[Cite as *State v. Rosado*, 2011-Ohio-1678.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94928

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AXEL ROSADO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-530981

BEFORE: Sweeney, J., Boyle, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: April 7, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Axel Rosado ("defendant") appeals his guilty plea to attempted felonious assault and the accompanying three year prison sentence. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On November 8, 2009, defendant struck Larry Jones ("the victim") in the head with an aluminum baseball bat after the victim allegedly attempted to hit defendant's wife. The injury required 18 stitches and the victim lost three teeth. On February 3, 2010, defendant pled guilty to attempted felonious assault, and on March 1, 2010, the court

sentenced defendant to three years in prison.

{¶ 3} Defendant appeals and raises two assignments of error for our review.

{¶ 4} "I. Mr. Rosado's sentence is disproportionate based on the facts and inconsistent when compared with more serious crimes against Rosado's family."

{¶ 5} Specifically, defendant argues that his sentence is unreasonable in light of the sentences received by six individuals who pled guilty to various offenses associated with the murder of a member of defendant's wife's family.[1] The six defendants received sentences ranging from community control sanctions to life in prison with the possibility of parole after 18 years. See *State v. Gross*, *et al.*, Cuyahoga County Common Pleas Case No. CR-529108A-F.

{¶ 6} The Ohio Supreme Court set forth the standard for reviewing felony sentencing in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. See, also, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. *Kalish*, in a plurality decision, holds that appellate courts must apply a two-step approach when analyzing alleged error in a trial court's sentencing. "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 this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." Id. at ¶4.

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[1] In the record, the murder victim is referred to as defendant's brother-in-law as well as defendant's wife's nephew.

{¶ 7} In the instant case, defendant was convicted of attempted felonious assault, a non-drug related third degree felony, which is punishable by community control sanctions or a prison sentence of between one and five years. R.C. 2929.14(A)(3). Non-drug related third degree felonies carry "no presumption for or against prison." *State v. Blalock*, Cuyahoga App. No. 82941, 2003-Ohio-6627, ¶4; R.C. 2929.13(C). Defendant's three year sentence is within the statutory range and not contrary to law.

{¶ 8} We now analyze the court's findings and review the decision for an abuse of discretion under the second prong of *Kalish*. The court found that defendant's acts and the resulting injury were "extreme," and if not for mitigating factors, defendant would be subject to the maximum sentence. The court took into consideration the "terrible family tragedy" that defendant allegedly overreacted to, as well as defendant's view that he thought he was protecting his wife. The court also considered that defendant had no prior criminal record and that he was a "family person." The court stated, "I am going to mitigate some time, despite the fact that the injuries in this case are severe, off of the five year sentence, and I'm going to impose a sentence of three years."

{¶ 9} A felony sentence should be proportionate to the severity of the offense committed, so as not to "shock the sense of justice in the community." *State v. Chaffin* (1972), 30 Ohio St.2d 13, 17, 282 N.E.2d 46. See, also, R.C. 2929.11(B). A defendant alleging disproportionality in felony sentencing has the burden of producing evidence to

"indicate that his sentence is directly disproportionate to sentences given to other offenders with similar records who have committed these offenses * * *." *State v. Breeden*, Cuyahoga App. No. 84663, 2005-Ohio-510, ¶81.

{¶ 10} Defendant relies solely on the six cases previously mentioned to support his argument. Of the six defendants, two pled guilty to felonious assault, which is similar to defendant's conviction of attempted felonious assault. However, these two individuals also pled guilty to involuntary manslaughter, aggravated burglary, and having a weapon while under disability. They received seven and eight years in prison, respectively. One defendant pled guilty to aggravated burglary and one to burglary; each received a sentence of community control sanctions. The fifth defendant pled guilty to involuntary manslaughter and was sentenced to three years in prison. The final defendant pled guilty to murder with a firearm specification and received a sentence of life in prison with parole eligibility after serving 18 years. See *State v. Gross*, *et al.*, Cuyahoga County Common Pleas Case No. CR-529108A-F.

{¶ 11} We find that the court acted within its discretion when sentencing defendant to three years in prison for a third degree felony, which is more than the minimum, but less than the maximum sentence. The court balanced defendant's recent family tragedy with the seriousness of hitting someone in the head with a baseball bat, and found that a three year prison term would adequately protect the public and punish defendant.

{¶ 12} Accordingly, defendant's first assignment of error is overruled.

{¶ 13} In defendant's second assignment of error, he argues as follows:

{¶ 14} "II. Mr. Rosado's trial attorney provided ineffective assistance by failing to limit his client's exposure in this case."

{¶ 15} "To substantiate a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of defendant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. In *State v. Bradley*, the Ohio Supreme Court truncated this standard, holding that reviewing courts need not examine counsel's performance if the defendant fails to prove the second prong of prejudicial effect. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. "The object of an ineffectiveness claim is not to grade counsel's performance." Id. at 143, 538 N.E.2d 373.

{¶ 16} To establish ineffective assistance of counsel when a defendant pleads guilty or no contest to charges against him, he must establish that but for his counsel's errors, he would have gone to trial. *Hill v. Lockhart* (1985), 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203. In other words, defendant waived the right to claim ineffective assistance of counsel, "except to the extent the defects complained of caused the plea to be less than knowing and voluntary."

State v. Barnett (1991), 73 Ohio App.3d 244, 249, 596 N.E.2d 1101.

{¶ 17} Specifically, defendant argues that his attorney allowed him to plead guilty to attempted felonious assault, a third degree felony, when his actions amounted to an aggravated assault, which is a fourth degree felony. Defendant bases his argument on statements made during his sentencing hearing. His attorney stated that defendant's recent family tragedy "triggered something in him," and defendant stated that he "lost [his] mind," when he saw the victim swing at his wife.

{¶ 18} R.C. 2903.12(A) governs aggravated assault, and it states in part as follows: "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly * * * [c]ause serious physical harm to another * * *."

{¶ 19} Defendant was indicted for two counts of felonious assault and ultimately pled guilty to one count of attempted felonious assault. At defendant's plea hearing, the court fully informed him of the rights he was waiving and the penalty he faced by pleading guilty. The court then found that defendant entered his guilty plea knowingly and voluntarily.

{¶ 20} Nothing in the record suggests that defendant made an uninformed decision to enter a guilty plea. There is no evidence of what was discussed between defendant and his counsel or between defense counsel and the State at the three pre-trials listed in the record.

Furthermore, there is no evidence that the victim provoked or incited defendant, which is one of the elements of aggravated assault. See *State v. Shane* (1992), 63 Ohio St.3d 630, 637-638, 590 N.E.2d 272 (holding that provocation, under the aggravated assault statute, "must be *occasioned by the victim*," and this element is not met when "[f]rom the evidence presented it would appear that the anger built up in [the defendant's] own mind") (emphasis in original). Without evidence that counsel failed to inform defendant of the applicable law, we cannot say that defendant was provided ineffective assistance of counsel.

{¶ 21} Defendant's second 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.

JAMES J. SWEENEY, JUDGE

MARY J. BOYLE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR