[Cite as *State v. Harvey*, 2009-Ohio-2385.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91299

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ULYSSES HARVEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-499131

BEFORE: Celebrezze, J., Cooney, A.J., and Jones, J.

RELEASED: May 21, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Susan J. Moran
55 Public Square
Suite 1616
Cleveland, Ohio 44113-1901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Brian M. McDonough
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant Ulysses Harvey brings this appeal challenging his sentence. After a thorough review of the record, and for the reasons set forth below, we affirm.

{¶2} On July 30, 2007, a Cuyahoga County Grand Jury indicted appellant on a five-count indictment: Counts 1 and 2 charged appellant with aggravated vehicular assault in violation of R.C. 2903.08(A)(1)(a); Counts 3 and 4 charged appellant with child endangering in violation of R.C. 2919.22(A); and Count 5 charged appellant with driving under the influence in violation of R.C. 4511.19(A)(1)(a) and/or (f).

{¶3} The indictment stemmed from an incident that occurred on May 18, 2007. On that evening, appellant was driving with his two minor children, ages six months and two and one-half years old, and his brother. Appellant, who admitted being intoxicated, crashed his car. The vehicle was damaged beyond repair, and appellant and his children required medical assistance. A blood test indicated that appellant's blood alcohol level was .204 at the time of the incident.

{¶4} After extensive pretrial conferences, appellant agreed to plead guilty to amended Counts 1, 3, and 5.[1] On October 10, 2007, the trial court held a plea hearing. The trial court reviewed appellant's statutory and constitutional rights

[1] Count 1 was amended to delete the driving under suspension specification, thus making it a third degree felony. Both Counts 1 and 3 were amended by replacing John Does I and II with the children's names and/or birth dates. Count 5 was amended to delete subsection (a) and proceed only on subsection (f).

and proceeded to accept appellant's guilty pleas. Then the trial court ordered a presentence investigation ("PSI"), the original bond was continued, and the court set a sentencing date.

{¶5} On November 13, 2007, the trial court held a sentencing hearing. The trial court reviewed with appellant the information contained in the PSI and mentioned repeatedly that appellant must have been "stumbling drunk," "pretty darn drunk," "falling down drunk," and "completely inebriated." The trial court addressed Count 1 stating: "But I take the first count, the aggravated vehicular assault so seriously because if you get anything out of this terrible experience it should be this: That is a lot of alcohol to have in your bloodstream to get in a car with your babies. *** [I]f your thinking is so clouded that you think .204 is not that drunk, you need some help with an alcohol problem whether or not we've seen you in court before ***."

{¶6} According to the PSI, appellant had been honorably discharged from the U.S. Air Force; he had a prior felony conviction in 1990 and a prior misdemeanor conviction in 1980, neither of which resulted in jail or prison time. Appellant was then given an opportunity to speak on the record, and he expressed remorse for his actions.

{¶7} The trial court sentenced appellant to prison for the maximum of five years on Count 1, with a ten-year driver's license suspension; the minimum of one year on Count 3; and the maximum of one year on Count 5, with a three-

year driver's license suspension and six points on his driving record. All prison and jail time was to run concurrently for a total of five years in prison.

Review and Analysis

{¶8} Appellant now brings this appeal, citing a sole assignment of error:

{¶9} "I. The sentence imposed by the trial court violated R.C. 2929.11 and R.C. 2929.12, and appellant's rights to due process and equal protection guaranteed by both the Ohio and United States Constitutions."

{¶10}Appellant argues that the trial court, by sentencing him to the maximum prison time on Counts 1 and 3, relied on a misconception about his blood alcohol level and did not take into account that the victims were not seriously injured. Appellant claims the trial court failed to consider R.C. 2929.11 and R.C. 2929.12 when imposing his sentence.[2]

{¶11}In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court articulated a two-step approach in reviewing felony sentences. The Court stated: "In applying *[State v.] Foster* [109 St.3d 1, 2006-Ohio-856, 845 N.E.2d 470] to the existing statutes, appellate courts must apply a two-step approach. First, they 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

[2]R.C. 2929.11 and 2929.12 relate specifically to felony sentencing. The comparable statutes which relate to misdemeanor sentencing are found at R.C. 2929.21 and 2929.22, and are substantively the same as for felony sentencing.

this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard."[3] Id.

{¶12}"In determining whether the trial court imposed its sentence in accordance with law, we are mindful that the trial court has full discretion to sentence an offender within the allowable statutory range permitted for a particular degree of offense." *State v. Foster*, supra.

{¶13} Under R.C. 2929.11(A), "[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." Under R.C. 2929.11(B), "[a] sentence imposed for a felony shall be 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." In *State v. Garrett*, Cuyahoga App. No. 90428, 2008-Ohio-3549, this court held that "R.C. 2929.11 does not require a trial court to make findings on the record, ***."

{¶14} Although the trial court in this case did not specifically mention R.C. 2929.11 and 2929.12, we find that it did consider both statutes in imposing appellant's sentence. The trial court focused on appellant's drunkenness, but it did so to make the point that he was fortunate his actions did not result in the death of

---

[3]We recognize *Kalish* is merely persuasive and not necessarily controlling because it has no majority. The Ohio Supreme Court is split over whether we review sentences under an abuse-of-discretion standard in some instances.

his children or someone else. The trial court was apparently not persuaded by appellant's show of remorse because, even though he professed to be sorry for his actions, appellant also repeatedly argued that he was not that intoxicated and that his children were properly restrained in their car seats.

{¶15} Appellant makes much of the court's repeated mention of his alcohol level being .204. He argues that the number is misleading because a blood test, not a breath test, revealed his blood alcohol level to be .204; therefore, he was not as intoxicated as he would be if a breath test had indicated his alcohol level was .204. There is no indication in the record, however, that the trial court is confused on this point. Appellant's alcohol level was admittedly above the statutorily specified level of .17 for a blood test. See R.C. 4511.19(A)(1)(f). The evidence at the sentencing hearing was that appellant had consumed approximately six beers before driving with his two young children strapped into the back seat of his car.

{¶16} The trial court imposed a prison sentence that was within the statutory guidelines. The record supports the imposition of a maximum sentence here where appellant refused to acknowledge the seriousness of his condition at the time he decided to drive intoxicated with his two children in the car, even after he and his children suffered physical injuries.

{¶17} We find that the trial court did not err in sentencing appellant. Even if there was no mention of the specific statutes, the trial court properly considered all applicable statutes. Accordingly, appellant's assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

COLLEEN CONWAY COONEY, A.J., and
LARRY A. JONES, J., CONCUR