[Cite as *State v. Justen*, 2018-Ohio-101.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105856

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CLARK JUSTEN

DEFENDANT-APPELLANT

JUDGMENT:
DISMISSED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-610349-A

BEFORE: Blackmon, J., Kilbane, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: January 11, 2018

ATTORNEY FOR APPELLANT

Kimberly K. Yoder
Kimberly K. Yoder Company, L.P.A.
20525 Center Ridge Road, Suite 133
Rocky River, Ohio 44116

APPELLANT

Clark Justen, pro se
Inmate No. A693700
Lake Erie Correctional Institution
P.O. Box 8000
Conneaut, Ohio 44030

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

By: Margaret Kane
Assistant County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶1} Following a guilty plea, appellant Clark Justen ("Justen") was convicted of aggravated vehicular homicide, and aggravated vehicular assault in connection with a 2016 collision. He filed a pro se notice of appeal, and counsel was appointed for him. Counsel has filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). After holding the motion in abeyance to give Justen an opportunity to file a pro se brief, and following our own independent review of the record and pro se brief, this court grants appointed counsel's motion to withdraw, and we dismiss the appeal.

Factual and Procedural History

{¶2} On October 1, 2016, Justen was involved in a motor vehicle collision that resulted in the death of Tanisha Matthews and injuries to Asia Matthews. He was subsequently indicted for two counts of aggravated vehicular homicide (Counts 1 and 2), aggravated vehicular assault (Counts 3 and 4), OVI (Count 5), drug possession (Count 6), failure to stop after an accident involving a fatality (Count 7), and improperly transporting a loaded firearm while intoxicated (Count 8).

{¶3} Justen pled not guilty. He later entered into a plea agreement with the state whereby he pled guilty to second-degree felony aggravated vehicular homicide (Count 1), aggravated vehicular assault (Count 3), OVI (Count 5), drug possession (Count 6), failure to stop after an accident involving a fatality (Count 7), and improperly transporting a loaded firearm while intoxicated (Count 8). One count of aggravated

vehicular homicide and one count of aggravated vehicular assault (Counts 2 and 4) were dismissed.

{¶4} The trial court subsequently merged Counts 1 and 5 and the state elected to sentence Justen on Count 1. The court imposed an eight-year term and a lifetime license suspension for aggravated vehicular homicide (Count 1), together with concurrent terms of 36 months for aggravated vehicular assault (Count 3), 12 months for drug possession (Count 6), 12 months for failing to stop after a traffic accident involving a fatality (Count 7), 12 months for improperly transporting a firearm (Count 8).

***Anders* Standard and Potential Issues for Review**

{¶5} In *Anders*, the United States Supreme Court held that if appointed counsel, after a conscientious examination of the case, determines the appeal to be wholly frivolous, he or she should advise the court of that fact and request permission to withdraw. *Anders* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id*. Further, counsel must also furnish the client with a copy of the brief and allow the client sufficient time to file his or her own brief, pro se. *Id*.

{¶6} Once the appellant's counsel satisfies these requirements, the appellate court "then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id*. If the appellate court determines that an appeal would be "wholly frivolous," i.e., that there are no appealable issues of arguable merit, "it may grant counsel's request to withdraw and dismiss the appeal * * *." *Id*., *see also* Loc.App.R.

16(C). If, however, the court finds "any of the legal points arguable on their merits," it must afford the appellant assistance of counsel to argue the appeal before deciding the merits. *Anders* at 744; Loc.App.R. 16(C).

{¶7} In this case, appointed counsel indicates that the trial court engaged in the required Crim.R. 11 colloquy. Counsel also indicates that the eight-year sentence on Count 1, although a maximum term, was ordered to be served concurrently to the other sentences and was not clearly and convincingly contrary to law. However, appellate counsel identified the following potential assigned error:

> The trial court erred in imposing a maximum [eight year] prison term upon [Appellant for aggravated vehicular homicide].

{¶8} Additionally, Justen assigns the following errors for review:

> The Appellant/Defendant's sentence does not consider his Eighth Amendment protections where as here his sentence does not consider his disease of drug addiction.
>
> This Appellant/Defendant seeks enforcement of his right to equal protection under the law to [a] sentence similar to others convicted of the same crime.

Maximum Term

{¶9} With regard to the potential assignment of error identified by counsel, we note that in reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2), rather than an abuse of discretion standard. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 7, 10. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or modify a sentence, or it

may vacate the sentence and remand for resentencing, only if it "clearly and convincingly" finds either (1) that the record does not support the trial court's findings under any relevant statutes, or (2) that the sentence imposed is contrary to law. *Id.* at ¶ 9.

{¶10} A sentence is not clearly and convincingly contrary to law "where the trial court considers the purposes and principles of sentencing under R.C. 2929.11 [and] the seriousness and recidivism factors listed in R.C. 2929.12, properly applies post-release control, and sentences a defendant within the permissible statutory range." *State v. Richardson*, 8th Dist. Cuyahoga No. 104958, 2017-Ohio-4441, ¶ 13, quoting *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 10.

{¶11} R.C. 2929.14(A)(2) sets the range of possible prison terms for a second-degree felony as two, three, four, five, six, seven, or eight years. In imposing the sentence within that range, R.C. 2929.11 requires that it shall be reasonably calculated to achieve the two overriding purposes of felony sentencing: (1) to protect the public from future crime by the offender and others; and (2) to punish the offender using the minimum sanctions that the court determines will accomplish those purposes. The sentence imposed shall also be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim, and consistent with sentences imposed for similar crimes by similar offenders." R.C. 2929.11(B). The sentencing court must also consider the nonexhaustive list of seriousness and recidivism factors set forth in R.C. 2929.12.

{¶12} R.C. 2929.11 and 2929.12 are not fact-finding statutes so the court is not required to use particular language or make specific findings on the record regarding its consideration of those factors. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31. Consideration of the appropriate factors can be presumed unless the defendant affirmatively shows otherwise. *State v. Allen*, 8th Dist. Cuyahoga No. 103148, 2016-Ohio-706, ¶ 9. A trial court's statement in its sentencing journal entry that it considered the required statutory factors is sufficient to fulfill a trial court's obligations under R.C. 2929.11 and 2929.12. *State v. Sutton*, 8th Dist. Cuyahoga Nos. 102300 and 102302, 2015-Ohio-4074, ¶ 72, citing *State v. Clayton*, 8th Dist. Cuyahoga No. 99700, 2014-Ohio-112, ¶ 9.

{¶13} In this matter, prior to sentencing, Justen's trial counsel explained to the court that Justen's substance abuse began following a back injury, for which he took prescribed pain medication. After his doctor moved, Justen began purchasing the pills from a drug dealer. Approximately seven weeks prior to the collision, Justen began to take heroin instead of the pain pills. In lab analyses completed as part of the investigation of this matter, Justen learned for the first time that the drug dealer had mixed the heroin with morphine and fentanyl. Since the collision, Justen cooperated with a drug investigation of the dealer and has been attending Narcotics Anonymous meetings. Justen wrote a letter describing his deep remorse for his actions and he apologized to the victims in court. Numerous letters were also submitted on Justen's behalf. The court

also considered the impact that Justen's actions had upon the victims and their family members.

{¶14} Defense counsel submitted detailed information concerning the sentences for other vehicular homicide cases in which sentences from three to seven years were imposed. He acknowledged, however, that some were third- degree felonies, and others did not involve alcohol or drug use. He also informed the court of a case involving two fatalities where the defendant received a 15- year sentence.

{¶15} In imposing sentence, the court stated:

> [F]rom the presentence report I would like to note that in 2001 the defendant had a driving under the influence conviction. He [had] a disorderly conduct in '01, a contempt of court in a closing hours violation in 2002 * * *, attempted possession of drugs in '03, a falsification in '03, a contempt of court in '04, passing bad checks in '06, and then this case as well. And there are also [traffic matters.].
>
> And so this case is different in the respect that you do have a prior DUI. You have a prior drug offense. And you have those other misdemeanors and driving offenses. This case is different in that, you know, Tanisha — I hope the family doesn't mind me using her first name — Tanisha's sister was seriously, seriously injured. You know, it truly is a miracle that there aren't two counts of aggravated vehicular homicide and two people that this family had to bury. I also have to consider Mr. Harris is lucky that he was not killed or injured. And then those three little babies in the car could

have been hurt as well. I mean, the harm you caused is so serious and it could have been even so much worse. The fact that while driving a truck you pulled off, used drugs, and continued to drive is incomprehensible. I understand you have a drug addiction. But that doesn't mean that you have to go into a truck, use them, and immediately go ahead and drive. And so having said all of that, on [C]ount 1, the felony of the second degree, I sentence you to eight years at LCI. You have a lifetime driver's license suspension. There's a three-year mandatory post-release control. Count 3, the felony of the third degree, 36 months. Three-year mandatory post-release control. Count 5 merged into count 1 and the state elected to be sentenced on [C]ount 1. So you'll receive no sentence on [C]ount 5. Count 6, felony of the fifth degree, 12 months. There's a three-year discretionary period of post-release control. Count 7, the felony of the fifth degree, 12 months. Three-year discretionary post-release control. Count 8, a felony of the fifth degree, 12 months. A three-year discretionary post-release control. All of the counts will be served concurrently.

{¶16} Applying the foregoing, Justen's sentence is within the permissible range for the offenses. Additionally, the court clearly considered both R.C. 2929.11 and 2929.12. The court expressly considered Justen's presentence investigation report and his prior offenses, the seriousness of the offenses of the instant matter, the great harm

caused by his actions and the great danger presented by Justen's conduct in driving immediately after taking drugs. Accordingly, there is no "clear and convincing evidence that the record does not support the sentence." *See Marcum*, 146 Ohio St.3d 516, at ¶ 23.

{¶17} Therefore, the potential assignment of error would not have arguable merit.

Cruel and Unusual Punishment

{¶18} Justen's first pro se assigned error argues that the sentence is cruel and unusual punishment becasue it imposes a penalty due to his drug addiction.

{¶19} In *Brookpark v. Danison*, 109 Ohio App.3d 529, 532, 672 N.E.2d 722 (8th Dist.1996), this court rejected a similar contention, within the context of a DUI conviction, and stated:

> Appellant was not punished for the offense of having a mental illness. Instead, appellant was punished, for the sixth time since 1984, for the offense of having driven an automobile while under the influence of alcohol.

{¶20} The *Danison* court noted the "human carnage and severe financial costs imposed on society by drunk drivers,"and held:

> This sentence by the trial court, which falls within the range of punishments contained within the valid punishment statute, does not shock the conscience of this panel, let alone the conscience of the community, particularly where there is no evidence to suggest that his medical needs

> will not be met during his incarceration. Accordingly, the punishment imposed cannot be deemed to be cruel and unusual punishment.

Id.

{¶21} Similarly, in *State v. Taeusch,* 11th Dist. Lake No. 2016-L-047, 2017-Ohio-1105, the court stated:

> [A]ppellant's voluntary intoxication does not ameliorate his actions, especially in light of the fact that he did not seek treatment for his alcohol abuse. * * * The trial court considered appellant's psychological evaluation and appellant's relative mental health issues. The court did not find that appellant's issues should militate in favor of a lesser penalty. Under the facts of the case, we discern no error.

Id. at ¶ 16.

{¶22} Likewise in this matter, Justen was not punished due to his drug issues. Rather, he was punished for using drugs while driving and causing a collision that killed one person and seriously injured another, possessing drugs, failing to stop after a fatal accident, and improperly transporting a firearm. Moreover, the court indicated that it considered all relevant issues, which included psychological and mental health issues. *Accord State v. Carrion*, 8th Dist. Cuyahoga Nos. 103393 and 103394, 2016-Ohio-2942, ¶ 31 (the trial court ordered a presentence investigation report and was aware if appellant's substance abuse issues).

{¶23} In accordance with the foregoing, the first pro se assignment of error is without merit.

Similar Crimes by Similar Offenders

{¶24} Justen next argues that the trial court did not sentence him commensurate with similar crimes committed by similar offenders.

{¶25} R.C. 2929.11(B) does not require the trial court to make express findings. In considering whether a sentence is consistent, we have held that "consistency" is not the same as uniformity. *State v. Georgakopoulos*, 8th Dist. Cuyahoga No. 81934, 2003-Ohio-341, ¶ 26. This court stated:

> The legislature's purpose for inserting the consistency language contained in R.C. 2929.11(B) is to make consistency rather than uniformity the aim of the sentencing structure. See Griffin and Katz, Ohio Felony Sentencing Law (2001), 59. Uniformity is produced by a sentencing grid, where all persons convicted of the same offense with the same number of prior convictions receive identical sentences. *Id.* Consistency, on the other hand, requires a trial court to weigh the same factors for each defendant, which will ultimately result in an outcome that is rational and predictable. Under this meaning of "consistency," two defendants convicted of the same offense with a similar or identical history of recidivism could properly be sentenced to different terms of imprisonment.

Id., quoting *State v. Quine*, 9th Dist. Summit No. 20968, 2002-Ohio-6987. *Accord State v. Bonness*, 8th Dist. Cuyahoga No. 96557, 2012-Ohio-474, ¶ 27.

{¶26} In this matter, defense counsel submitted detailed information concerning sentences for other vehicular homicide cases in which sentences from three to seven years

were imposed. He acknowledged, however, that some of the cases involved third-degree felonies, and other cases did not involve alcohol or drug use. Counsel acknowledged that in a case involving two fatalities, that defendant received a 15-year sentence. The record contains no evidence indicating that the sentence imposed here was inconsistent with or disproportionate to any sentences imposed for similar crimes by similar offenders.

{¶27} In accordance with all of the foregoing, including an examination of the potential assignment of error and the assigned errors raised by Justen, together with our own independent review, we find no arguably meritorious issues exist. Therefore, we conclude that Justen's appeal is wholly frivolous pursuant to *Anders*. Counsel's request to withdraw is granted, and the appeal is dismissed.

{¶28} This appeal is dismissed.

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

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

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
EILEEN T. GALLAGHER, J., CONCUR