[Cite as *State v. Mendoza*, 2011-Ohio-1971.]

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

State of Ohio — Court of Appeals No. WD-10-008

Appellee — Trial Court No. 2008CR0529

v.

Cory Mendoza aka Waltz — **DECISION AND JUDGMENT**

Appellant — Decided: April 22, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Gwen Howe-Gebers and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Mollie B. Hojnicki, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas that found appellant guilty, after trial to a jury, of two counts of aggravated vehicular homicide, two counts of aggravated vehicular assault, one count of operation of

a motor vehicle while under the influence, one count of endangering children, one count of failure to comply with the order or signal of a police officer and one count of failure to stop after an accident. Appellant was sentenced to an aggregate term of 39 years imprisonment. For the reasons that follow, the judgment of the trial court is affirmed in part and reversed in part.

{¶ 2} Appellant sets forth the following assignments of error:

{¶ 3} "First Assignment of Error: The trial court erred in denying appellant's motion to suppress the results of the blood test where the state made no showing of substantial compliance.

{¶ 4} "Second Assignment of Error: The trial court's imposition of the maximum and consecutive sentences was contrary to law and constituted an abuse of discretion.

{¶ 5} "Third Assignment of Error: The trial court's order requiring the warden of the institution where the appellant is housed to place the appellant in solitary confinement every October 5th is contrary to law.

{¶ 6} "Fourth Assignment of Error: The evidence at appellant's trial was insufficient to support a conviction and appellant's conviction is against the manifest weight of the evidence."

{¶ 7} The undisputed facts relevant to the issues raised on appeal are as follows. While on duty on the afternoon of October 5, 2008, Sergeant Gregory Konrad of the Wood County Sheriff's Office noticed a white Bonneville approaching him at a high rate of speed on Sand Ridge Road in Wood County. The car moved into Konrad's lane and

the officer was forced to drive off the road to avoid a collision. Konrad turned around and followed the car with his lights and siren activated, at one point traveling at approximately 90 m.p.h. as he attempted to keep up. Konrad briefly lost sight of the car at a curve in the road and, as he rounded the curve, saw a minivan lodged against a tree on the side of the road. Farther down the road, Konrad saw the white car, which had rolled onto its roof and caught fire. Sharon and William DeWitt, two of the minivan's passengers, died in the crash. The DeWitts' daughter, Shelen Steven, was seriously injured. Steven's three-year-old son was also in the minivan but was not seriously injured. Appellant, who had fled the scene, was located walking along the road about a mile from the crash site.

{¶ 8} On October 15, 2008, appellant was indicted as follows: Counts 1 and 2, aggravated vehicular homicide with specifications, in violation of R.C. 2903.06(A)(1)(a) and (B)(2)(b)(i); Counts 3 and 4, aggravated vehicular assault, in violation of R.C. 2903.08(A)(1)(a) and (B)(1)(a); Count 5, driving while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a); Count 6, endangering children, with a specification, in violation of R.C. 2919.22(C)(1) and (E)(5)(b); Count 7, failure to comply with an order or signal of police officer, with a specification, in violation of R.C. 2921.331(B) and (C)(5)(a)(i), and Count 8, failure to stop after an accident in violation of R.C. 4549.02(A) and (B).

{¶ 9} Appellant entered pleas of not guilty to all counts.

{¶ 10} On December 29, 2008, appellant filed a motion to suppress statements and a motion to suppress blood test results. The state filed a motion in limine to allow the blood test results to be introduced as evidence and a motion in opposition to the motions to suppress. After hearings on the motions, the trial court granted the motion to suppress statements appellant made while sitting in the police cruiser immediately after the crash, ruled admissible appellant's statements made while in the hospital on October 7, 2008, denied appellant's motion to suppress the blood test results, and granted the state's motion in limine.

{¶ 11} Following a three-day trial, the jury found appellant guilty as to all counts. The trial court proceeded directly to sentencing and imposed the following prison terms, to be served consecutively: a mandatory ten years as to Count 1, a mandatory ten years as to Count 2, eight years as to Count 3, four years as to Count 4, four years as to Count 7, and three years as to Count 8. As to Count 5, the trial court ordered appellant incarcerated in the Wood County Justice Center for ten days, and for six months on Count 6, with those sentences to be served concurrently with the prison terms. Finally, the trial court ordered that appellant be placed in solitary confinement every year on October 5, the anniversary of the crash.

{¶ 12} In his first assignment of error, appellant asserts that the trial court erred in denying his motion to suppress the results of his blood alcohol test.

{¶ 13} Initially, we note that "[a]ppellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372,

¶ 8. In ruling on a motion to suppress, "the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." Id., citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. On appeal, we "must accept the trial court's findings of fact if they are supported by competent, credible evidence." Id., *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. Accepting these facts as true, we must then "independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *State v. Luckett*, 4th Dist. Nos. 09CA3108 and 09CA3109, 2010-Ohio-1444, ¶ 8, citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

{¶ 14} Appellant relies on *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, in which the Ohio Supreme Court held that upon a defendant's motion to suppress the results of a blood alcohol test, the state must "show substantial compliance with R.C. 4511.19(D)(1) and Ohio Adm.Code Chapter 3701-53 before the test results are admissible." *Mayl* at ¶ 48.

{¶ 15} The results of the test in this case indicated that appellant's blood alcohol level was .114 percent. Appellant argues that the state failed to test his blood sample in substantial compliance with the Ohio Department of Health regulations pursuant to Ohio Adm.Code 3701-53-01, et seq., which provides that "[w]hen collecting a blood sample, an aqueous solution of a non-volatile antiseptic shall be used on the skin. No alcohol shall be used as a skin antiseptic." The nurse who performed the blood draw testified at the suppression hearing that she first disinfected appellant's arm with an alcohol swab.

Therefore, appellant asserts, the state failed to establish that it substantially complied with the requirements of R.C. 4511.19(D)(1) and Ohio Adm.Code Chapter 3701-53, rendering the results of the blood test inadmissible at trial.

{¶ 16} Two years after the *Mayl* decision, however, the Ohio General Assembly passed Am.Sub.H.B. No. 461, effective April 4, 2007, which enacted R.C. 4511.19(D)(1)(a). The version of R.C. 4511.19(D)(1)(a) in effect on October 5, 2008, states:

{¶ 17} "In any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(a) of this section *or for an equivalent offense that is vehicle-related*, the result of any test of any blood or urine *withdrawn and analyzed at any health care provider, as defined in section 2317.02 of the Revised Code*, may be admitted with expert testimony to be considered with any other relevant and competent evidence in determining the guilt or innocence of the defendant." (Emphasis added.)

{¶ 18} The Twelfth District Court of Appeals discussed the application of R.C. 4511.19(D)(1)(a) in *State v. Davenport*, 12th Dist. No. CA2008-04-011, 2009-Ohio-557, and concluded that, based on the plain language of R.C. 4511.19(D)(1)(a), "the results of *'any test of any blood'* may be admitted with expert testimony and considered with any other relevant and competent evidence in order to determine the guilt or innocence of the defendant for purposes of establishing a violation of division R.C. 4511.19(A)(1)(a), or '*an equivalent offense,*' including aggravated vehicular homicide in violation of R.C.

2903.06(A)(1)(a), so long as the blood was withdrawn and analyzed at a 'health care provider' as defined by R.C. 2317.12" (Emphasis sic.)

{¶ 19} Immediately after the collision, appellant was transported to the hospital, where he underwent a non-forensic, or medical, blood alcohol test. We find that R.C. 4511.19(D)(1)(a), in effect on October 5, 2008, applies to this case and authorizes the admission of appellant's blood test results. We note first that appellant stipulated that the hospital where his blood was drawn is a "health care provider" as required by the statute. Further, appellant was charged with violations of R.C. 4511.19(A)(1)(a), 2903.06(A)(1)(a) and 2903.08(A)(1)(a); according to R.C. 4511.181(A)(4), violations of those three offenses are "equivalent offenses" as set forth in R.C. 4511.19(D)(1)(a). It also is not disputed that the prosecution in this case is "vehicle related."

{¶ 20} For the reasons set forth above, we agree with the trial court's application of R.C. 4511.19(D)(1)(a) as well as the holding in *Davenport* and find that the trial court did not err in denying appellant's motion to suppress the results of his blood alcohol test. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 21} In his second assignment of error, appellant asserts that the trial court abused its discretion when it imposed maximum and consecutive sentences for his convictions on two counts of aggravated vehicular homicide and two counts of aggravated vehicular assault. Appellant also argues that the trial court erred by failing to reference either R.C. 2929.11 or 2929.12 during the sentencing hearing, which, appellant

asserts, indicates that the trial court did not consider any of the relevant factors set forth in those statutory sections.

{¶ 22} The Supreme Court of Ohio has established a two-step procedure for reviewing a felony sentence. *State v. Kalish* (2008), 120 Ohio St.3d 23, 2008-Ohio-4912. The first step is to 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. Id. at ¶ 15. The second step requires the trial court's decision to be reviewed under an abuse of discretion standard. Id. at ¶ 19. An abuse of discretion is "more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 23} Appellant's sentences all fell within the statutory range and thus meet the criteria of the first step. The ten-year maximum sentences for the two convictions of aggravated vehicular homicide with specifications were mandatory pursuant to R.C. 2903.06(B)(2)(b)(i). As to the convictions for aggravated vehicular assault with specifications, both sentences were within the statutory range. While the eight-year sentence for Count 3 was the maximum allowed by statute for a second-degree felony, the four-year sentence for Count 4, also a second-degree felony, was less than the maximum.

{¶ 24} This court has repeatedly held that *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, is the controlling law regarding this issue. *Foster* held several of Ohio's

sentencing statutes unconstitutional in violation of the Sixth Amendment to the United States Constitution. Since that ruling, trial courts have no longer been required to make specific findings of fact or give their reasons for imposing maximum, consecutive or greater than minimum sentences. *State v. Donald*, 6th Dist. No. S-09-027, 2010-Ohio-2790, ¶ 8. Thus, *Foster* vests trial courts with full discretion to impose a prison sentence which falls within the statutory range. Id.

{¶ 25} We note that where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes. *Kalish* at fn. 4 (citing *State v. Adams* (1988), 37 Ohio St.3d 295, paragraph three of the syllabus). Nevertheless, the record in this case clearly reflects that, although the court did not specifically cite R.C. 2929.11 and 2929.12, it acknowledged that it was required to consider the principals and purposes of criminal sentencing prior to imposing appellant's sentences. The record is clear that appellant's sentences were based upon the trial court's proper consideration of the relevant statutes and factors. We cannot find that the trial court abused its discretion when imposing the sentences or when ordering that they be served consecutively. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 26} In his third assignment of error, appellant asserts that the trial court erred by ordering him to be placed in solitary confinement on October 5 of each year. The state in this case concedes that Ohio courts have held that solitary confinement is not an acceptable penalty for a trial court to impose. We agree. The punishments set forth in

the Ohio Revised Code for appellant's convictions do not provide for any period of solitary confinement. There is no statutory provision for this type of punishment and it is contrary to law. See, e.g., *State v. Williams*, 8th Dist. No. 88737, 2007-Ohio-5073. Appellant's third assignment of error is well-taken and, accordingly, the offending portion of appellant's sentence must be vacated.

{¶ 27} In his fourth assignment of error, appellant asserts that the evidence at trial was insufficient to support a conviction and that his conviction was against the manifest weight of the evidence.

{¶ 28} A manifest weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins,* 78 Ohio St.3d 380, 387. In making this determination, the court of appeals sits as a "thirteenth juror" and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins,* supra, at 386, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 29} In contrast, "sufficiency" of the evidence is a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *Thompkins,* supra, at 386. When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court must examine "the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the

defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A conviction that is based on legally insufficient evidence constitutes a denial of due process, and will bar a retrial. *Thompkins*, supra, at 386-387.

{¶ 30} Appellant's sole argument in support of his challenges to the sufficiency of the evidence and the weight of the evidence is that the state failed to establish that he was driving the car at the time of the crash. Appellant argues that the undisputed fact that his father also fled the scene, and smelled of alcohol according to witnesses, strongly suggests that his father was the driver of the car, not appellant. Additionally, appellant challenges the credibility of the three witnesses who were passengers in the car at the time of the crash, all of whom testified that appellant was the driver. Appellant states that the witnesses all admitted to drinking prior to the crash and asserts that alcohol clouded their memories.

{¶ 31} Trinity Jay testified that on the afternoon of the crash appellant picked her up along with Jay's friends Roger Lambert and Alivia Baron. Appellant was driving; his young son and his father were also in the car. The group spent the next several hours driving around the area with appellant at the wheel. At one point, appellant and his father argued because appellant was driving extremely fast and swerving on the road. At the time of the crash, Jay testified, appellant was driving. Although everyone else had been

drinking alcoholic beverages, Jay testified that she had not. Roger Lambert testified that appellant was driving at the time of the crash. Lambert confirmed Jay's testimony that shortly before the crash, appellant and his father argued about who should drive since everyone was drinking. Alivia Baron testified that she and her friends had been drinking as they drove around town and that appellant and his father argued because appellant was "too drunk to drive." Additionally, Tamara Cook, a cashier at a gas station in Weston, Ohio, testified that appellant and several others had come into the store to purchase gas and other items in the early evening. She identified appellant as the one driving the car when it left the station.

{¶ 32} Based on the foregoing, we find that appellant's convictions were not against the manifest weight of the evidence. The jury clearly reached the rational conclusion, based on the testimony summarized above, that appellant was driving the car at the time of the crash. Further, we find that the state presented sufficient evidence that appellant was driving the car to support the convictions. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 33} Because we find that the trial court erred in ordering solitary confinement as part of its sentence, we affirm in part and reverse in part. It is ordered that a special mandate issue out of this court directing the Wood County Court of Common Pleas to carry this judgment into execution by modifying its judgment entry to delete that portion ordering solitary confinement. The judgment of the Wood County Court of Common

Pleas is otherwise affirmed. This matter is remanded to the trial court for correction of sentence. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED IN PART
AND 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. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE