

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

State of Ohio

Court of Appeals No. S-10-027

Appellee

Trial Court No. 09CR000864

v.

Jimmy L. Houston

DECISION AND JUDGMENT

Appellant

Decided: September 16, 2011

* * * * *

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

Keith O'Korn, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from the judgment of the Sandusky County Court of Common Pleas imposing a 23-year sentence on appellant Jimmy Houston. For the reasons that follow, we affirm.

{¶ 2} On July 30, 2009, a grand jury indicted appellant on two counts of attempted murder, two counts of felonious assault, two counts of kidnapping, two counts of aggravated robbery, one count of aggravated burglary with a firearm specification, 33 counts of grand theft, and one count of tampering with evidence. These charges stemmed from a home invasion where the victims were beaten and restrained, and numerous firearms were taken. Appellant planned the invasion, and recruited two other defendants, Paul Biddwell and Ronald Ruby, to help carry out the plan. Biddwell and Ruby were implicated as the individuals who entered the home and beat and restrained the victims.

{¶ 3} On April 26, 2010, appellant pleaded guilty to two counts of attempted murder in violation of R.C. 2903.02(A) and 2923.02, one count of kidnapping in violation of R.C. 2905.01(A)(2), and one count of aggravated burglary with a firearm specification in violation of R.C. 2911.11(A)(1), all felonies of the first degree. Appellant also pleaded guilty to one count of grand theft in violation of R.C. 2913.02(A)(1) and (B)(4), a felony of the third degree. The remaining charges were dismissed.

{¶ 4} A sentencing hearing was held on May 11, 2010. After considering the presentence investigation report and the statements from the victims and from appellant, the trial court sentenced appellant to a term of 23 years. The sentence consisted of ten years on each of the two attempted murder convictions, to be served consecutively, a term of ten years each on the kidnapping and aggravated burglary convictions, to be served concurrently to each other and to the attempted murder convictions, a mandatory

one-year firearm specification term to be served consecutively to the attempted murder convictions, and finally, a two-year term on the grand theft conviction, also to be served consecutively to the attempted murder convictions and to the firearm specification. The court memorialized this sentence in a judgment entry journalized on May 12, 2010.

{¶ 5} Appellant has timely appealed the May 12, 2010 judgment entry, and now raises the following three assignments of error:

1. "APPELLANT'S SENTENCE WAS CONTRARY TO LAW AND CONSTITUTED AN ABUSE OF DISCRETION."
2. "IN CONTRAVENTION OF RECENT U.S. SUPREME COURT PRECEDENT, *OREGON V. ICE*, THE 6TH AMENDMENT TO THE U.S. CONSTITUTION, AND THE RE-ENACTED OHIO SENTENCING CODE, THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUIRED STATUTORY FINDINGS PURSUANT TO R.C. §§ 2929.14(E)(4), 2929.41(A)."
3. "TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION."

{¶ 6} As to appellant's first assignment of error, we start with the general rule that "appellate courts must apply a two-step approach when reviewing felony sentences.

First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26. An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 7} Appellant presents four arguments in support of his first assignment of error. First, appellant argues that the sentence is contrary to law because it violates the conservation of resources principle under R.C. 2929.13(A). That statute states, in relevant part, "* * * a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender that are provided in sections 2929.14 to 2929.18 of the Revised Code. The sentence shall not impose an unnecessary burden on state or local government resources." R.C. 2929.13(A). The term "unnecessary burden" is not defined in the statute, but this court has stated that the language used "suggests that the costs, both economic and societal, should not outweigh the benefit that the people of the state derive from an offender's incarceration." *State v. Ward*, 6th Dist. No. OT-10-005, 2010-Ohio-5164, ¶ 9 (quoting *State v. Vlahopoulos*, 154 Ohio App.3d 450, 2003-Ohio-5070, ¶ 5, abrogated on other grounds by *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671).

{¶ 8} Here, appellant, who was born in 1976, contends that any danger to society he represents would be abated long before the time of his release, and thus any future benefit from his incarceration would be outweighed by the cost to the state. However, the state clearly has a significant interest in incarcerating anyone who plans a home invasion that results in the severe beating of two elderly citizens. Thus, we cannot find that appellant's sentence was clearly and convincingly contrary to R.C. 2929.13(A), and therefore appellant's first argument is without merit.

{¶ 9} Second, appellant argues that the sentence is neither proportional nor consistent under R.C. 2929.11, and that the sentence constituted an abuse of discretion. R.C. 2929.11(B) provides that "[a] sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing * * *, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." The two overriding purposes of felony sentencing are "to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(A). Appellant argues that the trial court failed to comply with R.C. 2929.11 because it made no reference to an analysis under that section in its sentencing entry, but merely imposed approximately the same sentence on appellant as it did on Biddwell and Ruby. The focus of appellant's argument is that his sentence should be less severe than Biddwell's and Ruby's because he did not desire to cause any physical harm to the victims.

{¶ 10} We initially note that "[t]he 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. Elkins*, 6th Dist. No. S-08-014, 2009-Ohio-2602, ¶ 16. Here, appellant has failed to raise this issue below. Thus, we will not address appellant's argument to the extent that he bases it on the contention that his sentence was disproportionate to that of his co-defendants. However, we will address appellant's argument to the extent that it is based on his contention that the trial court failed to comply with R.C. 2929.11.

{¶ 11} Appellant argues that the trial court failed to comply with R.C. 2929.11 by not referencing that section in its sentencing entry. However, "where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes." *State v. Kalish*, *supra*, at ¶ 18, fn. 4. Thus, appellant's argument is without merit.

{¶ 12} Moreover, the transcript of the sentencing hearing demonstrates that the trial court did properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12. The trial court stated:

{¶ 13} "The Court has heard the statements from [the victims], has reviewed the Presentence Investigation, which includes the defendant's criminal history, social history, education. And the Court needs to, you know, take all these things into consideration in crafting a penalty. The Court's first and foremost job is to protect the public, or attempt to protect the public from future crime and impose the appropriate punishment upon conviction.

{¶ 14} "We can not demean the seriousness of the crime, nor its impact upon the victims. Need to also take into consideration the resources of the State, maintain some consistency in the sentences. Need to take into consideration the seriousness and recidivism factors under 2929.12(B) through (E).

{¶ 15} "* * *

{¶ 16} "Need to take into consideration Mr. Houston's history of criminal convictions. * * *

{¶ 17} "* * *

{¶ 18} "So are there any factors which would make it less likely that you might commit future crimes? Well, I haven't found them. * * * And I note no factors which would make this offense less serious for sentencing purposes."

{¶ 19} Based on the foregoing, we cannot conclude that the trial court clearly and convincingly failed to consider R.C. 2929.11 and 2929.12.

{¶ 20} Further, after reviewing the record, we hold that the trial court did not abuse its discretion in sentencing appellant to 23 years. In explaining why appellant received a different sentence as compared to his co-defendants, the trial court explained that the additional year was due to appellant's leadership role in the crime. The trial court stated: "You were the master of the ship, so you take a little more responsibility." Considering this, we cannot conclude that the trial court's sentencing decision was unreasonable, arbitrary, or unconscionable. Therefore, appellant's second argument is without merit.

{¶ 21} Third, appellant argues that the May 12, 2010 judgment entry was ambiguous in that it did not specify that the two-year term for the grand theft conviction ran consecutive to the terms imposed for the attempted murder convictions. The original sentencing entry stated "Defendant is further sentenced to a **TWO (2)** year term in prison on count Ten, for an aggregate sentence of **TWENTY-THREE (23)** years prison [sic] * * *." Appellant contends that this is ambiguous and cites to the general proposition that "[i]f sentencing is ambiguous as to whether a sentence should be served concurrently or consecutively, the ambiguity must be resolved in favor of the defendant and the sentences must be served concurrently." *State v. Carr*, 167 Ohio App.3d 223, 2006-Ohio-3073, ¶ 4. However, despite not including the word "consecutive," we do not think that the sentence is ambiguous because to reach the aggregate term of 23 years, the two-year term for grand theft necessarily must be served consecutively.

{¶ 22} In addition, appellant argues that the trial court's nunc pro tunc entry clarifying that the grand theft term was to be served consecutively failed to comply with Crim.R. 32(C) and *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. This court has already addressed this matter in appellant's "Motion to Determine Appellate Jurisdiction." In our December 14, 2010 decision on that motion, we held that the trial court's nunc pro tunc entry "did not alter the sentence imposed in any manner." Thus, we found that "appellant has a judgment which complies with Crim.R. 32(C)." Consequently, appellant's third argument is without merit.

{¶ 23} Fourth, appellant argues that the term for the firearm specification must be served consecutively to the underlying offense. In this case, appellant contends that "[s]ince the prison term for the [aggravated] burglary expires ten years before the term for the second attempted murder count expires, the firearm specification would naturally also expire if the trial court had run the firearm specification truly 'consecutive' to the [aggravated] burglary count, the base offense." Appellant's argument, while creative, is not consistent with R.C. 2929.14(E)(1)(a), which provides for a mandatory firearm specification term to be served "consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender." Here, the attempted murder terms are prison terms "previously or subsequently imposed upon the offender." Therefore, appellant's fourth argument is without merit.

{¶ 24} Accordingly, because the trial court's sentence is neither contrary to law nor an abuse of discretion, appellant's first assignment of error is not well-taken.

{¶ 25} For his second assignment of error, appellant argues that the trial court erred by imposing consecutive sentences without making the required statutory findings pursuant to R.C. 2929.14(E)(4) and 2929.41(A). The Ohio Supreme Court has recently addressed this issue in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, and held that "[t]he United States Supreme Court's decision in *Oregon v. Ice* does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*." (Citations omitted.) *Hodge*, at paragraph two of the syllabus. "Trial court judges are not obligated to engage in judicial

fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." *Id.* at paragraph three of the syllabus. Therefore, the trial court did not err when it sentenced appellant without applying the excised statutes. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 26} Finally, in support of his third assignment of error, appellant argues that his trial counsel was ineffective for failing to file a motion to waive court costs, and for failing to "enter objections or make arguments at sentencing so as to preserve the all [sic] contentions set forth in the first and second assignments of error above." To demonstrate ineffective assistance of counsel, appellant must satisfy the two-prong test developed in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. That is, appellant must show counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that but for counsel's error, the result of the proceedings would have been different. *Strickland*, *supra*, at 687-688. Here, appellant has failed to demonstrate that the result of the proceedings would have been different had the purported errors not occurred.

{¶ 27} As to appellant's first grounds for claiming ineffective assistance, it is true that "an indigent defendant must move a trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. Otherwise, the issue is waived and costs are res judicata." *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-0905, ¶ 23. Appellant argues that his trial counsel's failure to move to waive costs

prejudiced him because now the issue cannot be raised on appeal and appellant must pay the costs. However, under R.C. 2949.092, a trial court has discretion to waive court costs. See, also, *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, ¶ 8, fn. 1. Here, appellant has made no demonstration that a "reasonable probability" exists that the lower court would have waived the costs upon appellant's motion. See *State v. King*, 6th Dist. No. WD-09-069, 2010-Ohio-3074, ¶ 11. Thus, we cannot conclude that trial counsel's failure to object to costs constituted ineffective assistance of counsel.

{¶ 28} As to appellant's second grounds for claiming ineffective assistance, we note that the only argument described above which appellant was prevented from raising on appeal was that his sentence was disproportionate to the sentences received by his co-defendants. As with his preceding claim of ineffective assistance, appellant has not demonstrated a reasonable probability exists that, but for the error, the outcome would have been different. As appellant identifies in his brief, this court has held that "[c]onsistent 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. Elkins*, 6th Dist. No. S-08-014, 2009-Ohio-2602, ¶ 17. "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." *Id.* Because we have already concluded that the trial court properly complied with the requirements of R.C. 2929.11 and 2929.12, appellant's appeal based on his sentence being disproportionate to that of his co-defendants must fail.

{¶ 29} Accordingly, appellant has failed to satisfy the second prong of *Strickland* with respect to either of his claims for ineffective assistance of counsel, and his third assignment of error is not well-taken.

{¶ 30} For the foregoing reasons, 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

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, 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:
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