

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

State of Ohio

Court of Appeals No. L-13-1213

Appellee

Trial Court No. CR0201302161

v.

Terry D. Austin

DECISION AND JUDGMENT

Appellant

Decided: May 29, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Clinton J. Wasserman, Assistant Prosecuting Attorney, for appellee.

Joanna M. Orth, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of conviction and sentence entered by the
Lucas County Court of Common Pleas, following a trial to the bench. That court found

defendant-appellant, Terry D. Austin, guilty of one count of receiving stolen property and one count of possession of cocaine, both fifth degree felonies, sentenced him to 11 months in prison for each of those offenses, and ordered the terms to be served consecutively. The court further found that appellant was in violation of his post-release control in an earlier case, imposed a prison term of 692 days for that violation and ordered that term to be served consecutively to the terms imposed in the present case. Appellant now challenges that judgment through the following assignments of error:

First Assignment of Error: Defendant/appellant's sentence should be vacated as the trial court punished the defendant/appellant for exercising his right to a trial.

Second Assignment of Error: Defendant/appellant's sentence should be vacated as the trial court failed, as a matter of law, to make specific findings of fact before imposing consecutive sentences pursuant to Ohio Revised Code § 2929.14(C)(4).

{¶ 2} On July 17, 2013, appellant was indicted and charged with three offenses: receiving stolen property in violation of R.C. 2913.51 and 2913.71(A), possession of cocaine in violation of R.C. 2925.11(A) and (C)(4)(a), and trafficking in cocaine in violation of R.C. 2925.03(A)(2) and (C)(4)(a), all fifth degree felonies. The charges resulted from the theft of items taken from an automobile on the morning of July 9, 2013, in a west Toledo neighborhood. Appellant was seen in the vicinity of that theft

attempting to break into another automobile. Upon his apprehension, appellant was found to be in possession of items taken in the earlier theft, as well as crack cocaine.

{¶ 3} Appellant pled not guilty to all charges and the case was set for trial. On August 27, 2013, the day the trial was to begin, the parties appeared in court at which point appellant waived his right to trial by jury and requested that his case be tried to the bench. The court reviewed with appellant his right to trial by jury and then presented him with a written waiver of jury trial form. Appellant reviewed it with counsel, signed it and returned it to the court. At that point, the court stated it would take a short recess while the form was filed with the clerk's office, then the case would reconvene for trial. Subsequently, the parties met the judge in chambers and the following discussion took place.

THE COURT: Let the record reflect that we are in Chambers. Mr. Austin, the reason I'm doing this is I just want you to know all parameters. I'm sure Mr. Neumeyer advised you of all these things, but I just want to make sure that on the record you're aware the first count of this indictment is receiving stolen property; it's a felony of the fifth degree. It carries with it a possible penalty of six months to 12 months. I don't know any of the facts of any of these cases. I don't know what the evidence is doing to be, so I don't know if deciding to go to trial is a good decision or a bad decision. The Count 2 is possession of cocaine, also a felony of the fifth

degree, carries with it a possible penalty of six months to 12 months. Count 3 is trafficking in cocaine, again a felony of the fifth degree, six months to 12 months.

I don't know, again, the facts so I don't know if you're convicted or not convicted of these cases. If you're convicted you face the possibility of 36 months on these offenses. Also, I've been – it's brought to my attention about post-release control, which is a significant problem as it relates to this case. As it relates to today's date, you have 692 days remaining on post-release control. If you're convicted of any one of these offenses, that post-release control will be imposed and whatever you're convicted of will be in addition to, or consecutive with, anything that's related to the post-release control. That's just to make sure – and I'm sure Mr. Neumeier has advised you of that but I want the record also to advise that. Sometimes when people are convicted, afterwards they're upset with their attorney, and I just want to make sure the record reflects that you've been advised of it.

Mr. Wasserman, has there been any plea negotiations as it relates to this case?

MR. WASSERMAN: Yes, there has, Your Honor. Thank you. The offer was presented in which the State had offered the defendant to plead to Count 1 and Count 2, which would be the receiving stolen property and the possession of cocaine charge, with the understanding that at the time of

sentencing the State would nolle Count 3. That was presented to the defense attorney Jim Neumeyer who then informed me that he presented it to his client and it was summarily denied.

THE COURT: Mr. Austin, I just want to make sure that you're aware of the difference between what was offered and what you potentially could be convicted of. And, again, I don't know what the facts are. Count 1 is a felony of the fifth degree. Count 2 also is a felony of the fifth degree. In most instances on a plea I would run those two sentences concurrently and I usually impose 10 months. So it would be the 692 days plus 10 months on top of that. So 692 is almost two years, and 10 months would be almost another – you know, another year. But as long as you've been advised of that and it's your decision not to accept that, that's the only thing I want on the record.

THE DEFENDANT: What is the – what does the plea bargain carry?

THE COURT: Well, as I just indicated, if – if you were to plead to Count 1 and 2, I would probably impose 10 months on each of the cases but run those concurrently with each other but consecutive to the post-release control.

THE DEFENDANT: Okay.

THE COURT: But anyways, as long as you're aware of that and it's your decision not to accept that plea, it's only going to take us a couple hours to try the case so it's not a – it's not a big problem for me. It's only a couple hours out of my life. It's a lot of time potentially out of your life. But if you want to go have a seat back out in the courtroom and discuss this matter with your attorney, I'll be out within the next five minutes.

{¶ 4} Appellant chose to proceed with the trial to the bench. At the conclusion of the state's case, appellant moved for an acquittal pursuant to Crim.R. 29. The court granted the motion as to Count 3, trafficking in cocaine, but denied the motion as to Counts 1 and 2. Appellant then took the stand in his own defense, and presented his explanation for his actions on the morning of July 9, and for his possession of a backpack that held the stolen items.

{¶ 5} At the conclusion of the case, the court found appellant guilty of receiving stolen property and possession of cocaine. Following statements by appellant and his counsel, the court sentenced appellant to 11 months in prison on each count and ordered that the terms be served consecutively. The court further ordered that, because appellant was on post-release control in Lucas County Common Pleas case No. CR200802775 when he committed the offenses in this case, appellant would spend the remainder of his term in that case, 692 days, in prison with that term to be served consecutively to the terms in this case. Appellant now appeals his sentence in two respects.

{¶ 6} In his first assignment of error, appellant asserts that his sentence should be vacated and this case remanded for resentencing because the lower court punished him for exercising his right to a trial. Appellant contends that the record establishes that the lower court sentenced him to a lengthier term of incarceration following the trial than it would have had he pled guilty to the two offenses.

{¶ 7} It is fully established that “a defendant is guaranteed the right to a trial and should never be punished for exercising that right or for refusing to enter a plea agreement[.]” *State v. O’Dell*, 45 Ohio St.3d 140, 147, 543 N.E.2d 1220 (1989). Indeed, “a trial court violates the Due Process Clause of the Fourteenth Amendment when it imposes a harsher sentence motivated by vindictive retaliation.” *State v. Stradford*, 8th Dist. Cuyahoga No. 95116, 2011-Ohio-1566, ¶ 23, citing *N. Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). However,

[v]indictiveness on the part of a sentencing court is not presumed merely because the sentence imposed is harsher than one offered in plea negotiations. *State v. Mitchell* (1997), 117 Ohio App.3d 703, 691 N.E.2d 354. To determine whether a court acted with vindictiveness, we look to see whether the record affirmatively shows retaliation as a result of the rejected plea bargain. [*State v. Paul*, [8th Dist. No. 79596, 2002-Ohio-591, *15,] *supra*, citing *State v. Warren* (1998), 125 Ohio App.3d 298, 307, 708 N.E.2d 288. There must be some positive evidence that portrays a

vindictive purpose on the court's part. *State v. Finley*, Montgomery App. No. 19654, 2004-Ohio-661, [¶ 42.] *Stradford, supra* at ¶ 24.

{¶ 8} Appellant asserts that because the trial court indicated prior to trial that it would sentence him to two concurrent terms of 10 months if he accepted the plea bargain, but could face up to 12 months on each count if he were convicted following a trial, and then sentenced appellant more harshly following the trial, it gave the appearance that it was punishing appellant for exercising his right to trial.

{¶ 9} We disagree with appellant's assessment of the trial court's comments during the in-chambers discussion. First, the court never committed to two concurrent terms of 10 months if appellant pled guilty; he simply notified appellant that he usually imposes that sentence on a plea. Second, the court's purpose in holding the in-chambers conference was to ascertain that appellant understood his potential exposure at trial and to ascertain that appellant was making an informed decision to reject the plea and proceed to trial. As the court in *Paul, supra*, at *15 explained:

Vindictiveness is one thing; imposing a sentence greater than that discussed in plea negotiations is another thing. When an accused rejects the offer of a plea bargain, elects to exercise the right to trial, and is found guilty, the court is not required to impose sentence within the parameters discussed in the rejected plea bargain. The incentive within a plea bargain is a reduced sentence in exchange for avoiding the time and expense of trial. *Santobello v. New York* (1971), 404 U.S. 257, 260, 92 S.Ct. 495, 30

L.Ed.2d 427. It would be counter intuitive to think that the court is somehow bound to the sentence limits discussed in the plea negotiations, even though it had been rejected by the accused.

{¶ 10} In sum, nothing in the record before us leads us to conclude that the sentence imposed by the lower court was the result of appellant's decision to stand trial on the charges. In particular, the court never commented on appellant's choice to proceed to trial in any negative way. *See State v. Noble*, 12th Dist. Warren No. CA2014-06-080, 2015-Ohio-652, *State v. Turner*, 9th Dist. Summit No. 27210, 2014-Ohio-4460, and *State v. Ambriez*, 6th Dist. Lucas No. L-03-1051, 2004-Ohio-5230. The first assignment of error is not well-taken.

{¶ 11} In his second assignment of error, appellant challenges the consecutive nature of the sentences imposed on him by the trial court.

{¶ 12} We review consecutive sentences under the standard of review set forth in R.C. 2953.08. *State v. Banks*, 6th Dist. Lucas No. L-13-1095, 2014-Ohio-1000, ¶ 10. Under R.C. 2953.08(G)(2), we may increase, reduce, or modify a sentence, or vacate the sentence and remand the matter to the sentencing court for resentencing, if we clearly and convincingly find that either the record does not support the trial court's findings under R.C. 2929.14(C)(4), or the sentence is otherwise contrary to law.

{¶ 13} R.C. 2929.14(C)(4) provides:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison

terms consecutively if the court finds 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 finds any of the following:

(a) The offender committed one or more of 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.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 14} Appellant asserts that the court failed to make the findings required to impose consecutive sentences. In *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus, the Supreme Court of Ohio recently clarified the responsibilities of a trial court when imposing consecutive sentences:

In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings.

{¶ 15} The court further explained:

[A] word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld.

Id. at ¶ 29.

{¶ 16} At the sentencing hearing below, the court stated that it had considered the principles and purposes of sentencing, and determined that because appellant had previously served a prison term and was also on post-release control at the time of the commission of the offenses in this case, appellant was not amenable to community control and a prison sanction was consistent with the principles of felony sentencing set forth in R.C. 2929.11. The court then further found that appellant's prior criminal history required consecutive sentences. That is the only comment the court made with regard to the consecutive nature of the sentences. While that comment supports the conclusion that the court properly determined that consecutive service was necessary to protect the public from future crime, there is nothing in the record to support a finding that the court engaged in the proportionality analysis required by the statute. Although the judgment

entry of sentence does include the necessary language, the court in *Bonnell, supra* at ¶ 29 made it clear that the required findings must be made at the sentencing hearing.

{¶ 17} Because the record does not support a conclusion that the trial court made all of the findings required by R.C. 2929.14(C)(4) at the time it imposed consecutive sentences, the imposition of consecutive sentences in this case is contrary to law and the second assignment of error is well-taken.

{¶ 18} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed in part and reversed in part; the judgment is reversed with regard to the consecutive nature of the sentences. This case is remanded to the trial court for resentencing consistent with this decision. The parties are to share equally the costs of this appeal pursuant to App.R. 24.

Judgment affirmed, in part
and reversed, in part.

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

James D. Jensen, 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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