

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 2002CA00057
MICHAEL EDWARDS RICHARDS	:	
	:	
Defendant-Appellant	:	
	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Stark County Court of Common Pleas, Case No. 2001-CR-1545(B)

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 9, 2002

APPEARANCES:

For Plaintiff-Appellee  
STARK COUNTY PROSECUTOR'S  
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For Defendant-Appellant  
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*Gwin, P.J.,*

{¶1} Appellant Michael E. Richards appeals a judgment of the Stark County Common Pleas Court convicting him of three counts of aggravated robbery with firearm specifications (R.C. 2911.01 (A)(1)), and one count of felonious assault with a firearm specification (R.C. 2903.11(A)(1)), upon a plea of guilty:

{¶2} “I. THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO SATISFY THE STATUTORY REQUIREMENTS FOR IMPOSING CONSECUTIVE SENTENCES .

{¶3} “II. THE TRIAL COURT COMMITTED PLAIN ERROR IN IMPOSING CONSECUTIVE SENTENCES FOR DUPLICATE CHARGES.

{¶4} “III. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ENTERED A JUDGMENT OF CONVICTION AND SENTENCED THE DEFENDANT ON ALLIED OFFENSES OF SIMILAR IMPORT IN VIOLATION OF R.C. 2941.25 AND ALSO IN VIOLATION OF THE STATE AND FEDERAL PROHIBITIONS AGAINST THE IMPOSITION OF MULTIPLE PUNISHMENTS AS SET FORTH IN THE DOUBLE JEOPARDY CLAUSE.

{¶5} “IV. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO APPELLANT’S CONSECUTIVE PRISON TERMS AT THE SENTENCING HEARING.”

{¶6} On November 14, 2001, appellant and his co-defendants, Victor Miller and Jesse Thomas DelGado, participated in an armed robbery of Ferraro’s Restaurant in Canton, Ohio. During the course of the robbery, appellant broke the jaw and injured the eyes of an individual he robbed in the restaurant. On December 14, 2001, appellant was

indicted by the Stark County Grand Jury with three counts of aggravated robbery with firearm specifications, and on one count of felonious assault.

{¶7} On January 30, 2002, appellant pled guilty to the charges in the indictment. The court conducted a combined plea and sentencing hearing. Appellant admitted to the trial court that he was on felony probation at the time of the offenses, and that he understood the plea could result in revoking such probation.

{¶8} The court sentenced appellant to a determinate nine year prison term for the first count of aggravated robbery, and to a determinate term of six years incarceration on each of the remaining counts of aggravated robbery. The two six-year terms were to run concurrently to each other, and consecutively to the nine year term. The court sentenced appellant to a determinate seven year term of incarceration for felonious assault, to run consecutively to the other terms. Finally, the court merged the firearm specifications and sentenced appellant to serve a determinate term of three years incarceration, prior to and consecutively to the other prison terms. The aggregate sentence was a determinate term of twenty-five years.

I

{¶9} Appellant first argues that the court did not satisfy the statutory requirements for imposing consecutive sentences.

{¶10} Upon reviewing a sentence, we may increase, reduce, or otherwise modify a sentence only if we find by clear and convincing evidence that the record does not support the sentence, or that the sentence is otherwise contrary to law. R.C. 2953.08 (G)(2).

{¶11} To impose consecutive terms, the trial court must comply with R.C. 2929.14.(E)(4). The court must find that consecutive service is necessary to protect the public from future crime or to punish the offender, and that consecutive sentences are not

disproportionate to the seriousness of the offender's conduct and the danger the offender poses to the public. *Id.* Further, the court must find that the offender committed the multiple offenses while the offender was awaiting trial or sentencing, or was under post-release control for a prior offense; the harm caused by the offenses was so great or unusual that a single prison term would not adequately reflect the seriousness of the offender's conduct; or that the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. *Id.*

{¶12} In its sentencing entry, and on the record, the court made the necessary findings pursuant to the statute. In the court's entry, the court found that for the reasons stated on the record, consecutive sentences are necessary to protect the public from future crime and to punish appellant, and were not disproportionate to the seriousness of appellant's conduct and the danger appellant poses to the public. The court found that appellant was under a post-release control sanction when the offenses were committed, and that his history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime. Judgment Entry, Change of Plea and Sentence Imposed, February 6, 2002.

{¶13} During the sentencing hearing, the prosecutor read appellant's extensive criminal record, which included convictions in 1990 on 19 aggravated burglary counts, and a conviction in 2000 of failing to comply with an order or signal of a police officer. The court noted on the record that appellant was incarcerated in 1990, just after he became an adult, and served ten years. In 2000, he was released, and almost immediately found himself in prison again for one year. He was out of prison approximately six months before he was involved in the actions leading to the charges in the instant case. Appellant was on

probation at the time he committed the instant offenses. The court found on the record that what appellant did in the instant case, was “practically right out of the wild, wild, west.” Tr. 39-40. The court found that appellant went into a restaurant with a gun, and began smacking people with the gun, and shooting at objects in the restaurant. Tr. 39-40. Appellant also told the court that he wanted to go back to prison.

{¶14} It is clear from the record that the court’s finding that consecutive sentences were necessary to protect the public from future crime was supported by the record. Appellant had demonstrated a propensity to re-offend and was on probation at the time of the instant offenses. Further, it is clear from appellant’s colloquy with the court that he did not function well outside of the prison system, and wanted to go back to prison, indicating that consecutive sentencing was necessary to protect the public from future crime by appellant. The first assignment of error is overruled.

## II

{¶15} Appellant argues that the court erred in imposing consecutive sentences, as the indictment appeared to contain duplicate charges.

{¶16} A plea of guilty constitutes a complete admission of guilt, and by entering a plea of guilty, the accused is not simply stating that he did the acts described in the indictment; he is admitting guilt of a substantive crime. *State v. Barnett* (1991), 73 Ohio App. 3d 244, 248; *United States v. Broce* (1989), 488 U.S. 563, 570. A guilty plea renders irrelevant all constitutional violations that are not logically inconsistent with the valid establishment of factual guilt. *Menna v. New York* (1975), 423 U.S. 61. A guilty plea waives procedural issues, except for reviewing whether the record demonstrates that appellant was improperly coerced into entering a plea. *State v. Kelley* (1991), 57 Ohio St. 3d 127, 130. Specifically, this court has held that by pleading guilty, a defendant waives

his right to challenge any defects in the indictment. *State v. Dannemiller* (December 6, 1999), Stark Appellate No. 1999-CA-00263.

{¶17} By entering a plea of guilty, appellant has waived his right to challenge the indictment and the Bill of Particulars. Appellant cannot attempt to attack the indictment and Bill of Particulars under the guise of claiming error in the sentencing procedure, as the crux of appellant's assignment of error challenges the indictment and Bill of Particulars.

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

### III

{¶19} In his third assignment of error, appellant argues that the court erred in sentencing him to terms of imprisonment for aggravated robbery and felonious assault, as they are allied offenses of similar import. For the reasons stated in II above, by entering a plea of guilty, appellant has waived his right to argue that the offenses of aggravated robbery and felonious assault should have been merged. Further, felonious assault and aggravated robbery are not allied offenses of similar import, as a defendant can commit aggravated robbery without committing felonious assault, and vice versa. E.g., *State v. Moore* Cuyahoga Appellate No. 79353, 2002-Ohio-2133, at paragraph 50.

{¶20} The third assignment of error is overruled.

### IV

{¶21} Appellant argues that his trial counsel was ineffective for failing to object to consecutive sentences at the sentencing hearing.

{¶22} To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that he was prejudiced by such performance. *Strickland v. Washington* (1984), 466 U.S. 668, 687-689; *State v. Bradley* (1989), 42 Ohio St. 3d 136, cert. denied (1990), 497 U.S. 1011. To

demonstrate prejudice, the defendant must show that but for counsel's errors, the result of the proceeding would have been different. Id.

{¶23} Appellant has not demonstrated that the result of the proceeding would have been different had counsel objected to consecutive sentencing. As discussed earlier in this opinion, the court complied with all requirements for consecutive sentencing, and the offenses were not allied offenses of similar import. Further, the record of the plea hearing indicates that counsel negotiated a sentencing range for appellant of twenty to twenty-five years, a term agreed to and acknowledged by appellant at the plea hearing.

{¶24} Appellant's fourth assignment of error is overruled.

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

Judgment affirmed.

Wise and Boggins, JJ., concur.

topic: consecutive sentencing - guilty plea

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JUDGES

WSG:clw 1125

[Cite as *State v. Richards*, 2002-Ohio-6847.]