[Cite as *State v. Lee*, 2009-Ohio-3423.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08-CA-70
G. MICHAEL LEE	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court of Common Pleas Case No. CR2008-0207
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	July 9, 2009

APPEARANCES:

For Plaintiff-Appellee:

D. MICHAEL HADDOX 0004913
Muskingum County Prosecutor
27 N. Fourth St.
Zanesville, Ohio 43701

ROBERT L. SMITH 0039297
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

EMILY STRANG TARBERT 0083153
825 Adair Ave.
Zanesville, Ohio 43701

Delaney, J.

{¶1} Defendant-Appellant, G. Michael Lee, appeals from his convictions of one count of robbery, a felony of the third degree, one count of theft, a felony of the fourth degree, and his subsequent jointly recommended sentence. The State of Ohio is Plaintiff-Appellee.

{¶2} On August 20, 2008, Appellant was indicted on one count of robbery, a felony of the second degree, in violation of R.C. 2911.02(A)(2), and one count of theft, a felony of the fourth degree, in violation of R.C. 2913.02.

{¶3} Subsequent to his indictment, Appellant engaged in plea negotiations with the State, wherein he agreed to plead guilty to the indictment in exchange for the State's recommendation that he serve an aggregate term of five years in prison on those charges.

{¶4} On October 14, 2008, Appellant appeared at a plea hearing in the trial court and entered a guilty plea to the indictment. After a Crim.R. 11 colloquy, the trial court accepted Appellant's guilty plea and ordered a presentence investigation.

{¶5} On November 24, 2009, Appellant appeared before the court for a sentencing hearing. Prior to imposing sentence, the trial court sua sponte amended the robbery charge from a felony of the second degree to a felony of the third degree and explained that the court wanted to make sure that Appellant received the same accommodation that was afforded to his co-defendant, who pled guilty to robbery, a felony of the third degree. Neither the State or Appellant and his counsel objected to this amendment.

{¶6} The trial court then proceeded to impose the recommended sentence of five years as agreed to by the parties.

{¶7} Appellant raises two Assignments of Error:

{¶8} "I. THE DEFENDANT-APPELLANT'S SENTENCE IS CONTRARY TO LAW.

{¶9} "II. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS."

I.

{¶10} In his first assignment of error, Appellant argues that the trial court erred in imposing what amounted to a maximum sentence for his conviction of robbery, a felony of the third degree. We disagree.

{¶11} The sentence imposed by the trial court was a jointly recommended sentence by the parties.

{¶12} R.C. 2953.08(D) governs jointly recommended sentences. Specifically, it states:

{¶13} "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."

{¶14} This Court has previously addressed challenges to jointly recommended sentences. In *State v. Rockwell*, 5th Dist. No. 2004CA00193, 2005-Ohio-5213, the defendant pled guilty to his indictment and agreed that the prosecution would recommend an aggregate sentence of twenty years. The trial court in *Rockwell* adopted the recommendation and sentenced him to twenty years in prison. The defendant challenged his sentence and contended that the trial court erred because it did not

make findings required by R.C. 2929.14(B) and that the trial court violated *Blakely v. Washington* (2004), 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403, by basing the sentence on facts that were not stipulated to by the defendant or found by the jury.

{¶15} This Court, in rejecting Rockwell's arguments, stated as follows:

{¶16} "Upon review, we find that the trial court imposed the agreed upon sentence and that the sentence did not exceed the maximum sentence. Furthermore, in such cases, there is no need to make the findings required under R.C. 2929.14(B) and 2929.14(E)(4). See *State v. Porterfield*, 106 Ohio St.3d 5, 829 N.E.2d 690, 2005-Ohio-3095 in which the Ohio Supreme Court held that "[o]nce a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify the sentence." Id at. paragraph 25. See also *State v. Horsley*, 5th Dist. No. 04-CA-95, 2005-Ohio-2987, *State v. Turner*, 5th Dist. Nos. 04-CA-01, 04-CA-27, 2005-Ohio-2986. See also *State v. Bryant*, 6th Dist. No. L-03-1359, 2005-Ohio-3352, in which the court, in response to the appellant's argument that his sentencing violated *Blakely*, supra., held that "the eight year sentence imposed by the trial court was an agreed upon sentence and any matters concerning that sentence are not subject to review under R.C. 2953.08(D)(11). Id at ¶ 24.

{¶17} "In short, we find that appellant was sentenced in accordance with a jointly recommended sentence that was authorized by law. Appellant's sentence, therefore, is not subject to review." *Rockwell*, supra at ¶¶ 20-21.

{¶18} Where the record indicates that a defendant freely and knowingly entered into a plea agreement and a jointly recommended sentence, and the trial court imposes that sentence which is authorized by law, the sentence is not subject to appellate

review. See *Rockwell*, supra; see also *State v. Horsley*, 5th Dist. No. 07-CA-95, 2005-Ohio-2987.

{¶19} In the present case, it is clear that Appellant agreed to the jointly recommended sentence in exchange for his plea. The following colloquy occurred:

{¶20} "Mr. Smith: Thank you, Your Honor. This is the case of State of Ohio versus G. Michael Lee, Case No. CR2008-0207. This matter comes on before the Court on a change of plea. It's my understanding that the defendant is here in court with his attorney, Mr. Rankin, and after speaking with him, he's agreed to withdraw his former pleas of not guilty and enter pleas of guilty to this indictment which charges him with one count of robbery, a felony of the second degree, and one count of theft, a felony of the fourth degree.

{¶21} "It's my understanding that in exchange for these change of pleas, the defendant is willing to plead guilty, and the State would recommend as follows: That he receive a five-year prison sentence on Count 1, and an 18-month prison sentence on Count 2, these sentences to run concurrent with one another.

{¶22} "The defendant is currently under post-release control in connection with Case No. CR2007-0224. The State's agreed to recommend that he receive an additional one-year prison sentence on that case, and he has agreed to accept the State's recommendation in that case.

{¶23} "As part of this agreement, he's agreed to cooperate in the prosecution of Troy Murphy regarding two robberies that occurred in Muskingum County at Century National Bank branches on July 9th and July 14th of this year. And he's also agreed to accept the Court's order to pay restitution to his victims in this case.

{¶24} "It's my understanding the defendant has reviewed and signed the plea form setting forth this agreement. I am now prepared to present it to the court.

{¶25} "The Court: Thank you. Mr. Rankin.

{¶26} "Mr. Rankin: Thank you, Your Honor. If it please the Court, Mr. Smith's statements are entirely correct. That is my understanding of the plea agreement, and I have explained that to my client as well as reviewed the plea of guilty form which explains to him his constitutional rights in this matter, and I'm satisfied that he understands his rights and charges against him and is willing to change his plea here today.

{¶27} "The Court: Thank you. Mr. Lee, did you hear the statements made by Mr. Smith and by your attorney?

{¶28} "The Defendant: Yes.

{¶29} "The Court: Is that your understanding of what you're here to do today?

{¶30} "Yes.

{¶31} * * *

{¶32} "The Court: The State of Ohio is recommending that you receive a five-year sentence in this case, a one-year sentence to be served consecutive to that on your PRC, for a total of six year; is that your understanding?

{¶33} "The Defendant: Yes.

{¶34} * * *

{¶35} "The Court: You understand that the prosecutor's recommendation is not binding on the Court, I do not have to follow it?

{¶36} "The Defendant: Yes."

{¶37} It is clear from the record that Appellant understood that his sentence was jointly recommended and that he was in agreement with the five year sentence on his new charges and with the one year sentence on his post-release control violation. Accordingly, Appellant's sentence is not subject to appellate review, as it was jointly recommended. Appellant's first assignment of error is overruled.

II.

{¶38} In his second assignment of error, Appellant claims that his due process rights were violated because the charge, but not the sentence, was reduced at sentencing. We disagree.

{¶39} Appellant appears to be complaining about a benefit that he received, to wit: that the trial court, without a legal reason, reduced his already entered guilty plea from that of a felony two to that of a felony three robbery. The trial court, however, continued to abide by the joint recommendation, which was a sentence of five years in prison on the new charges. Appellant asserts that he would not have pled guilty if he had known he would have been sentenced to the "maximum" sentence. We would note that five years is not the maximum sentence that Appellant could have received, as he was also convicted of a fourth degree felony theft, which he was ordered to serve concurrently with the five year robbery sentence. A maximum sentence on these charges would have been six and a half years.

{¶40} Moreover, there is no objection by trial counsel in the record to this downward amendment of the charge. As such, we find that Appellant waived any argument that he could have made regarding this beneficial reduction in charge.

{¶41} We find Appellant's argument that he would not have pled guilty had he known that he would have been given a maximum sentence on the robbery to be disingenuous. Appellant knowingly, voluntarily, and intelligently pled guilty to robbery, a felony of the second degree, and to theft, a felony of the fourth degree. As part of that plea bargain, the disposition of his separate post-release control violation was also included in the plea and he was guaranteed a recommendation of a five year sentence for all of the charges he was currently under indictment on and an additional one year on the post-release control violation.

{¶42} Had Appellant not accepted the joint recommendation and the terms of the plea, it is very likely that he would have proceeded to trial on second and fourth degree felony charges, and had he been convicted, he would have been facing a maximum of nine years in prison plus whatever the court wished to impose on his post-release control violation. We do not see how Appellant's due process rights were violated where he agreed to a particular plea and sentence.

{¶43} Moreover, Appellant has cited no case law demonstrating that he has been subjected to a due process violation. As such, we find no support for his argument and therefore his second assignment of error is overruled.

{¶44} For the foregoing reasons, we overrule Appellant's assignments of error and we affirm the decision of the Muskingum County Court of Common Pleas.

By: Delaney, J.

Gwin, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

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IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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	:	
-vs-	:	JUDGMENT ENTRY
	:	
G. MICHAEL LEE	:	
	:	
Defendant-Appellant	:	Case No. 08-CA-70
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS