

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| v. | : | No. 09AP-302 (C.P.C. No. 07CR-03-1539) |
| James K. Hall, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on October 29, 2009

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, James K. Hall, from a judgment of sentence entered by the Franklin County Court of Common Pleas, following this court's remand for resentencing in *State v. Hall*, 179 Ohio App.3d 727, 2008-Ohio-6228.

{¶2} On March 1, 2007, appellant was indicted on two counts of kidnapping, three counts of aggravated robbery, six counts of robbery, two counts of attempted murder, and one count of felonious assault. Each of the counts also carried a firearm specification. On December 12, 2007, appellant entered a guilty plea to the following counts of the indictment: Count 3, aggravated robbery with a firearm specification; Count 6, aggravated robbery with no firearm specification; and Count 14, felonious assault.

{¶3} At the plea hearing, as set forth in *Hall* at ¶3, the state presented the following factual background giving rise to the charges against appellant:

On the evening of February 22, 2007, appellant and his brother, Michael Hall * * *, entered the Ameristop, and Michael displayed a firearm. Appellant ordered a customer and the store manager to the floor and took \$160 from the cash register. When another customer, Donald Croy * * *, entered the store and did not comply with an order to get on the floor, Michael began to wrestle with Croy. The affray continued outside the store and developed into a fight between Croy, appellant, and Michael, during which appellant and Michael pistol-whipped Croy. Although both appellant and Michael attempted to flee, Croy was able to restrain appellant until the police arrived and took him into custody.

{¶4} The trial court conducted a sentencing hearing on January 25, 2008. At the conclusion of the hearing, the court indicated it would impose a sentence of eight years on Count 3, with a mandatory three-year sentence on the firearm specification, eight years on Count 6, and eight years on Count 14, with the sentences to be served consecutively to each other. Counsel for appellant moved the trial court to reconsider the sentence. By judgment entry filed January 30, 2008, the trial court sentenced appellant to eight years incarceration on Count 3, with a consecutive three-year term for the firearm

specification, eight years on Count 6, and eight years on Count 14, with Counts 3 and 6 to run concurrently with each other, and Count 14 to run consecutive with Counts 3 and 6, for a total sentence of 19 years imprisonment.

{¶5} Appellant appealed from the trial court's judgment, arguing that the court erred in imposing extra years of imprisonment because of appellant's refusal to waive his Fifth Amendment privilege against self-incrimination. In *Hall* at ¶20, this court vacated appellant's sentence and remanded for resentencing, holding in part: "The trial court's statements at the sentencing hearing support appellant's claim that the court improperly relied upon his refusal to testify as an aggravating factor in calculating his sentence."

{¶6} On remand, the original sentencing judge recused herself, and the matter was reassigned to another judge, who conducted a resentencing hearing on March 4, 2009. By entry filed March 31, 2009, the court sentenced appellant to nine years on Count 3, with a consecutive three-year term for the firearm specification, nine years on Count 6, and eight years on Count 14, with Counts 3 and 6 to run concurrently with each other, and Count 14 to run consecutively with Counts 3 and 6, for a total sentence of 20 years imprisonment.

{¶7} On appeal, appellant sets forth the following two assignments of error for this court's review:

First Assignment of Error

The trial court erred by imposing a sentence inconsistent with and significantly longer than that imposed on the co-defendant contrary to the requirements of R.C. 2929.11(B).

Second Assignment of Error

Appellant's Due Process rights were violated when the trial court imposed a harsher sentence after his successful appeal.

{¶8} Under the first assignment of error, appellant asserts that the trial court's sentence was disproportionate and excessive because it was significantly longer than the sentence imposed on his co-defendant, Michael Hall (appellant's brother). Appellant argues that the co-defendant agreed to a negotiated plea resulting in a ten-year sentence, whereas appellant received an aggregate sentence of 20 years. Appellant cites statements made at the resentencing hearing indicating that Michael Hall, who had a prior criminal record, brought the gun into the store and then fled the scene with the weapon.

{¶9} Appellant acknowledges that this court rejected a similar argument in his initial appeal. Specifically, while this court remanded the matter for resentencing, we found "no grounds for reversal of appellant's sentence based on the mere fact that it is harsher than that imposed on Michael for his involvement in the same chain of events." *Hall* at ¶11. In addressing appellant's argument, this court noted that "[a]n individual has no substantive right to a particular sentence within the statutorily authorized range," and that "there is no requirement that co[-]defendants receive equal sentences." *Id.* at ¶10, citing *State v. Tewolde*, 10th Dist. No. 06AP-764, 2007-Ohio-2218, and *State v. Templeton*, 5th Dist. No. 2006-CA-33, 2007-Ohio-1148. See also *State v. Wickham*, 5th Dist. No. CT2006-0084, 2007-Ohio-1754, ¶29 ("[a]ppellant cites no precedent, or any other authority, for reversal of an otherwise valid sentence on the basis that more culpable co-defendants were not punished more severely").

{¶10} Appellant relies upon R.C. 2929.11(B), providing that sentences are to be "consistent with sentences imposed for similar crimes committed by similar offenders."

This court, however, has previously held that "[c]onsistency * * * does not necessarily mean uniformity. Instead, consistency aims at similar sentences [and] accepts divergence within a range of sentences and takes into consideration a trial court's discretion to weigh relevant statutory factors." *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100, ¶8, quoting *State v. Battle*, 10th Dist. No. 06AP-863, 2007-Ohio-1845, ¶24, quoting *State v. King*, 5th Dist. No. CT06-0020, 2006-Ohio-6566, ¶23. Thus, "a consistent sentence is not derived from a case by case comparison; rather, the trial court's proper application of the statutory sentencing guidelines ensures consistency." *Hayes* at ¶9. As a result, "appellate courts have rejected consistency claims where one person involved in an offense is punished more severely than another involved in the same offense." *Id.* Instead, "a defendant claiming inconsistent sentencing must show that the trial court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12." *Id.* at ¶10.

{¶11} During the resentencing hearing in the instant case, the prosecutor related that appellant and his brother, while committing an armed robbery, attempted to fire the weapon at the victim. Appellant and the co-defendant then pistol whipped the victim, who suffered serious personal injury, requiring surgical staples to his head.¹ A police detective stated during the hearing that the victim, because of the injuries received, had been unable to work following the incident. The prosecutor also noted appellant's prior criminal record. At the conclusion of the resentencing hearing, the trial court stated the following:

¹ We note that, in appellant's initial appeal, this court observed that the record "does not provide any details of Michael's plea agreement," or "even the charges to which Michael pleaded guilty." *Hall* at ¶11. Similarly, the record before this court following the resentencing hearing does not reflect the details of the co-defendant's plea agreement, or the charges to which he entered a guilty plea.

Okay. Just for the record, I have read the court of appeals decision and I have read the referral. I've read the PSI. I'm evaluating this case strictly upon 2929.19. I'm going to make my determinations based upon the facts as they were presented[.]

My concerns are as follows: The Defendant's excuse that he had been ingesting alcohol and Xanax does not logically progress to what the events were that day in going over the counter, the other side of the counter, the fight that they ensued in later, the sadistic nature of the abuse that went on outside the Ameristop. All those are indications against some of the activities and his rendition that it was a drug issue of the underlying problem. I have some concerns about the safety of the general public when it comes to Mr. Hall. The sadistic nature – I mean, threatening to shoot this guy. It could have been very well a murder. It probably never would have been solved due to the circumstances. * * * Mr. Hall could have probably gotten away * * * but for Mr. Croy holding on[.]

That aside, I'm also influenced by the fact that he had been through probation once. He actually flunked out of day reporting, which * * * shows a total disregard for the system, a very simple issue on Mr. Hall's behalf.

(Tr. 15-16.)

{¶12} Upon review, the record reflects that the trial court based its sentencing decision on the facts of the case, and the court properly considered the factors under R.C. 2929.11 and 2929.12. Inasmuch as the trial court considered the requisite statutory factors, and the sentence imposed was within the statutory range for the offense, we find unpersuasive appellant's contention that the sentence was excessive or disproportionate. *Hayes* at ¶10.

{¶13} Based upon the foregoing, appellant's first assignment of error is without merit and is overruled.

{¶14} Under the second assignment of error, appellant argues that the imposition of a harsher sentence following this court's remand for resentencing requires reversal. Appellant cites *North Carolina v. Pearce* (1969), 395 U.S. 711, 725, 89 S.Ct. 2072, 2080, in which the United States Supreme Court held that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Appellant argues that, whenever a trial court imposes a more severe sentence after a new trial, the reasons for doing so must affirmatively appear, and the factual data upon which the increased sentence is based must be made a part of the record. Appellant maintains that the record in this case does not contain information sufficient to rebut the presumption that actual vindictiveness was behind the increased sentence.

{¶15} In response, the state argues that case law subsequent to *Pearce* stands for the proposition that there is no presumption of vindictiveness when the resentencing judge is different than the original sentencing judge. We agree.

{¶16} In *Texas v. McCullough* (1986), 475 U.S. 134, 140, 106 S.Ct. 976, 979, the United States Supreme Court made clear that the *Pearce* requirements do not apply in every case in which a convicted defendant receives a harsher sentence on retrial, and that the presumption is inapplicable where "different sentencers assessed the varying sentences that [a defendant] received." Ohio courts have recognized that the presumption in *Pearce* has been narrowed by *McCullough*. See *State v. Smith*, 168 Ohio App.3d 141, 2006-Ohio-3720, ¶85 ("[w]here a different judge imposes a harsher sentence after an independent assessment, there is no true 'increase' in the sentence, and the vindictiveness presumption does not apply"); *State v. Howard*, 174 Ohio App.3d 562,

2007-Ohio-4334, ¶20 ("[t]he *Pearce* presumption of vindictiveness does not apply in this case because defendant's current sentence was imposed by a judge different from the sentencer who had imposed the prior sentence"); *State v. Goodell*, 6th Dist. No. L-07-1016, 2007-Ohio-5318, ¶18 (*Pearce* presumption of vindictiveness "does not apply where, as here, the resentencing judge is not the one who originally sentenced the defendant").

{¶17} In cases in which the *Pearce* presumption does not apply, "the defendant must demonstrate vindictiveness from the record." *Smith* at ¶86. In the instant case, there is simply nothing in the record to suggest that the trial court's sentence was the result of judicial vindictiveness. Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶18} Based upon the foregoing, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.
