[Cite as *State v. Dudas,* 2007-Ohio-6739.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**PER CURIAM OPINION**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NOS. 2006-L-267 and 2006-L-268**
RONALD DUDAS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 06 CR 000560 and 06 CR 000700.

Judgment: Affirmed.

William D. Mason, Cuyahoga County Prosecutor and *Daniel Kasaris*, Assistant Prosecutor, The Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, OH 44113 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender and *Vanessa R. Clapp,* Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

PER CURIAM

{¶1} Appellant, Ronald A. Dudas, appeals the sentence of the Lake County Court of Common following his guilty plea to intimidation of a Cuyahoga County Common Pleas Court Judge and engaging in a pattern of corrupt activity involving the thefts of money and real estate from numerous victims. At issue is whether the state breached the negotiated plea bargain. For the reasons that follow, we affirm.

{¶2} On October 19, 2005, Cuyahoga County Common Pleas Judge David T. Matia sentenced appellant to eleven months in prison subsequent to his guilty plea to felony theft in Cuyahoga County Common Pleas Court. Judge Matia also sentenced appellant to six months in prison for a probation violation, which the court ordered to be served consecutively to the sentence on the theft conviction.

{¶3} Immediately after appellant was taken by sheriff's deputies to the Cuyahoga County Jail, appellant started making collect telephone calls to his girlfriend Jennifer Bost discussing his sentencing. On October 19, 2005, he told her he was "gonna visit [North Olmsted Police Detective Simon Cesareo] when "I'm out of here." He said, "I want [Det. Cesareo] sodomized." This detective had investigated many of the fraud cases over the past ten years that had resulted in convictions against appellant.

{¶4} On October 21, 2005, appellant called Ms. Bost again. While discussing his sentence with her, he said he "was gonna take that gun from the deputy and shoot the fucker [Judge Matia] in the head."

{¶5} Between October 19, 2005 and October 21, 2005, appellant also discussed his sentencing with some of his fellow inmates. He told inmate Daniel Whitehead that because Judge Matia gave him almost the maximum sentence, he took it personally and wanted Judge Matia to be killed and wanted Detective Cesareo to be hurt. He offered to pay Whitehead $10,000 to accomplish this, but Whitehead declined.

{¶6} On October 22, 2005, appellant told inmate Robert Harmon he hated Judge Matia and wanted him killed and wanted Detective Cesareo's legs broken.

Appellant told him he would pay him $500 now, $5,000 when Harmon got out of jail, and a final $5000 when Harmon had done it.

{¶7} Harmon later contacted Cleveland Police Homicide Detective Hank Veverka and told him about appellant's threat. The detective caused Judge Matia to be notified. Harmon agreed to wear a recording device. On October 25, 2005, appellant again discussed the murder plot with Harmon, only this time the conversation was tape-recorded. Appellant told Harmon how he would get the money; that he guaranteed Harmon he would be paid; and that he wanted both jobs done. Appellant later called one of his associates Phil Rossiter and told him to give the funds to Harmon.

{¶8} On November 11, 2005, in a telephone conversation to Ms. Bost, appellant told her he "wanted to beat the shit out of Don Galvin [one of appellant's victims] because [he] had turned [appellant] in."

{¶9} On April 18, 2006, appellant was indicted by the Cuyahoga County Grand Jury with 14 counts of intimidation, felonies of the third degree, in violation of R.C. 2921.03; 15 counts of retaliation, felonies of the third degree, in violation of R.C. 2921.05; two counts of conspiracy to commit aggravated murder, felonies of the first degree, in violation of R.C. 2903.01 and 2923.01; attempted aggravated murder, a felony of the first degree, in violation of R.C. 2903.01 and 2923.02; and attempted felonious assault on a police officer, a felony of the second degree, in violation of R.C. 2903.11 and 2923.02.

{¶10} Further, between June, 2000 and April, 2002, appellant formed and carried on an enterprise for the ostensible purpose of providing loans to individuals in desperate financial straits, but with the true purpose of stealing their funds and real

estate. Appellant employed various schemes to accomplish this objective. Many of appellant's victims were near foreclosure, and appellant took advantage of their need by stealing the last of their assets. Appellant recruited associates to act as straw borrowers and purchasers and created spurious mortgages and loan documents to obtain loans from lenders. He then stole the proceeds from these loans.

{¶11} Pursuant to this enterprise, appellant forged signatures on conveyance instruments and mortgages and falsified loan applications in order to obtain loans. He prepared and filed fraudulent mechanics' liens against properties, and falsified documents that allowed him to collect on them. He stole in excess of one million dollars from multiple victims. The indictment listed 35 victims. He stole more than $100,000 apiece from 14 separate victims.

{¶12} Appellant would often convince victims, many of whom were elderly, to give him their money so he could "invest" it. He would then steal the funds and use them for his own purposes. When these victims later wanted their money back, he would purport to transfer properties to them in exchange, but he never recorded the deeds. On other occasions, as part of the loan application process, appellant would have the victims quitclaim their properties to him. He then sold the properties and kept the sale proceeds.

{¶13} On September 26, 2006, appellant was indicted in a 135-count indictment for engaging in a pattern of corrupt activity, a felony of the first degree, in violation of R.C. 2923.32; conspiracy to engage in a pattern of corrupt activity, a felony of the second degree, in violation of R.C. 2923.01 and 2923.32; 30 counts of tampering with records, felonies of the third degree, in violation of R.C. 2913.42; 10 counts of securing

writings by deception, felonies of the third or fourth degree, in violation of R.C. 2913.43; six counts of telecommunications fraud, felonies of the third or fourth degree, in violation of R.C. 2913.05; 46 counts of forgery, felonies of the third or fourth degree, in violation of R.C. 2913.31; 21 counts of theft by deception when the value of the property stolen was between $5,000 and $100,000, felonies of the fourth degree, in violation of R.C. 2913.02; 14 counts of theft by deception when the value of the property stolen was $100,000 or more, felonies of the third degree, in violation of R.C. 2913.02; theft beyond the scope of consent when the value of the property stolen was $100,000 or more, a felony of the third degree, in violation of R.C. 2913.02; and six counts of money laundering, felonies of the third degree, in violation of R.C. 1315.55.

{¶14} While these two cases were pending in the Cuyahoga County Common Pleas Court, appellant filed a motion for change of venue, arguing that he could not receive a fair trial in Cuyahoga County due to pre-trial publicity. All Cuyahoga County Common Pleas judges were disqualified by the Ohio Supreme Court, and the cases were assigned to Judge Eugene Lucci of the Lake County Common Pleas Court pursuant to order entered on August 24, 2006.

{¶15} The jury trial in the murder conspiracy case began on October 17, 2006. The prosecutor gave his opening statement, and several key witnesses, including Judge Matia and Det. Cesareo, testified. Then, after two days of trial, on October 19, 2006, appellant entered a guilty plea in both cases. In Cuyahoga County Common Pleas Court Case No. 479861 (Lake County Common Pleas Court Case No. 06CR000560), appellant pleaded guilty to four counts of intimidation, felonies of the third degree, and one count of retaliation, a felony of the third degree. In Cuyahoga County Common

Pleas Court Case No. 486200 (Lake County Common Pleas Case No. 06CR000700), appellant pleaded guilty to one count of engaging in a pattern of corrupt activity, a felony of the first degree; one count of tampering with records, a felony of the third degree; one count of forgery, a felony of the fourth degree; one count of theft, a felony of the third degree; one count of uttering, a felony of the fourth degree; one count of securing writings by deception, a felony of the third degree; and one count of telecommunications fraud, a felony of the fourth degree. During this plea hearing, the prosecutor stated on the record that as part of the plea bargain, he would limit his sentence recommendation to ten years in prison.

{¶16} The matter was set for sentencing on December 1, 2006 at 9:00 a.m. Earlier that morning appellant filed a pro se motion to withdraw his guilty plea. When the trial court brought this motion to defense counsel's attention, he stated, "we're gonna withdraw that motion. I'm gonna withdraw it on behalf of the Defendant. So we don't have to have a hearing on it and be heard. We'll withdraw the motion to withdraw the plea." When asked by the court if he agreed with these remarks, appellant said he did.

{¶17} By way of mitigation, appellant's counsel argued that appellant is bi-polar and that he committed his schemes to defraud his victims because "he was upset *** from the sentence he received from Judge Matia." Appellant attempted to excuse his plot to murder Judge Matia by saying that it was only after other inmates told him his sentence in 2005 was unfair that appellant began to plan the Judge's murder.

{¶18} Judge Matia attended the sentencing hearing and spoke as a victim. He asked the court to impose more than ten years imprisonment. He said ten years would

demean the seriousness of appellant's life work, which has been to defraud and steal from his victims. Judge Matia listed appellant's many convictions. Appellant had been convicted for theft in Lyndhurst, Eastlake, and Mentor. In 1995, appellant pleaded guilty to fraud in the Cuyahoga County Common Pleas Court, and was sentenced to one year in prison. Following this sentence, appellant filed a motion for judicial release that was denied by Cuyahoga County Common Pleas Judge Thomas Patrick Curran. In revenge, appellant took out a contract on Judge Curran to have his hand broken for $2,500.

{¶19} Judge Matia told the court that in 1995, appellant became angry with another Cuyahoga County Common Pleas Judge Timothy McGinty due to remarks Judge McGinty had made while sentencing appellant's then-girlfriend Patricia Boychuk in a criminal case she had in his court. Appellant tracked down the Judge to a health club where the Judge works out in downtown Cleveland. Appellant joined the club so he could get near to the Judge. While Judge McGinty was using the bench press, appellant suddenly appeared over him and grabbed the bar Judge McGinty was using, attempting to harass and intimidate him.

{¶20} Thereafter, in 2001, appellant was convicted in the Cuyahoga County Court of Common Pleas for the unauthorized practice of law and theft.

{¶21} Judge Matia said that appellant grew up in a family that encourages intimidation of public officials. The Judge said that on the day appellant pleaded guilty in Judge Lucci's court room, appellant's brother Richard Dudas gave Judge Matia the finger.

{¶22} Judge Matia said appellant actually delivered the funds to the person he believed would kill him; however, the funds were delivered to a sheriff's deputy and not, as appellant intended, to a real hit man.

{¶23} Several of appellant's other victims also spoke at the sentencing. They described how they and their families had been destroyed financially and emotionally by appellant. Their credit was ruined and many were forced into bankruptcy. Cheryl Golic said that appellant had filed false liens on two houses she and her husband owned totaling $32,000. While appellant's guilty plea in the instant case was being negotiated, appellant's counsel assured the prosecutor appellant had released the fraudulent liens. Following the plea, the prosecutor discovered from the Golics that appellant did not release the liens and in fact refused to do so. The liens were mechanic's liens wherein appellant swore in affidavits that the Golics owed him money for work he had done on two properties that he never performed.

{¶24} Another victim Bruce Limmer testified appellant sold him a house in Parma for $80,000, only to find out that appellant forged the owners' names on the deed as the sellers and never transferred the property to him. Appellant told Mr. Limmer the couple living at the house, the Campbells, were tenants who had defaulted on their rent and told Mr. Limmer to evict them. When he attempted to do so, he learned the Campbells owned the property and that he had been duped.

{¶25} The Campbells were present and told the court that appellant had stalked them, burglarized their home, and attempted to physically harm them.

{¶26} Another victim Dan Mullen testified that appellant had defrauded him and his son out of $500,000, causing Dan to experience the "shame and devastation" of

bankruptcy. Appellant's fraud caused Dan's wife to experience a complete mental breakdown.

{¶27} The prosecutor told the court that in the case of *Cuyahoga County Bar Association v. Boychuk,* 79 Ohio St.3d 93, 1997-Ohio-403, the Supreme Court suspended Attorney Patricia Boychuk's license to practice law. She had been appellant's girlfriend. The Board of Commisssioners on Grievances and Discipline of the Supreme Court found that she was a battered woman and that appellant had battered her. The Board found Boychuk was addicted to cocaine and that appellant had supplied the drug to her. Beginning in 1992, appellant took over her law practice without her being aware of what was happening. Appellant falsely held himself out as an attorney, and accepted fees to perform legal work for Boychuk's clients.

{¶28} The prosecutor told the court that appellant has attempted to intimidate his victims to prevent them from coming forward. He said that when appellant is caught by his victims, he typically becomes loud and intimidating, threatening to physically injure them if they come forward.

{¶29} The prosecutor said that while appellant was on probation from Cuyahoga County Common Pleas Judge Richard McMonagle for the unauthorized practice of law and theft in 2001, he stole money or the homes of John and Barbara Hawkins, Cynthia Woide, Evelyn Morman, Mark and Dorothy Fowler, Randy Vecchio, Debbie and Jack Dell, Bruce Limmer, Pat and Mark Campbell, Denice Bates, Linda Williams, Dan Mullen, Steven Ruben, Dan Emrisko, Dawn Clark, Kerry Jorgenson, Gerald Markovic, and J.D. Goddard.

{¶30} In arguing for a reduced sentence, appellant's counsel stated that "we had an agreement of not less than 5 nor more than 10 years in the penitentiary. *** I'm gonna ask that the Court give him a minimum sentence of 5 years. Per the agreement that I have with the State - - not with the Court, but with the State, that that be done."

{¶31} Later, during the sentencing hearing, the prosecutor said, "But Your Honor, he has to receive a prison sentence. It's gotta be long, and it's gotta be at least 10 years." There was no objection to this statement of the prosecutor.

{¶32} After the prosecutor spoke, appellant told the court, "Whatever you tell me I have to do, whether it's 1 years [sic] or 100 years, Your Honor, I'm gonna do that. Because I owe it to these people, I owe it to this community and I owe it most to my family."

{¶33} The court carefully considered the purposes and principles of felony sentencing under R.C. 2929.11. It considered the seriousness and recidivism factors in R.C. 2929.12. The court noted the advanced age of several of appellant's victims. The victims uniformly suffered serious psychological harm in both cases and in the racketeering case, extreme economic harm. Appellant held a position of trust and the offenses were related to that position. Further, his occupation facilitated the offenses. The court noted appellant acted as part of organized criminal activity in both cases.

{¶34} The court noted that several recidivism factors were present and that unless he was stopped, appellant would continue to commit crimes. Many of the crimes were committed while appellant was under community control sanctions to other judges. The court noted appellant has a lengthy history of criminal convictions, many of which are similar to those involved in the cases sub judice. He was convicted of theft in

Lyndhurst in 1979 and received one year probation. In 1987, he was convicted of three counts of theft in the Willoughby Municipal Court and placed on probation. In 1992, appellant pleaded guilty to theft in the Lake County Common Pleas Court for an offense he committed in Mentor and received probation.

{¶35} In 1995, appellant pleaded guilty in the Cuyahoga County Common Pleas Court to three counts of theft, felonies of the third degree. Appellant was sentenced by Judge Patrick Curran to one year in prison. While appellant was in prison, he filed a pro se motion for shock probation. Judge Curran denied the motion, and appellant decided to seek revenge against the Judge. Appellant solicited fellow inmate Daniel Ott, a criminal informant, to break Judge Curran's hand and offered Ott $2,500 to do it. Ott contacted Detective Thomas Doyle of the Eastlake Police Department and advised him of appellant's efforts to injure Judge Curran. Det. Doyle asked Ott for written proof, and Ott obtained a note from appellant instructing his brother Richard Dudas to pay Ott $2,500 once Ott had handled the matter. Appellant was found guilty by a jury of intimidation against the Judge and sentenced to two years in prison.

{¶36} In 2001, appellant was convicted of the unauthorized practice of law in the Cuyahoga County Common Pleas Court. He was given one year probation and "ordered not to participate in any financial institution or related fields." He began another financial transaction the very next day.

{¶37} On September 7, 2004, appellant was convicted of a theft he committed in North Olmsted. He was put on probation by Judge David Matia. Appellant's probation was terminated due to a new offense he committed in North Olmsted in 2005. Judge Matia sentenced him to 11 months in prison for that offense plus an additional six

months on a probation violation. It was in response to that sentence that appellant plotted to murder Judge Matia.

{¶38} The trial court noted that appellant has not responded well to previously imposed sanctions. He had not obtained treatment for his alcohol and drug abuse. The court stated it did not believe appellant was genuinely remorseful. The court stated appellant had an anti-social personality in that he had seriously damaged so many people, and that he fit in the category of psychopath.

{¶39} In Lake County Common Pleas Court Case No. 06CR000560, the court sentenced appellant on each of four counts of intimidation to five years, each term to run concurrent to the others. The court sentenced him to five years on the retaliation count, to be served consecutively with the intimidation counts, for a total of ten years.

{¶40} In Lake County Common Pleas Court Case No. 06CR000700, the court sentenced appellant to ten years for engaging in a pattern of corrupt activity, five years for tampering with records, 18 months for forgery, one year for theft, 18 months for uttering, five years for securing writings by deception, and 18 months for telecommunications fraud. The prison terms imposed for forgery, theft, uttering, and telecommunications fraud were to be served concurrent to each other and concurrent to the terms imposed for engaging in a pattern of corrupt activity, tampering with records, and securing records by deception. The terms for engaging in a pattern of corrupt activity, tampering with records, and securing records by deception were to be served consecutive to each other, for a total of 20 years in prison, and consecutive to the prison term in Lake County Common Pleas Court Case No. 06CR000560, for a total of 30 years in prison.

{¶41} On December 5, 2006, appellant filed another pro se motion to withdraw his guilty plea which the trial court denied by order, dated January 3, 2007.

{¶42} Appellant appeals his sentence asserting eight assignments of error. For his first assigned error, appellant states:

{¶43} "THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION WHEN IT SENTENCED HIM TO A PRISON TERM BASED ON THE STATE'S RECOMMENDATION IN VIOLATION OF A PLEA AGREEMENT."

{¶44} Appellant argues the state breached the plea bargain by asking the court to sentence appellant to "at least ten years" in prison.

{¶45} The transcript of the guilty plea hearing reflects that as part of the plea bargain, the prosecutor agreed to "limit his request [concerning appellant's sentence] to 10 years in prison." During that hearing the court asked the prosecutor if this was his understanding and the state's counsel stated that it was.

{¶46} However, during the later sentencing hearing, the prosecutor stated, "[appellant] has to receive a prison sentence. It's gotta [sic] be long, and it's gotta be at least 10 years." By making this statement, the prosecutor in effect asked for a sentence that would be 10 years or more. Following this recommendation, both appellant's counsel and appellant himself addressed the court. Neither objected to the state's recommendation and in fact appellant told the court, "Whatever you tell me I have to do, whether it's 1 years [sic] or 100 years, Your Honor, I'm gonna do that. ***"

{¶47} Appellant argues that pursuant to the Supreme Court's decision in *Santobello v. New York* (1971), 404 U.S. 257, appellant's sentence should be vacated and the case remanded for resentencing. We do not agree.

{¶48} In *Santobello,* the defendant had been indicted on two gambling counts. The state agreed that in exchange for the defendant's guilty plea to a lesser-included offense, the state would make no sentencing recommendation. However, a different prosecutor assigned to the case for sentencing recommended the maximum sentence, which the trial court imposed. The Court noted that defense counsel immediately objected to the state's recommendation on the ground the state had promised the defendant there would be no sentencing recommendation by the state. The Court held: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id. at 262.

{¶49} The Court further held:

{¶50} "We need not reach the question whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea. He stated that the prosecutor's recommendation did not influence him and we have no reason to doubt that. Nevertheless, we conclude that the interests of justice *** will be best served by remanding the case to the state courts for further consideration. The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, *** or whether, in the view of the state court, the circumstances require granting the relief

sought by the petitioner, i.e., the opportunity to withdraw his plea of guilty. ***" Id. at 262-263.

{¶51} In the case sub judice, neither appellant nor his counsel objected to the state's recommendation. We must therefore consider whether appellant waived the issue on appeal. The Court in *Santobello* did not address the effect of a defendant's waiver since the defendant's attorney objected to the state's breach of the plea bargain.

{¶52} The Sixth Circuit Court of Appeals has had occasion to rule on the effect of waiver in these circumstances in *Teeple v. United States*, 15 Fed. Appx. 323, 2001 U.S. App. LEXIS 16983. In that case, in exchange for the defendant's guilty plea to one count of sexual abuse, the government agreed to make a recommendation that the sentence be imposed within the guideline range where offense level 28 and the defendant's criminal history category intersect without seeking an upward departure.

{¶53} The trial court noted the defendant's extensive criminal record, and the government failed to recommend that the defendant be sentenced within the guidelines required under the plea agreement. The defendant failed to object. The Circuit Court held the pivotal issue was whether Teeple waived his right to appeal his sentence when he failed to object after the prosecution did not make a recommendation at the sentencing. The court held that a defendant must "'raise all objections to the sentence before the sentencing judge in the first instance.'" Id. at 324, quoting *United States v. Cullens*, (C.A. 6, 1995), 67 F.3d 123, 124. Further, the court held that the failure to object results in waiver of the issue on appeal. Id. The court held that by not objecting to the state's failure to make the promised recommendation at the sentencing hearing, the defendant waived his right to appeal any breach of the plea agreement.

{¶54} As a result, the court held that a plain error analysis was applicable. Crim.R. 52(B) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Notice of plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. Plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Moreland* (1990), 50 Ohio St.3d 58, 62.

{¶55} The court in *Teeple* noted that the defendant had an extensive criminal history and the trial court had the plea agreement before it. As a result, the court held the government's breach did not affect the defendant's substantial rights and was not plain error.

{¶56} We are mindful that one year later, in 2002, the author of the dissenting opinion in *Teeple* wrote the majority opinion for the Sixth Circuit in *United States v. Barnes* (C.A. 6, 2002), 278 F.3d 644, in which the court reached the opposite conclusion. The court in *Barnes* held that the defendant's failure to object to the government's breach of a plea bargain did not prevent the breach from constituting plain error. However, we find the analysis in *Teeple* to be more persuasive and we adopt it.

{¶57} It must be noted that the circumstances present in this case militate strongly against a finding of plain error. First, the court considered appellant's extensive criminal history, including numerous prior thefts and frauds and previous plots and efforts to intimidate other sentencing judges. Next, the trial court was fully aware of the state's agreement because the prosecutor stated on the record during the plea hearing

that he would not request more than ten years in prison. The victim**,** Judge Matia, asked that the trial court sentence appellant to more than ten years. Appellant listened to two days of his trial before deciding to plead guilty. He thus heard the prosecutor outline the state's evidence and heard the victims testify before he decided to plead guilty. Further, appellant concedes in his brief that the trial court informed him that the court was not bound by the plea bargain; that, despite the plea bargain, the court could run the sentences for each offense consecutive to each other; and that appellant's potential sentence on the charges to which he pleaded guilty was 54.5 years if the sentences were to be served consecutively. Moreover, appellant fully understood the potential sentence. The following exchange took place between the court and appellant during the plea hearing:

{¶58} "JUDGE LUCCI: Do you understand that I can run the sentences on each of these counts consecutive with each other?

{¶59} "RONALD DUDAS: Even though there's a - -

{¶60} "***

{¶61} "RONALD DUDAS: Even though we have a plea between 5 and 10?***

{¶62} "JUDGE LUCCI: Well, let me explain that. First off, you understand that the agreement between you, your attorneys and the prosecutor are between you, your attorneys and the prosecutor. You understand that?

{¶63} "RONALD DUDAS: I do.

{¶64} "JUDGE LUCCI: You understand I'm not a party to the agreement.

{¶65} "RONALD DUDAS: So you don't have to accept either or.

{¶66} "JUDGE LUCCI: That's correct. ***

{¶67} "***

{¶68} "JUDGE LUCCI: *** So you understand that the consecutive maximum on these counts comes up to 54.5 years.

{¶69} "RONALD DUDAS: I can get that much?

{¶70} "JUDGE LUCCI: You can. ***

{¶71} "***

{¶72} "JUDGE LUCCI I want to make it clear. Do you understand that what you're pleading to, it can result – I'm not saying it will but it can result in a prison term of 54 ½ years?

{¶73} "RONALD DUDAS: Could be dead before then. "***

{¶74} "JUDGE LUCCI: Okay. But do you understand - -?

{¶75} "***

{¶76} "RONALD DUDAS: Yes I do.

{¶77} "***

{¶78} "JUDGE LUCCI: So that no one can commit for me. Your attorneys can't tell you what I'll do, the prosecutor can't, and certainly I can't at this point. You understand that?

{¶79} "RONALD DUDAS: I do.

{¶80} "JUDGE LUCCI: And you understand I am not bound by, and do not have to accept the recommendations by your attorney, the prosecutor, or any joint recommendation in this case?

{¶81} "RONALD DUDAS: Yes, sir.

{¶82} "***

{¶83} "JUDGE LUCCI: And are you entering this plea freely and voluntarily?

{¶84} "RONALD DUDAS: Yes I am.

{¶85} "JUDGE LUCCI: And do you understand that if you perform everything that you, that's been represented you will perform under this agreement with the prosecutor, then the prosecutor on the sentencing day will not ask me to sentence you to more than 10 years in prison?

{¶86} "RONALD DUDAS: I do.

{¶87} "JUDGE LUCCI: And do you understand that despite your performance of everything that would fulfill your obligation with the prosecutor, that I'm not bound by that agreement.

{¶88} "RONALD DUDAS: I understand.

{¶89} "JUDGE LUCCI: So this can turn out – I'm tell[ing] you it can turn out – I'm not saying it will, but I'm telling you it can turn out that the prosecutor asks me to sentence you to no more than 10 years in prison. It can turn out that I sentence you to 54.5 years in prison. Do you understand that?

{¶90} "RONALD DUDAS: Yes.

{¶91} "JUDGE LUCCI: Do you still wish to plead guilty?

{¶92} "RONALD DUDAS: Yes."

{¶93} The trial court was thus fully aware of the plea bargain and fully explained it and its consequences to appellant. During the plea hearing, the prosecutor acknowledged on the record the limits of his recommendation under the plea bargain. At the later sentencing hearing, following the prosecutor's recommendation, neither appellant nor his counsel objected, and appellant told the court he would serve any

sentence the court imposed, whether it was one or 100 years. In the circumstances of this case, we hold that appellant waived any error arising from the prosecutor's recommendation and same did not rise to the level of plain error.

{¶94} Appellant's first assignment of error is without merit.

{¶95} For his second assignment of error, appellant states:

{¶96} "THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING DEFENDANT'S MOTION TO WITHDRAW HIS PLEA IN VIOLATION OF HIS DUE PROCESS RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶97} Appellant concedes he withdrew his December 1, 2006 pre-sentence motion to withdraw his guilty plea the same day he filed the motion. He was thereafter sentenced on December 1, 2006. He filed another motion to withdraw his guilty plea on December 5, 2006. While that motion was pending, appellant through counsel filed this appeal on December 15, 2006. On January 3, 2007, the trial court denied appellant's remaining motion to withdraw.

{¶98} Appellant asserts on appeal that the trial court's sentence of 20 years greater than the sentence provided by the plea bargain constituted manifest injustice.

{¶99} However, we note the filing of a notice of appeal divests the trial court of jurisdiction to consider a motion to withdraw a guilty plea. *State v. Morgan*, 8th Dist. No. 87793, 2007-Ohio-398, at ¶9; *State v. Winn* (Feb. 19, 1999), 2d Dist. No. 17194, 1999 Ohio App. LEXIS 511. The court in *Winn* held:

{¶100} "This is consistent with the general rule that after appeal, trial courts retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as the collateral issues like contempt, appointment of a receiver and injunction. *** A motion to withdraw a plea is not a collateral issue, because it potentially directly impacts an appeal." Id. at *12-*13.

{¶101} By filing a notice of appeal while his motion to withdraw was pending in the trial court, appellant divested that court of jurisdiction to consider his motion. As a result, this court is without jurisdiction to consider the trial court's judgment denying the motion.

{¶102} Appellant's second assignment of error is without merit.

{¶103} For his third assignment of error, appellant asserts:

{¶104} "THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS TO EQUAL PROTECTION AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND UNDER SECTIONS 2, 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION WHEN IT SENTENCED HIM CONTRARY TO R.C. 2929.11(B)."

{¶105} Appellant argues that his sentence was disproportionate because, in his view, his crimes were not as serious as certain other crimes for which criminal defendants face lesser sentences. Before addressing the merits of this assigned error, we feel constrained to comment on appellant's argument that his crimes merely had some economic impact on his victims and that there are other crimes far more serious than his. Appellant's crimes did not merely cause economic harm to his victims. He actually hired a hit man and plotted the murder of a common pleas judge and physical

attack on a law enforcement officer for no other reason than to seek revenge for the performance of their official duties in investigating and adjudicating appellant's crimes. Appellant intimidated these victims just as he intimidated the scores of helpless victims he defrauded and brought to their financial ruin. As the trial court noted, based on his crimes, appellant is anti-social with no real remorse for his crimes or his victims. The court noted all appellant's victims had suffered severe psychological harm and in the racketeering case, extreme economic harm. The trial court was justified in considering this background in imposing his sentence.

{¶106} Appellant argues that his equal protection and due process rights were violated by the trial court in that his sentence was inconsistent with other sentences imposed for the same offense in violation of R.C. 2929.11(B). It must first be noted that appellant failed to object on this basis in the trial court. As a result, this assigned error is waived. Awan, supra.

{¶107} Even if appellant had not waived this issue on appeal, it would be without merit. Pursuant to *State v*. *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, a trial court is vested with full discretion to impose a sentence within the statutory range. Id. at paragraph seven of the syllabus. Therefore, post-*Foster*, we apply an abuse of discretion standard in reviewing a sentence within the statutory range. Id. at ¶100; *State v. Lloyd*, 11th Dist. No. 2006-L-185, 2007-Ohio-3013. An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Further, when applying the abuse of discretion standard, an

appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd*., 66 Ohio St.3d 619, 621, 1993-Ohio-122.

{¶108} In *Foster* the Ohio Supreme Court held that two sections of Ohio's sentencing scheme must still be followed by trial courts in sentencing offenders. R.C. 2929.11 and R.C. 2929.12 apply as a general guide for every sentencing. The Court held that these two sections do not mandate judicial fact-finding; rather, a court is merely to "consider" the statutory factors set forth in these two sections prior to sentencing. Id. at ¶ 36-42.

{¶109} R.C. 2929.11(A) provides that a trial court that sentences an offender for a felony conviction must be guided by the "overriding purposes of felony sentencing." Those purposes are "to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders. Finally, R.C. 2929.12 sets forth factors concerning the seriousness of the offense and recidivism factors.

{¶110} R.C. 2929.11(B) requires consistency when applying Ohio's sentencing guidelines. However, this court has held that sentencing consistency is not derived from the trial court's comparison of the current case to prior sentences for similar offenders and similar offenses. *State v. Spellman*, 160 Ohio App.3d 718, 2005-Ohio-2065, at ¶12. Rather, it is the trial court's proper application of the statutory sentencing guidelines that ensures consistency in sentencing. *State v. Swiderski*, 11th Dist. No.

2004-L-112, 2005-Ohio-6705, at ¶58. Thus, in order to show a sentence is inconsistent, a defendant must show the trial court failed to properly consider the statutory factors and guidelines.

{¶111} Appellant's suggestion that consistency in a sentence is determined by a numerical comparison to other sentences for similar crimes lacks merit. Simply because appellant's sentence may not be identical to sentences in other cases does not imply that his sentence was inconsistent with sentences of other similarly situated offenders.

{¶112} Appellant pleaded guilty to four counts of intimidation, felonies of the third degree; one count of retaliation, a felony of the third degree; one count of engaging in a pattern of corrupt activity, a felony of the first degree; one count of tampering with records, a felony of the third degree; one count of forgery, a felony of the fourth degree; one count of theft of one hundred thousand dollars or more, a felony of the third degree; one count of uttering, a felony of the fourth degree; one count of securing writings by deception, a felony of the third degree; and one count of telecommunications fraud, a felony of the fourth degree. The total exposure was 54.5 years.

{¶113} The court stated on the record that it considered the purposes of felony sentencing under R.C. 2929.11, including the requirement that sentences imposed be consistent. The court also considered the seriousness and recidivism factors of R.C. 2929.12.

{¶114} Upon review of the record, we hold that appellant's sentence of ten years for engaging in a pattern of corrupt activity, five years for tampering with records, five years for securing writings by deception, 18 months for forgery, one year for theft, 18

months for uttering, 18 months for telecommunications fraud, five years for retaliation, and five years each on four counts of intimidation are within the statutory range of penalties for the offenses of which he pleaded guilty. Moreover, the trial court properly applied and considered the statutory sentencing factors before imposing appellant's sentence. The court's sentencing thus met the consistency requirement of R.C. 2929.11(B).

{¶115} Appellant's third assignment of error is without merit.

{¶116} For his fourth, fifth, sixth, seventh, and eighth assignments of error, appellant asserts as follows:

{¶117} "[4.] THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT-APPELLANT TO MORE-THAN-THE-MINIMUM AND CONSECUTIVE PRISON TERMS IN VIOLATION OF THE DUE PROCESS AND EX POST FACTO CLAUSES OF THE OHIO AND UNITED STATES CONSTITUTIONS.

{¶118} "[5.] THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT-APPELLANT TO MORE-THAN-THE-MINIMUM AND CONSECUTIVE PRISON TERMS IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS.

{¶119} "[6.] THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT-APPELLANT TO MORE-THAN-THE-MINIMUM AND CONSECUTIVE PRISON TERMS BASED ON THE OHIO SUPREME COURT'S SEVERANCE OF THE OFFENDING PROVISIONS UNDER *FOSTER*, WHICH WAS AN ACT IN VIOLATION OF THE PRINCIPLE OF SEPARATION OF POWERS.

{¶120} "[7.] THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT-APPELLANT TO MORE-THAN-THE-MINIMUM AND CONSECUTIVE PRISON TERMS CONTRARY TO THE RULE OF LENITY.

{¶121} "[8.] THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT-APPELLANT TO MORE-THAN-THE-MINIMUM AND CONSECUTIVE PRISON TERMS CONTRARY TO THE INTENT OF THE OHIO LEGISLATORS."

{¶122} The arguments asserted by appellant in these assignments of error are interrelated and will therefore be considered together. They are identical to those arguments raised and rejected in numerous prior decisions of this court. See *State v. Green*, 11th Dist. Nos. 2005-A-0069 and 2005-A-0070, 2006-Ohio-6695; *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, at ¶30, discretionary appeal not allowed by *State v. Elswick*, 113 Ohio St.3d 1513, 2007-Ohio-2208; *State v. Asbury*, 11th Dist. No. 2006-L-097, 2007-Ohio-1073, at ¶15; *State v. Anderson*, 11th Dist. No. 2006-L-142, 2007-Ohio-1062, at ¶15; *State v. Spicuzza*, 11th Dist. No. 2006-L-141, 2007-Ohio-783, at ¶13-35.

{¶123} These same arguments have also been consistently rejected by other Ohio appellate districts and federal courts. See *State v. Gibson*, 10th Dist. No. 06AP-509, 2006-Ohio-6899; *State v. Moore*, 3d Dist. No. 1-06-51, 2006-Ohio-6860, at ¶9; *United States v. Portillo-Quezada* (C.A. 10, 2006), 469 F.3d 1345, 1354-1356, and the cases cited therein.

{¶124} Finally, these arguments have essentially been rejected by the Ohio Supreme Court as a result of the Court's refusal to exercise jurisdiction in *Elswick*, supra.

{¶125} Appellant's fourth, fifth, sixth, seventh, and eighth assignments of error are without merit.

{¶126} For the reasons stated in the Per Curiam Opinion of this court, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, P.J., MARY JANE TRAPP, J., TIMOTHY P. CANNON, J., conur.