[Cite as *State v. Gagnon*, 2009-Ohio-5185.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1235

Appellee — Trial Court No. CR08-1056

v.

Michael Gagnon — **DECISION AND JUDGMENT**

Appellant — Decided: September 30, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

William F. Oswall, Jr. and Stephan D. Madden, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Michael Gagnon, appeals from his convictions following his no contest pleas in the Lucas County Court of Common Pleas for five counts of aggravated vehicular homicide and two counts of aggravated vehicular assault. Appellant was sentenced to 43 years in prison. For the reasons that follow, we affirm.

{¶ 2} Appellant asserts six assignments of error for our consideration:

{¶ 3} "I. Defendant-appellant's conviction must be reversed where the indictment was defective as to all counts to which defendant-appellant pled no contest.

{¶ 4} "II. Defendant-appellant's conviction must be reversed because the trial court failed to substantially comply with the requirements of Criminal Rule 11 when it accepted the defendant-appellant's plea of no contest.

{¶ 5} "III. The defendant-appellant suffered prejudicial, ineffective assistance of counsel when counsel failed to notify defendant-appellant of the mens rea of each offense in the indictment.

{¶ 6} "IV. The trial court violated defendant-appellant's rights to equal protection and due process of law under the Fifth and Fourteenth Amendments to the U.S. Constitution and under Sections 2, 10 and 16, Article I of the Ohio Constitution when it sentenced him contrary to R.C. 2929.11(B).

{¶ 7} "V. The trial court erred when it imposed consecutive sentences.

{¶ 8} "VI. The trial court erred by failing to notify the defendant-appellant of his right to appeal pursuant to Criminal Rule 32(B)(2)."

{¶ 9} Appellant's first three assignments of error will be addressed together as they all three involve the definition of a strict liability offense. In his first assignment of error, appellant contends that his indictment was defective for failing to specify the requisite mens rea for the offenses charged. In his second assignment of error, appellant contends that his no contest pleas were not voluntary, knowing or intelligent due to his

defective indictment. In his third assignment of error, appellant contends that his counsel was ineffective in failing to advise him as to the applicable mens rea elements.

{¶ 10} In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*), the Ohio Supreme Court addressed the issue of whether an indictment is fatally flawed when it fails to set forth a required mens rea for a particular crime. In that case, the Ohio Supreme Court determined that an indictment for the crime of robbery, which failed to include the mens rea of recklessness as to the infliction of, or attempt to inflict, or threat to inflict, physical harm, was structurally deficient. Id., ¶ 27. On reconsideration, the Ohio Supreme Court clarified that the structural-error analysis for defective indictments is "appropriate only in rare cases * * * in which multiple errors at trial follow the defective indictment." *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*).

{¶ 11} Initially we note that this court has already determined that *Colon* applies only to cases in which a defendant has been indicted for the offense of robbery in violation of R.C. 2911.02(A)(2). *State v. Horner*, 6th Dist. No. L-07-1224, 2008-Ohio-6169, ¶ 20. And, this court has declined to extend *Colon* to cases such as this which did not involve a trial. *State v. White*, 6th Dist. No. L-07-1196, 2009-Ohio-4587.

{¶ 12} More importantly for our analysis is the fact that not every criminal charge requires a certain mental state for a conviction to stand. The Ohio Supreme Court has held that a culpable mental state "of the offender is a part of every criminal offense in Ohio, except those that plainly impose strict liability." *Colon I*, ¶ 11.

{¶ 13} Here, appellant was indicted on five counts of aggravated vehicular homicide under R.C. 2903.06(A)(1), one count for each of the five victims. Appellant's indictment mirrored the language of the statute which provides: "[N]o person, while operating or participating in the operation of a motor vehicle * * * shall cause the death of another * * * as the proximate result of committing a violation of Division (A) of [R.C. 4511.19]." Appellant was also indicted on two counts of aggravated vehicular assault under R.C. 2903.08(A)(1)(a), one count for each of the two victims. Appellant's indictment mirrored the language of that statute which provides:

{¶ 14} "[N]o person, while operating or participating in the operation of a motor vehicle, * * * shall cause serious physical harm to another person * * * as the proximate result of committing a violation of division (A) of [R.C. 4511.19]." R.C. 4511.19 provides that: "no person shall operate any vehicle * * * if, at the time of the operation * * * the person is under the influence of alcohol * * *."

{¶ 15} Appellant contends that the applicable mens rea for the above offenses is recklessness. We disagree. In both statutes, the presence of R.C. 4511.19 acts to create a strict liability offense rather than a culpable mental state. *State v. Moine* (1991), 72 Ohio App.3d 584, 587. The court in *Moine* stated:

{¶ 16} "The language of R.C. 4511.19(A)(1) clearly indicates a purpose to impose strict liability, because the overall design of the statute is to protect against hazards to life, limb, and property created by drivers who have consumed so much alcohol that their faculties are impaired. * * * The act of driving a vehicle while under the influence of

alcohol (or drugs, or a combination of both) is a voluntary act in the eyes of the law, and the duty to refrain from doing so is one that in the interests of public safety must be enforced by strict criminal liability without the necessity of proving a culpable state of mind." *State v. Moine*, supra.

{¶ 17} Ohio courts have already determined that R.C. 2903.06(A)(1) and 2903.08(A)(1)(a) are strict liability offenses requiring no culpable mental states. *State v. Hundley*, 1st Dist. No. C-060374, 2007-Ohio-3556, *State v. Mayl*, 154 Ohio App.3d 717, 2003-Ohio-5097, *State v. Griesheimer*, 10th Dist. No. 05AP-1039, 2007-Ohio-837, and *State v. Harding*, 2d Dist. No. 20801, 2006-Ohio-481. Further proof of the legislature's intent in this matter can be gleaned from the fact that both R.C. 2903.06 and 2903.08 provide for offenses in which the culpable mental state of recklessly is specifically enumerated. See R.C. 2903.06(A)(2)(a) and 2903.08(A)(2)(b).

{¶ 18} For the foregoing reasons, appellant's first three assignments of error are found not well-taken.

{¶ 19} In his fourth assignment of error, appellant contends that the court, in sentencing him, failed to consider R.C. 2929.11(B) which calls for felony sentencing to be "[c]onsistent with sentences imposed for similar crimes committed by similar offenders." Appellant, in his brief, has cited to numerous examples of defendants, charged similarly to appellant, receiving lesser sentences.

{¶ 20} In *State v. Lathan*, 6th Dist. No. L-03-1188, 2004-Ohio-7074, ¶ 25, reversed in part on other grounds and on reconsideration, *State v. Lathan*, 6th Dist. No.

L-03-1188, 2005-Ohio-321, however, we determined that a comparison of similar cases was not mandated under R.C. 2929.11(B), noting that "[e]ach case is necessarily, by its nature, different from every other case-just as every person is, by nature, not the same." We have, therefore, held that "[w]e are no longer required to consider whether the trial court's sentence is consistent with those imposed in similar cases." *State v. Wheeler*, 6th Dist. No. L-06-1125, 2007-Ohio-6375, ¶ 13. See, also, *State v. Donahue*, 6th Dist. No. WD-03-083, 2004-Ohio-7161. Appellant's fourth assignment of error is found not well-taken.

{¶ 21} In his fifth assignment of error, appellant contends that the court erred in imposing consecutive sentences. Appellant was sentenced to five, consecutive, seven year terms for aggravated vehicular homicide, felonies of the second degree. Pursuant to R.C. 2929.14(A)(2), the penalty for a second degree felony shall be two, three, four, five, six, seven, or eight years. Appellant was also sentenced to two, consecutive, four year terms for aggravated vehicular assault, felonies of the third degree. Pursuant to R.C. 2929.14(A)(3), the penalty for a third degree felony shall be one, two, three, four, or five years.

{¶ 22} In *State v. Foster*, the Supreme Court of Ohio, in striking down parts of Ohio's sentencing scheme, held that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus. Thus, an appellate

court reviews felony sentences for an abuse of discretion. Id. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying an abuse of discretion standard, an appellate court may not generally substitute its judgment for that of the trial court. See *Pons v. Ohio State Med. Bd*. (1993), 66 Ohio St.3d 619, 621.

{¶ 23} Nonetheless, R.C. 2929.11 and 2929.12, which require consideration of the purposes and principles of felony sentencing and the seriousness and recidivism factors, must still be considered by trial courts in sentencing offenders. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38. R.C. 2929.11(A) provides that when a trial court sentences an offender for a felony conviction it must be guided by the "overriding purposes of felony sentencing." Those purposes are "to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(B) states that a felony sentence "must be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim * * *." Finally, R.C. 2929.12 sets forth factors concerning the seriousness of the offense and recidivism factors.

{¶ 24} In this case, the sentences imposed for appellant's offenses are within the ranges provided by statute. The court noted that appellant's decision to drink and drive resulted in the death of five members of one family, one adult and four children, and severe injuries to two members of that family. The court specified that it considered the

record, oral statements, victim impact, the presentence investigation report, and the sentencing principles and purposes under R.C. 2929.11 and 2929.12. Therefore, we cannot say that the trial court abused its discretion in imposing maximum, consecutive sentences for appellant's offenses. Appellant's fifth assignment of error is found not well-taken.

{¶ 25} In his sixth assignment of error, appellant contends that the trial court failed to inform him of his right to appeal pursuant to Crim.R. 32(B) which states:

{¶ 26} "(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

{¶ 27} "(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court also shall advise the defendant of all of the following:

{¶ 28} "(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

{¶ 29} "(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

{¶ 30} "(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

{¶ 31} "(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf."

{¶ 32} At appellant's sentencing, the court stated: "[D]efendant is, again, reminded of the limited right to appeal the plea, as well as his right to appeal the sentence under certain circumstances as provided for in 2953.08." Although the trial court did not adhere to the letter of Crim.R. 32(B), appellant was advised of his appellate rights after sentencing. Any error in this instance is harmless in that appellant timely filed his notice of appeal to this court. Finding no prejudice to appellant, his sixth assignment of error is found not well-taken.

{¶ 33} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Charles D. Abood, J. _____
CONCUR.
JUDGE

Judge Charles D. Abood, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.