[Cite as *State v. Arios*, 2009-Ohio-5814.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91506

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSE ARIOS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED
AND VACATED IN PART; REMANDED
FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500492

BEFORE: Sweeney, J., Rocco, P.J., and Jones, J.

RELEASED: November 5, 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).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Jose Arios ("defendant") appeals his convictions for various drug related offenses and subsequent sentence to 47 years in prison. After reviewing the facts of the case and pertinent law, we affirm in part; reverse and vacate in part and remand for resentencing.

{¶ 2} On August 21, 2007, Cleveland Police Detective Scott Moran arranged for a confidential informant named Luis to purchase 25 grams of heroin from co-defendant Felix Quinones ("Quinones"). Defendant was with Quinones at the time of the sale, which took place at 3267 West 86th Street, in Cleveland, and defendant handed the drugs to Luis. After the sale, defendant and Quinones went back to an apartment at 8513 Madison Avenue that police had under surveillance. Det. Moran prepared a search warrant for the green Mercury that defendant and Quinones were seen in that day. In the meantime, Luis set up another buy for 60 grams of heroin.

{¶ 3} On August 22, 2007, the second heroin sale took place at the West 86th Street address, and defendant again arrived with Quinones. After the buy, Luis made arrangements for the delivery of 40 pounds of marijuana, and police followed Quinones and defendant to a house at 3451 West 135th Street, which was also under surveillance. Quinones and defendant went inside and came out with a large black plastic garbage bag that Quinones put in the trunk of the Mercury.

{¶ 4} Police followed Quinones and defendant for a few blocks, stopped their vehicle on West 117th Street, executed the search warrant, and seized the

marijuana from the trunk. Det. Moran then prepared search warrants for the Madison Avenue apartment and the house on West 135th Street. After searching the Madison Avenue apartment, which police thought was a stash house for the drugs because it was unfurnished save for a mattress, police seized large quantities of heroin and marijuana. After searching the West 135th Street house, police seized $22,000 in cash and, among other items, defendant's passport.

{¶ 5} On August 31, 2007, defendant and Quinones were indicted for 14 counts of drug related offenses. Defendant filed three motions to suppress and on February 19, 2008, after an evidentiary hearing, the court denied defendant's motions. On May 2, 2008, a jury found defendant guilty of the following counts:

{¶ 6} (1) drug trafficking of between ten and 50 grams of heroin in violation of R.C. 2925.03(A)(1);

{¶ 7} (2) drug trafficking of between ten and 50 grams of heroin in violation of R.C. 2925.03(A)(2);

{¶ 8} (3) drug possession of between ten and 50 grams of heroin in violation of R.C. 2925.11(A);

{¶ 9} (4) drug trafficking of between 50 and 250 grams of heroin in violation of R.C. 2925.03(A)(1);

{¶ 10} (5) drug trafficking of between 50 and 250 grams of heroin in violation of R.C. 2925.03(A)(2);

{¶ 11} (6) * * *

{¶ 12} (7) drug trafficking of between 5,000 and 20,000 grams of marijuana in violation of R.C. 2925.03(A)(2);

{¶ 13} (8) drug possession of between 5,000 and 20,000 grams of marijuana in violation of R.C. 2925.11(A);

{¶ 14} (9) drug trafficking of 250 or more grams of heroin with a major drug offender specification in violation of R.C. 2925.03(A)(2) and 2941.1410;

{¶ 15} (10) * * *

{¶ 16} (11) * * *

{¶ 17} (12) drug trafficking of between 5,000 and 20,000 grams of marijuana in violation of R.C. 2925.03(A)(2);

{¶ 18} (13) drug possession of between 5,000 and 20,000 grams of marijuana in violation of R.C. 2925.11(A); and

{¶ 19} (14) possessing criminal tools in violation of R.C. 2923.24(A).

{¶ 20} The court sentenced defendant to an aggregate of 47 years in prison: eight years each on counts one, two, and three; ten years each on counts four, five, and nine; five years each on counts seven, eight, 12, and 13; and one year on count 14, with the sentences for counts one, two, four, seven, nine, 12, and 14 to run consecutively.

{¶ 21} Defendant appeals and raises four assignments of error for our review.

{¶ 22} "I. The trial judge violated the appellant's right to due process when it sentenced the appellant to maximum consecutive prison terms and erred by

failing to conduct a proportionality review in determining consecutive sentences to be appropriate."

{¶ 23} Specifically, defendant argues that the court failed to consider sentencing criteria, such as mitigating factors, failed to conduct a proportionality analysis, and failed to order a presentence investigation report.

{¶ 24} *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, addresses the standard for reviewing felony sentencing decisions, and holds that appellate courts must apply a two-step approach when analyzing alleged error in a trial court's sentencing. "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 shall be reviewed under an abuse-of-discretion standard." *Kalish*, supra, at ¶4.

{¶ 25} In determining whether defendant's sentence is contrary to law, we look to R.C. 2929.14(A), which lists the statutory sentencing ranges for the various degrees of felonies. We find that the court sentenced defendant to the maximum term of incarceration for each felony conviction: ten years for each first degree felony; eight years for each second degree felony; five years for each third degree felony; and one year for the fifth degree felony. Therefore, defendant's prison sentence is within the statutory range.[1]

[1]Defendant's 18-year sentence for counts two, three, seven, eight, 12, and 13 is vacated pursuant to our analysis of his fourth assignment of error, infra, concerning

{¶ 26} We also find that the court properly included postrelease control as part of defendant's sentence, stating that at the conclusion of his prison term, he is required to serve five years of postrelease control. See *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085.

{¶ 27} Next, we must determine whether the trial court considered the purpose and principles of felony sentencing found in R.C. 2929.11 and the seriousness and recidivism factors found in R.C. 2929.12 when sentencing defendant.

{¶ 28} The record shows that, through defense counsel's argument for a minimum sentence, the court considered that defendant did not have a history of criminal convictions, that he was not the primary target in this investigation, that he did not actively participate in all the drug transactions that took place, and that "[h]e's still a young man [who] won't be seeing his daughters for the next, at least minimum of ten years." The court asked defendant if he wished "to make a statement or present any evidence in mitigation of punishment," to which defendant replied, through an interpreter, that he did not feel that he was guilty. The court then stated that defendant was involved in "major drug dealing * * * [of] a lot of heroin." The court took into consideration that defendant entered the United States with a bad passport on April 14, 2007, was "sent back," and re-entered the United States illegally the next day "to continue * * * drug dealing

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merger of allied offenses under R.C. 2941.25. We affirm the court's sentencing appellant to 29 years in prison on the remaining counts under defendant's first

with [his] relative.[2]" The court then stated the following: "Now, you know what drugs are. You know what they smell like. You were not just along. You actively participated in this. Therefore, you are just as guilty as Mr. Quinones."

{¶ 29} The court found that defendant was not eligible for community control sanctions, and that "a minimum sentence will demean the seriousness of the offense, because of the amount of drugs involved, and the length of time that this was going on." Because trial courts "are no longer required to make findings and give reasons for imposing maximum, consecutive or more than the minimum sentences," we find that defendant's sentence in the instant case is not contrary to law. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶7 of the syllabus. See, also, *Kalish*, supra, at Fn. 4 (noting that "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").

{¶ 30} We now review the trial court's sentencing decision for an abuse of discretion under the second prong of *Kalish*. "The term 'abuse of discretion' connotes 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.

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assignment of error.

[2] The record shows that defendant is related to Quinones, either as a half-brother, a step-brother, or a brother-in-law.

{¶ 31} The record shows that the jury found the defendant to be a major drug offender because he was involved in the sale of more than 250 grams of heroin, which is a first degree felony and carries a mandatory ten-year prison term. Based on the facts of this case, particularly the large quantities of heroin and the multiple convictions for trafficking in heroin and marijuana, we cannot say that the court abused its discretion by sentencing defendant to 47 years in prison.

{¶ 32} Although defendant argues that the court erred by failing to order a presentence investigation report and failing to conduct a sentencing proportionality analysis, Ohio law does not require the court to do these two things when sentencing a felon.

{¶ 33} Pursuant to R.C. 2947.06(A)(1) and Crim.R. 32.2, presentence investigation reports are discretionary when a court sentences a felony offender to a prison term. See *State v. Myrick*, Cuyahoga App. No. 91492, 2009-Ohio-2030. Furthermore, the trial court is not obligated to conduct a proportionality analysis. See *State v. Brumley*, Cuyahoga App. No. 82723, 2003-Ohio-6871 (holding that "[e]ven had there been an express duty for the court to state factors going to the proportionality of the sentence, we would not reverse the court because Brumley has made no attempt to show us that his sentence is directly disproportionate to sentences given out in similar cases").

{¶ 34} Accordingly, defendant's first assignment of error is overruled.

{¶ 35} In defendant's second assignment of error, he argues as follows:

{¶ 36} "II. The weight of the evidence did not support the jury verdicts of guilt where it was clear that mere presence is not enough to find the appellant guilty of the offenses."

{¶ 37} Specifically, defendant argues that he was unaware of Quinones's drug trafficking as he was just a guest in the West 135th Street home and he was just a passenger in Quinones's car. Additionally, defendant argues that the only evidence of his involvement in the transactions came from Luis, whose testimony cannot be relied upon.

{¶ 38} The standard of review for a claim that an appellant's convictions are against the manifest weight of the evidence is as follows: "The appellate court sits as the 'thirteenth juror' and, reviewing the entire record, weighs all the reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶ 39} Defendant was convicted of multiple counts of drug trafficking and possession, and one count of possession of criminal tools. Pursuant to R.C. 2925.03(A)(1) and (2), drug trafficking occurs when an offender sells or offers to sell, a controlled substance, or when an offender prepares a controlled substance for sale knowing that the controlled substance is intended for sale. Pursuant to R.C. 2925.11(A), an offender is guilty of drug possession when he or she obtains, possesses, or uses a controlled substance. Possessing criminal tools is defined

in R.C. 2923.24(A), which states that "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

{¶ 40} Det. Moran testified that during surveillance of the August 21, 2007 transaction, he observed a hand-to-hand exchange between the defendant and Luis. Det. Moran also testified that on the audio tapes of the August 21, 2007 transaction recorded from the wire Luis wore, defendant is heard correcting Quinones "as to how many grams of heroin were sold just then to Luis." Cleveland Police Detective Thomas Klamert testified that during part of the August 21, 2007 transaction, defendant was driving the Mercury and Quinones was in the passenger seat. Furthermore, all the Cleveland police officers who were part of the surveillance crew testified consistently that defendant was with Quinones in the Mercury and together they entered the Madison Avenue apartment building and the house on West 135th Street during the transactions.

{¶ 41} Luis testified as follows: Defendant was with him and Quinones when they "discussed business" at a local restaurant called Johnny Mangos. He had seen defendant with Quinones before this meeting, as "they always rode together." Typically, defendant would hand him the drugs and he would hand defendant the money. Quinones was in charge of the operation but Quinones would never touch the drugs; rather, Quinones would pay someone, usually defendant or a person named "Chantos," to ride with him and handle the drugs.

{¶ 42} The Ohio Supreme Court has held that "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, at ¶one of the syllabus. Luis's testimony in the instant case was corroborated by the police surveillance team and nothing the informant said was inconsistent with other evidence in the record. Defense counsel conducted a thorough cross-examination of Luis, and delved into Luis's criminal background, which, pursuant to Evid.R. 611(B), "shall be permitted on all relevant matters and on matters affecting credibility."

{¶ 43} It was in the province of the jury whether to believe Luis's testimony that defendant participated in the drug sales, which was bolstered by Det. Moran's witnessing the defendant and Luis engage in a hand-to-hand transaction, and the defendant's voice, which was captured on the audio tape of the wire Luis was wearing. Accordingly, nothing in the record shows that the jury lost its way in finding defendant guilty of multiple drug related offenses and his second assignment of error is overruled.

{¶ 44} In defendant's third assignment of error, he argues as follows:

{¶ 45} "III. The trial court erred when it quashed defense subpoenas thereby not allowing the appellant a full[,] fair and impartial hearing and when it failed to suppress evidence seized at the appellant[']s residence when the officers did not posses[s] a search warrant at the time of entry and provide it to the occupant."

{¶ 46} Defendant first argues that the court erred by not allowing into evidence the police officers' duty logs to show inaccuracies regarding the timing of the search of the Mercury and of the West 135th Street house. This identical argument was raised by co-defendant Quinones in his appeal and addressed by this Court in *State v. Quinones*, Cuyahoga App. No. 91632, 2009-Ohio-2718.[3]

{¶ 47} In *Quinones*, supra, at ¶27-28, this Court held that the "duty logs requested by appellant were part of an official criminal investigation and prepared in anticipation of the prosecution of appellant for drug offenses. Thus, appellant was excluded from discovery pursuant to Crim.R. 16(B)(2).

{¶ 48} "Additionally, R.C. 149.43(A)(1) excludes the discovery of the duty logs."

{¶ 49} Defendant next argues that the police officers did not physically have the search warrant upon entering the house on West 135th Street. Therefore, they were unable to show the warrant to the home's occupant, and the court erred when it failed to suppress the evidence seized during this search.

{¶ 50} This argument was also raised by Quinones and overruled by this Court on appeal. "There is no requirement * * * that the executing officer present the occupant of the premises with a copy of the warrant prior to performing the

[3] After the suppression hearing, the court determined that defendant and Quinones did not have standing to challenge the search of the Madison Avenue apartment because neither of them lived there. Quinones appealed this determination, and we reversed the court's ruling, holding that Quinones had a legitimate expectation of privacy because he had the keys to the apartment and he spent the night previous to his arrest at the apartment. However, in the instant case, defendant does not appeal the court's denying his motion to suppress regarding the Madison Avenue apartment.

search. In this case, the trial court found that Det. Moran left the judge's house with a signed warrant by 7:35 p.m., the surveillance team was notified immediately thereafter, and the entry was made at 7:38 p.m. These findings of fact are supported by competent and credible evidence of the testimony of [Det.] Moran * * *. Hence, the police conducted the search pursuant to a signed, valid warrant." Id. at ¶61 (internal citations omitted.)

{¶ 51} Det. Moran testified that he arrived at the West 135th house at approximately 8:10 p.m. with the warrant while the search was still in progress. Although the occupant of the house testified that Det. Moran did not arrive with the warrant until almost 9:00 p.m., the court chose to believe Det. Moran, whose testimony was consistent with other officers' accounts of the events that night. The *Quinones* court held that this was a reasonable amount of time within which to present the occupant with a copy of the warrant and that the trial court did not err in denying the motion to suppress.

{¶ 52} Accordingly, in following our holdings in co-defendant Quinones's case, we overrule defendant's third assignment of error.

{¶ 53} In defendant's fourth and final assignment of error, he argues as follows:

{¶ 54} "IV. The appellant's convictions in pertinent part should be reversed and remanded to the trial court for application of R.C. 2941.25."

{¶ 55} In *Quinones*, this Court held that the trial court failed to merge Quinones's trafficking convictions in violation of R.C. 2925.03(A)(2) with his

possession convictions in violation of R.C. 2925.11(A), which "are allied offenses of similar import pursuant to R.C. 2941.25. See *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181 (holding that drug trafficking in violation of R.C. 2925.03(A)(2) and drug possession in violation of R.C. 2925.11(A) are allied offenses of similar import)." The court reversed Quinones's convictions and vacated his sentences for these counts. *Quinones*, supra, at ¶42.

{¶ 56} In the instant case, defendant's convictions for drug trafficking in violation of R.C. 2925.03(A)(2) in counts two, seven, and 12 should merge with his convictions for drug possession in violation of R.C. 2925.11(A) in counts three, eight, and 13.[4] Defendant's fourth assignment of error is sustained. His convictions for these counts are reversed and the case is remanded to the trial court for an allied offense merger under R.C. 2941.25. Additionally, defendant's prison sentences for eight years each on counts two and three, and five years each on counts seven, eight, 12, and 13 are vacated.

Judgment affirmed in part; reversed and vacated in part. Case remanded to the trial court for resentencing consistent with this opinion.

It is ordered that appellant and appellee shall each pay their respective costs herein taxed.

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[4] During the preliminary part of defendant's sentencing, the court noted that counts two and three should merge. However, when imposing the sentence moments later, the court failed to merge these counts. Additionally, the sentencing journal entry does not reflect merger.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for resentencing.

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

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR