

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

State of Ohio

Court of Appeals No. L-11-1279

Appellee

Trial Court No. CR0201101593

v.

Jeffery D. Belew

DECISION AND JUDGMENT

Appellant

Decided: March 22, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bahner, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Jeffery D. Belew appeals an October 25, 2011 judgment of the Lucas County Court of Common Pleas. The judgment convicted appellant on two counts of felonious assault on a police officer (violations of R.C. 2903.11(A)(2) and first degree felonies pursuant to R.C. 2903.11(D)(1)(a)) with firearm specifications under both R.C.

2941.1412 (discharged firearm at peace officer or corrections officer) and 2941.145 (displayed, brandished, indicated possession of or used firearm) on each count. The convictions are based upon guilty pleas.

{¶ 2} In the judgment, the trial court also imposed sentence. The sentence ordered appellant to serve a ten-year prison term on each felonious assault count with the sentences to be served consecutively. It also ordered appellant to serve seven-year prison terms on the firearm specifications on both counts, to be served concurrently to each other, but consecutively to the sentences for felonious assault. Taken together, the court imposed an aggregate sentence of imprisonment for 27 years.

{¶ 3} The original indictment included two additional counts. In addition to the two counts of felonious assault with firearm specifications, the indictment charged appellant with two counts of attempted aggravated murder, violations of R.C. 2903.01(E) and (F) and 2923.02, and felonies in the first degree. Both attempted aggravated murder counts also included R.C. 2941.145 and 2941.1412 firearm specifications.

{¶ 4} The criminal charges relate to an incident that occurred on April 10, 2011, at approximately 5:12 a.m. What occurred is not in dispute. Three Oregon police officers responded to a domestic disturbance call at an apartment complex located on Pickle Road. A caller reported that one person had a gun and provided a physical description of the suspect.

{¶ 5} A police sergeant was first to arrive at the scene and stopped his vehicle in front of a person wearing clothing fitting the description of the suspect, now known to be

appellant. As the sergeant prepared to exit his vehicle, he saw appellant raise his gun and begin firing in his direction. Two of the shots hit his police car.

{¶ 6} The sergeant immediately put his car in reverse and backed up to where two other responding police officers were located in the parking lot. Appellant ignored subsequent orders to stop and stand down. He proceeded to advance in the direction of the officers and fired his gun in their direction. Appellant was incapacitated and subdued after police shot him in the chest. Police assured appellant received emergency medical treatment.

{¶ 7} At the hearing where appellant pled guilty to the felonious assault charges and associated firearm specifications, the prosecutor also stated that the evidence at trial would have established that four shell casings from the firearm fired by appellant were discovered at the scene in an investigation after the incident. A dash camera made a video recording of the incident.

{¶ 8} Appellant initially pled not guilty by reason of insanity to the charges in the indictment. After separate psychological evaluations by Dr. Charlene Cassel, Ph.D. and by Dr. Wayne Graves, Ph.D., appellant changed his plea. Under the plea agreement, appellant pled guilty to the two felony assault counts, including firearm specifications, with an agreement that the state, at sentencing, would nolle the attempted aggravated murder counts and associated firearm specifications.

{¶ 9} Appellant asserts four assignments of error on appeal:

Assignment of Error No. 1: The sentence imposed upon appellant constitutes an abuse of discretion due to “extraordinary circumstances” and is a manifest injustice.

Assignment of Error No. 2: Appellant’s counsel rendered ineffective assistance at sentencing.

Assignment of Error No. 3: The trial court erred when it failed to ask appellant if he wished to make a statement on his own behalf or present any information in mitigation of punishment, in violation of Crim.R. 32(A).

Assignment of Error No. 4: The trial court erred in rejecting appellant’s plea of not guilty by reason of insanity.

{¶ 10} We consider the assignments of error out of turn. Under Assignment of Error No. 4, appellant contends that the trial court erred with respect to his not guilty by reason of insanity plea (“NGRI”). Appellant contends that the trial court rejected the plea and denied him his right to assert the defense at trial.

{¶ 11} The state denies that the trial court struck the NGRI affirmative defense. It argues that appellant retained the right to assert the defense of NGRI at trial until he pled guilty. The state also argues that any trial court error with respect to the court’s rulings on appellant’s pleas of NGRI was waived by appellant’s guilty pleas.

{¶ 12} At arraignment, appellant entered pleas of not guilty and NGRI. Appellant requested the trial court refer the case to the Court Diagnostic and Treatment Center for an evaluation and report pursuant to R.C. 2945.371(G)(4). The court made the referral.

{¶ 13} The trial court conducted a hearing on May 18, 2011, concerning the plea. The court stated that it had received a report by Dr. Charlene Cassel of the Court Diagnostic and Treatment Center. The report was reviewed at the hearing. Counsel for appellant requested a short continuance to determine whether appellant would seek a second evaluation. The trial court stated:

All right, I would first indicate that based on Dr. Cassel's evaluation she finds that the Defendant does not meet the criteria to raise the defense of not guilty by reason of insanity. I'm going to continue this matter for one week * * * so that the Defendant has a chance to explore whether or not a second evaluation will be requested.

The court issued an order after the hearing. The order provided in pertinent part:

Report received from Court Diagnostic and Treatment Center, by Dr. Charlene Cassel, Ph.D., and was admitted. *Pursuant to the report, the Defendant does not meet the criteria for a plea of Not Guilty by Reason of Insanity.* Pursuant to the request of Defendant, matter rescheduled for hearing on * * *. (Emphasis added.)

{¶ 14} On May 26, 2011, the court conducted another hearing concerning the NGRI plea. In the interim, appellant filed a motion requesting a second evaluation, by

another expert, Dr. Jolie Brahms, Ph.D. Appellant indicated that he was indigent. He requested public funds be used to pay for the cost of the evaluation, and estimated the cost.

{¶ 15} At the hearing, the court stated that the estimated cost of an evaluation by Dr. Brahms was excessive. The court stated that it would order a second evaluation but would not appoint Dr. Brahms to conduct it. The court stated: “If you have no objection, I would appoint Dr. Wayne Graves to conduct the evaluation.” Counsel agreed stating: “Wayne Graves I like as well.” The court ordered a second evaluation by Dr. Graves.

{¶ 16} Dr. Graves completed his evaluation and submitted a report. The report was reviewed at a hearing on July 13, 2011. A copy of the report was admitted into evidence. The report does not support a claim of NGRI. After counsel for appellant stated he had reviewed the report, the court asked how he wished to proceed. Counsel stated, “I would move that it be entered into evidence, Your honor, and ask for a trial date.”

{¶ 17} With respect to the report, the trial court stated at the hearing:

Based on the information contained in the report of Dr. Wayne Graves, he does state that the Defendant was not suffering under a mental defect at the time the offense was committed, therefore, he’s not eligible for the Defense of not guilty by reason of insanity. That report will be admitted into evidence.

{¶ 18} The trial court issued an order on July 15, 2011. Appellant argues, for the first time on appeal, that by the order the trial court rejected his NGRI plea and denied him his right to proceed to trial on the affirmative defense. The order provided in pertinent part:

Matter called for hearing regarding Defendant's plea of Not Guilty by Reason of Insanity. Report received from Dr. Wayne Graves, Central Behavioral Healthcare, Inc., dated July 6, 2011, and admitted into evidence. *Based upon Dr. Graves' findings, Defendant does not meet the criteria for a plea of Not Guilty by Reason of Insanity.*

At the Defendant's request, matter set for Trial on Monday, September 12, 2011, at 9:00 a.m. * * * (Emphasis added.)

{¶ 19} Appellant pled NGRI at arraignment and, therefore, did not require leave of court to make the plea. *See* Crim.R. 11(H). NGRI is an affirmative defense that the defendant must prove by a preponderance of the evidence at trial. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72, ¶ 64; R.C. 2901.05(A). No jury instruction is required on NGRI at trial if the evidence is insufficient to raise the defense. *State v. Monford*, 190 Ohio App.3d 35, 2010-Ohio-4732, 940 N.E.2d 634, ¶ 70 (10th Dist.); *State v. Austin*, 1st Dist. No. C-110359, 2012-Ohio-3053, ¶ 10; *see State v. Melchior*, 56 Ohio St.2d 15, 20-21, 381 N.E.2d 195 (1978).

{¶ 20} Although perhaps inartfully expressed, we view the trial court's orders referring to the findings made by Dr. Cassel and Dr. Graves in their R.C. 2945.371(G)(4)

reports as doing no more than providing notice that the psychologists did not support a defense of NGRI. The court did not issue an order striking the NGRI pleas or otherwise removing the affirmative defense from consideration at trial.

{¶ 21} We also agree with the state that appellant waived any claimed error with respect to his NGRI pleas when he entered his guilty pleas. A valid guilty plea is a “complete admission of the defendant’s guilt.” Crim.R. 11(B)(1). By pleading guilty to the two counts of felonious assault with specifications, appellant waived claimed trial court error with respect to his insanity defense. *State v. Jackson*, 8th Dist. No. 80299, 2002-Ohio-2711, ¶ 14; *State v. McQueeney*, 148 Ohio App.3d 606, 2002-Ohio-3731, 774 N.E.2d 1228, ¶ 34 (12th Dist.).

{¶ 22} We conclude appellant’s claim of error with respect to the July 15, 2011 order is without merit. No plain error is presented by the order.

{¶ 23} We find Appellant’s Assignment of Error No. 4 not well-taken.

{¶ 24} Under Assignment of Error No. 3, appellant contends that the trial court failed to comply with the requirements of Crim.R. 32(A)(1) with respect to his right of allocution at sentencing. At sentencing, the trial court addressed appellant directly and asked “Mr. Belew, is there anything you would like to say.” Appellant contends that the trial court’s question was too general and did not inform appellant of his right to discuss matters in mitigation of punishment.

{¶ 25} Crim.R. 32(A)(1) provides:

Sentence shall be imposed without unnecessary delay. * * * At the time of imposing sentence, the court shall do all of the following:

(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

{¶ 26} The state argues, that placed in context, there was no need to advise appellant that his statement could address issues in mitigation of punishment.

{¶ 27} The sentencing hearing began with the testimony of Dr. Wayne Graves, Ph.D. Dr. Graves was called as a defense witness and testified as to matters in mitigation of sentence. Dr. Graves testified that appellant suffered from post-traumatic stress disorder that is severe, major depression without psychosis, and alcohol dependence. Dr. Graves also testified that it was his opinion that appellant was attempting to commit “suicide by cop” when he approached police, firing a weapon at the time of the incident in this case.

{¶ 28} A statement by appellant’s counsel to the court followed the testimony by Dr. Graves. Counsel argued that the court should consider the fact that appellant was a veteran who served in Iraq and suffers from war related post-traumatic stress syndrome, depression, and substance abuse in determining sentence. Counsel also argued that the court should consider the fact that the conduct on which the prosecution is based was, in

fact, an attempt by appellant to commit suicide. Once defense counsel concluded, the trial court addressed appellant directly and asked “is there anything you would like to say.”

{¶ 29} To that point, the entire hearing had been focused on the issue of matters offered in mitigation of punishment. We agree with the state that under these circumstances it was unnecessary for the trial court to explain to appellant that any statement he made could include matters offered in mitigation of sentence. The hearing had considered nothing else.

{¶ 30} Furthermore, Ohio appellate courts have recognized that sentencing courts are not required to use the exact language of the rule and have upheld similar general invitations to a defendant to make a statement. *State v. Boyd*, 8th Dist. No. 98342, 2013-Ohio-30, ¶ 7; *State v. Massey*, 5th Dist. No. 2006-CA-00370, 2007-Ohio-3637, ¶ 30-31; *State v. Crable*, 7th Dist. No. 04 BE 17, 2004-Ohio-6812, ¶ 19-20;

{¶ 31} We find Appellant’s Assignment of Error No. 3 not well-taken.

{¶ 32} Under Assignment of Error No. 1, appellant challenges his sentences. He argues that extraordinary circumstances demonstrate the trial court abused its discretion as to sentence.

{¶ 33} The Ohio Supreme Court has identified a two-step analysis in reviewing felony sentencing on appeal. First, appellate courts are required to “examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law.”

State v. Kalish, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26. If this first prong is satisfied, then an abuse of discretion standard is applied by the reviewing court. *Id.*

{¶ 34} Appellant acknowledges that the two step analysis under *Kalish* applies to appellate review of the sentences in this case and that appellant’s sentences are not contrary to law. Appellant also agrees that his sentences are within the statutory range of sentences authorized for his convictions.

{¶ 35} This court has held that where a trial court’s sentence is within the range of sentences authorized by statute, “the trial court’s sentence cannot be considered an abuse of discretion, absent some extraordinary circumstances.” *State v. Rehard*, 6th Dist. No. L-08-1194, 2010-Ohio-470, ¶ 11; *State v. Clark*, 6th Dist. No. L-10-1092, 2011-Ohio-4681, ¶ 14-15.

{¶ 36} Appellant argues that extraordinary circumstances are presented in this case, first, by matters to be considered in mitigation of sentence and, second, application of the purposes of felony sentencing under R.C. 2929.11 and sentencing factors under R.C. 2929.12 in determining sentence. Appellant centers his argument on the fact that he suffers from mental illness—severe post-traumatic stress syndrome and severe depression, both related to his military service in Iraq. Appellant also argues in mitigation that the incident on which prosecution is based was an attempt by him to commit suicide.

{¶ 37} The state responds that the trial court specifically stated that it had reviewed the presentence investigative report, the reports by both psychologists (Dr. Cassel and Dr. Graves), and letters from appellant's mother. The court also stated that it listened carefully to the testimony by Dr. Graves at sentencing and arguments by counsel offered in mitigation of sentence. The court also stated that it had considered the principles and purposes of sentencing under R.C. 2929.11 and seriousness and recidivism factors under R.C. 2929.12 in imposing sentence.

{¶ 38} The trial court stated at sentencing that appellant was continually in trouble in the military. The record reflects that appellant, while in the service, stole and wrecked his roommate's car for which he was "busted in rank." He was discharged from the service after he was court martialed for stealing government property.

{¶ 39} Evaluations by Dr. Cassel and Dr. Graves concluded that appellant knew the wrongful nature of his conduct when he chose to shoot a firearm at police. Physical evidence demonstrates that he discharged his weapon four times. In two of those instances, he hit a police car as a police sergeant exited the vehicle upon arriving at the scene.

{¶ 40} The court stated at sentencing that the crimes were extremely serious and that appellant could have killed police officers who had responded to the scene in performance of their duties. The court concluded that appellant was a danger to the community despite having a minimal criminal history. The record supports these conclusions. The record also demonstrates that the trial court considered the principles

and purposes of felony sentencing under R.C. 2929.11 and seriousness and recidivism factors in felony sentencing under R.C. 2929.12 in determining sentence.

{¶ 41} In our view the trial court acted within its discretion with respect to the weight it gave, in mitigation of punishment, to evidence that appellant suffered from war related post-traumatic stress syndrome and depression and had a history of substance abuse in determining sentence. The trial court imposed sentences within the authorized statutory range of sentences for the offenses committed by appellant. In our view, no extraordinary circumstances are presented in this case to make the trial court's decision as to sentence an abuse of discretion.

{¶ 42} We find appellant's Assignment of Error No. 1 not well-taken.

{¶ 43} Under Assignment of Error No. 2, appellant argues ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 44} Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different.” *Id.* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

{¶ 45} Additionally, a court must be “highly deferential” and “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” in reviewing a claim of ineffective assistance of counsel. *Id.* at 689. A properly licensed attorney in Ohio is presumed to execute his or her duties in an ethical and competent manner. *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988). Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995).

{¶ 46} Appellant argues first that trial counsel was deficient in failing to argue that appellant needed treatment for his mental illness and substance abuse and that sentencing appellant to community control would increase his access to treatment and likelihood of successful rehabilitation. Appellant also argues that trial counsel was deficient for failing to introduce evidence of sentences imposed upon other similarly-situated offenders for similar offenses.

Failure to Argue for a Sentence to Community Control

{¶ 47} Appellant was convicted of two counts of felonious assault of a police officer in violation of R.C. 2903.11(A)(2), and, pursuant to 2903.11(D)(1)(a), both felonies of the first degree. Both felonious assault convictions included firearm specifications under R.C. 2941.1412. We agree with the state that a sentence to

community control was not available to appellant because, by statute, appellant faced a mandatory term of imprisonment due to his convictions.

{¶ 48} Both R.C. 2941.1412 firearm specifications require a sentencing court to impose a mandatory seven-year prison term and that the sentences under the specifications run consecutively to sentences imposed for the underlying felony offenses. R.C. 2929.14(B)(1)(f). Assuming the court ordered the sentences for firearm specifications to run concurrently to each other, appellant faced a minimum mandatory sentence of imprisonment for seven years.

{¶ 49} The state contends that appellant faced mandatory prison terms for the felonious assaults as well. We disagree. Appellant was convicted of felonious assault of a police officer in violation R.C. 2903.11(A)(2). An R.C. 2903.11(A)(2) offense does not include as an element a showing that the officer/victim suffered serious physical harm as a result of commission of the offense. *Id.*

{¶ 50} The provisions of R.C. 2903.11(D)(1)(b) imposing a mandatory term of imprisonment for felonious assault on a police officer applies only where the victim police officer suffered serious physical harm as a result of the commission of the offense. *State v. Fredericy*, 8th Dist. No. 95677, 2011-Ohio-3834, ¶ 26; R.C. 2903.11(D)(1)(b). As the trial court was required to impose a mandatory seven year term of imprisonment as part of appellant's sentence, trial counsel was not deficient in failing to argue for a sentence of community control. Such a sentence was unavailable.

**Failure to Assert Sentences are Inconsistent and Disproportionate to
Sentences Imposed on Similar Offenders for Similar Crimes**

{¶ 51} Appellant next argues that trial counsel was deficient in failing to introduce evidence of sentences imposed for similarly-situated offenders and similar offenses. R.C. 2929.11 sets forth the overriding purposes of felony sentencing in Ohio. R.C. 2929.11(B) instructs:

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and *consistent with sentences imposed for similar crimes committed by similar offenders.* (Emphasis added.)

{¶ 52} In *State v. Dahms*, 6th Dist. No. S-11-028, 2012-Ohio-3181, this court recently considered consistency and proportionality requirements under R.C. 2929.11(B):

The consistency and proportionality requirements of R.C. 2929.11(B) require that sentencing courts impose punishment and sentence “consistent with the sentences imposed for similar crimes committed by similar offenders.” Consistency does not necessarily mean uniformity; rather, consistency has a goal of similar sentences for similar offenses. *See State v. Battle*, 10th Dist. No. 06AP-863, 2007-Ohio-1845. As a result, consistency includes a range of sentences, taking into consideration a trial

court's discretion to weigh the relevant statutory factors. *Id.* Even though offenses may be similar, "distinguishing factors may justify dissimilar sentences." *Id.* at ¶ 24; *State v. King*, 5th Dist. No. CT06-0020, 2006-Ohio-6566, ¶ 23.

In addition, consistency in sentencing does not result from a case-by-case comparison, but by the trial court's proper application of the statutory sentencing guidelines. *State v. Hall*, 179 Ohio App.3d 727, 2008-Ohio-6228, 903 N.E.2d 676, ¶ 10 (10th Dist.). An offender cannot simply present other cases in which an individual convicted of the same offense received a lesser sentence to demonstrate that his sentence is disproportionate. *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100, ¶ 10, citing *State v. Battle*, 10th Dist. No. 06AP-863, 2007-Ohio-1845, ¶ 23. Rather, to demonstrate that a sentence is inconsistent, an offender must show that the trial court did not properly consider applicable sentencing criteria found in R.C. 2929.11 and 2929.12. *State v. Holloman*, 10th Dist. No. 07AP-875, 2008-Ohio-2650, ¶ 19. *Id.* at ¶ 21-22.

{¶ 53} In our view, appellant's arguments as to sentence fail to recognize the distinguishing nature and seriousness of the offenses he committed. He shot a firearm at police who were acting in performance of their duties. The trial court recognized that appellant could have killed police officers by his conduct.

{¶ 54} Appellant argues that counsel was deficient for failing to raise a list of cases allegedly showing that his sentences were disproportionate and inconsistent with sentences for similar offenders for similar crimes. The listed cases were dissimilar. No Ohio case cited by appellant involved assaults on police with a firearm.

{¶ 55} We reviewed appellant's sentences under Assignment of Error No. 1. It is agreed that the sentences are not contrary to law. We have determined that they were not an abuse of discretion. In our view, the trial court applied the proper sentencing criteria found in R.C. 2929.11 and 2929.12 in determining sentence.

{¶ 56} We find that trial court was not deficient in failing to assert that his sentences were

{¶ 57} inconsistent and disproportionate to sentences imposed for similar crimes committed by

{¶ 58} similar offenders.

{¶ 59} We find appellant's Assignment of Error No. 2 not well-taken.

{¶ 60} We conclude that appellant was not denied a fair trial and affirm the judgment of the Lucas County Court of Common Pleas. We order appellant 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
