

[Cite as *State v. Thompson*, 2010-Ohio-5449.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant/Cross-Appellee

-vs-

ZACHARY D. THOMPSON

Defendant-Appellee/Cross-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 10CAA020014

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court of
Common Pleas, Case No. 08CRI080407

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 5, 2010

APPEARANCES:

For Plaintiff-Appellant/Cross-Appellee

For Defendant-Appellee/Cross-Appellant

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Hoffman, J.

{¶1} Plaintiff-appellant State of Ohio appeals the January 27, 2010 Judgment Entry of the Delaware County Court of Common Pleas sentencing Defendant-appellee Zachary D. Thompson on two counts of aggravated vehicular homicide.

STATEMENT OF THE CASE

{¶2} On December 1, 2009, Appellee entered a plea of guilty to two counts of aggravated vehicular homicide, in violation of R.C. 2903.06(A)(1)(a) and R.C. 2903.06(A)(2)(a).

{¶3} On January 27, 2010, the trial court sentenced Appellee to five years in prison, the first two years being mandatory, on each of the two counts, the sentences to be served consecutively. The trial court further ordered Appellee pay costs and restitution in the sum of \$11,466.29. In addition, Appellee's driver's license was suspended for life.

{¶4} The State now appeals, assigning as error:

{¶5} "I. THE SENTENCE OF FIVE YEARS WITH ONLY TWO YEARS BEING MANDATORY FOR EACH COUNT OF AGGRAVATED VEHICULAR HOMICIDE IMPOSED CONSECUTIVELY BY THE TRIAL JUDGE WAS UNLAWFUL AND VOID BECAUSE R.C. 2903.06(E) REQUIRES THE ENTIRE PRISON TERM TO BE MANDATORY."

{¶6} As set forth above, Appellee was convicted on two counts of aggravated vehicular homicide, in violation of R.C. 2903.06(A)(1)(a) and R.C. 2903.06(A)(2)(a).

{¶7} R.C. 2903.06(B)(2)(a) reads:

{¶8} “(2)(a) Except as otherwise provided in division (B)(2)(b) or (c) of this section, aggravated vehicular homicide committed in violation of division (A)(1) of this section is a felony of the second degree and the court shall impose a mandatory prison term on the offender as described in division (E) of this section.”

{¶9} Subsection (E) states:

{¶10} “(E) The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(1) of this section. If division (B)(2)(c)(i), (ii), (iii), (iv), (v), (vi), (vii), or (viii) of this section applies to an offender who is convicted of or pleads guilty to the violation of division (A)(1) of this section, the court shall impose the mandatory prison term pursuant to section 2929.142 of the Revised Code. The court shall impose a mandatory jail term of at least fifteen days on an offender who is convicted of or pleads guilty to a misdemeanor violation of division (A)(3)(b) of this section and may impose upon the offender a longer jail term as authorized pursuant to section 2929.24 of the Revised Code. The court shall impose a mandatory prison term on an offender who is convicted of or pleads guilty to a violation of division (A)(2) or (3)(a) of this section or a felony violation of division (A)(3)(b) of this section if either of the following applies:

{¶11} “(1) The offender previously has been convicted of or pleaded guilty to a violation of this section or section 2903.08 of the Revised Code.

{¶12} “(2) At the time of the offense, the offender was driving under suspension or cancellation under Chapter 4510. or any other provision of the Revised Code or was operating a motor vehicle or motorcycle, did not have a valid driver's license, commercial driver's license, temporary instruction permit, probationary license, or

nonresident operating privilege, and was not eligible for renewal of the offender's driver's license or commercial driver's license without examination under section 4507.10 of the Revised Code.”

{¶13} Revised Code Section 2929.14(A),

{¶14} “(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section or in division (D)(6) of section 2919.25 of the Revised Code and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

{¶15} “***

{¶16} “(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.”

{¶17} The State maintains, since the prison term is mandatory, the only discretion the sentencing court has is with regard to the number of years imposed after evaluating the seriousness and recidivism factors set forth by statute. The State concludes the sentencing court has no discretion to modify the period of mandatory imprisonment, and the defendant must serve the stated period.

{¶18} This Court recently addressed the issue raised herein in *State v. May*, Morrow App. No. 2010CA2, 2010-Ohio-4625, holding:

{¶19} “We recognize that subsequent to the filing of the briefs in this matter, this Court decided *State v. Hess*, Morrow App. No.2009CA0015, 2010-Ohio-3695, in which

we applied the holding of *State v. Thomas*, Allen App.No. 1-04-88, 2005-Ohio-4616, to conclude the trial court was required to impose a mandatory prison term for the entire length of the sentence prescribed and not create a ‘hybrid sentence.’ *Id.* at ¶ 32. However, the Generally Assembly has not specifically disallowed the type of partially mandatory sentence crafted by the trial court in the case sub judice, and, as R.C. 2929.01(FF) and R.C. 2929.20(C)(2) indicate, a ‘stated term’ is not necessarily synonymous with a ‘mandatory term.’ It is well-established that the sentencing provisions set forth in the Revised Code are to be strictly construed against the state and liberally construed in favor of the accused. See, e.g., *State v. Fanti*, 147 Ohio App.3d 27, 30, 768 N.E.2d 718, 2001-Ohio-7028; R.C. 2901.04(A).

{¶20} “Accordingly, we decline to herein adopt our previous rationale in *Hess*. We find the trial court acted within its discretion in imposing a one-year ‘mandatory’ term, which comports with R.C. 2903.08(D)(1) and is within the range of penalties for a third-degree felony, even though the ‘stated term’ was ordered to be two years.”¹

{¶21} In accordance with *May*, supra, we find the trial court did not abuse its discretion in sentencing Appellee, and the State’s assigned error is overruled.

{¶22} The judgment of the Stark County Court of Common Pleas is affirmed.

CROSS-ASSIGNMENT OF ERROR

{¶23} As cross-assignment of error Appellee asserts:

¹ As the author of *State v. Hess*, Morrow App. No. 2009CA0015, 2010-Ohio-3695, I have now reconsidered my prior position on this issue based upon the analysis set forth in *State v. May*, supra, as did Judge Edwards in the *May* case.

{¶24} “THE CONSECUTIVE SENTENCES IMPOSED UPON APPELLEE WERE CONTRARY TO LAW AS THE TRIAL COURT FAILED TO MAKE THE REQUISITE FINDINGS UNDER O.R.C. §2929.14(E).”

{¶25} Upon review, the cross-assignment of error is overruled on the authority of this Court’s prior opinion in *State v. Arnold* (June 25, 2010), Muskingum App. No. CT2009-0021, 2010-Ohio-3125.

{¶26} The January 27, 2010 Judgment Entry of the Delaware County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. concurs,

Wise, J. concurs.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellant/Cross-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ZACHARY D. THOMPSON	:	
	:	
Defendant-Appellee/Cross-Appellant	:	Case No. 10CAA020014

For the reasons stated in our accompanying Opinion, the January 27, 2010 Judgment Entry of the Delaware County Court of Common Pleas is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE