[Cite as *State v. Rammel*, 2015-Ohio-2715.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case Nos. 25899
Plaintiff-Appellee	:	25900
	:	
v.	:	Trial Court Case Nos. 11-CR-435
	:	10-CR-3732
MATTHEW A. RAMMEL	:	
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)
	:	

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O P I N I O N

Rendered on the 2nd day of July, 2015.

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HALL, J.

{¶ 1} Matthew Rammel appeals from his resentencing on numerous offenses. He

contends that his sentence is contrary to law because the trial court used the sentencing-package doctrine to restructure his sentence and engaged in vindictive sentencing. Rammel also contends that he received ineffective assistance of appellate counsel because counsel failed to raise these two issue on appeal. Finding no error, we affirm.

I. Procedural History

{¶ 2} In 2011, seventeen charges were pending against Rammel in two separate cases. In Case Number 10-CR-3732 he had been charged with third-degree felony burglary under R.C. 2911.12(A)(3) and fourth-degree felony receiving stolen property under R.C. 2913.51(A). In Case Number 11-CR-435 Rammel had been charged again with fourth-degree felony receiving stolen property under R.C. 2913.51(A), as well as with nine misdemeanor counts of receiving stolen property, and with four more third-degree felony burglaries under R.C. 2911.12(A)(3). Rammel was also charged with fifth-degree felony breaking and entering under R.C. 2911.13(A). Rammel and the State negotiated a plea agreement under which Rammel pleaded no contest to all of the charges and the State recommended a total sentence range of 5 to 8 years in prison.

{¶ 3} The total sentence imposed by the trial court was within the agreed range. The court sentenced Rammel to 180 days for each misdemeanor receiving stolen property and to 18 months for each felony receiving stolen property. For each of the five burglaries the court imposed 5 years. Lastly, the trial court sentenced Rammel to 12 months for breaking and entering. The court ordered that the felony receiving-stolen-property sentences be served consecutively to each other and consecutively to the burglary sentences, that the burglary sentences be served

concurrently to each other, and that the remaining sentences—including the one for breaking and entering—be served concurrently. The total sentence was 8 years in prison.

{¶ 4} Rammel appealed his sentence, arguing among other things that the trial court erred by ordering consecutive sentences and by failing to consider properly the principles of sentencing under R.C. 2929.11 and the recidivism factors under R.C. 2929.12. We rejected these argument (and the others) and affirmed the sentence in *State v. Rammel,* 2d Dist. Montgomery Nos. 24871, 24872, 2012-Ohio-3724 (*Rammel I*).

{¶ 5} Rammel later filed an App.R. 26(B) application to reopen his direct appeal, contending that the trial court failed to apply the sentencing-law changes made by H.B. 86 to the maximum sentence for third-degree felonies and to the requirements for consecutive sentences. We granted the application to reopen and concluded in *State v Rammel*, 2d Dist. Montgomery Nos. 24871, 24872, 2013-Ohio-3045 (*Rammel II*), that the trial court did fail to apply the statutory changes. We concluded that the maximum to which Rammel could be sentenced for each burglary offense was 3 years and that the trial court failed to make the findings required by R.C. 2929.14(C)(4) before imposing consecutive sentences. "By not applying H.B. 86 to Rammel," we said, "the trial court imposed sentences on Rammel that are contrary to law." *Rammel II* at ¶ 19. We concluded that "these unlawful sentences are not merely voidable, but void." *Id*. Therefore we reversed that part of the judgment imposing sentence and remanded for resentencing.

{¶ 6} On remand, the trial court reduced each burglary sentence from 5 years to 3 years. The court also reduced the two felony receiving-stolen-property offenses from 18 months to 12 months, citing a change in the sentencing law that made these offenses

fifth-degree, not fourth-degree, felonies. The court then made the findings needed to impose consecutive sentences and ordered the sentences imposed in the second case to be served consecutive to those imposed in first case. And the trial court ordered the breaking-and-entering sentence to be served consecutively to the sentences in both cases. The effect of the sentence restructuring on the total sentence length was to reduce it by one year, to 7 years in prison.

{¶ 7} Rammel appealed his resentencing, and his appellate counsel filed a brief under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), indicating that he had not found any error having arguable merit. We independently reviewed the case and concluded in *State v Rammel*, 2d Dist. Montgomery Nos. 25899, 25900, 2014-Ohio-1281 (*Rammel III*), that there were no potential assignments of error having arguable merit. We noted that the sentence is "within the statutory ranges and that the applicable sentencing statutes were followed." *Rammel III* at ¶ 10. "Perhaps more importantly," we continued, "Rammel's aggregate sentence range had been agreed to by the parties." *Id*. We concluded that there was no merit to the contention that on remand the trial court should simply have reduced the burglary sentences by two years. So we affirmed the new sentence.

{¶ 8} Rammel then filed an App.R. 26(B) application to reopen his resentencing appeal. He contended that appellate counsel failed to argue that the trial court improperly used the sentencing-package doctrine to restructure his sentence and that the court engaged in vindictive sentencing. We granted the application to reopen, confining the reopened appeal to those two issues. We pointed out that "with the charges to which he pled, at least some of his sentences would have to have been ordered to be served

consecutively to arrive at the 6 year sentence to which Rammel claims he is entitled." (Oct. 22, 2014 Decision and Entry, 7). "This could be construed to mean," we said, "that Rammel accepted and adopted a sentencing deal that would allow the trial court to craft any combination of sentences that would result in a range of sentences between 5 and 8 years in prison." (*Id*.).

II. Analysis

{¶ 9} Rammel assigns three errors to his resentencing, which focus on the change to the breaking-and-entering sentence, from concurrent to consecutive service. The first assignment of error alleges that the trial court used the sentencing-package doctrine, rejected by the Ohio Supreme Court, to restructure the sentences and alleges that by modifying the breaking-and-entering sentence the court exceeded the scope of remand. The second assignment of error alleges that the change in the breaking-and-entering sentence was motivated by the trial court's vindictiveness. The third assignment of error alleges that appellate counsel rendered Rammel ineffective assistance by not raising the issues raised in the first two assignments of error.

A. Is Rammel's sentence subject to review?

{¶ 10} The State contends that Rammel is precluded from challenging his sentence by R.C. 2953.08(D)(1), which provides that "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." Rammel's sentence, says the State, is authorized by law and falls within the range to which Rammel agreed.

{¶ 11} The First District has held that "a sentence is not an agreed sentence unless

the parties agree to a specific term, as opposed to a range of possible terms." *State v. Gray*, 1st Dist. Hamilton No. C-030132, 2003-Ohio-5837, ¶ 9. In *State v. Lawson*, 2d Dist. Montgomery No. 19643, 2003-Ohio-3775, an *Anders* case decided by this Court, the defendant agreed to plead to the charges for which he was convicted, and in exchange, the State agreed to a five-year cap on his total sentence. In our review, we noted that under R.C. 2953.08(D) a sentence may not be appealed that is recommended by both parties and "authorized by law." But in that case, we said, the defendant "did not agree to be sentenced to five years, he agreed that his sentence, if imposed, would be 'capped' at five years." *Lawson* at ¶ 4.

{¶ 12} Here, Rammel agreed to be sentenced within a certain range but not to a specific term. Given the unusual specific facts of the resentencing in this case resulting from multiple appeals, we decline to find that his sentence is an agreed sentence for purposes of R.C. 2953.08(D)(1) and we need not opine whether a sentence to an agreed range of a term is a statutorily unappealable agreed sentence.

B. Restructuring Rammel's sentence

{¶ 13} The first assignment of error alleges that the trial court erred by using the sentencing-package doctrine to restructure Rammel's sentence and erred by exceeding the scope of remand by modifying the breaking-and-entering sentence.

{¶ 14} An appellate court may modify or vacate a sentence if it "clearly and convincingly" finds that "the record does not support the sentencing court's findings" under R.C. 2929.14(C)(4) or finds that "the sentence is otherwise contrary to law." R.C. 2953.08(G)(2)(a) and (b). A sentence is contrary to law if it does not follow "the system of overriding purposes and principles of sentencing as well as legislative guidance for the

exercise of judicial discretion." Katz & Giannelli, *Criminal Law*, Section 122:3 (3d Ed.2014); *see also State v. Mayberry*, 2014-Ohio-4706, 22 N.E.3d 222, ¶ 35 (2d Dist.) (saying that " ' "contrary to law" means that a sentencing decision manifestly ignores an issue or factor which a statute requires a court to consider,' " quoting *State v. Lofton*, 2d Dist. Montgomery No. 19852, 2004-Ohio-169, ¶ 11).

{¶ 15} Rammel contends that his sentence is contrary to law because the trial court relied on the sentencing-package doctrine to restructure his sentence. In particular, Rammel points to the breaking-and-entering sentence, which the trial court originally ordered him to serve concurrently but on remand ordered him to serve consecutively, despite the fact that the sentence was unaffected by H.B. 86. It was Rammel's position at oral arguments that the maximum total sentence that the trial court could impose at resentencing was 5 years.[1]

{¶ 16} The trial court did not use the sentencing-package doctrine or exceed the scope of remand. We concluded in *Rammel II* that changes in sentencing law rendered Rammel's original sentence void. Consequently we reversed the entire sentence and remanded for a new sentencing hearing. The trial court had to reconsider all of its sentencing decisions, including which sentences to require Rammel to serve consecutively. Under Rammel's plea agreement with the State, he agreed to plead no contest in exchange for a total sentence of 5 to 8 years. On remand, Rammel could have moved to withdraw his pleas based on this change in the individual maximums, or he

[1] In his Application for Reopening filed June 25, 2014 in CA 25899, 25900, Rammel argued that because the individual 5 year sentences previously imposed for those burglary cases that were affected by the H.B. 86 transition were reduced to a maximum of 3 years, for a 2 years net reduction, then Rammel's aggregate sentence of 8 years should be reduced by that 2 years resulting in an aggregate 6 year sentence. *Id*., at 7.

could have repudiated his plea agreement, but he did neither. At the re-sentencing the trial court said "Mr. Rammel had entered pleas with an agreed sentencing range of five to eight years. And so with that table being set, is there anything that you'd like to say on his behalf?" (Re-sentencing T. 4). He did not disavow the benefit of his plea agreement to a range of 5 to 8 years. And, Rammel's current argument on appeal, that he could only be sentenced to a maximum of 5 years, is not what was raised at the sentencing below. There he argued "he should receive the benefit of that and have two years taken off of his sentence." *Id*. (resulting in a 6 year sentence). The new aggregate sentence is shorter than the original, and just as importantly, it is within the range that Rammel had agreed to accept.

{¶ 17} The first assignment of error is overruled.

C. Vindictive sentencing

{¶ 18} The second assignment of error alleges that the trial court resentenced Rammel vindictively because he had successfully appealed his original sentence.

{¶ 19} The U.S. Supreme Court in *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), "created a presumption of judicial vindictiveness that applies when a judge imposes a more severe sentence upon a defendant." *Plumley v. Austin*, __ U.S. __, 135 S.Ct. 828, 190 L.Ed.2d 923 (2015) (Thomas, J., dissenting). "Due process of law * * *," said the Supreme Court, "requires 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." *Pearce* at 725. The Court was concerned that "the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction." *Id*. The Court created the

vindictiveness presumption to help free a defendant "of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Id*.

{¶ 20} But the "presumption of vindictiveness 'do[es] not apply in every case where a convicted defendant receives a higher sentence.' " *Alabama v. Smith*, 490 U.S. 794, 799, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), quoting *Texas v. McCullough*, 475 U.S. 134, 138, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986). Rather, the Supreme Court has "limited its application * * * to circumstances 'where its "objectives are thought most efficaciously served." ' " *Id.*, quoting *McCullough* at 138, quoting *Stone v. Powell*, 428 U.S. 465, 482 and 487, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). "Accordingly," the Court has said, "in each case, we look to the need, under the circumstances, to 'guard against vindictiveness in the resentencing process.' " *McCullough* at 138, quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 25, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973).

{¶ 21} There is no basis for a presumption of vindictiveness in a case in which the defendant has agreed to a narrowly set range for sentencing and the total length of a defendant's sentence after resentencing for multiple offenses is shorter than the total length of the original sentence. Rammel's agreed 5-8 year sentencing range for multiple offenses solidified his concern over the total length of his sentence, not the length of any individual sentence. Indeed even when the burglary charges were believed to allow maximum 5 year sentences, the only way for the trial court to impose more than the minimum of the 5-8 year range was for some combination of the sentences to be served consecutively. He chose to continue with the agreed range. Thus, in this case the vindictiveness presumption simply does not apply.

{¶ 22} Moreover, "vindictiveness of a sentencing judge is the evil the [*Pearce*] Court sought to prevent rather than simply enlarged sentences." *McCullough* at 138. The *Pearce* Court wanted to prevent judges when resentencing a defendant who had successfully challenged his conviction from punishing the defendant with a heavier sentence. Imposing a shorter total sentence within an agreed-upon range of sentence is hardly a punishment. Here, the trial court followed Rammel's agreement and reduced the total length of his sentence by one year. Accordingly, the circumstances in this case do not indicate a need to guard against vindictiveness.

{¶ 23} If the *Pearce* presumption does not apply, "the burden remains upon the defendant to prove actual vindictiveness." (Citation omitted.) *Smith*, 490 U.S. at 799, 109 S.Ct. 2201, 104 L.Ed.2d 865. Rammel does not attempt to show actual vindictiveness, and we do not see any evidence of it.

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

D. The claim for ineffective assistance of appellate counsel

{¶ 25} The third assignment of error alleges that Rammel's appellate counsel rendered ineffective assistance.

{¶ 26} To prevail on a claim for ineffective assistance, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show deficiency, the defendant must show that trial counsel's representation fell below an objective standard of reasonableness. *Id*. Reversal is warranted only where the defendant shows a reasonable probability that but for counsel's errors the result of the proceeding would have been different. *State v. Bradley,* 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). The same

standard applies to an ineffective-assistance claim made against appellate counsel. *State v. Rojas*, 64 Ohio St.3d 131, 141, 592 N.E.2d 1376 (1992).

{¶ 27} Rammel alleges that his appellate counsel was deficient for not challenging his sentence based on the issues raised in the first two assignments of error. Given our conclusions on those issues, we cannot say that appellate counsel should have raised the issues or that, if counsel had raised them, Rammel's sentence would have been different.

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

III. Conclusion

{¶ 29} We have overruled all of the assignments of error. Therefore the trial court's judgment is affirmed.

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FROELICH, P.J., and WELBAUM, J., concur.

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