[Cite as *State v. Maguire*, 2009-Ohio-4393.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 188
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
KEVIN MAGUIRE,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 07CR330.
JUDGMENT:	Affirmed.

APPEARANCES:

For Plaintiff-Appellee:	Attorney Paul Gains Prosecuting Attorney Attorney Ralph Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Attorney Douglas King 91 West Taggart Street P.O. Box 85 East Palestine, Ohio 44413

JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: August 20, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Kevin Maguire appeals from his sentence rendered in the Mahoning County Common Pleas Court for his conviction of driving under the influence of alcohol, a violation of R.C. 4511.19(A)(1)(a)(G)(1)(e)(i), a third degree felony. Three issues are raised in this appeal. The first is whether the trial court erred in ordering a maximum sentence. The second is whether trial counsel provided effective assistance of counsel at the sentencing hearing. The third issue is whether the issuance of a maximum sentence violated R.C. 2929.13 because the sentence is "unnecessarily burdensome to the state or local government resources." For the reasons expressed below, there is no merit with any of these issues and thus the sentence is hereby affirmed.

STATEMENT OF THE CASE

¶{2} Maguire was indicted for one count of driving while under the influence of alcohol, a violation of R.C. 4511.19(A)(1)(a)(G)(1)(e)(i), a third degree felony. (04/05/07 Indictment.) He originally entered a not guilty plea; however, after reaching an agreement with the state that it would recommend the minimum mandatory six month sentence at the sentencing hearing, he changed his not guilty plea to a guilty plea. After completing a Crim.R. 11 plea colloquy, the trial court accepted the guilty plea. (03/19/08 Plea Tr.; 03/19/08 J.E.)

¶{3} After multiple continuances, sentencing occurred. The state abided by its agreement and recommended the minimum mandatory six month sentence. (09/05/08 Sentencing Tr. 2). The trial court did not follow the recommendation and instead sentenced Maguire to the maximum penalty of five years imprisonment and suspended his driver's license for life. (09/11/08 J.E.; 09/05/08 Sentencing Tr. 4-5). Maguire filed a timely notice of appeal from that sentence.

FIRST AND SECOND ASSIGNMENTS OF ERROR

¶{4} "THE TRIAL COURT ERRED IN IMPOSING THE MAXIMUM SENTENCE ON DEFENDANT/APPELLANT."

¶{5} "THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION IN IMPOSING THE MAXIMUM SENTENCE UPON DEFENDANT/APPELLANT."

¶{6} The first and second assignments of error are addressed simultaneously due to the commonality of the issues. Maguire contends that the sentence was clearly and convincingly contrary to law and that the trial court abused its discretion in issuing a maximum sentence for the conviction. He asserts that the record is not susceptible to review because no reasons were provided for the imposition of the maximum sentence. He states that although *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, disposed of the requirement that prior to sentencing an offender to the maximum sentence the trial court was required to find that the offender committed the worst form of the offense, the court should still engage in that "worst form of the offense analysis and at the least state its reasons" for imposing a maximum sentence. He also argues that the trial court's references to R.C. 2929.11 were "robotic" and, as such, do not aide in our review of the sentence. Similarly, he contends that there is nothing in the record that indicates that the trial court considered the statutory factors in R.C. 2929.11 and R.C. 2929.12. Thus, according to him, the trial court's attitude was unreasonable especially in light of the recommended six month sentence from the state.

¶{7} We have recently explained that following the Ohio Supreme Court's decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, we review felony sentences using both the clearly and convincingly contrary to law and abuse of discretion standards of review. *State v. Gratz*, 7th Dist. No. 08MA101, 2009-Ohio-695, ¶8; *State v. Gray*, 7th Dist. No. 07MA156, 2008-Ohio-6591, ¶17. We first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. *Gratz*, 2009-Ohio-695, at ¶8, citing *Kalish*, 2008-Ohio-4912, at ¶13-14. Then, if it is not clearly and convincingly contrary to law, we must determine whether the sentencing court abused its discretion in applying the factors in R.C. 2929.11 and R.C. 2929.12. *Gratz*, 2009-Ohio-695, ¶8, citing *Kalish*, 2008-Ohio-4912, at ¶17.

¶{8} Here, Maguire was sentenced to five years, which is the maximum penalty for a third degree felony under R.C. 4511.19(A)(1)(a)(G)(1)(e)(i). At the sentencing hearing, the trial court referenced both R.C. 2929.11 and R.C. 2929.12. It stated:

¶{9} "THE COURT: Okay I've heard the recommendation of the state, the defense, considered the degree of the felony, the purposes and principles of sentencing under 2929.11 to punish the offender and protect the public from future crimes of this offender and others, considered the need for incarceration, deterrence, and rehabilitation. The sentence will be commensurate with and not demeaning to the seriousness of the offender's conduct and consistent with sentences for similar crimes by similar defendants. Sentencing is not based on race, gender, ethnicity, or religion. I don't believe the seriousness factors nor the less serious factors apply. However, as to recidivism, you have a history of criminal convictions, especially alcohol-related convictions. You have not responded favorably to sanctions previously imposed or to programs you've been in. I think you leave us with no other choice but to warehouse you." (09/05/08 Sentencing Tr. 3-4).

¶{10} Furthermore, in the sentencing entry, the trial court stated that it considered the "principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12." (09/11/08 J.E.).

¶{11} The above shows that the trial court did consider R.C. 2929.11 and R.C. 2929.12 when sentencing Maguire. The reference to the principles and purposes of sentencing, rehabilitation, deterrence and the need for incapacitation, and that the sentence is commensurate with and not demeaning to the seriousness of the offender's conduct is a reference to R.C. 2929.11. Likewise, the trial court referencing the seriousness and recidivism factors is a clear reference to R.C. 2929.12(B)-(E) (section (B) is factors that make the offender's conduct more serious, section (C) is factors that make the offender's conduct less serious, section (D) is factors that make recidivism more likely, and section (E) is factors that make recidivism less likely). Thus, there was consideration of the applicable sentencing factors.

¶{12} Maguire's contention that the reference to R.C. 2929.11 is "robotic" and does not aide in our review fails. While the trial court's reference to R.C. 2929.11 may

seem “robotic” because it closely follows the language of that statute, we do not criticize a court for using the language of the statute. Pre-*Foster* this court, when discussing a trial court’s decision to deviate from the minimum sentence and how it was to make the findings in accordance with the felony sentencing statute, stated that we do not require talismanic words. *State v. McCarthy,* 7th Dist. No. 01BA33, 2002-Ohio-5185 ¶12. However, we cautioned that it was prudent for the trial court to mimic the statute's language. Id. Accordingly, as we found no problem with the trial court following the statute’s language, and in fact encouraged them to do so in that situation, we do not find fault with the trial court tracking the language of the statute (R.C. 2929.11) in this situation.

¶{13} Moreover, in discussing R.C. 2929.11 and R.C. 2929.12, a trial court does not need to state reasons why the factors in those statutes apply. *State v. Jones*, 7th Dist. No. 03BE28, 2004-Ohio-1535, ¶20, citing *State v. Arnett* (2000), 88 Ohio St.3d 208, 215. See, also, *State v. Mathis*, 109 Ohio St.3d 54, 62, 2006-Ohio-855 (stating that after *Foster* the trial court is no longer compelled to make finings and give reasons at the sentencing hearing). In fact, we have recently explained that a silent record, where there is no mention of R.C. 2929.11 and R.C. 2929.12, contains the presumption that the court considered the factors in those statutes. *Gratz*, 2009-Ohio-695, at ¶11 and *State v. Mayor*, 7th Dist. No. 07MA177, 2008-Ohio-7011, ¶40 citing *Kalish,* 2008-Ohio-4912, ¶18, fn. 4.

¶{14} In conclusion, considering the references to R.C. 2929.11 and R.C. 2929.12, the statements made by the trial court and its reference to alcohol-related convictions, which show that recidivism is more likely, we cannot find that the sentence was clearly and convincingly contrary to law or that the trial court abused its discretion in issuing the sentence it did. These assignments of error have no merit.

THIRD ASSIGNMENT OF ERROR

¶{15} “DEFENDANT/APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS SENTENCING HEARING.”

¶{16} To prove an allegation of ineffective assistance of counsel, Maguire must satisfy the two-prong *Strickland* test. *Strickland v. Washington* (1984), 466 U.S. 668. First, he must establish that counsel's performance fell below an objective standard of

reasonable representation. *Strickland*, 466 U.S. at 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. Second, he must show that he was prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. at 687. To show prejudice, Maguire must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley,* 42 Ohio St.3d at paragraph three of the syllabus. If this court finds that either prong fails, there is no need to analyze the remaining prong because in order for ineffective assistance of counsel to be shown both prongs must be established by the appellant. *State v. Herring*, 7th Dist. No. 06JE8, 2007-Ohio-3174, ¶43.

¶{17} This court has consistently stated that by entering a guilty plea, the defendant waives the right to claim that he was prejudiced by constitutionally ineffective assistance of counsel, except to the extent the defendants complained of cause the plea to be less than knowing and voluntary. *State v. Kelly*, 7th Dist. No. 08CO23, 2009-Ohio-1509, ¶11; *State v. McQueen*, 7th Dist. No. 08MA24, 2008-Ohio-6589, ¶18; *State v. Doak*, 7th Dist. Nos. 03CO15 and 03CO31, 2004-Ohio-1548, ¶55. We have found as such because "a defendant who admits his guilt waives the right to challenge the propriety of any action taken by the court or counsel **prior to that point in the proceedings** unless it affected the knowing and voluntary nature of the plea." *McQueen*, 7th Dist. No. 08MA24, 2008-Ohio-6589, at ¶19, citing *State v. Madeline*, 11th Dist. No. 2000-T-0156, 2002-Ohio-1332. (Emphasis Added).

¶{18} Recently we have extended the above rule of law and held that a guilty plea also waives any claim of ineffective assistance counsel at the sentencing phase unless it affects the knowing and voluntary nature of the plea. *State v. Sayers*, 7th Dist. No. 07MA234, 2008-Ohio-6633, ¶22-24. That holding is incorrect and is hereby overruled. The Ohio Supreme Court has stated that "a defendant who enters a voluntary plea of guilty while represented by competent counsel waives all nonjurisdictional **defects in prior stages of the proceedings**." *Ross v. Common Pleas Court of Auglaize County* (1972), 30 Ohio St.2d 323, 324. (Emphasis added). See, also, *State v. Spates* (1992), 64 Ohio St.3d 269, 271-272, quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267 (stating, "We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events

which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."). Thus, a guilty plea only waives ineffective assistance of counsel claims for defects that occur prior to the plea, not after the plea.

¶{19} Accordingly, even though Maguire pled guilty to the charge, he can still raise an argument that counsel was ineffective at the sentencing stage. As such, we now address his argument that counsel was ineffective at the sentencing hearing because counsel failed to make any argument regarding what sentence the trial court should impose on Maguire. (09/05/08 Sentencing Tr. 2-3).

¶{20} We find no merit with his argument. Counsel's failure to speak at the sentencing hearing did not amount to deficient performance. Possibly the decision for counsel to not speak at the sentencing hearing was strategy. Tactical or strategic trial decisions, even if unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558. Regardless, Maguire spoke on his own behalf at sentencing. He expressed his remorse and stated that he was glad no one was injured while he was driving under the influence. (09/05/08 Sentencing Tr. 3). Thus, the trial court did have information from Maguire before sentencing him.

¶{21} Yet, even if counsel's failure to make an argument at the sentencing hearing amounts to deficient performance, Maguire cannot show prejudice. While the state did recommend the minimum mandatory sentence, the trial court was not bound to follow that recommendation; it was free to sentence Maguire to the minimum, the maximum or anywhere in between. *State v. Martinez*, 7th Dist. No. 03MA196, 2004-Ohio-6806, ¶8. There is nothing in the record to remotely suggest that had counsel made an argument at the sentencing hearing that the trial court would have followed the recommendation. In fact, it appears from the record that the trial court still would have sentenced Maguire to the same sentence regardless of what counsel said. The trial court specifically referenced Maguire's PSI. In that PSI, not counting the instant offense, from 1993 until 2007 there are 12 alcohol-related convictions (six are for driving under the influence of alcohol (DUI), three are for probation violations

associated with one of the DUI's, two are for open container, and the last one is for using a weapon while intoxicated). Furthermore, the PSI shows that Maguire was sentenced to probation and went to Neil Kennedy and Donofrio House and yet he still continued to reoffend by committing alcohol-related offenses. Likewise, at sentencing, the trial court considered Maguire's past criminal conviction, especially the ones that were alcohol-related and explained that he had not responded favorably to sanctions or programs. (09/05/08 Sentencing Tr. 4). Thus, it appears that the trial court did not view this as a case where the minimum sentence was appropriate given the extensive record and the fact that Maguire had not responded well to programs and the probation he was given on the previous offenses. Consequently, from the record, Maguire has not shown prejudice. In all, there is no merit with this assignment of error.

FOURTH ASSIGNMENT OF ERROR

¶{22} "THE TRIAL COURT'S IMPOSITION OF THE MAXIMUM SENTENCE IN THE PRESENT IS CONTRARY TO LAW AND/OR VIOLATES THE MANDATES OF ORC 2929.13(A)."

¶{23} Maguire argues that the sentence violates R.C. 2929.13 because it is "unnecessarily burdensome to the state or local government resources." Given the facts of this case, his argument fails.

¶{24} R.C. 2929.13(A) does provide that a felony "sentence shall not impose an unnecessary burden on state or local government resources." Considering this statutory language, we have explained:

¶{25} "'Just what constitutes a "burden" on state resources is undefined by the statute, but the plain language suggests that the costs, both economic and societal, should not outweigh the benefit that the people of the state derive from an offender's incarceration. Some have argued that in cases where the multiple life tails might be involved, incarceration of aged offenders who require the kind of nursing care needed by elderly people might place a burden on the state's resources. Of course this is true, but it is only one type of cost associated with incarceration. The court must also consider the benefit to society in assuring that an offender will not be free to reoffend. Many people sleep better at night knowing that certain offenders are incarcerated.

They would no doubt consider a lengthy incarceration worth the cost of housing those offenders.' *State v. Vlahopoulos,* 154 Ohio App.3d 450, 2003-Ohio-5070 ¶5." *State v. Goins*, 7th Dist. No. 06MA131, 2008-Ohio-1170, ¶35.

¶{26} Hence, considering Maguire's prior record, especially the driving under the influence convictions and other alcohol-related convictions, it cannot be said that the cost of incarceration outweighs the benefit to society of this offender being incarcerated to the maximum penalty. During his incarceration, he is unable to harm society with his inability to control the use of alcohol. Thus, we do not find that R.C. 2929.13 is violated in this situation. This assignment of error lacks merit.

CONCLUSION

¶{27} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Waite, J., concurs.
DeGenaro, J., concurs.