

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

State of Ohio

Court of Appeals No. OT-11-043

Appellee

Trial Court No. 06 CR 039

v.

Bryant L. Boyd

DECISION AND JUDGMENT

Appellant

Decided: March 29, 2013

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Nancy L. Jennings, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas issued upon remand by this court for resentencing on three counts on which appellant had been convicted. For the following reasons, this matter is remanded to the trial court for resentencing.

{¶ 2} In July 2006, appellant was tried on a ten-count indictment. Appellant was found guilty of all ten counts, but only the following are relevant to this appeal: two counts of trafficking in drugs within the vicinity of a school, both fourth-degree felonies (Counts 6 and 8), one count of trafficking in drugs within the vicinity of a school, in an amount over one gram but less than five grams of crack cocaine, a third-degree felony (Count 7), and one count of engaging in a pattern of corrupt activity, a first-degree felony (Count 10).

{¶ 3} Appellant was sentenced to a prison term of 18 months each as to Counts 6 and 8, five years as to Count 7, and ten years as to Count 10. Following sentencing on August 24, 2006, appellant filed a timely notice of appeal as to his trial and sentencing. On appeal, appellant asserted that the evidence was insufficient to sustain a conviction, that his conviction was not supported by the manifest weight of the evidence, and that the trial court erred by imposing the maximum possible and consecutive sentences for Counts 7 and 10.

{¶ 4} In a decision released March 14, 2008, this court found that the state failed to prove with sufficient evidence the school enhancement specifications attached to Counts 6, 7 and 8:

[T]he school enhancement specifications attached to Counts 6, 7, and 8 are reversed and must be vacated. Because only the school enhancement specifications are vacated, the conviction on Count 6 is now a felony of the

fifth degree, the conviction on Count 7 is now a felony of the fourth degree, and the conviction on Count 8 is now a felony of the fifth degree. R.C. 2925.03(C). Because both of the 18-month terms for Counts 6 and 8 and the five-year term for Count 7 now exceed the statutory maximums for the offenses, R.C. 2929.14(A)(4), (5), those sentences must be vacated as contrary to law. R.C. 2953.08(G)(2)(b). *State v. Boyd*, 6th Dist. No. OT-06-034, 2008-Ohio-1229, ¶ 50.

{¶ 5} On November 4, 2011, the matter came before the trial court for resentencing pursuant to this court's order. In its judgment entry, the trial court found that following this court's decision, no action had been taken by the trial court until March 21, 2011. Citing *State v. Brown*, 152 Ohio App.3d 8, 2003-Ohio-1218, 786 N.E.2d 492 (7th Dist.), the trial court found that since no action had been taken for 37 months, the court had lost jurisdiction in this matter. The court then dismissed Counts 6, 7 and 8 and denied all pending motions. The state of Ohio did not object to the dismissal or appeal the judgment. Appellant appeals from that judgment, setting forth the following two assignments of error:

I. The trial court erred when re-sentencing appellant when it failed to re-sentence appellant on the RICO count making appellant's sentence contrary to law.

II. The trial court abused its discretion when imposing sentence upon appellant.

{¶ 6} Appellant's assignments of error will be considered together as they raise a common sentencing issue. Appellant essentially argues that the trial court should have resentenced him on Count 10, the RICO conviction, because once Count 7 was dismissed there no longer was a first, second or third-degree felony remaining as part of the pattern of corrupt activity and Count 10 was reduced to a felony of the second degree, requiring appropriate resentencing.

{¶ 7} This court finds appellant's arguments well-taken. Because appellant was charged with a first-degree felony charge of engaging in a pattern of corrupt activity, at least one of the incidents of corrupt activity would have to be a felony of the first, second or third degree. R.C. 2923.32(B)(1); *State v. Adkins*, 136 Ohio App.3d 765, 737 N.E.2d 1021 (3d Dist.2000). Appellant's sentence as to Count 10 is contrary to law. Based on the foregoing, appellant's first and second assignments of error are well-taken.

{¶ 8} This matter is remanded to the trial court solely to resentence appellant on his conviction for Count 10 pursuant to this decision. Costs of this appeal are assessed to appellee pursuant to App.R. 24.

Case remanded.

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

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, 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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.