

[Cite as *State v. Jordan*, 2009-Ohio-3078.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91869

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BURK JORDAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-352721

BEFORE: Celebrezze, J., Cooney, A.J., and Boyle, J.

RELEASED: June 25, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Burk Jordan, brings this appeal challenging his sentence. After a thorough review of the record, and for the reasons set forth below, we affirm.

{¶ 2} This case stems from a 1996 incident in which appellant fired eight or nine shots at a passing car containing four passengers, injuring one. In 1997, appellant was charged with four counts of felonious assault in violation of R.C. 2903.11, with gun specifications, and two counts of intimidation in violation of R.C. 2921.04. On August 1, 1997, a jury found appellant guilty on all four counts of felonious assault, all attached gun specifications, and one count of intimidation. The jury found him not guilty on the other count of intimidation.

{¶ 3} On October 8, 1997, the trial court sentenced appellant to eight years on each of the felonious assault convictions, to run consecutively; three years on each gun specification, to run consecutively; and five years on the intimidation conviction, to run concurrently; for an aggregate total of 44 years in prison.

{¶ 4} Appellant filed an appeal challenging, among other alleged errors, his sentence and the trial court's failure to merge several counts for the purposes of sentencing. On November 25, 1998, this court affirmed in part and modified in part. *State v. Jordan* (Nov. 25, 1998), Cuyahoga App. No. 73364 ("*Jordan I*").

The portion of appellant's appeal that was modified related solely to his sentence.

{¶ 5} In *Jordan I*, the first issue appellant raised was whether the trial court could sentence him on four separate felonious assault charges stemming from a single transaction. Relying on *State v. Gregory* (1993), 90 Ohio App.3d 124, 628 N.E.2d 86, this court held that appellant could be convicted of four separate counts because there were four potential victims in the car, appellant knew there were four passengers, and he shot eight or nine times at the car, even though only one passenger was shot and suffered physical injuries. On the issue of merging the four firearm specifications, this court held that the trial court could not impose more than one additional prison term on the four separate firearm specifications. See R.C. 2929.14(D).

{¶ 6} Appellant also argued that the trial court erred by sentencing him to maximum consecutive sentences. Relying on *State v. Beasley* (June 11, 1998), Cuyahoga App. No. 72853, this court held that the trial court did not abuse its discretion by imposing maximum consecutive sentences on the four felonious assault convictions. See, also, R.C. 2929.13(2)(b). The end result was that this court vacated a portion of the sentence as it related to the firearm specifications, merged those four counts, and appellant's sentence was modified to 35 years.

{¶ 7} The Ohio Supreme Court denied jurisdiction. *State v. Jordan* (1999), 85 Ohio St.3d 1476, 709 N.E.2d 849.

{¶ 8} On May 2, 2007, appellant filed a pro se motion for resentencing, arguing that his sentence was void based on the trial court's failure to impose postrelease control. The trial court denied appellant's motion. Subsequently, the state filed a motion for resentencing on the same grounds. On June 12, 2008, the trial court granted the state's motion on the authority of *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197. On June 30, 2008, appellant was resentenced to the same 35 years in prison, and the trial court imposed three years of postrelease control.

{¶ 9} On July 30, 2008, appellant filed a notice of appeal raising two assignments of error for our review.

Review and Analysis

Consecutive Sentences

{¶ 10} "I. The trial court erred and violated appellant's Fifth Amendment right to be free from double jeopardy when it ordered consecutive service for allied offenses."

{¶ 11} Appellant argues that he cannot be sentenced for four counts of felonious assault when there was a single animus – the act of shooting at the passing car. Appellant contends he committed a single offense and should serve concurrent sentences at most. The state argues that appellant's claim is barred by the doctrine of res judicata and, in the alternative, under this fact pattern, appellant's four sentences for felonious assault should not merge where there were four separate victims.

{¶ 12} We are not persuaded by the state’s argument that appellant’s claim is barred. When the trial court resentenced appellant on June 30, 2008, it did so because his first sentence was void. See *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, at syllabus. Therefore, it is as if appellant’s initial sentence and the issues he raised in his first appeal related to his sentence do not exist. The only sentence we now review is the sentence imposed by the trial court on June 30, 2008.

{¶ 13} Nor are we persuaded by appellant’s argument that his four sentences for felonious assault should merge and require concurrent service.

{¶ 14} Appellant’s reliance on *State v. Sutton* (July 24, 2008), Cuyahoga App. No. 90172, is misplaced. Unlike in *Sutton*, where the court merged the convictions for attempted murder and felonious assault for each victim, the case at bar does not involve two or more convictions based on a single animus toward a single victim. There were four victims because appellant shot at a car in which he knew there were four passengers. In *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, the Ohio Supreme Court held that “[e]ven though appellant set only one fire, each aggravated arson count recognizes that his action created a risk of harm to a separate person.” Similarly, appellant’s act of shooting at a passing car created a known risk of harm to four separate people.¹ See, also, *State v. Jones* (1985), 18 Ohio St.3d 116, 480 N.E.2d 408.

¹Arguably, appellant committed more than a single act given that he shot his weapon eight or nine separate times.

{¶ 15} Appellant's first assignment of error is overruled.

Disproportionate Sentence

{¶ 16} "II. The trial court erred and abused its discretion by imposing an unreasonable and disproportionately harsh sentence on appellant, which was grossly inconsistent with sentences imposed on similar offenders for similar crimes and violated his Eighth Amendment rights."

{¶ 17} In his second assignment of error, appellant challenges the severity of his sentence by arguing that similarly situated defendants were not given maximum consecutive sentences. Because appellant did not raise this issue before the trial court at resentencing, we are barred from reviewing it here.

{¶ 18} This court has repeatedly recognized that in order to support a contention that a "sentence is disproportionate to sentences imposed upon other offenders, a defendant must raise this issue before the trial court and present some evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal." *State v. Redding*, 8th Dist. No. 90864, 2008-Ohio-5739, at ¶18, fn. 7, quoting *State v. Edwards*, 8th Dist. No. 89181, 2007-Ohio-6068, ¶11.

{¶ 19} Appellant offers no other cases in which a similarly situated defendant was given a lighter sentence, nor does he demonstrate that the court did not consider the guiding principles of R.C. 2929.11 and 2929.12. He merely argues that serving his sentence will keep him in prison until he is 63 years old. This argument has no merit.

{¶ 20} Appellant's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

COLLEEN CONWAY COONEY, A.J., and
MARY JANE BOYLE, J., CONCUR