

[Cite as *State v. Word*, 2019-Ohio-795.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107235

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN C. WORD

DEFENDANT-APPELLANT

JUDGMENT:
DISMISSED IN PART; AFFIRMED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-613131-A

BEFORE: S. Gallagher, P.J., Jones, J., and Keough, J.

RELEASED AND JOURNALIZED: March 7, 2019

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SEAN C. GALLAGHER, P.J.:

{¶1} John C. Word appeals his conviction that followed a senseless decision to haphazardly discharge a firearm into a bar on New Year's Eve. Word had been removed from the establishment by staff members after he refused to finish or discard his drink at closing time. As captured by surveillance cameras, Word spent the next few minutes contemplating a response.

At one point, he retrieved an illegally possessed firearm from a parked car, all the while hurling invectives at the staff members who had locked themselves inside the establishment. After a period of visible contemplation, Word fired at least two shots into the populated bar. One of the bullets struck Travis Stephens in the temple, causing his death hours later. Mr. Stephens, who by all accounts was innocently finishing a drink at the bar, had nothing to do with the incident leading to Word's removal — which is not to imply that Mr. Stephens's involvement would have justified Word's actions in any respect.

{¶2} Word agreed to plead guilty to involuntary manslaughter of Mr. Stephens, along with an attendant 54-month firearm specification under R.C. 2941.145(D), and the attempted murder of a John Doe victim, which also included a 54-month firearm specification.¹ Word also pleaded guilty to having a weapon while under disability. The most important aspect of the plea deal from the state’s perspective was Word’s agreement to jointly recommend a sentencing range of 20 to 25 years, with the trial court being permitted to determine how to fashion the aggregate term to effectuate the agreement.

{¶3} The trial court accepted the jointly recommended sentencing range and imposed an aggregate 22-year term of imprisonment. An 8-year sentence was imposed for the involuntary manslaughter offense, along with the 54-month sentence on the firearm specification that is to be served prior and consecutive to the base sentence. A 5-year sentence was imposed on the attempted murder offense, along with the mandatory, consecutive 54-month sentence for that attendant firearm specification. The 36-month sentence for having a weapon while under disability was imposed concurrently with all other sentences.

{¶4} Despite receiving that which he bargained for, Word appealed his sentence and his guilty plea. Word’s arguments pertaining to the validity of the plea are largely based on sentencing issues. Thus, we will address those concerns within the framework of R.C. 2953.08(D), which precludes review of jointly recommended sentences imposed by the trial court. *State v. Lee*, 2018-Ohio-1839, 112 N.E.3d 65, ¶ 25 (8th Dist.), *discretionary appeal not allowed*, 153 Ohio St.3d 1468, 2018-Ohio-3450, 106 N.E.3d 65. In light of Word’s sentencing

¹Word did not object to or otherwise timely preserve any error with respect to naming the victim of the attempted murder count as “John Doe” before pleading guilty to the amended charges. He waived his right to contest nonjurisdictional defects in the indictment. *State v. Tate*, 8th Dist. Cuyahoga No. 104342, 2016-Ohio-8309, ¶ 4 (string citing cases).

agreement, we must first determine the scope of our jurisdiction. *Id.*, citing *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095.

{¶5} A defendant's right to appeal a sentence is derived from R.C. 2953.08. *State v. Sergeant*, 148 Ohio St.3d 94, 2016-Ohio-2696, 69 N.E.3d 627, ¶ 15. "[I]f a jointly recommended sentence imposed by a court is 'authorized by law,' then the sentence 'is not subject to review.'" *Id.*, quoting R.C. 2953.08(D)(1). An appellate court lacks jurisdiction to review jointly recommended sentences. *Noling* at ¶ 22. There is no dispute from the record that the trial court imposed the sentence that was jointly recommended. R.C. 2953.08(D)(1). Thus, the only question in this case is whether the sentences imposed are authorized by law.

{¶6} Word does not argue, let alone demonstrate, that his sentences are not authorized by law. The Supreme Court of Ohio has held that a sentence is "authorized by law," and is therefore not appealable within the meaning of R.C. 2953.08(D)(1), "'if it comports with all mandatory sentencing provisions.'" *Sergeant* at ¶ 26, quoting *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, paragraph two of the syllabus.

{¶7} Word agreed to serve 20 to 25 years in prison in exchange for his pleading guilty to lesser charges, two of which included 54-month firearm specifications. The sentences on the firearm specifications were mandatory, and the legislature required the sentences to be served in the manner in which they were actually imposed in this case. R.C. 2929.14(B)-(C). Once Word agreed to plead guilty to the firearm specifications, the trial court was required to impose the sentences on the firearm specifications consecutive to each other and both of the respective base offenses. In order to reach the 20- to 25-year aggregate term agreed upon, the underlying sentences on the involuntary manslaughter and attempted murder offenses were also consecutively imposed — all of which totaled 22 years (8 + 4.5 + 5 + 4.5) in prison. The R.C.

2929.14(C)(4) findings for the consecutive service of the base offenses were included in the final entry of conviction, although the findings were unnecessary under *Sergeant*. The aggregate term of imprisonment to which Word agreed is authorized by law and, therefore, is not subject to appellate review. R.C. 2953.08(D).

{¶8} In order to circumvent the statutory prohibition against appellate review of his sentences, Word claims that the trial court failed to advise him during the plea colloquy that the sentences on the firearm specifications were statutorily mandated to be served prior and consecutive to the sentences on the base offenses, that the trial court erred in failing to merge the involuntary manslaughter and attempted murder of different victims as being allied offenses, and that the trial court erred by accepting his guilty plea to the involuntary manslaughter and attempted murder counts without reference to the attendant firearm specifications to which Word agreed to plead guilty.

{¶9} We cannot review Word's argument regarding merger of the involuntary manslaughter and attempted murder convictions. A defendant cannot agree to consecutively serve sentences without agreeing that the court has the authority to impose the individual sentences on each count. *Lee*, 2018-Ohio-1839, 112 N.E.3d 65, at ¶ 9. Agreeing to the imposition of multiple sentences, i.e., that the two offenses do not merge under R.C. 2941.25, is a necessary prerequisite to agreeing to consecutively serve the sentences. It is "[o]nly after the judge has imposed a separate prison term for each offense may the judge then consider in his [or her] discretion whether the offender should serve those terms concurrently or consecutively." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 9. Although Word did not expressly agree to serve his sentences consecutively, he agreed to permit the trial court to impose the sentences in any manner to achieve a 20- to 25-year aggregate term of imprisonment.

The only way to achieve the agreed sentencing range in this case was through the imposition of consecutive sentences.

{¶10} A defendant's concession or stipulation that the offenses are separate waives the right to appeal the allied offense issue.² *State v. Johnson*, 8th Dist. Cuyahoga No. 105904, 2018-Ohio-102, ¶ 11, citing *State v. Black*, 2016-Ohio-383, 58 N.E.3d 561, ¶ 16 (8th Dist.); *State v. Woods*, 1st Dist. Hamilton No. C-160851, 2017 Ohio App. LEXIS 4432, 4 (Oct. 4, 2017). When an offender agrees to consecutively serve separate sentences on multiple offenses, such an agreement constitutes a waiver of the right to challenge the sentences under R.C. 2941.25. *Lee* at *id.* Word's agreement to serve consecutive sentences necessarily included the affirmative concession that the offenses were committed separately, with a separate animus or against separate victims because consecutive sentences cannot be imposed for allied offenses.

{¶11} Word waived his ability to challenge the merger issue through his agreement to the sentencing range that required consecutive service of separate sentences on the offenses. *Id.* Because Word thereby conceded that the offenses were not allied, the trial court satisfied all mandatory obligations and the sentences are authorized by law. It is only if the trial court determines or the parties concede that the offenses are allied that a mandatory prohibition against separate sentences arises. *Id.* at ¶ 5, citing *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234; *Rogers*; and *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. We lack jurisdiction to review the merger issue in this particular case. R.C. 2953.08(D)(1); *Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 22.

²This contrasts with the situation discussed in *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, in which the offender forfeited his right to raise the merger issue through silence and thereby preserved appellate review under the plain error standard.

{¶12} Word next claims that he could not be sentenced to the firearm specifications attendant to the two base offenses because the trial court generically asked him if he was pleading guilty to Count 1, as amended to involuntary manslaughter, and Count 5, attempted murder, without express reference to his pleading guilty to the attached firearm specifications. According to Word, his sentence imposed on the firearm specifications must be vacated because of the procedural irregularity in the plea process. It is important to note that Word is not challenging the validity of his plea agreement, which included his agreement to plead guilty to the firearm specifications, but instead is attacking his resulting sentence because of a defect in the plea process. This distinction is important.

{¶13} In light of Word's claim that his sentence for the firearm specification is voidable based on a procedural defect in the process, we are in want of jurisdiction to review it. If the sentence imposed is void, R.C. 2953.08(D) does not preclude review. *Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, at ¶ 28. Procedural defects in the guilt stages of the trial process, however, do not render the resulting sentence as being void; the resulting sentence is merely voidable. *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶ 15. Word does not challenge the validity of his guilty plea, but instead he appeals the process in which the trial court accepted the plea. In order to determine whether the sentence is voidable based on procedural irregularities in the guilt stages, an appellate court must have jurisdiction to review the sentence. In the absence of jurisdiction, we cannot review any procedural defects that led to the sentence that is otherwise authorized by law. *Noling* at ¶ 22.

{¶14} Notwithstanding the foregoing discussion, R.C. 2953.08(D) does not preclude our review of the validity of the plea itself. *State v. Canady*, 1st Dist. Hamilton No. C-060267, 2007-Ohio-313, ¶ 8; *see, e.g., State v. Padgett*, 8th Dist. Cuyahoga Nos. 107015 and 107016,

2019-Ohio-174, ¶ 10. On this point, Word claims his plea was not knowingly, voluntarily, or intelligently entered because the trial court failed to notify Word of the mandatory and consecutive nature of the sentences on the firearm specifications during the plea colloquy. In other words, Word claims he was unaware of the manner in which the aggregate term of imprisonment would ultimately be imposed.

{¶15} The trial court informed Word of the maximum sentences he faced in pleading guilty. Thus, any argument is limited to whether the trial court's notifications substantially complied with Crim.R. 11 and, if not, whether Word can demonstrate prejudice. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). "The test is whether the plea would have otherwise been made." *Id.*, citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977); and Crim.R. 52(A).

{¶16} Word received the aggregate term of imprisonment for which he bargained. Under those circumstances, it cannot be said that the failure to notify him of all the possible combinations of sentences that could culminate in the 20- to 25-year sentencing range would have resulted in a different outcome. There were only two ways of achieving the agreed result in this case: either the state dismissed the firearm specifications and the trial court imposed sentences on the base offenses consecutively to achieve the 20- to 25-year aggregate term (the maximum sentences for the three offenses were 11 years for the involuntary manslaughter, 11 years for the attempted murder, and 3 years for having a weapon while under disability); or the trial court imposed the sentences in the manner in which it did — once Word agreed to plead guilty to the specifications, sentences on those were required under R.C. 2929.14(B)-(C). Either way, Word agreed to the sentencing range, so the trial court's lack of clarity on how to achieve that term is inconsequential. The record definitely demonstrates that Word would have pleaded

guilty even if he had been informed of the mandatory and consecutive nature of the sentences on the firearm specifications — he agreed to serve 20 to 25 years in prison regardless of how that aggregate term was achieved. As a result, he cannot demonstrate prejudice.

{¶17} The appeal is dismissed in part and affirmed in part.

It is ordered that appellee recover of appellant costs herein taxed. The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

LARRY A. JONES, SR., J., and
KATHLEEN ANN KEOUGH, J., CONCUR