

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

State of Ohio

Court of Appeals No. L-12-1267

Appellee

Trial Court No. CR0201201716

v.

Christopher Jones

DECISION AND JUDGMENT

Appellant

Decided: October 25, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jennifer L. Donovan, Assistant Prosecuting Attorney, for appellee.

Ernest E. Bollinger, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Christopher Jones, appeals the judgment of the Lucas County Court of Common Pleas, finding him guilty of aggravated vehicular homicide and aggravated vehicular assault. We affirm.

A. Facts and Procedural Background

{¶ 2} On the evening of October 15, 2011, Jonathan Gruss was travelling in the left lane of northbound Interstate 75 in Toledo, Ohio. Northbound Interstate 75 was

separated from southbound Interstate 75 by a concrete barrier. A Mitsubishi Gallant being driven by Dawn Lerma was directly behind Gruss in the left lane. Lerma was accompanied by four passengers.

{¶ 3} While Gruss was attempting to make a lane-change, his wife alerted him to a Ford Escort travelling in the wrong direction on the northbound left lane. Appellant was the driver of that vehicle. In an effort to avoid a head-on collision, Gruss quickly swerved into the right lane. After Gruss changed lanes, appellant's vehicle collided with Lerma's vehicle, causing the instantaneous death of Lerma's fiancé, Matthew Davis. Lerma was also seriously injured in the crash, as were two of the remaining passengers, both of whom were teenagers at the time.

{¶ 4} Following the accident, appellant was indicted on one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a) and (B), and three counts of aggravated vehicular assault in violation of R.C. 2903.08(A)(2)(b) and (C). At his arraignment on May 17, 2012, appellant entered a plea of not guilty. Following plea negotiations, appellant decided to enter a plea of no contest to aggravated vehicular homicide and two counts of aggravated vehicular assault. In exchange, the state agreed to dismiss the remaining aggravated vehicular assault charge. Following appellant's change of plea, the trial court ordered the completion of a presentence investigation report and continued the matter for sentencing.

{¶ 5} At sentencing, the court imposed the maximum allowable prison term for each offense. Specifically, appellant was sentenced to 60 months for aggravated

vehicular homicide and 18 months on both counts of aggravated vehicular assault. Additionally, the court ordered the terms to be served consecutively for an aggregate prison term of eight years. Appellant has filed his timely notice of appeal.

B. Assignments of Error

{¶ 6} On appeal, appellant sets forth the following assignments of error:

I. The case should be dismissed because the defendant did not commit a criminal act.

II. The trial court erred when it sentenced defendant-appellant to the maximum sentence on each count of the indictment and ordered those sentences to be served consecutively.

II. Analysis

{¶ 7} In his first assignment of error, appellant argues that the case should be dismissed because his actions, as outlined by the prosecutor during the plea hearing, do not constitute a crime. In particular, appellant contends that the facts do not warrant a finding that he “recklessly” operated his motor vehicle as required by R.C.

2903.06(A)(2)(a) and 2903.08(A)(2)(b). Based on appellant’s no contest plea, we must disagree.

{¶ 8} “The plea of no contest is not an admission of defendant’s guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint * * *.” Crim.R. 11(B)(2). While a no contest plea generally waives all nonjurisdictional defects in a felony conviction, the plea leaves open a challenge to the sufficiency of the

indictment. *State v. Watson*, 12th Dist. Clinton No. CA2007-04-020, 2008-Ohio-629, ¶ 11. Even so, such a challenge is deemed waived and may only be raised on appeal under a plain error standard unless raised in the trial court. *Id.*

{¶ 9} Despite his admission via the no contest plea, appellant now argues that the evidence was insufficient to establish his recklessness. Here, the indictment tracks the language of R.C. 2903.06(A)(2)(a) and 2903.08(A)(2)(b). Specifically, the indictment states that appellant recklessly operated his motor vehicle in violation of those statutes. As we have previously held, a defendant is barred from challenging the sufficiency of the evidence as to elements that are deemed admitted via his no contest plea. *State v. Taylor*, 6th Dist. Lucas No. L-10-1302, 2011-Ohio-5462, ¶ 18. Since appellant admitted to driving recklessly by entering a no contest plea, his sufficiency argument is without merit.¹

{¶ 10} Accordingly, appellant's first assignment of error is not well-taken.

{¶ 11} In his second assignment of error, appellant argues that the trial court erred when it imposed the maximum prison term for each count of the indictment and ordered the terms to be served consecutively. Specifically, appellant contends that the trial court

¹ Notably, appellant also acknowledged his recklessness on numerous occasions during the sentencing hearing. For example, on one such occasion, defense counsel stated: "All that being said, judge, we certainly acknowledge the recklessness of [appellant's] actions. I mean that goes without saying." In addition, when given an opportunity to make a statement, appellant personally stated: "I also hope that my sentence will give the victims and their families some closure, some sort of closure for my recklessness."

should have imposed a shorter prison term pursuant to R.C. 2929.11 and 2929.12, in light of his limited prior criminal record, which contains no other felony convictions.

{¶ 12} An appellate court reviews challenges to the sentencing court’s application of R.C. 2929.11 and 2929.12 using the method announced in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. In *Kalish*, the Supreme Court established a “two-prong” process for appellate review of felony sentences, stating:

First, [appellate courts] must 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. If this first prong is satisfied, the trial court’s decision shall be reviewed under an abuse-of-discretion standard. *Id.* at ¶ 4.

{¶ 13} Here, appellant’s sentence falls within the statutory range. We have previously held that a choice of sentence from within the permissible statutory range cannot, by definition, be contrary to law. *State v. Sattler*, 6th Dist. Erie No. E-11-085, 2013-Ohio-326, ¶ 10, citing *Kalish* at ¶ 15. Thus, the first prong under *Kalish* is satisfied.

{¶ 14} Under the second prong, we review the trial court’s “exercise of its discretion in selecting a sentence within the permissible statutory range,” using the sentencing record as the context. *Kalish* at ¶ 17. This prong asks whether, in selecting a specific prison term, the court’s decision was “unreasonable, arbitrary or unconscionable.” *Id.* at ¶ 20.

{¶ 15} R.C. 2929.11(A) provides that “[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes * * *.” In order to comply with the mandates of R.C. 2929.11, a trial court must impose a sentence that is “reasonably calculated to achieve the two overriding purposes of felony sentencing * * * 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.” R.C. 2929.11(B). In exercising its discretion, the trial court must consider, inter alia, the seriousness of the criminal conduct and the likelihood of recidivism. R.C. 2929.12(A). Consideration of these factors involves an examination of the defendant’s conduct, the victims involved, the harm caused to the victims, the defendant’s record, the defendant’s level of genuine remorse, and any other mitigating factors. *Id.*

{¶ 16} Here, appellant argues that the trial court “ignored the factors mandated by Ohio Revised Code Sections 2929.11 and 2929.12.” Concerning those factors, the trial court’s judgment entry states, in relevant part:

The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.

* * *

As to all counts the Court finds the defendant is not amenable to community control and that prison is consistent with the purposes of R.C. 2929.11 and the Court further finds pursuant to the statute, the shortest prison term possible will demean the seriousness of the offense AND will not adequately protect the public and therefore imposes a greater term.

* * *

The Court finds that the consecutive sentence is necessary to protect the public from future crime or to punish the defendant, and not disproportionate to the seriousness of the defendant's conduct or the danger the defendant poses, the Court further finds the harm caused was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

{¶ 17} In addition to its judgment entry, the trial court provided a verbal explanation as to its reasoning behind imposing the maximum sentence in this case. First, the court recited appellant's prior traffic record, which includes a red light violation, two speeding violations, two assured clear distance violations, and an O.V.I. offense. Because the offenses at issue involved the operation of a motor vehicle, the court found appellant's traffic record particularly important. Second, the court noted appellant's pattern of drug and alcohol abuse revealed in the presentence investigation report. Although appellant claimed that he last consumed alcohol on New Year's Eve in

2008, the police found a can of beer in his vehicle's glove box at the scene of the accident. Additionally, the police reported that the vehicle smelled of intoxicants.

{¶ 18} Notwithstanding the court's extensive consideration of the factors pertaining to felony sentencing delineated above, appellant argues that the trial court abused its discretion by imposing the maximum sentence. He contends that his clean criminal record warrants a less-than-maximum sentence. In making his argument, appellant minimizes his prior traffic record and overlooks his prior O.V.I. conviction.

{¶ 19} Essentially, appellant urges us to reverse the trial court based on its allegedly improper weighing of the various statutory factors pertaining to sentencing. As relevant to appellant's argument, the Supreme Court of Ohio has previously stated: "A decisionmaker need not weigh mitigating factors in a particular manner. The process of weighing mitigating factors, as well as the weight, if any, to assign a given factor is a matter for the discretion of the individual decisionmaker." *State v. Fox*, 69 Ohio St.3d 183, 193, 631 N.E.2d 124 (1994). Thus, appellant's argument concerning the trial court's weighing of the applicable factors is without merit.

{¶ 20} In this case, the trial court thoroughly outlined its consideration of the factors during the sentencing hearing. Additionally, the court's judgment entry makes it evident that the trial court complied with R.C. 2929.11 and 2929.12. Therefore, we find that the trial court's imposition of maximum sentences in this case was not an abuse of discretion.

{¶ 21} Accordingly, appellant's second assignment of error is not well-taken.

III. Conclusion

{¶ 22} Based on the foregoing, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs are hereby assessed to appellant in accordance with 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

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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>
