

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-170613
	:	TRIAL NO. B-1704223
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
KENNETH BROOKS,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Kenneth Brooks pleaded guilty to failure to comply with an order or signal of a police officer. While high, Brooks had led police on a high-speed chase through a residential area of Cincinnati. Brooks drove at speeds approaching 60 m.p.h. During the chase, he struck several vehicles before crashing. Ossie Johnson was in one of the vehicles and was injured as a result. Shortly after the accident, Johnson believed her injuries were relatively minor. But, as time passed, she began to suffer from concussion syndrome, anxiety, dizzy spells, balance issues, migraines, and vertigo. As a result of these conditions, she was unable to return to her position as a teacher.

At the sentencing hearing, Brooks subpoenaed Johnson to appear. When Johnson had appeared previously before the municipal court on Brooks's related charges, she had told the court that she forgave him for what had happened. That hearing had occurred before Johnson's more significant symptoms had presented. At the sentencing hearing below, however, Johnson told the trial court how extensively her life had been impacted by what had happened, and she asked the trial court to sentence him "to every second of his time plus more."

The trial court then spoke to Brooks for several minutes, talking to him about the severity of his drug problem and the significance of Johnson's injuries. The trial court then sentenced Brooks to 36 months in prison. Before the hearing concluded but after the trial court had announced its sentence, the trial court invited Brooks to speak on his own behalf. Brooks told the trial court that he did understand his need for treatment, and expressed his concern that a lengthy prison sentence would hamper his future employment prospects. The trial court acknowledged his statements, and again explained why the prison term was appropriate. The trial court then concluded the hearing.

In his first assignment of error, Brooks claims that the trial court did not consider the appropriate sentencing factors when imposing the maximum sentence. He argues that this is demonstrated by the court's statement that "I told your counsel I'm going to base my sentence totally on Miss Johnson." Brooks argues that "[w]hen the trial court sentenced based solely on the request of Ms. Johnson for the maximum sentence, the sentence was contrary to law."

The trial court must consider the purposes and principles of sentencing before imposing sentence, in accordance with the sentencing statutes, including R.C. 2929.11 and 2929.12. *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000). In the absence of an affirmative demonstration to the contrary, we may presume from even a silent record that the court considered the factors. *State v. Alexander*, 1st Dist. Hamilton Nos. C-110828 and C-110829, 2012-Ohio-3349, ¶ 24, *overruled sub silentio in part on other grounds*, *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659.

The record in this case demonstrates that the trial court considered much more than Johnson's request for the maximum sentence. The judge was deeply concerned about Brooks's drug addiction, noting that he was so high at the time of the chase that he couldn't say how he got to Cincinnati. The trial court also observed

that Brooks was so high at the time that his first instinct when he saw the police was to flee. The judge said that Brooks “really desperately needs treatment.” The trial court reached the conclusion that “there is nothing to indicate to me that you’re going to be able to walk out of here or walk out of any institution receiving absolutely no treatment and be able to resist heroin or cocaine. * * * I have to put you in a place. And I need to get you the best treatment possible.” The trial court finally noted that “I was going to give you a sentence and just send you back to Kentucky, but I can’t do that. * * * You really need treatment. You need it badly. * * * I’m just trying to save your life. That’s what this sentence is meant for.” This is a legitimate factor to consider when sentencing a defendant. *See* R.C. 2929.12(D)(4).

But even if we look only at the issue of the trial court relying on Johnson’s statement, the trial court did not—as Brooks claims—base its decision on Johnson’s sentencing recommendation. In the context of the colloquy, the trial court was referring to Johnson’s injuries. Before the sentencing hearing began, when the trial court had made this statement to counsel, it was believed that Johnson’s injuries were minor and had resolved. The trial court said that the “[i]nitial word that we had received was that she was hurt. But she wasn’t hurt very much.” But it then became clear that her injuries had been much more extensive. The trial court said that “[t]he only question left was for Miss Johnson. How hurt was she. We were under the impression that she did not receive tremendous injury. But she did. You affected her whole life.” This is a legitimate factor to consider when sentencing a defendant. *See* R.C. 2929.12(B)(2).

Brooks has failed to establish that the trial court did not consider the appropriate statutory factors when it sentenced him to 36 months in prison. The record clearly demonstrates that the trial court considered much more than Johnson’s sentencing recommendation.

Additionally, Brooks contends that the trial court failed to afford him the right of allocution. It would have been error to announce the sentence and conclude the hearing without allowing Brooks to speak. *See* Crim.R. 32(A)(1). However, in this case, after the initial announcement of the sentence, the trial court invited Brooks to speak on his own behalf before the hearing concluded. The fact that Brooks's remarks did not convince the trial court to change the sentence does not mean the trial court did not consider what he said. The trial court's subsequent remarks indicated that it had heard and understood his comments; it simply remained unswayed. We overrule Brooks's first assignment of error.

In his second assignment of error, Brooks claims that counsel was ineffective for issuing a subpoena to bring Johnson to speak at the sentencing hearing. But Johnson had previously spoken favorably on behalf of Brooks, and it was a surprise to all involved that Johnson's condition was much worse than originally believed and that her position on Brooks had changed. The decision to bring Johnson in to speak on Brooks's behalf, knowing what was known at the time, was an appropriate decision. The fact that a trial decision was ultimately unsuccessful does not mean that it amounted to ineffective assistance of counsel. *See State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 115. We overrule Brooks's second assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., ZAYAS and MYERS, JJ.

To the clerk:

Enter upon the journal of the court on November 2, 2018
per order of the court _____.
Presiding Judge