

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

State of Ohio

Court of Appeals No. OT-08-008

Appellee

Trial Court No. 06-CR-148

v.

Jason Smaltz

DECISION AND JUDGMENT

Appellant

Decided: December 6, 2013

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Brad F. Hubbell, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} In a judgment filed on September 18, 2012, we granted appellant's App.R.
26(B) motion to reopen this appeal based upon a genuine issue as to whether appellant,
Jason Smaltz, was deprived effective assistance of counsel on appeal. Appellant has

claimed appellate counsel was deficient in failing to assert trial court error as to sentencing in this appeal.

{¶ 2} Appellant contends that the trial court erred as to the sentence it imposed for operating a motor vehicle under the influence, a violation of R.C. 4511.19(A)(1)(a) and a third degree felony. The offense was charged in Count 1 of the indictment and the count also included an R.C. 2941.1413 specification.

{¶ 3} This appeal is a direct appeal from a January 15, 2008 judgment of conviction and sentence filed in the Ottawa County Court of Common Pleas, after a jury returned guilty verdicts at trial against appellant on all counts of a five count indictment. At sentencing, the trial court found that Counts 1, 2, 4, and 5 of the indictment were allied offenses of similar import. The court merged the offenses for purposes of sentencing and imposed sentence on the third degree felony OVI offense, the accompanying R.C. 2941.1413 specification, and the driving under suspension offense.

{¶ 4} In the January 15, 2008 sentencing judgment, the trial court ruled that the OVI offense carried a mandatory sentence of imprisonment of four years. The court imposed the four year term of imprisonment on the OVI conviction and imposed an additional four year term on the accompanying R.C. 2941.1413 specification. The court ordered that the sentences on the OVI offense and R.C. 2941.1413 specification be served consecutively. The court also sentenced appellant to serve 180 days in the Ottawa County Detention Facility on a driving under suspension conviction (a violation of R.C.

4510.14(A) and a first degree misdemeanor) and ordered that sentence to be served concurrent to the OVI and specification sentences.

{¶ 5} Appellant argues that the OVI offense was not subject to a mandatory term of imprisonment and that the sentence on the OVI offense is contrary to law and void. The state agrees and has joined appellant in requesting that this court reverse the sentencing judgment to the extent it imposed a mandatory four year term of imprisonment on the third degree felony OVI offense. Both request that we remand the case for resentencing on the OVI offense. The parties also agree that the trial court did not err as to the sentence imposed on the R.C. 2941.1413 specification.

{¶ 6} We issued our decision and judgment in this appeal on February 6, 2009, in *State v. Smaltz*, 6th Dist. Ottawa No. OT-08-008, 2009-Ohio-517. Appellant presented no claim of trial court error as to sentencing in prior proceedings in this appeal.

{¶ 7} For the reasons that follow, we conclude that the trial court's sentence on the third degree felony violation of R.C. 4511.19(A)(1)(a) was clearly and convincingly contrary to law. The trial court erred in imposing a mandatory four year term of imprisonment on the OVI offense. Both the state and appellant have previously requested court relief from the judgment. *State v. Smaltz*, 6th Dist. Ottawa No. OT-11-026, 2012-Ohio-2345, ¶ 3, 5. We conclude that the joint efforts of the state and appellant present good cause for relief under App.R. 26(B) at this time.

**Applicable Sentence for Third Degree Felony R.C. 4511.19(A) OVI Offense
Where Conviction Includes R.C. 2941.1413 Specification**

{¶ 8} Count 1 of the indictment charged appellant with operating a vehicle while under the influence of alcohol, a drug of abuse or a combination of them in violation of R.C. 4511.19(A)(1)(a) and having been previously convicted or pleaded guilty to a prior violation of R.C. 4511.19(A) that was a felony. R.C. 4511.19(G)(1)(e) specifies that such an offense is a third degree felony: “An offender who previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony of the third degree.”

{¶ 9} With respect to the R.C. 2941.1413 specification, the specification may be brought under an indictment or information charging a felony violation of R.C. 4511.19(A). R.C. 2941.1413(A). It “specifies that the offender, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more equivalent offenses.” *Id.*

Where an offender is convicted of a felony violation of R.C. 4511.19(A) and the indictment or information includes an R.C. 2941.1413 specification, R.C. 4511.19(G)(1)(e)(i) requires that the sentence for the R.C. 2941.1413 specification be mandatory. Wheeler and Wheeler, *Ohio Driving Under the Influence Law*, Section 14:19 (2012-2013 Ed.). R.C. 2929.13(G)(2) requires that the mandatory term of imprisonment

for the specification and the prison sentence for the underlying OVI offense run consecutively to each other with the sentence on the specification to be served first.

{¶ 10} The statutory scheme provides that the OVI offender is to be sentenced on both the R.C. 2941.1413 specification and underlying OVI offense. *State v. Tacket*, 11th Dist. Ashtabula No. 2012-A-0015, 2013-Ohio-4286, ¶ 14; *State v. McAdams*, 11th Dist. Lake No. 2010-L-012, 2011-Ohio-157, ¶ 33. However, the statutory scheme does not impose any mandatory period of incarceration for the underlying OVI offense where the mandatory sentence for an R.C. 2941.1413 specification is imposed. R.C. 4511.19(G)(1)(e)(i); Wheeler and Wheeler, Section 14:19 (chart); *see State v. McAdams* at ¶ 15; *State v. Stillwell*, 11th Dist. Lake No. 2006-L-010, 2007-Ohio-3190, ¶ 33-35.

{¶ 11} At the time of the OVI offense and sentencing, R.C. 2929.14(A)(3) provided a range of sentences for third degree felony offenses of one, two, three, four, or five years. Furthermore, as the trial court viewed the OVI sentence as mandatory, the court failed to consider the principles and purposes of sentencing under R.C. 2929.11 and failed to balance the seriousness and recidivism factors under R.C. 2929.12 in determining sentence.

{¶ 12} We conclude that imposition of a mandatory four year sentence on the OVI offense is clearly and convincingly contrary to law under the analysis mandated by *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 15, and cannot stand.

{¶ 13} Accordingly we reverse the trial court judgment with respect to the sentence on the third degree felony OVI conviction and remand for resentencing on that

offense. As it is not claimed that the court erred as to sentencing on the R.C. 2941.1413 specification or on the R.C. 4510.14(A) driving under suspension offense, resentencing on remand shall be limited to the third degree felony R.C. 4511.19(A) offense alone. We order the state to pay costs of this appeal pursuant to App.R. 24.

Judgment reversed in part.

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.

Stephen A. Yarbrough, J.

James D. Jensen, J.

CONCUR.

JUDGE

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>
