

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-08-014

Appellee

Trial Court No. 08 CR 203

v.

Daniel A. Elkins

DECISION AND JUDGMENT

Appellant

Decided: June 5, 2009

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Phillip T. Wylykanowitz, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the May 14, 2008 judgment of the Sandusky County Court of Common Pleas, which sentenced appellant, Daniel A. Elkins, after he was convicted following a guilty plea to three counts of complicity to aggravated robbery, violations of R.C. 2911.01(A)(1) and 2923.03, felonies of the first degree. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

{¶ 2} "1. The trial court erred by imposing excessive and consecutive sentences contrary to law.

{¶ 3} "2. The trial court erred by entering into improper judicial fact finding as prohibited by *State v. Foster* and *State v. Mathis*.

{¶ 4} "3. Appellant's right to due process, right to a grand jury indictment and right to notice of all essential elements for which he was charged was violated by the state's failure to include a required mental state (*mens rea*) in the counts for which he was convicted.

{¶ 5} "4. The trial court abused its discretion by sentencing appellant to a vindictive and excessive sentence in comparison to that of his similarly situated co-defendants when appellant took his case to the eve of trial before plea.

{¶ 6} "5. Appellant's plea was not knowingly, voluntarily and intelligently [*sic*] given when he was not fully informed of the consequences of his guilty plea.

{¶ 7} "6. Defendant was subject to ineffective assistance of counsel as he was assured of an outcome beyond his counsel's control to convince him to accept a plea bargain."

{¶ 8} On February 19, 2008, appellant was indicted in a multi-count indictment alleging 17 counts: Counts 1 through 6 alleged complicity, R.C. 2923.03, to aggravated robbery, R.C. 2911.01(A)(1) for using a gun during the theft offense against six different victims. Counts 7, 10 and 11 alleged complicity, R.C. 2923.03, to aggravated robbery, R.C. 2911.01(A)(3); Counts 8 and 12 alleged complicity, R.C. 2923.03, to robbery, R.C.

2911.02(A)(2); Count 9 alleged complicity, R.C. 2923.03, to robbery, R.C. 2911.02(A)(3); Counts 13, 14 and 15 alleged complicity, R.C. 2923.03, to felonious assault, R.C. 2903.11(A)(2); Count 16 alleged complicity, R.C. 2923.03, to theft, R.C. 2913.02(A)(1); and Count 17 alleged complicity, R.C. 2923.03, to aggravated burglary, R.C. 2911.11(A)(2). Each count, except Count 16 contained a firearm specification, R.C. 2941.145. The indictment was amended on April 18, 2008, to add a mental state of recklessness only to the robbery and aggravated robbery charges under R.C. 2911.01(A)(3).

{¶ 9} After the trial and conviction of one of appellant's accomplices, appellant's case went to trial. Appellant decided to plead guilty shortly after voir dire had been completed in his case. He pled guilty to Counts 1, 2 and 3 of the indictment, and the state nolledd the remaining counts. The court immediately proceeded to a sentencing hearing. Appellant was sentenced to eight years for each count, each to be served consecutively to the other. Appellant brought an appeal from this judgment.

{¶ 10} The following facts were presented at the plea hearing. Appellant admitted entering the home of the victims, but stated that he entered last, after all of his accomplices had already entered the premises and robbed the victims. He admitted that one of the others carried a gun, but denied that he had a gun. He stated that he had been misled and was just in the wrong place at the wrong time. He admitted only to looking through the home to see if there was anything left that he could steal.

{¶ 11} The prosecution presented appellant's criminal history from Mississippi, and it was mostly comprised of convictions for assaults and all were misdemeanors. The prosecution also stated that the court knew the facts of the robberies in this case because of the recent trial of an accomplice. The prosecution reminded the court that the crime resulted in serious injuries to all six victims. Consecutive sentences were sought because of the harm to the victims.

{¶ 12} The defense sought to have the court overlook appellant's mixed messages regarding the entry of a plea in this case because his confusion was brought about by stress and the influence of family members and because appellant is now prepared to accept responsibility for his conduct. Furthermore, appellant's counsel argued that the court could not impose consecutive sentences because appellant had pled to aggravated robbery of a single home and there are no specific circumstances to justify consecutive sentences.

{¶ 13} The court noted, based on evidence submitted during the previous trial of an accomplice, that three of the victims suffered severe physical injuries and others suffered psychological trauma. The wife of one of the most seriously injured victims spoke at the plea hearing and stated that her husband had been life-flighted to the hospital. He still suffers from pain and headaches, which are controlled only by medication. She also noted the emotional suffering she and their children still suffer. Another victim stated that he was unable to identify the perpetrators because they wore ski masks. He believed that the perpetrators came with the intent to kill them, because

the victims were of Mexican descent, and then robbed them. The victims were all beaten to the extent that they had to go to the hospital.

{¶ 14} In his first assignment of error, appellant alleges that the consecutive sentences imposed by the court were excessive and unlawful. He argues that the similarly situated accomplices were charged with the same crimes and yet received a variety of sentences, all of which were shorter than the sentence imposed upon appellant. He further argues that there was no evidence that supported a finding that appellant had greater culpability than the other perpetrators. Appellant argues that the trial court improperly cited evidence admitted from the trial of an accomplice. In his fourth assignment of error, appellant argues that the trial court abused its discretion in sentencing because it is obvious that appellant's lengthy sentence was vindictive and excessive and solely based upon the fact that he did not enter a plea until after his trial had begun. Both assignments of error will be considered together.

{¶ 15} When reviewing a felony sentence, the appellate court must first examine the trial court's sentence to determine if it is clearly and convincingly contrary to law. If the appellate court finds that the trial court complied with all applicable rules and statutes, it then determines whether the trial court abused its discretion by imposing the sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 18-19.

{¶ 16} Appellant argues that his sentence is disproportionate to the sentences imposed on his accomplices. The issue of disproportionate sentencing must first be raised in the trial court and supported by sufficient evidence to preserve the error for

appeal. *State v. Eperson*, 8th Dist. No. 91099, 2009-Ohio-234, ¶ 7. Appellant in this case failed to preserve this error for appeal.

{¶ 17} Nonetheless, we address the issue because of the allegation under his fourth assignment of error that the sentence was based upon non-statutory and unconstitutional factors. One of the three goals of sentencing is that the sentence must be "consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B). This statutory requirement has not been interpreted to mean that co-defendants must receive equal sentences. *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100, ¶ 9, and *State v. Rupert*, 11th Dist. No. 2003-L-154, 2005-Ohio-1098, ¶ 11, reversed on other grounds in (2006), 109 Ohio St.3d 313, citing *State v. Lloyd*, 11th Dist. No. 2002-L-069, 2003-Ohio-6417, ¶ 21. Consistent sentencing occurs when a trial court properly considers the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12 in every case. *State v. O'Keefe*, 10th Dist. Nos. 08AP-724, 08AP-725, 08AP-726, 2009-Ohio-1563, ¶ 41; *State v. Ward*, 4th Dist. No. 07CA9, 2008-Ohio-2222, ¶ 17; *State v. Wilson*, 6th Dist. No. L-06-1303, 2008-Ohio-80, ¶ 6. Therefore, appellant cannot support an assignment of error of disproportionate sentencing solely based upon references to sentences imposed in other cases where defendants were sentenced for the same offense. We have examined the sentence and found that the trial court properly followed the statutory requirements of sentencing.

{¶ 18} In addition, a sentence may not be influenced by a defendant's exercise of his constitutional right to a jury trial or the entering of a plea. *U.S. v. Goodwin* (1982),

457 U.S. 368, 372, and *State v. O'Dell* (1989), 45 Ohio St.3d 140, paragraph two of the syllabus. The burden of proving that the sentence was vindictive falls on the defendant. *U.S. v. Poole* (C.A.6, 2005), 407 F.3d 767, 774, certiorari denied (2005), 546 U.S. 913; *U.S. v. Raymer* (C.A.10, 1991), 941 F.2d 1031, 1039-1040; *State v. Smith*, 2d Dist. No. 08-CA-37, 2009-Ohio-1041, ¶ 17; and *State v. Ganaway*, 8th Dist. No. 89722, 2008-Ohio-1629, ¶ 23-24.

{¶ 19} Within his first and fourth assignments of error, appellant focuses solely upon the events of the crime and his belief that he was, at least, no more culpable than his accomplices. For this reason, he believes that he should have received a shorter sentence of imprisonment just as they did. Appellant asserts that he and his accomplices had similar backgrounds, but there is no evidence in the record to support this claim. There is evidence, however, that by the time appellant was sentenced, the trial court had gained a greater appreciation of the details of the charged crimes and insight into appellant's character. The court concluded that because of the seriousness of the offenses, a single prison term was not sufficient. We find that there is nothing in the record to support a finding that the sentence was vindictive.

{¶ 20} Therefore, we find appellant's first and fourth assignments of error not well-taken.

{¶ 21} In his second assignment of error, appellant argues that the trial court erred when it unlawfully considered facts outside the record of this case. Appellant asserts that the court employed the judicial fact-finding provisions of former R.C. 2929.14(B), (C)

and (E)(4) (which were severed by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856) when it made specific factual findings prior to imposing maximum sentences and ordering the sentences to be served consecutively.

{¶ 22} Appellant correctly notes that after the Ohio Supreme Court's decision in *State v. Foster*, supra, judicial fact-finding is no longer required before a court imposes consecutive prison terms. Instead, judges return to the use of their discretion in sentencing so long as the sentence falls within the statutory sentencing ranges provided by R.C. 2929.14. *State v. Marshall*, 5th Dist. No. 2008 CA 00222, 2009-Ohio-1757, ¶ 40-41.

{¶ 23} Pursuant to R.C. 2929.14(A)(1), the trial court was limited to imposing a sentence within the range for a felony of the first degree of three, four, five, six, seven, eight, nine, or ten years. The trial court also had full discretion to impose consecutive sentences without making any factual findings. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 1 and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 99 and ¶ 100.

{¶ 24} Appellant's argument is based upon three former statutes: (1) R.C. 2929.14(B)(2), which required the minimum sentence to be imposed unless the court found that the shortest term would demean the seriousness of the conduct or would not protect the public from future crime; (2) R.C. 2929.14(C), which required that the maximum sentence be imposed upon the offender that committed the worst form of the offense; and (3) R.C. 2929.14(E)(4), which permitted the court to impose consecutive sentences for multiple convictions if the court found that "the consecutive service is

necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public," and if the court also made certain specific factual findings. Those factual findings include: "(a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense[;] (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct[;] or (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

{¶ 25} At the sentencing hearing, appellant told the court what happened on the night of the crime. The prosecution directed the court's attention to the facts of this case which the court heard during the trial of appellant's accomplices the prior week and the extent of the injuries the victims' suffered. The defense argued that there was not enough evidence in the record to warrant consecutive sentences since only one event of burglary occurred with multiple victims.

{¶ 26} The trial judge noted the fact that the accomplice who had a weapon was never identified. Nonetheless, serious harm was caused that night, both physical and emotional. The court then pronounced sentence as follows:

{¶ 27} "As to count one, a first degree felony, in accordance with the principals [sic] and purposes of sentencing which are to protect the public and punish the Defendant, I'm going to sentence you to eight years in prison as to count one. Because there were multiple offenses committed and your attorney made a wonderful court of appeals argument as to burglary and we'll move on to appointing counsel for you if you so desire as to making an appeal on this matter. But because there were two separate crimes and that there was harm caused, I'm of the opinion that the seriousness of the offenses that a single prison term for any of the offenses committed is not enough, therefore, I'm sentencing you to an additional eight years on count two, said eight years to run consecutive to the first eight years. As to count three, once again I'm making the same exact findings. I'm sentencing you to eight years to run consecutive to counts one and two, that's a total of 24 years for you to contemplate as to the harm that you caused to society."

{¶ 28} In its sentencing judgment, the court stated that: "The Court has considered the record and oral statements, as well as the principles and purposes of sentencing under R.C. 2929.11. Due to the seriousness of the offenses, the Court makes a finding that consecutive sentences are necessary, pursuant to R.C. 2929.14."

{¶ 29} Appellant takes issue with several phrases employed by the trial court: the references to "multiple offenses committed"; appellant's right to appeal the issue of whether this case involved one offense or three; the need for appellant to "contemplate as to the harm that you caused to society"; and that the court found "pursuant to R.C. 2929.14" that consecutive sentences are necessary "due to the seriousness of the offenses."

{¶ 30} Upon an examination of the transcript and sentencing judgment, we find that the trial court's finding that consecutive sentences were necessary, because of the seriousness of the crime, and the court's rejection of appellant's argument that the three counts involve only one course of conduct were actions made in connection with the court's duty to consider carefully the principles and purposes of felony sentencing before imposing a sentence. The "finding" that the court made that consecutive sentences are necessary is a discretionary determination, not an impermissible "factual" finding under the severed portions of the sentencing statutes. Appellant's second assignment of error is not well-taken.

{¶ 31} In his third assignment of error, appellant argues that he was improperly indicted for robbery under R.C. 2911.01(A)(1) because the indictment failed to include the required mental state of recklessness. Appellant seeks to have this court extend the holdings of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, to aggravated robbery. This court has already addressed and rejected this argument. *State v. Mason*, 6th Dist. No. L-06-1404, 2008-

Ohio-5034, ¶ 62-65. Furthermore, we note that appellant was convicted of aggravated robbery and the charges of robbery were nolle by the prosecution. Therefore, we find appellant's third assignment of error not well-taken.

{¶ 32} In his fifth assignment of error, appellant argues that the trial court erred by not permitting appellant to withdraw his guilty plea after sentencing. Appellant asserts that his plea was not knowingly, voluntarily, and intelligently given because he was not fully informed of the charges and potential penalties for each crime alleged during the Crim.R. 11 hearing.

{¶ 33} First, there is no indication in the record that appellant ever sought to withdraw his guilty plea either before or after sentencing. To the extent that appellant contends that the trial court did not comply with Crim.R. 11, we address that issue. Crim.R. 11(C)(2)(a) requires that a trial court inform the defendant of the nature of the charges and the maximum penalty, including a mandatory prison term. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, ¶ 22. The trial court must strictly comply with Crim.R. 11(C)(2) regarding federal constitutional rights, but need only substantially comply with the rule regarding non-constitutional rights. *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, *State v. Marcum*, 10th Dist. No. 07AP-905, 2008-Ohio-2292, ¶ 6; and *State v. Lamb*, 6th Dist. No. L-07-1181, 2008-Ohio-1569, ¶ 10. A defendant's right to be informed of the nature of the charges and the maximum penalty that could be imposed after the acceptance of a guilty plea is a non-constitutional right. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 14, reconsideration denied (2008), 120 Ohio St.3d

1423, and *State v. Abuhashish*, 6th Dist. No. WD-07-048, 2009-Ohio-3849, ¶ 33. To determine whether appellant understood the nature of the charges, the appellate court looks at the totality of the circumstances. *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, ¶ 56-57, certiorari denied (2005), 545 U.S. 1130; *State v. Nero* (1990), 56 Ohio St.3d 106, 108, and *State v. Rainey* (1982), 3 Ohio App.3d 441, 442. Furthermore, appellant must also show that a failure to substantially comply with Crim.R. 11(C)(2)(a) resulted in prejudice and that he would not have entered the plea had he known this information. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶ 12.

{¶ 34} In this case, the written plea agreement reflected that appellant desired to enter a guilty plea to three counts, each charging aggravated robbery, and that the court could sentence him to a "prison term of 3, 4, 5, 6, 7, 8, 9, or 10 years." At the sentencing hearing, the court explained to appellant that the court could sentence appellant "for a prison term of 3, 4, 5, 6, 7, 8, 9, or 10 years on each of the three counts. * * *And I do have the power to make those sentences consecutive." Appellant indicated that he understood. We find that there is nothing in the record that suggests that appellant did not understand the potential penalties he faced upon pleading guilty.

{¶ 35} The remaining issue is whether appellant understood the nature of the charges against him. The trial court did explain to appellant that he was pleading guilty to three counts of aggravated robbery. The court did not set forth the elements that had to be proven. Appellant admitted at the plea hearing that he and others entered the home of another and stole something from them. He did not admit to carrying a firearm, but

admitted that one of his accomplices did carry a weapon. The indictment as well set out the alleged factual details of the offense.

{¶ 36} There is no doubt in this case that appellant understood the nature of the offense to which he was entering a plea. We reject appellant's assertion that the court had a duty to explain the charges against him and the elements the prosecution would have needed to prove. This is not a case where the indictment was amended and the defendant could be confused as to which crime a plea was being entered. See *State v. Jones*, 8th Dist. No. 91025, 2009-Ohio-483, ¶ 12. All of the charges and facts supporting the charges were set forth in the indictment and the judge made reference to the indictment. Appellant was sufficiently informed of the nature of the charges against him.

{¶ 37} Appellant's fifth assignment of error is not well-taken.

{¶ 38} In his sixth assignment of error, appellant argues that his trial counsel rendered ineffective assistance because he informed appellant that if he entered a plea, the sentences would not be consecutive.

{¶ 39} When the claims of ineffective assistance of counsel are based upon facts outside the appellate record, the issue must be raised in a petition for postconviction relief, not on appeal. *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228. Because appellant did not seek to withdraw his plea there is no evidence in the record as to conversations between appellant and his counsel. Therefore, we cannot address the ineffectiveness issue because it is based upon evidence de hors the record. Appellant's sixth assignment of error is not well-taken.

{¶ 40} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.