

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 14AP-815
Josias T. Smith,	:	(C.P.C. No. 13CR-2520)
Defendant-Appellant.	:	(REGULAR CALENDAR)

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D E C I S I O N

Rendered on April 23, 2015

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*Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for  
appellee.

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

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Josias T. Smith is pursuing a second appeal from the sentences totaling 26 years of incarceration which were imposed upon him. He assigns a single error for our consideration:

The trial court committed plain error in imposing consecutive sentences when the record does not support the finding that consecutive sentences are not disproportionate to the seriousness of Appellant's conduct and the danger he poses to the public.

{¶ 2} In his first appeal, a panel of this court found that the trial court judge who sentenced Smith did not sufficiently comply with R.C. 2929.14(C)(4) when the judge

ordered consecutive sentences. We vacated the sentences imposed and remanded the case to the trial court for a new sentencing hearing.

{¶ 3} After the new sentencing hearing and identical sentences being imposed, Smith has again appealed. His counsel no longer argues non-compliance with R.C. 2929.14(C) but now asserts that the findings required by R.C. 2929.14(C) were not factually supported by the record.

{¶ 4} Smith entered into a plea bargain under the terms of which he pled guilty to aggravated burglary with a firearm specification, kidnapping with a firearm specification, tampering with evidence and failure to comply with an order or signal of a police officer.

{¶ 5} Smith received sentences of incarceration totaling 7 years based upon the firearm specifications alone. He received consecutive sentences of incarceration of 4 years on the aggravated burglary charge, 8 years on the kidnapping charge, 5 years on the aggravated robbery charges, 12 months on the tampering with evidence charge and 12 months on the failure to comply charge.

{¶ 6} The facts presented to the court at the time of the guilty plea were as follows:

MR. STEAD: If it please the court, the facts of this indictment occurred on April 29 [2013] at 5624 Beechcroft Road, the residence of Markesha and Demetris Gravely. On that date the defendant approached the residence, knocked on the door, pretending to be a meat salesman. He left and came back a short time later. This time when Ms. Gravely answered the door, he produced a firearm. He forced her inside the residence. He forced her – she was pregnant at the time. She had several small children with her. She was forced into the bedroom, looking for money. She was taken to the kitchen.

Ultimately, Mr. Smith, who was armed with a gun, not happy with her cooperation, fired the gun into the floor at the foot of the young child in the residence. Having obtained money jugs that belonged to the children, he took those jugs and fled from the residence to a car that was awaiting him, containing his codefendants, Mr. Moore and Mr. Diggs.

It so happened that Ms. Gravely let her husband know what had happened. He spotted the vehicle. There was a high-speed chase. During that high-speed chase the firearm was

thrown from the vehicle, which is the basis for the tampering charge. Speeds on the chase were in excess of a hundred miles an hour out on the freeway, through residential areas, blowing stop signs, putting both responding officers and civilians at risk throughout the chase.

Ultimately, the car came to rest and Mr. Smith was apprehended in the car. The property stolen was found inside the car. He was identified by the victim as the individual who had come inside the house, and he confessed.

(Dec. 9, 2013 Tr. 12-14.)

{¶ 7} The trial court judge, based upon these facts and a pre-sentence investigation stated on January 10, 2014:

THE COURT: I am at a loss, and I will tell you why I am at a loss. I am at a loss because I agree with Mr. Stead, I think what you did, your involvement is probably the worst out of what happened. Pointing a gun at a child, I can't even imagine where you would have to be to do something like that.

Let me go through all of the factors for felony sentencing so that the record is clear.

The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplished those purposes without imposing an unnecessary burden on state or local government resources.

To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense.

The court may consider the physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

Certainly that is present. We have Mrs. Gravely who was present at the time that this offense was committed, we have her children who were present. We have a child who had a shot fired at her, and so that factor is present.

The victim of the offense suffered serious physical, psychological, or economic harm. That is applicable. Mr. and Mrs. Gravely have shared with us that their children are still not comfortable living in their own home based on what transpired during this offense.

Whether the offender held a public office or position of trust in the community, and the offense related to that office or position. That is not applicable.

The offender's relationship with the victim facilitated the offense. That is not applicable.

The offender committed the offense for hire or as a part of an organized criminal activity. That is applicable since we have two other codefendants in this case.

The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense.

The victim induced or facilitated the offense. That is not applicable in this case.

In committing the offense, the offender acted under strong provocation. There was no provocation. You went to their home disguised as a meat salesperson. You left the home and

came back to rob them of what you thought might be in the home. There was no strong provocation for you to do this.

In committing the offense, the offender did not cause or expect to cause physical harm to any person or property. That certainly does not apply, because when you fire a shot at a child, there is a likelihood that you might hit that child.

There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

I do not find that that is applicable.

The sentencing court shall consider all of the following that apply regarding the offender and any other relevant factors as factors indicating that the offender is likely to commit future crimes.

At the time of committing the offense, the offender was under release from confinement before trial or sentencing. That is not applicable.

The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that he has demonstrated that pattern or refuses treatment for the drug or alcohol abuse.

You have admitted that you were inclined to commit this offense because you were under the influence of heroin and another substance. Your history is filled with references to your drug abuse, and you seem at this point to acknowledge that there is an issue.

The offender shows no genuine remorse for the offense.

I find that you have shown a level of genuine remorse for your actions.

The sentencing court shall consider all of the following that apply regarding the offender and any other relevant factors as factors indicating that the offender is not likely to commit future crimes:

Prior to committing the offense, the offender had not been adjudicated a delinquent child.

I believe that that is accurate.

Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

There were dismissals of domestic violence cases, and so there were no prior convictions on Mr. Smith's record.

Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

Again, these are the first felony convictions.

The offense was committed under circumstances not likely to recur.

I cannot say that with certainty because, again, you were easily influenced to commit these crimes, you may be influenced by someone else in the future.

So let me – well, most of this time is going to be mandatory time for which you are not eligible for probation. I think counts 12 and 13, you would be eligible.

I am going to find that prison is the most appropriate sanction for all of these offenses and that that sanction is consistent with the purposes and principles of felony sentencing.

I do find that these are all separate offenses of separate import with distinct animus, and so there will be no merger as to counts 7, 8, 9, 12, and 13.

Let me be clear, Mr. Stead, on your recitation regarding the mandatory firearm specifications. If you could just repeat that for the court, please.

MR. STEAD: Judge, the law requires that because in this offense he was convicted of aggravated robbery, as well as the other felony one offenses, that he must get sentenced on the aggravated robbery, and the court must impose an additional three-year firearm specification on the most serious other charge out there. The court has the discretion to impose the additional. So, in other words, the court could

impose three three-year firearm specifications on those if the court wanted to, but the court must impose two.

THE COURT: All right. Here is what I am going to do. I am going to impose a mandatory firearm specification as to count nine. I am going to impose the mandatory firearm specification as to count three. I find that is the most serious of the charges.

MR. STEAD: Judge, it is not count three.

THE COURT: I am sorry, count eight, counts eight and nine, the court will impose three-year firearm specifications. The kidnapping count, restraining Mrs. Gravely's liberty, along with those of her children, I just find that to be so completely outlandish, Mr. Smith. I can barely stomach that, so six years on the two firearm specifications as to counts 8 and 9. All right.

So I know where I wanted to land, and I needed to figure out mathematically how I get there.

As to count seven, aggravated burglary, as to that underlying charge, the court is going [to] impose a prison sentence of five years with the Ohio Department of Rehabilitation and Corrections.

As to count eight, the kidnapping count, the court is going to impose a prison sentence of eight years with the Ohio Department of Rehabilitation and Correction.

As to count nine, the court is going to impose a prison sentence of five years with the Ohio Department of Rehabilitation and Correction.

Counts 12 and 13, the court is going to impose prison sentences of 12 months as to each of those counts. All of those counts will run consecutively, and I think that comes to 26 years.

I want everybody to be quiet, is what I want to happen. That is exactly what I want to happen. This is life-changing stuff for everybody in the room. That is not lost on the court. But do you know how badly this could have turned out?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you know you could been [sic] doing 49 years today?

THE DEFENDANT: Yes, ma'am.

(Jan. 10, 2014 Tr. 35-43.)

{¶ 8} This was supplemented at the second sentencing hearing with the following:

As to count nine, the court will impose a prison sentence of five years and impose an additional consecutive three years as to the firearm specification associated with count nine.

As to count twelve, the court will impose a prison sentence of twelve months, with an additional one year as to the firearm specification associated with count twelve.

As to count thirteen, the court will impose a prison sentence of twelve months. Counts seven, eight, nine, twelve, and thirteen will be served consecutive to each other and consecutive to the firearm specification as to count eight, consecutive as to the firearm specification as to count nine, and consecutive to the firearm specification as to count twelve, for a total of 26 years of incarceration.

Because the court has imposed consecutive sentences, consistent with Revised Code 2929.14(C)(4), the court is imposing consecutive sentences because it finds that the consecutive sentences are necessary to protect the public from future crime and to punish you, and that consecutive sentences are not disproportionate to the seriousness of your conduct and to the danger that you pose to the public.

(Sept. 18, 2014 Tr. 10-11.)

{¶ 9} The terror inflicted on a pregnant mother and young children clearly affected the trial court judge, as well it should have. The fact a gun was fired near the children would have a long lasting affect on the children.

{¶ 10} The permanent psychological damage done both to Makesha Gravely and to the children justifies the extensive sentence. They will all have to live with the memories from Smith's crimes long after he is done serving his term of incarceration. The sentences are not disproportionate to the harm inflicted.

{¶ 11} Clearly Josias Smith was not thinking of anyone but himself when he terrorized a pregnant mother and young children. The findings of the trial court judge were supported by the conduct Smith displayed.

{¶ 12} The sole assignment of error is overruled. The judgment of the trial court is affirmed.

*Judgment affirmed.*

SADLER and LUPER SCHUSTER, JJ., concur.

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