

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

State of Ohio

Court of Appeals No. L-14-1276

Appellee

Trial Court No. CR0201401511

v.

Zachary Neal

DECISION AND JUDGMENT

Appellant

Decided: March 4, 2016

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Dexter Phillips, Assistant Prosecuting Attorney, for appellee.

Karin L. Coble, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from an October 10, 2014, judgment of the Lucas County Court of Common Pleas, which found appellant guilty of one count of attempted retaliation, in violation of R.C. 2923.02 and 2921.05(B)(C), a fourth degree felony.

{¶ 2} On December 10, 2014, appellant was sentenced to a term of incarceration of 17 months, ordered to be served consecutively to a prior sentence that appellant had received in a separate felony case. The trial court also imposed the costs of supervision, confinement, assigned counsel, and prosecution. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 3} Appellant, Zachary Neal, sets forth the following two assignments of error:

The record does not clearly and convincingly support the trial court's findings regarding appellant's sentence.

The trial court erred in imposing the costs of confinement and of court-appointed counsel, by failing to find appellant had the ability to pay.

{¶ 4} The following undisputed facts are relevant to this appeal. On March 13, 2014, appellant was at the Lucas County Court of Common Pleas being sentenced on an attempted grand theft conviction. During that sentencing hearing, the victim in the case presented a victim impact statement to the court. After the victim finished, he returned to his seat in the front of the courtroom.

{¶ 5} As appellant was being escorted from the courtroom at the conclusion of the sentencing hearing, he looked directly at the victim and very provocatively threatened him. Appellant proclaimed to the victim, "I'm going to kill you motherfucker." In conjunction with the verbal threat, appellant simultaneously made a gun firing gesture with his hand. Appellant pointed at the victim, mimicked the act of shooting a gun with his hand while threatening, "[P]ow, pow" at the victim.

{¶ 6} Following appellant's criminal courtroom outburst, which notably occurred during the course of being sentenced on another matter, appellant was also charged with one count of retaliation against the victim.

{¶ 7} Appellant subsequently pled no contest to an amended lesser offense of attempted retaliation, in violation of R.C. 2923.02, a felony of the fourth degree. Appellant was sentenced to a term of incarceration of 17 months, ordered to be served consecutively to the term of incarceration being served by appellant for the initial felony conviction. In addition, appellant was ordered to pay the costs relating to supervision, confinement, assigned counsel, and prosecution. This appeal ensued.

{¶ 8} In the first assignment of error, appellant maintains that the trial court's felony sentence was improper. In support, appellant suggests that the imposition of prison time, and the imposition of consecutive prison terms, was not supported by the record. We do not concur.

{¶ 9} It is well-established under Ohio law that when an individual is challenging a felony sentence, the standard of review is not an abuse of discretion, but rather, whether the record "clearly and convincingly" supports the disputed sentence. R.C. 2953.08(G)(2). R.C. 2929.11 delineates the purposes to be served by felony sentencing:

(A) The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish

those purposes without imposing an unnecessary burden on state or local government resources.

{¶ 10} R.C. 2929.14 sets forth the additional applicable standard in this case due to consecutive sentences being imposed. R.C. 2929.14(C)(4) establishes:

(C)(4) 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 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.

{¶ 11} Contrary to appellant's unilateral conclusion that the record does not support the imposition of consecutive sentences, the record clearly encompasses ample evidence in support of the disputed sentence. Specifically, the trial court noted at sentencing in pertinent part:

[Y]ou're here today, because you threatened to kill the victim in the case that you had before Judge Franks. This is serious, Mr. Neal, because victims should not have to go through what this victim did at your hands. Victims should not have to fear for their safety. You've also shown your aggression in this court by your previous outbursts as you were being escorted from the courtroom. You have – you're 21 years old, you have a significant criminal history, you have one adult felony, two juvenile felonies, total of 14 misdemeanors. Much of your juvenile history involves violent offenses. You've violated previous sanctions imposed, and I've taken all of this into consideration.

{¶ 12} The record reflects that appellant possesses a lengthy criminal history, including multiple past felony cases. In this case, appellant confronted the victim and threatened to kill the victim while appellant was being led out of court on the initial felony case. As such, the facts and circumstances of this case epitomize a case in which protecting the public is a paramount consideration. The court properly concluded that the

harm appellant caused and the threat posed was such that consecutive sentences were necessary in order to both reflect the seriousness of the conduct and to protect the public.

{¶ 13} We note that appellant appears to perceive that his post hoc claims of a challenged childhood somehow operate so as invalidate the lawfulness of the disputed sentence. The record of evidence and applicable statutes do not comport with appellant's position. Accordingly, we find appellant's first assignment of error not well-taken.

{¶ 14} In the second assignment of error, appellant contends that the trial court did not make the requisite statutory findings necessary in order to impose the disputed costs of confinement and of court-appointed counsel. In support, appellant alleges that, "The trial court failed to make any statements or make any findings regarding appellant's ability to pay. The trial court only stated that appellant was ordered to pay the costs of prosecution." The record does not bear out appellant's claim.

{¶ 15} There are various categories of cost which a trial court can order the appellant to pay: prosecution costs, confinement costs, and costs of assigned counsel. *State v. Maloy*, 6th Dist. Lucas No. L-10-1350, 2011-Ohio-6919, ¶ 9. Under Ohio law, in order for costs of confinement to be imposed, the trial court must, "[C]onsider the offender's present and future ability to pay the amount of the sanction or fine." *Id.* at ¶ 13. In addition, "[T]he record must contain some evidence that the court considered the offender's present and future ability to pay such a sanction." *Id.*

{¶ 16} The imposition of costs of assigned counsel also requires the trial court to consider the appellant's ability to pay. *Id.* at ¶ 14. There does not have to be a separate

hearing on the matter, but costs imposed have to be an amount the individual is reasonably expected to pay and it must be supported by, “[C]lear and convincing evidence of record.” *Id.* at ¶ 14.

{¶ 17} Contrary to appellant’s position, the record unambiguously establishes the propriety of the trial court finding favorably regarding appellant’s present and future ability to pay. Notably, appellant conveyed to the court that he has, “[G]ainful employment doing roofing and [his] boss has held [his] job for [him].” Appellant is twenty-one years old, healthy, and possesses a successful employment history in local roofing/construction. There is nothing demonstrating an inability of appellant to be gainfully reemployed upon release. Wherefore, we find appellant’s second assignment of error to be not well-taken.

{¶ 18} Wherefore, the judgment of the Lucas County Court of Common Pleas is hereby 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.

Arlene Singer, 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:
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