v. Russell* (March 13, 2000), Auglaize App. No. 1-98-81, unreported. A trial court must strictly comply with the relevant sentencing statutes by making such findings of fact on the record at the sentencing hearing. *Bonanno, supra* at 6. Further, when required, the court must state its particular reasons for doing so. *Id.* R.C. 2953.08(G)(1) permits this Court to vacate a sentence and remand it to the trial court for the purpose of resentencing in

the event that we clearly and convincingly find that the record does not support the sentence or that the sentence is otherwise contrary to law.

When sentencing an offender on a third degree felony, a trial court may impose a prison term ranging from one to five years. See R.C. 2929.14(A)(3). In addition, when determining whether to impose a prison term as a sanction for a felony of the third degree * * * the sentencing court shall comply with the purposes and principles of sentencing under R.C. 2929.11 and R.C. 2929.12. R.C. 2929.12 provides various factors a court must consider in determining whether the offender's conduct is more or less serious than conduct normally constituting the offense and the likelihood of recidivism. See R.C. 2929.12(A).

Upon finding that pursuant to R.C. 2929.12, imprisonment is the most appropriate punishment, the trial court must then turn to R.C. 2929.14. Subsection (B) of this statute provides that if an offender has not previously served a prison sentence the court must impose the shortest term unless it finds on the record that "the shortest term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime * * *."

Once a trial court finds that the shortest term of imprisonment is not an appropriate sanction, it may then properly impose the maximum term upon concluding, among other things, that the offender committed one of the worst forms of the offense or that the offender poses the greatest likelihood of

committing future crimes. R.C. 2929.14(C); *Russell, supra* at 2. Additionally, pursuant to R.C. 2929.19(B)(1)(e), when the court imposes the longest term available, it is required to state its reasons for doing such. In *State v. Edmonson* (1999), 86 Ohio St.3d 324, the Supreme Court of Ohio articulated the difference between making a finding on the record and giving reasons for imposing a certain sentence. The court indicated that “finds on the record” merely means that the court must specify which statutorily sanctioned ground it has relied upon in deciding to impose a particular sentence, i.e. that the offender has committed the worst form of the offense. *Id.* at 326. However, when a statute further requires the court to provide its reasons for imposing a sentence, as in the case of a maximum term, *the court must make the applicable findings, and then provide a factual explanation setting forth the basis for those findings. Id.*

In the case *sub judice*, the trial court failed to comply with the statutory requirements at the sentencing hearing. The trial court never determined that the offender’s conduct was more serious than conduct normally constituting the offense, therefore making imprisonment the most appropriate punishment. As there is no information in the record to reflect that the appellant has previously served a prison term, in order to impose more than the shortest term of imprisonment prescribed by law, the trial court is required to make additional findings, which it failed to do. Before imposing a maximum term of

imprisonment, the court must find on the record that the offender committed one of the worst forms of the offense or poses the greatest likelihood of committing future crimes. Additionally, the court must state its reasons for doing so. While it could possibly be said that the court listed the factors it relied upon in imposing a sentence, the court failed to meet all the other requirements.

The record in this case reveals that at the sentencing hearing, the trial judge found that the appellant's prior history demonstrated that he had a drug abuse problem, which he continues to deny. The trial judge also noted a lack of remorse on the part of the appellant and that the appellant placed the blame on the victim throughout the proceedings. This recitation by the trial court falls short of meeting any of the statutory requirements proscribed by the sentencing guidelines.

It appears from the record that at the sentencing hearing, the prosecutor realized that the court had erred and attempted to assist the court in complying with the sentencing guidelines. In his previous statement to the court, the prosecutor had read the applicable statutory requirements and the findings he sought the court to make. After the trial judge had sentenced the appellant to the maximum sentence, the following dialogue took place between the prosecutor and the judge.

Prosecutor: For the record, the statutory facts that were previously read, are you adopting them and making the finding that they exist?

The Court: Yes. And I felt that covered most of them you said, if not all. And I figure honestly anything less than a five-year period would really demean the seriousness of the offense.

This Court cannot say that the mere reference to the findings given by the State is adequate to satisfy the trial court's duty to make certain necessary findings on the record at the sentencing hearing. See, *State v. Evans* (Dec. 27, 1999), Marion App. No. 9-99-49, unreported. This Court has consistently held that a trial court must strictly comply with the sentencing provisions of the Revised Code by making such findings of fact on the record at the sentencing hearing. *Bonanno*, supra at 6; *State v. Russell* (March 13, 2000), Auglaize App. No. 1-98-81, unreported; *State v. Nelson* (October 3, 2000), Shelby App. No. 17-2000-05, unreported. The fact that the trial court made the necessary statutory findings in its Judgment Entry filed five days later, is not adequate to correct the court's deficiencies at the sentencing hearing. The maximum sentence imposed by the trial court is not supported by the record and is contrary to law.

Accordingly, the appellant's third assignment of error is well taken.

The judgment of the Crawford County Court of Common Pleas is affirmed in part and reversed in part and the cause is remanded to the trial court for further sentencing proceedings consistent with this opinion.

***Judgment affirmed in part,
reversed in part and cause
remanded.***

Case No. 3-2000-14

WALTERS and SHAW, J.J., concur.
r