

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

State of Ohio

Court of Appeals No. OT-12-022

Appellee

Trial Court No. 12-CR-033

v.

Zachary Brody

DECISION AND JUDGMENT

Appellant

Decided: April 26, 2013

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

William A. Settina, for appellant.

* * * * *

JENSEN, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas sentencing appellant, Zachary Brody, to maximum consecutive sentences for the beating death of Phil Masterson. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On March 12, 2012, Zachary Brody was charged by way of information with one count of involuntary manslaughter in violation of R.C. 2903.04(A), a felony of the first degree, and two counts of tampering with evidence in violation of R.C. 2921.12(A)(1), felonies of the third degree. Later that day, Brody entered a written plea of guilty to all counts. The trial court accepted Brody's plea and ordered the preparation of a presentence investigation report ("PSI") pursuant to R.C. 2951.03(A)(1).

{¶ 3} The sentencing hearing was held May 23, 2012. The parties were given an opportunity to review the PSI. On page two, the PSI indicates: "The State of Ohio and Defendant have in their possession a copy of all reports regarding this matter, a copy of which is attached to the Court's copy of this report." The trial court engaged Brody's counsel in the following colloquy:

THE COURT: Mr. Settina, has the defense had the opportunity to review the pre-sentence report?

MR. SETTINA: I have, Your Honor.

THE COURT: Are there any material changes that need to be made?

MR. SETTINA: No, Your Honor.

THE COURT: Any reason not to proceed to sentencing?

MR. SETTINA: No, Your Honor.

{¶ 4} Thereafter, statements were made by the state, the victim's parents, the attorney for the victim's family, Brody, Brody's counsel, and Brody's parents. The trial

court indicated that it had read every witness statement, every victim-impact letter, and every letter submitted in support of Brody. The trial court also indicated that it reviewed the police and autopsy reports, and viewed photographs of the victim and post-incident photographs of Brody. The trial court declared that it had considered the purposes and principles of sentencing and that it weighed the seriousness and recidivism factors. The trial court then stated:

I want to note in specific some of the issues that I have considered in fashioning a sentence, I have considered those factors in 2929.11, 2929.12 and, as I said, police reports, witness statements and the rest.

Some things that stuck out in my mind, some things that gave me concern. You never called the police. You never called to report an intruder, or a disturbance or an altercation. You never call the E.M.S. or the first responders to aid Mr. Masterson, not even anonymously.

You secluded the victim, I am thinking in order to inhibit his discovery by others. You took his wallet and his I.D. presumably to prevent his identification.

You went home and then returned to the island to further hide what was then Phil Masterson's body.

After you returned home, you gathered your essentials, your money, your passport. You acquired a cell phone that you believed couldn't be traced, presumably in anticipation of fleeing.

My review of the autopsy, the photographs, reveal, frankly, the worst beating I have ever seen inflicted without a weapon in my 37 years in this business.

I also noted that you had very little, if any, injury as a result of this altercation.

I think most disturbing is that after the beating, you checked on Phil Masterson repeatedly and left him to die. Each time, you chose to disregard the value of a human life. Each time, you checked on him and walked away and did nothing.

This was not one instance of bad judgment, not an instance of bad judgment made in the heat of rage, but a series of judgments made over an extended period of time which, by my view, speaks less to your judgment and more to your character and your disregard for human life.

{¶ 5} The trial court sentenced Brody to consecutive prison terms of 10 years on the involuntary manslaughter charge and 36 months for each of the tampering with evidence charges, for a total of 16 years in prison. Appellant filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 6} Appellant sets forth three assignments of error, the first of which provides:

The sentencing Judge conducted an ex parte independent investigation into facts and evidence not contained within presentence report or evidence properly presented by either party when sentencing the Appellant, contrary to the Ohio Rules of Professional Responsibility 2.9 and therefore was disqualified as an adjudicatory body.

{¶ 7} Under his first assignment of error, Brody asserts the trial court violated Rule 2.9(C) of the Code of Judicial Conduct prior to sentencing by independently investigating circumstances surrounding the underlying offense and by considering evidence not properly presented to the court. Specifically, Brody contends the trial court went beyond the contents of the presentence investigation report by seeking and reviewing discovery provided by the prosecution.

{¶ 8} Preliminarily, we note this court is without jurisdiction to determine whether the sentencing judge violated the Code of Judicial Conduct by engaging in an ex parte independent investigation. “Allegations of judicial misconduct are not cognizable on appeal but are matters properly within the jurisdiction of Disciplinary Counsel.” *Parker v. Elsass*, 10th Dist. Nos. 01AP-1306, 02AP-15, 02AP-144, 2002-Ohio-3340, ¶ 25, citing *Szerlip v. Szerlip*, 5th Dist. No. 01CA09, 2002-Ohio-2541, ¶ 18. *See also State v. Richard*, 8th Dist. No. 85407, 2005-Ohio-3723, ¶ 8.

{¶ 9} With that being said, there is no evidence contained in the record submitted by appellant that the trial judge erred by engaging in an independent investigation. As to the propriety of the PSI’s contents, appellant conceded, at oral argument, that all of the

items considered by the trial court when fashioning the sentence were included in reports exchanged during discovery.

{¶ 10} Furthermore, by failing to object in the trial court, appellant has not properly preserved as error on appeal any issue regarding the items the trial court considered in fashioning appellant's sentence. "It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus, citing *State v. Glaros*, 170 Ohio St. 471, 166 N.E.2d 379 (1960). See *State v. Keefe*, 6th Dist. No. E-12-014, 2013-Ohio-629 (appellant failed to preserve error by objecting to the trial court's use of another jurisdiction's PSI).

{¶ 11} For the foregoing reasons, appellant's first assignment of error is found not well-taken.

SECOND ASSIGNMENT OF ERROR

{¶ 12} Appellant's second assignment of error contends:

Under R.C. 2929.11(A) the sentencing Judge erred in imposing maximum sentences upon the Appellant contrary to law.

{¶ 13} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Supreme Court of Ohio created a two-step analysis for reviewing felony sentences on appeal. First, the reviewing court is required 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 ¶ 26. If the first inquiry is satisfied, the appellate court reviews the decision imposing sentence under an abuse of discretion standard. *Id.*

{¶ 14} Here, the trial court stated in its sentencing judgment entry that it “considered the record, oral statements, all victim impact statements, and the pre-sentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11.” The trial court further stated that it had “balanced the seriousness and recidivism factors under Ohio Revised Code 2929.12.” Finally, the trial court stated that Brody was not amenable to a community control sanction and that imprisonment was necessary to protect the public from future crime and to punish the offender.

{¶ 15} The trial court’s ten year sentence for the first degree felony and three year sentences for each of the third degree felonies are within the statutory ranges and are not clearly and convincingly contrary to law.

{¶ 16} As to the second inquiry—abuse of discretion—the appellate court must determine whether the trial court’s attitude “was either unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). R.C. 2929.11 and 2929.12 “serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence.” *Kalish* at ¶ 17. Where the trial court imposes a sentence within the permissible statutory range, a reviewing court will presume

the trial court followed the standards in determining sentence, absent evidence to the contrary. *Id.* at fn. 4. We have reviewed the record and the PSI. We find no evidence to conclude that the trial court failed to consider the factors under R.C. 2929.11 and 2929.12 in selecting an appropriate sentence. The trial court’s decision to impose maximum terms for each of the three felonies is supported by the record. It is not unreasonable, arbitrary or unconscionable. Appellant’s second assignment of error is found not well-taken.

THIRD ASSIGNMENT OF ERROR

{¶ 17} Appellant’s third assignment of error contends:

Under R.C. 2929.14(C) the sentencing Judge erred in imposing consecutive sentences upon the Appellant contrary to law.

{¶ 18} An appellate court must “review the record, including the findings underlying the sentence or modification given by the sentencing court.” R.C. 2953.08(G)(2). The standard of review is not whether the sentencing court abused its discretion, but whether the appellate court clearly and convincingly finds either that (1) “the record does not support the sentencing court’s findings under [R.C. 2929.14(C)(4)]” or (2) “the sentence is otherwise contrary to law.” R.C. 2953.08(G)(2). *See also State v. Clark*, 2d Dist. No. 2011-CA-32, 2013-Ohio-300, ¶ 21.

{¶ 19} According to R.C. 2929.14(C)(4),

If multiple prison terms are imposed on an offender for convictions of multiple offense, the court may require the offender to serve the prison terms consecutively if the court find that the consecutive service is

necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 20} “A trial court satisfies this statutory requirement when the record reflects that the court has engaged in the required analysis and has selected the appropriate statutory criteria.” *State v. Goins*, 8th Dist. No. 98256, 2013-Ohio-263, ¶ 10, citing *State v. Edmonson*, 86 Ohio St.3d 324, 326, 715 N.E.2d 131 (1999). Here, the trial court considered the factors set forth in R.C. 2929.14(C)(4) and found consecutive sentences

necessary under division (4)(b). Because the PSI and record support the trial court's findings that Brody assaulted Phil Masterson, secluded the severely wounded victim, checked on the victim repeatedly without notifying the authorities, removed the victim's identification from his wallet, went home and then returned to the island to further conceal the victim's body, we do not clearly and convincingly find that the record does not support the trial court's findings with respect to the imposition of consecutive sentences, or that the sentences are otherwise contrary to law. Accordingly, the third assignment of error is found not well-taken.

{¶ 21} For the foregoing reasons, the judgment of the Ottawa County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

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

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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