[Cite as *State v. May*, 2010-Ohio-4625.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

-vs-

TIMOTHY R. MAY

Defendant-Appellee

JUDGES:
Hon. Julie A. Edwards, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2010 CA 2

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 178
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 27, 2010

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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Wise, J.

{¶1} Appellant State of Ohio appeals from the conviction and sentencing of Appellee Timothy R. May, in the Richland County Court of Common Pleas, for aggravated vehicular assault and OVI. The relevant facts leading to this appeal are as follows:

{¶2} On the afternoon of June 1, 2008, Appellee May was driving his Chevrolet pickup truck on County Road 20 in Morrow County. With him were his two young grandchildren. At some point, the truck left the roadway, struck a guardrail, and overturned into a creek.

{¶3} Several Good Samaritans happened by and helped appellee rescue the two children from the water. EMS personnel also responded, as well as Trooper Holloway of the Ohio State Highway Patrol. Holloway's subsequent investigation included interviewing appellee at Morrow County Hospital. Furthermore, a hospital lab technician drew a blood sample from appellee at the trooper's direction.

{¶4} In September 2008, the Morrow County Grand Jury indicted appellee on one count of aggravated vehicular assault (R.C. 2903.08(A)(1)(a)), a felony of the third degree, and one count of OVI (R.C. 4511.19(A)(1)(f)), a misdemeanor of the first degree.

{¶5} On February 3, 2009, appellee filed a motion to suppress the evidence obtained as a result of his detention by Trooper Holloway. The trial court conducted a hearing on March 10, 2009, and thereafter denied the motion to suppress.

{¶6} The matter proceeded to a plea hearing October 13, 2009. Appellee at that time entered pleas of no contest to aggravated vehicular assault and OVI, which the court accepted.

{¶7} Following a hearing on December 16, 2009, after reviewing a presentence investigation, the trial court sentenced appellee to two years in prison (with one year of the term ordered as mandatory) on the aggravated vehicular assault count, plus a fine and a suspension of appellee's driver's license for five years. The court imposed no additional sentence for the OVI count.

{¶8} On February 18, 2010, the State of Ohio filed a notice of appeal.[1] It herein raises the following sole Assignment of Error:

{¶9} "I. WHEN A MANDATORY PRISON TERM IS REQUIRED, DOES THE SENTENCING JUDGE HAVE THE AUTHORITY TO IMPOSE A PRISON TERM FROM THE PERMISSIBLE RANGE AND MAKE ONLY A PORTION OF THE TERM MANDATORY?

I.

{¶10} In its sole Assignment of Error, the State of Ohio contends the trial court erred in issuing a sentence for aggravated vehicular assault with only a portion of the term being mandatory. We disagree.

{¶11} Generally, trial courts have full discretion to impose a prison sentence within the statutory ranges. See *State v. Freeman*, Delaware App. No. 07CAA01-0001, 2008-Ohio-1410. In order to find an abuse of discretion, we must find that the trial

[1] On or about the same day, Mr. May filed a notice of appeal regarding suppression issues. That appeal has been numbered Morrow County 2010CA0001.

court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶12} As noted in our recitation of facts, appellee herein was convicted under R.C. 2903.08(A)(1)(a) for aggravated vehicular assault, a felony of the third degree. The General Assembly has set forth the following sentencing requirement for this offense in R.C. 2903.08(D)(1): "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."

{¶13} The State argues that the trial court's sentence in this case, consisting of a one-year "mandatory" term within a two-year prison term, is not authorized by statute and is erroneous as a matter of law. Appellee responds in part that various sections of R.C. Chapter 29 evince a legislative intent to differentiate "stated prison terms" and "mandatory prison terms."

{¶14} For example, R.C. 2929.01(FF) states as follows:

{¶15} " 'Stated prison term' means the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court pursuant to section 2929.14, 2929.142, or 2971.03 of the Revised Code or under section 2919.25 of the Revised Code. ***."

{¶16} Furthermore, R.C. 2929.20(C)(2) states:

{¶17} "If the stated prison term is at least two years but less than five years, the eligible offender may file [a judicial release] motion not earlier than one hundred eighty days after the offender is delivered to a state correctional institution or, *if the prison term includes a mandatory prison term or terms*, not earlier than one hundred eighty days after the expiration of all mandatory prison terms." (Emphasis added).

{¶18} We recognize that subsequent to the filing of the briefs in this matter, this Court decided *State v. Hess*, Morrow App.No. 2009CA0015, 2010-Ohio-3695, in which we applied the holding of *State v. Thomas*, Allen App.No. 1-04-88, 2005-Ohio-4616, to conclude the trial court was required to impose a mandatory prison term for the entire length of the sentence prescribed and not create a "hybrid sentence." Id. at ¶32. However, the Generally Assembly has not specifically disallowed the type of partially mandatory sentence crafted by the trial court in the case sub judice, and, as R.C. 2929.01(FF) and R.C. 2929.20(C)(2) indicate, a "stated term" is not necessarily synonymous with a "mandatory term." It is well-established that the sentencing provisions set forth in the Revised Code are to be strictly construed against the state and liberally construed in favor of the accused. See, e.g., *State v. Fanti*, 147 Ohio App.3d 27, 30, 768 N.E.2d 718, 2001-Ohio-7028; R.C. 2901.04(A).

{¶19} Accordingly, we decline to herein adopt our previous rationale in *Hess.* We find the trial court acted within its discretion in imposing a one-year "mandatory" term, which comports with R.C. 2903.08(D)(1) and is within the range of penalties for a third-degree felony, even though the "stated term" was ordered to be two years.

{¶20} The State's sole Assignment of Error is therefore overruled.

{¶21} For the foregoing reasons, the sentencing entry of the Court of Common Pleas, Morrow County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, J., concurs.

Edwards, P. J., concurs separately.

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JUDGES

JWW/d 0907

EDWARDS, P.J., CONCURRING OPINION

{¶22} I concur in the majority's analysis and disposition of appellant's assignment of error. I write separately only to note that I have reconsidered my prior position on this issue in *State v. Hess*, Morrow App. No. 2009 CA 0015, 2010-Ohio-3695, based upon the majority's persuasive analysis concerning the legislative intent and statutory construction of R.C. 2903.08(D)(1).

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Judge Julie A. Edwards

JAE/rad/rmn

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
TIMOTHY R. MAY	:	
Defendant-Appellee	:	Case No. 2010 CA 2

For the reasons stated in our accompanying Memorandum-Opinion, the sentencing entry of the Court of Common Pleas of Morrow County, Ohio, is affirmed.

Costs assessed to appellant.

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JUDGES