

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 09AP-224
	:	(C.P.C. No. 08CR-07-5359)
Andre R. Banks,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 22, 2009

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellee.

Blaise G. Baker, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Andre R. Banks is appealing from the sentence he received following his guilty plea to one count of aggravated vehicular homicide, a felony of the second degree and two counts of aggravated vehicular assault. He assigns two errors for our consideration:

Assignment of Error No. 1: The prosecuting attorney's remarks during the plea proceedings breached the terms and conditions of the parties' negotiated plea agreement and

constituted prosecutorial misconduct and plain error in violation of the Fourteenth Amendment to the United States Constitution and comparable provisions of the Ohio Constitution.

Assignment of Error No. 2: The failures of Appellant's trial counsel constituted ineffective assistance, thereby depriving Appellant of his rights as guaranteed by the Sixth Amendment to the United States Constitution and comparable provisions of the Ohio Constitution.

{¶2} Banks was driving under the influence of alcohol and marijuana in the early morning hours of July 1, 2007, when he went left-of-center and struck a vehicle containing the Stout family—a husband, wife, and their two children. The husband, James Stout, was killed. The wife sustained extremely serious injuries. The two children also were hurt.

{¶3} Banks was indicted on a total of ten charges, including the three to which he pled guilty. As a part of his plea agreement, seven of the charges were dismissed. The most serious charge, the aggravated vehicular homicide charge, was reduced from a felony of the first degree to a felony of the second degree as the result of the agreed removal of the part of the charge indicating that Banks was driving under a suspension imposed under Chapter 4510 of the Ohio Revised Code. The aggravated vehicular assault charges were also reduced by a single level as the result of the removal of the specification with respect to driving under a suspension. All three charges require a prison sentence and the aggravated vehicular homicide charge required a lifetime driver's suspension because Banks was under the influence at the time of the collision which killed the husband.

{¶4} Nothing in the record before us indicates that the State of Ohio promised to conceal the fact that Banks was driving under suspension when he killed James Stout. The trial judge was on notice of the issue because the charges in the indictment specifically mentioned the fact. At the time the pleas were entered, the trial judge noted that the levels of the offenses were being reduced by the removal of the driving under suspension element. Also, at the time the pleas were entered, the State of Ohio informed the trial court judge that Banks was driving under suspension at the time of the collision. Defense counsel did not object to the mention of the suspension, which would be expected if defense counsel, the defendant, and the State of Ohio had agreed that the driving under suspension issue would be completely removed from the case. Instead, the record indicates that the removal of the driving under suspension element was a device used to lower the level of the felonies to a level which Banks could accept in return for a guilty plea. The amount of prison time he faced was significantly reduced, but the State of Ohio did not agree to conceal the truth from the sentencing judge.

{¶5} Stated more briefly, the record does not show the State of Ohio breached the terms of the plea agreement. The first assignment of error is overruled.

{¶6} The second assignment of error is dependent upon the same set of allegations. Trial counsel for Banks is alleged to have been ineffective for failing to object when counsel for the State of Ohio mentioned the fact that Banks was driving under suspension at the time of the collision.

{¶7} Again, the record before us does not indicate that the agreement between the State of Ohio and the defense went that far. The driving under suspension element

was removed to reduce the level of the felonies to which Banks pled, but the parties did not agree to remove the fact that Banks was driving under suspension from all consideration in this case.

{¶8} Defense counsel did not render ineffective assistance of counsel as determined with reference to *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

{¶9} The second assignment of error is overruled.

{¶10} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
