

[Cite as *State v. Martin*, 2016-Ohio-885.]
STATE OF OHIO, MAHONING COUNTY

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STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)

PLAINTIFF-APPELLEE

VS.

JENNIFER MARTIN

DEFENDANT-APPELLANT)

CASE NO. 14 MA 0139

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from the Youngstown
Municipal Court of Mahoning County,
Ohio
Case Nos. 13 TRC 3771; 14 TRD 2181

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Dana Lantz
Youngstown City Prosecutor
Shelli Ellen Freeze
Assistant Prosecuting Attorney
26 S. Phelps Street, 4th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Atty. Rhys Cartwright-Jones
42 North Phelps St.
Youngstown, Ohio 44503-1130

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 4, 2016

{¶1} Appellant Jennifer Martin appeals two separate judgement entries of the Youngstown Municipal Court dated October 2, 2014. In one, Appellant was sentenced to 177 days in jail for probation violations stemming from a Crim.R. 11 plea agreement. In the other, Appellant was sentenced to 90 days in jail for leaving the scene of an accident, failure to reinstate her driver's license and failure to control her vehicle. Appellant argues that her sentence is disproportionate to sentences received by similar defendants convicted of the same offense. However, the record reflects that Appellant, who was sentenced on several traffic related offenses and five probation violations, is not similarly situated with the defendants in the cases she cites. Accordingly, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

Case Number 13 TRC 3771

{¶2} On August 21, 2013, Appellant was charged with two counts of operating a motor vehicle while impaired, a first-degree misdemeanor in violation of R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(H), and one count of driving left of center, a minor misdemeanor in violation of R.C. 4511.25. On December 23, 2013, Appellant entered into a Crim.R. 11 plea agreement where the state agreed to dismiss one OVI count, R.C. 4511.19(A)(1)(H), and in return, Appellant agreed to plead no contest in regard to the other two charges. The trial court sentenced her to three days in jail with the option of completing a driver's intervention program by February 28, 2014, instead. The court also sentenced Appellant to one year of

probation, a six-month license suspension, fines, costs, and fees in the amount of \$589, to be paid by April 30, 2014.

Case Number 14 TRD 2181

{¶3} On April 12, 2014, while still on probation, Appellant was charged with failure to control her vehicle, a third-degree misdemeanor in violation of R.C. 4511.20; failure to reinstate her driver's license, in violation of R.C. 4510.111; and failure to stop after an accident, a first-degree misdemeanor in violation of R.C. 4549.02. Appellant was also charged with the following probation violations: failure to timely complete a driver's intervention program; failure to timely pay fines, costs, and fees; failure to appear at arraignment; and the three offenses relating to the April 12, 2014 accident. The trial court sentenced Appellant to 177 days in jail and terminated her probation in case number 13 TRC 3771. She was also sentenced to 90 days in jail in case number 14 TRD 2181. The sentences were ordered to run consecutively. This timely appeal followed.

Assignment of Error

THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING JENNIFER MARTIN TO 90 DAYS LOCAL CONFINEMENT, AND COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE PROPORTIONALITY.

{¶4} Appellant has presented two different issues within her sole assignment of error. Appellant first argues that her sentence is disproportionate to those received by similar defendants within the locality. Appellant cites to twenty local municipal

court cases where OVI defendants received lesser sentences. In her second argument, Appellant contends that her counsel was ineffective for failing to object to her disproportionate sentence.

{¶15} In response, the state argues that the cases cited by Appellant do not bear any factual similarity to the case at bar. The state explains that most of the cases cited by Appellant involve first-time offenders, whereas Appellant is a second-time offender who was additionally sentenced on several probation violations. The state cites to ten OVI cases where the facts are similar to Appellant's case and where the defendant received a similar sentence.

{¶16} A misdemeanor sentence is reviewed for an abuse of discretion. *State v. Reynolds*, 7th Dist. No. 08-JE-9, 2009-Ohio-935, ¶9, citing R.C. 2929.22; *State v. Frazier*, 158 Ohio App.3d 407, 2004-Ohio-4506, 815 N.E.2d 1155, ¶15. Abuse of discretion is "more than a mere error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable." *Reynolds* at ¶9, citing *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980). "[A]n appellate court is guided by the presumption that the trial court's findings were correct." *Reynolds* at ¶9, citing *In re Slusser* 140 Ohio App.3d 480, 487, 748 N.E.2d 105 (2000).

{¶17} As Appellant concedes that she failed to object to the alleged disproportionality of her sentence in the trial court, she is limited to a plain error review. A three-part test is employed to determine whether plain error exists. *State v. Parker*, 7th Dist. No. 13 MA 161, 2015-Ohio-4101, ¶25, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). "First, there must be an error, *i.e.* a

deviation from a legal rule. Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. Third, the error must have affected 'substantial rights.' ” *Parker* at ¶12, citing *State v. Billman*, 7th Dist. Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶21.

{¶8} Pursuant to R.C. 2929.21(B):

A sentence imposed for a misdemeanor or minor misdemeanor * * * shall be reasonably calculated to achieve the two overriding purposes of misdemeanor sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar offenses committed by similar offenders.

{¶9} The state correctly points out that Appellant is not similarly situated with the defendants in the cases she cites. Most of the defendants in the cases cited by Appellant are first time offenders. As the state accurately states, Appellant is not a first-time offender. The three cases Appellant cited that involve a second-time offender did not involve any additional probation violations and are otherwise factually distinguishable. However, the state cites to ten local municipal court cases where defendants received similar sentences for an OVI offense where probation violations were also charged. Similar to the defendants in these cases, in addition to her status as a second-time offender, Appellant's sentence is also based on several probation violations.

{¶10} Appellant was originally cited for an OVI in August of 2013. She was given a choice to either serve three days in jail or attend a driver's intervention program by February 28, 2014. She was also required to pay \$589 in fines, costs, and fees by April 30, 2014. She elected to attend the driver's intervention program; however, she failed to complete the course by the requisite date due to alleged health issues. This was her first probation violation. She also failed to pay the \$589 fine by April 30, 2014. This was her second violation. She was then cited for failure to control her vehicle, failure to reinstate her driver's license, and failure to stop after an accident, despite having a suspended license. These three offenses resulted in her third, fourth, and fifth probation violations.

{¶11} Accordingly, the record shows that her sentence was not solely based on the April 12, 2014 accident. Rather, her sentence additionally reflected punishment for five probation violations. None of the cases cited by Appellant involve a similar factual situation. Appellant also argues that her 90-day jail sentence, ordered to run consecutively to her 177-day sentence, is also disproportionate to sentences received by similarly situated defendants. However, Appellant has not provided this Court with a single case demonstrating that her consecutive sentence is disproportionate to any similarly situated defendant. As the facts of Appellant's case are dissimilar to the cases she cites, she has failed to demonstrate that her sentence is disproportionate.

{¶12} To successfully assert a claim of ineffective assistance of counsel, an appellant must demonstrate that counsel's performance was deficient and must also

show resulting prejudice. *State v. White*, 7th Dist. No. 13 JE 33, 2014-Ohio-4153, ¶18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶107.

{¶13} As the record does not support Appellant's argument that she received a disproportionate sentence, she cannot show that her counsel was deficient for failing to raise this issue at trial. Thus, she cannot satisfy the first *Strickland* prong. Accordingly, Appellant's arguments are without merit and are overruled.

Conclusion

{¶14} Appellant argues that her sentence is disproportionate to sentences received by similarly situated defendants. However, she has failed to demonstrate that her sentence, which was based on multiple traffic offenses and five probation violations, is disproportionate to sentences received by similarly situated defendants. Accordingly, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.