

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 09CA0077-M

Appellee

v.

ANDREI S. ZAHARIE

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 08-CR-0346

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 2, 2010

CARR, Presiding Judge.

{¶1} Appellant, Andrei Zaharie, appeals his sentence out of the Medina County Court of Common Pleas. This Court affirms.

I.

{¶2} On August 27, 2008, Zaharie was indicted on two counts of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a), felonies of the third degree; and one count of aggravated vehicular assault in violation of R.C. 2903.08(A)(2)(b), a felony of the fourth degree. The charges arose out of an incident on July 20, 2008, during which Zaharie allegedly recklessly operated a vehicle at a speed in excess of 99 mph. He collided with another vehicle, killing that vehicle's two occupants, while also injuring a passenger in the vehicle he was operating. Zaharie initially pleaded not guilty to the charges.

{¶3} On March 9, 2009, Zaharie appeared before the court for a change of plea hearing. He withdrew his prior not guilty plea and entered a plea of no contest to all three

charges. The trial court found Zaharie guilty and referred the matter to the Adult Probation Department for a pre-sentence investigation prior to sentencing. On April 27, 2009, the trial court sentenced Zaharie to five years in prison on each count of aggravated vehicular homicide and to 18 months on the count of aggravated vehicular assault. The trial court ordered that the two five-year terms would run consecutively, while the 18-month term would run concurrently. The trial court ordered that the defendant's driver's license would be suspended for life. The court further notified the defendant that he was subject to mandatory post-release control "up to a maximum of 3 years[.]"

{¶4} Zaharie appealed. On September 9, 2009, this Court by journal entry vacated Zaharie's sentence for lack of proper notification regarding post-release control and remanded the matter to the trial court for resentencing. *State v. Zaharie* (Sep. 9, 2009), 9th Dist. No. 09CA0032-M.

{¶5} Upon remand, the trial court resentenced Zaharie to five years in prison on each count of aggravated vehicular homicide and to 18 months on the count of aggravated vehicular assault. The trial court ordered that the two five-year terms would run consecutively, while the 18-month term would run concurrently. The court further suspended Zaharie's driver's license for life.

{¶6} Zaharie filed a timely appeal, raising one assignment of error for review.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY IMPOSING MAXIMUM CONSECUTIVE PRISON TERMS TOTALING TEN YEARS UPON DEFENDANT-APPELLANT FOR AGGRAVATED VEHICULAR HOMICIDE, WHERE (1) CONTRARY TO R.C. 2929.11(B), SUCH A SENTENCE WAS NOT CONSISTENT WITH OTHER SENTENCES FOR SIMILAR OFFENSES COMMITTED BY SIMILAR OFFENDERS BOTH

WITHIN THAT COUNTY AND A LARGER NEIGHBORING COUNTY, AND (2) CONTRARY TO THE RECIDIVISM UNLIKELY FACTORS OF R.C. 2929.12 AND 2929.14(B), DEFENDANT-APPELLANT HAD NO PRIOR FELONY RECORD AND DEMONSTRATED REMORSE FOR THE OFFENSES.”

{¶7} Zaharie argues that the trial court erred and abused its discretion by imposing a sentence contrary to law. Specifically, he argues that his sentence is not consistent with other sentences imposed on similar offenders for similar offenses, and that his maximum consecutive prison terms are contrary to a consideration of the factors enumerated in R.C. 2929.12 and 2929.14(B). This Court disagrees.

{¶8} The Ohio Supreme Court clearly held in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph seven of the syllabus: “Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” Nevertheless, trial courts must still consider the statutes applicable to felony cases, including R.C. 2929.11, regarding the purposes of sentencing, and R.C. 2929.12, delineating factors relating to the seriousness of the offense and the offender’s likelihood of recidivism. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at ¶38.

{¶9} Post-*Foster*, the Ohio Supreme Court, in a plurality opinion, developed a two-step analysis for reviewing sentences. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. The *Kalish* court stated:

“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.

{¶10} In this case, the trial court expressly stated that it had considered the purposes and principles of sentencing as set forth in R.C. 2929.11, as well as the seriousness and recidivism factors set forth in R.C. 2929.12. On the charges of aggravated vehicular homicide, felonies of the third degree, Zaharie was subject to a range of confinement for a period of one, two, three, four, or five years. On the charge of aggravated vehicular assault, he was subject to a term of imprisonment from 6 to 18 months. Accordingly, the felony sentences imposed by the trial court are within the permissible statutory ranges. Therefore, this Court concludes that Zaharie's sentence is not clearly and convincingly contrary to law.

{¶11} Moreover, the sentence imposed does not constitute an abuse of discretion. An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶12} Here, the trial court stated that it considered the record, oral statements, victim impact statements, the pre-sentence investigation report, as well as the relevant statutory considerations. The trial court considered that Zaharie had been convicted in 2007 of a drug abuse offense, resulting in a license suspension, and that he had a prior speed violation, as well. The trial court noted that Zaharie was traveling at a high rate of speed and left of center just prior to the accident, causing a motorcyclist and his passenger to swerve to avoid a collision. The court emphasized that this near-miss put Zaharie on notice of his recklessness. The trial court recited that Zaharie's vehicle was traveling at 99.4 mph when it collided with a vehicle driven by a teenaged Samantha Archer. Samantha's teenaged boyfriend Marco DaDante was riding in the front seat. Both teens were wearing seat belts, and both front air bags deployed. Nevertheless, both teens were killed. The fathers of both teens articulated their families' profound grief as a result of their loss. In addition, the court noted that one of Zaharie's passengers suffered serious

physical harm as a result of the collision. The trial court emphasized Zaharie's recklessness in causing these significant injuries and deaths. Zaharie's actions resulted in a senseless and tragic loss of life. Based on these circumstances, this Court concludes that the trial court did not abuse its discretion by imposing maximum, consecutive sentences in this case.

{¶13} Zaharie further argues that his sentence is unreasonable based on sentences for similar offenders for similar offenses. R.C. 2929.11(B) requires a sentence to be "consistent with the sentences imposed for similar crimes committed by similar offenders." It has been held:

"Consistency, however, does not necessarily mean uniformity. Instead, consistency aims at similar sentences. Accordingly, consistency accepts divergence within a range of sentences and takes into consideration a trial court's discretion to weigh relevant statutory factors. [The task of an appellate court is to examine the available data, not to determine if the trial court has imposed a sentence that is in lockstep with others, but to determine whether the sentence is so unusual as to be outside the mainstream of local judicial practice.] Although offenses may be similar, distinguishing factors may justify dissimilar sentences." *State v. Marriott*, 2d Dist. No. 2008 CA 48, 2009-Ohio-2323, ¶37, quoting *State v. King*, 5th Dist. No. CT06-0020, 2006-Ohio-6566, at ¶23.

Moreover, "[a] consistent sentence is not derived from a case-by-case comparison; rather, the trial court's proper application of the statutory sentencing guidelines ensures consistency." *State v. Hall*, 179 Ohio App.3d 727, 2008-Ohio-6228, at ¶10. This Court has already determined that the trial court properly applied the statutory guidelines in imposing sentence. Accordingly, Zaharie's assignment of error is overruled.

III.

{¶14} Zaharie's sole assignment of error is overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

CAMERON B. PEDRO, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MICHAEL P. MCNAMARA, Assistant Prosecuting Attorney, for Appellee.