

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
DEFIANCE COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 4-14-02

v.

MARK D. CARNAHAN,

OPINION

DEFENDANT-APPELLANT.

Appeal from Defiance County Common Pleas Court
Trial Court No. 11 CR 11114

Judgment Affirmed in Part, Reversed in Part and Cause Remanded

Date of Decision: March 30, 2015

APPEARANCES:

Joseph A. Benavidez for Appellant

Russell R. Herman for Appellee

SHAW, J.

{¶1} Defendant-appellant Mark D. Carnahan (“Carnahan”) appeals the December 11, 2013 judgment of the Defiance County Common Pleas Court sentencing Carnahan to an aggregate prison term of 78 months after Carnahan pled no contest and stipulated to a finding of guilt to Aggravated Robbery in violation of R.C. 2911.01(B)(1), a felony of the first degree, two counts of Assault in violation of R.C. 2903.13(A), both felonies of the fourth degree, and Felonious Assault in violation of R.C. 2903.11(A)(2), a felony of the first degree. Carnahan also pled guilty to Aggravated Burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree.¹

{¶2} The facts relevant to this appeal are as follows. On April 13, 2011, Carnahan was indicted for Aggravated Burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree, Felonious Assault in violation of R.C. 2903.11(A)(2), a felony of the first degree, two counts of Assault in violation of R.C. 2903.13(A), both felonies of the fourth degree, two counts of Assault in violation of R.C. 2903.13(A), both misdemeanors of the first degree, and Possession of Cocaine in violation of R.C. 2925.03(A)/(C)(4)(a), a felony of the fifth degree. (Doc. 1).

¹ For the Felonious Assault and Aggravated Burglary convictions, Carnahan was sentenced to community control.

{¶3} On April 20, 2011, Carnahan was arraigned and pled not guilty to the charges. (Doc. 4). Later, he also pled not guilty by reason of insanity.

{¶4} On May 16, 2011, Carnahan's counsel filed a motion to evaluate Carnahan's competency to stand trial. (Doc. 8). The motion was granted and a competency evaluation was ordered on May 31, 2011. (Doc. 9).

{¶5} On October 7, 2011, a second indictment was filed against Carnahan for Aggravated Robbery in violation of R.C. 2911.01(B)(1), a felony of the first degree. (Doc. 19).

{¶6} On October 31, 2011, Carnahan was arraigned on the charge from the second indictment and pled not guilty. As the charge in the second indictment arose from same incident as the charges from the first indictment, the cases were consolidated.

{¶7} Also on October 31, 2011, the Court found that based on Carnahan's competency evaluation, he was at that time, incompetent to stand trial but capable of being restored to competency. (Doc. 16).

{¶8} Carnahan then entered a psychiatric treatment facility and was treated for his mental condition. After several months of treatment, Carnahan's doctors deemed him fit to stand trial. Another hearing was then held as to Carnahan's competency, and he was determined competent to stand trial by the court. Carnahan then withdrew his pleas of not guilty by reason of insanity.

{¶9} On October 8, 2013, a hearing was held wherein Carnahan elected to withdraw his previously tendered pleas of not guilty and plead no contest with a stipulation to a finding of guilt as to the offenses of Aggravated Robbery in violation of R.C. 2911.01(B)(1), a felony of the first degree, Felonious Assault in violation of R.C. 2903.11(A)(2), a felony of the first degree, and two counts of Assault in violation of R.C. 2903.13(A), both felonies of the fourth degree. In addition, Carnahan also pled guilty to Aggravated Burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree. In exchange the State indicated that it would be dismissing the Possession of Cocaine charge and the two misdemeanor Assault charges at the time of sentencing, and would recommend an aggregate prison term of 78 months. After engaging in a Criminal Rule 11 colloquy with Carnahan, the court accepted Carnahan's pleas as knowingly, intelligently, and voluntarily given and found him guilty. The court then ordered a pre-sentencing investigation and set sentencing for a later date.

{¶10} On November 26, 2013, a sentencing hearing was held. Carnahan was sentenced to serve a "mandatory" four years imprisonment on the Aggravated Robbery conviction, and fifteen months in prison on each Assault conviction. All of those prison terms were ordered to be served consecutively for an aggregate prison term of 78 months. In addition, Carnahan was sentenced to community control for five years for his Felonious Assault and Aggravated Burglary

convictions. Carnahan was informed that if he violated the terms of his community control for Felonious Assault he would be sentenced to 8 years in prison, and if he violated the conditions of his community control for Aggravated Burglary he would be sentenced to 7 years in prison, and those prison terms would run consecutively for a total of 15 years. As indicated at the plea hearing, the State then moved to dismiss the Possession of Cocaine charge and the two misdemeanor Assault charges, and that was granted. A judgment entry memorializing Carnahan's sentence was filed December 11, 2013. (Doc. 73).

{¶11} It is from this judgment that Carnahan appeals, asserting the following assignments of error for our review.

ASSIGNMENT OF ERROR 1

THE APPELLANT'S FIFTH AMENDMENT RIGHT AGAINST DOUBLE JEOPARDY WAS VIOLATED WHEN THE TRIAL COURT SENTENCED HIM TO ALLIED OFFENSES.

ASSIGNMENT OF ERROR 2

THE APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN COUNSEL FAILED TO OBJECT TO APPELLANT BEING SENTENCED TO ALLIED OFFENSES.

ASSIGNMENT OF ERROR 3

THE APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN COUNSEL FAILED TO ADEQUATELY REPRESENT THE APPELLANT.

ASSIGNMENT OF ERROR 4

APPELLANT’S SENTENCE IS VOID AS THE RECORD DOES NOT SUPPORT THE SENTENCE AND IT IS CONTRARY TO LAW TEHREBY VIOLATING HIS FOURTEENTH AMENDMENT RIGHTS OF DUE PROCESS OF LAW.

{¶12} Due to the nature of the disposition, we elect to address the assignments of error out of the order in which they were raised.

Fourth Assignment of Error

{¶13} In Carnahan’s fourth assignment of error, he makes a number of arguments that the sentence in his case was improper. He challenges the mandatory nature of his prison sentence for Aggravated Robbery, and he argues that the court failed to make findings to support his sentences for the various crimes.

{¶14} First we will address Carnahan’s argument that he was improperly sentenced to a “mandatory” prison term for Aggravated Robbery. Aggravated Robbery, as indicted in this case, is codified in R.C. 2911.01(B)(1). According to the Aggravated Robbery statute, Aggravated Robbery in violation of section (B)(1) is a felony of the first degree. There is no mention in R.C. 2911.01 of Aggravated Robbery requiring a mandatory prison term.

{¶15} Pursuant to R.C. 2929.14, the penalty for a felony of the first degree “shall be three, four, five, six, seven, eight, nine, ten, or eleven years.” R.C. 2929.14(A)(1). While Aggravated Robbery thus has a presumptive prison term,

there is no indication that the prison term was required to be mandatory. Under R.C. 2929.13(F)(6), the prison term for a first degree felony *can* be mandatory if the offender had previously been convicted of a first or second degree felony. While Carnahan had a lengthy criminal history according to his PSI,² there is no clear indication in the record before us that he has a prior first or second degree felony.³ Thus we see nothing in the revised code that permits Carnahan's Aggravated Robbery prison term to be "mandatory" in this instance.⁴

{¶16} Carnahan argues in his brief that perhaps the trial court, the State, and Carnahan's original defense counsel intended Carnahan's prison term for Felonious Assault to carry a "mandatory" prison term rather than the Aggravated Robbery conviction. We would note that Felonious Assault under R.C. 2903.11(D)(1)(b) *can* carry a mandatory prison term where the victim is a peace officer *and* the victim suffered serious physical harm. Here the victim was a police officer but the record is unclear as to the extent of any physical harm.⁵ Thus perhaps Carnahan is correct in his statement that the State and the trial court simply misstated the crime that was to carry a mandatory prison term. Nevertheless, for lack of a clear record as to any of the required statutory predicate

² The summary of the PSI indicates that Carnahan had been arrested over 36 times with over 100 charges as an adult. The PSI indicated that 20 of those convictions were felonies.

³ The PSI did state that Carnahan was charged with "Felonious Assault" in 2001, and it seems to indicate that Carnahan was convicted for it and sentenced to prison for 14 months. However, the PSI does not make it clear that the crime Carnahan was ultimately convicted of in 2001 was a first or second degree felony.

⁴ And if Carnahan did have a prior first or second degree felony, his Aggravated Burglary prison term for which he received community control could then be mandatory as well pursuant to R.C. 2929.13(F)(6).

⁵ The only true narrative of what happened was contained in the PSI.

circumstances, Carnahan's sentence to a "mandatory" prison term for Aggravated Robbery was improper in this case.

{¶17} Next, we turn to Carnahan's sentence to community control for his Felonious Assault and Aggravated Burglary convictions, both of which were first degree felonies. According to R.C. 2929.13(D), both of these crimes, as first degree felonies, carry a presumption in favor of prison. Despite this presumption in favor of prison, the sentencing court may deviate downward and impose community control instead of a prison term if the court makes both of the following findings set forth in R.C. 2929.13(D)(2)(a) and (b):

(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.

{¶18} The sentencing court must make both the findings specified above before it may deviate from the presumption that a prison term should be imposed.

State v. Milhoan, 10th Dist. Franklin No. 13AP-74, 2014-Ohio-310, ¶ 6, appeal

not allowed, 139 Ohio St.3d 1418, 2014-Ohio-2487, ¶ 6, citing *State v. Fisher*, 10th Dist. No. 13AP-236, 2013-Ohio-4063, ¶ 7. “These findings must be made *at the sentencing hearing*.” (Emphasis added). *Fisher*, at ¶ 7, citing *State v. Martin*, 10th Dist. Franklin No. 08AP-1103, 2009-Ohio-3485, ¶ 7.

{¶19} In this case, the State stipulated at the *plea hearing* that the findings necessary for overcoming the presumption of prison were present in this case. However, no such findings were made by the trial court at the *sentencing hearing*, or in the trial court’s sentencing entry. These findings *must* be made by the trial court at the sentencing hearing before the presumption of prison under R.C. 2929.13(D) may be overcome. *See Milhoan, supra*. Thus we have no choice but to determine that the trial court’s findings to overcome the presumption of prison in favor of community control for Carnahan’s two first degree felonies were inadequate in this case.

{¶20} Finally, Carnahan argues that the trial court did not make the proper findings under R.C. 2929.14(C)(4) to support consecutive sentences. The trial court arguably made these findings at the sentencing hearing, but the 2929.14(C)(4) findings were not present at all in the trial court’s judgment entry.⁶

⁶ While these findings may have been unnecessary for the Aggravated Robbery prison term to run consecutive to the Assault prison terms pursuant to R.C. 2929.14(C)(3), the findings would have been necessary for the Assault prison terms to run consecutively.

However, as Carnahan must be resentenced the trial court will need to make the consecutive sentencing findings again regardless.⁷

{¶21} In sum, we have found error with the trial court’s “mandatory” sentence on Carnahan for his Aggravated Robbery conviction, and for the lack of findings made to overcome the presumption of prison when Carnahan was sentenced to community control for two first degree felonies. In addition, the findings in the trial court’s judgment entry did not contain the R.C. 2929.14(C)(4) language to support consecutive sentences. For all of these reasons, we find that Carnahan’s sentence in this case must be reversed and a new sentencing hearing must be held. Therefore, Carnahan’s fourth assignment of error is sustained.

First and Second Assignments of Error

{¶22} In Carnahan’s first assignment of error, he contends that his convictions for Aggravated Robbery and Felonious Assault were allied offenses of similar import and that the trial court erred for convicting him and sentencing him for both offenses. In Carnahan’s second assignment of error, he argues that his counsel was ineffective for failing to raise the issue of allied offenses to the trial court at sentencing. Given our disposition of the fourth assignment of error where we found the trial court’s sentence with respect to both the Aggravated Robbery

⁷ We would also note that the trial court’s judgment entry regarding post-release control conflicts with the statements the trial court made at the sentencing hearing. In its entry, the trial court ordered a mandatory five years of post-release control. (Doc. 73). At the sentencing hearing, the trial court stated that Carnahan would be “subject to a mandatory period of three years post release control.” (Tr. at 7).

and the Felonious Assault convictions was improper, Carnahan's arguments regarding those two offenses being allied are now premature, as he will be resentenced. Carnahan can thus make his arguments regarding allied offenses to the trial court at his resentencing hearing. Therefore Carnahan's first and second assignments of error are moot, and we decline to further address them.

Third Assignment of Error

{¶23} In Carnahan's third assignment of error, he argues that his trial counsel was ineffective. Specifically, Carnahan argues that his trial counsel allowed him to enter into "an obviously unconstitutional plea agreement that violates established law[.]" (Appt's Br. at 9).

{¶24} Under this assignment of error Carnahan makes claims that his trial counsel was involved with Carnahan's representation in both civil and criminal proceedings. Carnahan argues that "[trial counsel's] interests were not to protect the Appellant's rights during the criminal proceedings, but he focused more on the civil proceedings." (Appt's Br. at 10). In a vague attempt to support this argument, Carnahan mentions depositions that were taken that are outside of the record before this Court. As those depositions are not before this court, there is simply nothing in the record before us to review regarding this argument. Nothing else in the record remotely supports Carnahan's claims on this issue. Therefore this argument is not well-taken.

{¶25} Lastly, Carnahan seems to argue that he was innocent of Felonious Assault and Aggravated Burglary. Regarding the Felonious Assault, Carnahan claims there was no physical harm done to the officers. However, physical harm is not a requirement of Felonious Assault. Pursuant to R.C. 2903.11(A)(2), to find Carnahan guilty the State had to prove that Carnahan “[c]ause[d] or attempt[ed] to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.” There is no requirement of actual physical harm; rather, an attempt is all that is necessary.⁸ Therefore, Carnahan’s argument is not well-taken.

{¶26} With regard to the Aggravated Burglary, Carnahan claims that the evidence “clearly shows” that Carnahan did not enter the victim’s apartment by force, stealth, or deception. However, at the plea hearing, where Carnahan pled guilty to Aggravated Burglary, the State indicated that Carnahan, by force, stealth, or deception trespassed in a female victim’s residence and then inflicted or attempted to inflict physical harm on the victim and also damaged some property at the residence. (Oct. 8, 2013 Tr. at 23-24). Thus Carnahan’s argument on this issue is not well-taken as there was a factual basis to support the crime to which Carnahan pled guilty. Accordingly, Carnahan’s third assignment of error is overruled.

⁸ Moreover, we would note that while Carnahan pled no contest to the Felonious Assault, he stipulated to a finding of guilt—perhaps in part so that the reading of certain facts into the record would not impact whatever civil case Carnahan claims to also have been involved with.

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{¶27} For the foregoing reasons, Carnahan's third assignment of error is overruled, his fourth assignment of error is sustained, and his first and second assignments of error are rendered moot. The judgment of the Defiance County Common Pleas Court is therefore affirmed in part and reversed in part and this case is remanded to the Defiance County Common Pleas Court to resentence Carnahan.

*Judgment Affirmed in Part,
Reversed in Part and
Cause Remanded*

ROGERS, P.J. and WILLAMOWSKI, J., concur.

/jlr