

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93728

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NIEESHA HARDNICK

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-435815 and CR-436927

BEFORE: Jones, J., Gallagher, A.J., and Cooney, J.

RELEASED: May 27, 2010

**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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

LARRY A. JONES, J.:

{¶ 1} This cause came on to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records and briefs of counsel.

{¶ 2} Defendant-appellant, Nievesha Hardnick (“Hardnick”), appeals the trial court’s denial of her motion for judicial release. Based on our review of the record and pertinent case law, we affirm.

STATEMENT OF THE FACTS

{¶ 3} Hardnick pled guilty in Case No. CR-435815 to drug trafficking with a juvenile specification, drug possession, and two counts of misdemeanor child endangerment. Hardnick also pled guilty in Case No. CR-436927 to drug possession, drug trafficking, and tampering with evidence. All of the charges stemmed from Hardnick’s ongoing sale of heroin in the presence of her minor children.

{¶ 4} On October 29, 2003, the trial court sentenced Hardnick in both cases. With respect to Case No. CR-435815, the trial court stated:

“* * * under Count 1, realizing there is a presumption, too, of jail time here, that the defendant will be sentenced to the Marysville for Women for a period of time on Count 1 for four years. On Count 2 the defendant is sentenced to Marysville for Women for a period of time of one year, and those will be consecutive.

On Counts 9 and 10 she will be sentenced to six months on each of those counts, 9 and 10, and those will be served concurrently with each other, and concurrently with Counts 1 and 2.”¹

¹Tr. 20, sentencing hearing transcript. See, also, State’s exhibit 3 attached to State’s Opposition to Defendant’s Motion for Judicial Release filed July 23, 2009.

Regarding Case No. CR-436927, the trial court stated:

“In Case [CR-]436927, on Count 2 of the indictment, the defendant is sentenced as we indicated, there is mandatory time here too. Count 2 of the indictment, she’ll be sentenced to three years at Marysville for Women. On Count 3 she will be sentenced to three years at Marysville for Women. Those two counts will be served concurrently, or together.

On Count 4 she is sentenced to one year at Marysville for Women. But that count will be consecutive to Counts 2 and 3. That will make a total of four years.² And the sentences in [CR-]436927 are consecutive to the sentences in [CR-]435815.”³

{¶ 5} Hardnick has previously filed requests for judicial release and modification of her sentence. In those previous motions, Hardnick consistently stated that she was sentenced to nine years in prison. On March 23, 2009, Hardnick filed her third motion for judicial release in Case No. CR-436927. The trial court held a hearing and assigned counsel. During the hearing, the trial court clarified that the hearing was not for judicial release, but rather was based on Hardnick’s motion for immediate release.⁴ The trial court denied Hardnick’s motion. Hardnick now appeals.

Assignment of Error

{¶ 6} Hardnick assigns one assignment of error on appeal:

²Tr. 21 sentencing hearing transcript. See, also, State’s exhibit 3 attached to State’s Opposition to Defendant’s Motion for Judicial Release.

³Id.

⁴Tr. 3, 14.

{¶ 7} “[1.] The trial court erred in denying appellant’s motion for immediate release, in light of the expiration of her prison term as set forth in the journal entries from her sentencing in case numbers [CR-]435815 and [CR-]436927.”

LEGAL ANALYSIS

Motion for Release

{¶ 8} Hardnick filed a motion for judicial release. The lower court clarified that the motion was not to be treated as a judicial release motion. Hardnick then made an oral motion for her “immediate release,”⁵ and the lower court denied her motion. In her appeal to this court, Hardick restates her issue as one for “immediate release.”

{¶ 9} The Ohio Supreme Court has previously held that courts may recast “no-name motions” into whatever category necessary to identify and establish the criteria by which a motion should be judged. *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, _12, citing *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, and *State v. Reynolds* (1999), 79 Ohio St.3d 158, 679 N.E.2d 1131.

{¶ 10} Hardnick’s motion will be construed as a petition for postconviction relief. Postconviction relief petitions are reviewed under the abuse of discretion standard. *State v. Sevayega*, Cuyahoga App. No. 92499, 2009-Ohio-5008, _12.

{¶ 11} Hardnick’s petition lacks substantive merit. Hardnick was sentenced in both cases at the same time by the trial judge. The transcripts from sentencing

⁵Tr. 14.

clearly reflect the trial court's intention to run the cases consecutive to each other. The sentencing journal entry in Case No. CR-435815 does not refer to the companion case. However, the sentencing journal entry in the later case, Case No. CR-436927, does refer to the older case. The sentencing journal entry for Case No. CR-435815 reads as follows:

"* * *. ON A FORMER DAY OF COURT DEFENDANT PLEAD [sic] GUILTY TO DRUG TRAFFICKING WITH JUVENILE SPECIFICATION R.C. 2925.03 F-2 (S. B. 2) AS CHARGED IN COUNT 1; POSSESSION OF DRUGS R.C. 2925.11 F-3 AS CHARGED IN COUNT 2; AND ENDANGERING CHILDREN R.C. 2919.22 F-2 AS CHARGED IN COUNTS 9 AND 10.

"PRIOR TO SENTENCING PROSECUTOR MOVES TO AMEND COUNTS 9 AND 10 TO READ M-1.

"THE COURT CONSIDERED ALL OF THE REQUIRED FACTORS OF THE LAW.

"IN REGARDS TO COUNTS 9 AND 10 THE DEFENDANT IS SENTENCED TO COUNTY JAIL FOR A TERM OF 6 MONTHS ON EACH COUNT, COUNTS TO RUN CONCURRENTLY WITH EACH OTHER AND CONCURRENTLY WITH COUNTS 1 AND 2 AT OHIO REFORMATORY FOR WOMEN.

"IN REGARDS TO COUNTS 1 AND 2 THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R.C. 2929.11. THE COURT IMPOSES A PRISON TERM AT OHIO REFORMATORY FOR WOMEN OF 4 YEARS ON COUNT 1, TO RUN CONSECUTIVE TO COUNT 2; 1 YEAR ON COUNT 2.

"DEFENDANT TO RECEIVE 216 DAYS JAIL TIME CREDIT, TO DATE POST RELEASE CONTROL IS A PART OF THIS PRISON SENTENCE FOR THE MAXIMUM PERIOD ALLOWED FOR THE ABOVE FELONY(S) UNDER R.C. 2967.28."

{¶ 12} The sentencing journal entry for Case No. CR-436927 reads as follows:

“* * *. ON A FORMER DAY OF COURT DEFENDANT PLEAD [sic] GUILTY TO POSSESSION OF DRUGS ORC 2925.11 F-2 SB2 AS CHARGED IN COUNT 2; DRUG TRAFFICKING ORC 2925.03 F-2 AS CHARGED IN COUNT 3; TAMPERING WITH EVIDENCE ORC 2921.12 F-3 AS CHARGED IN COUNT 4.

“* * *

“THE COURT CONSIDERED ALL OF THE REQUIRED FACTORS OF THE LAW.

“THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R.C. 2929.11.

“THE COURT IMPOSES A PRISON TERM AT THE OHIO REFORMATORY FOR WOMEN OF 3 YEARS AS TO COUNTS 2 AND 3, COUNTS TO RUN CONCURRENT WITH EACH OTHER; 1 YEAR AS TO COUNT 4, TO RUN CONSECUTIVE TO COUNTS 2 AND 3 **AND TO RUN CONSECUTIVE TO CR 435815.**

“DEFENDANT TO RECEIVE 216 DAYS JAIL TIME CREDIT, TO DATE.”

(Emphasis added.)

{¶ 13} Accordingly, a review of the record demonstrates that the lower court’s journal entry provided that the sentences in both cases were to be run consecutively with each other. The journal entry clearly provides that it was the lower court’s intention to run appellant’s sentence of four years in Case No. CR-436927, consecutive to the five year sentence in Case No. CR-435815 for a total of nine years.

{¶ 14} Moreover, a review of the record provides that although the trial judge remarked that Hardnick’s sentence *could* be interpreted in the manner she

suggested, the judge still denied Hardnick's motion. Specifically, the lower court record provides the following:

MS. CLANCY: "I believe that the journal entry in Case No. [CR-] 436927 does state that the sentences are to be consecutive sentences."

THE COURT: "Does it?"

MS. CLANCY: "The Court imposed, as it stated, the Court imposes - - oh, our Honor, I did mark that as State's Exhibit No. 2 attached to my brief. But it indicates that the court imposes a prison term at the Ohio Reformatory for Women of three years as to counts two and three. Counts to run concurrent with each other. One year as to count four, to run consecutive to counts two and three, and to run consecutive to [CR-]435815."

THE COURT: "And to run - "

MS. CLANCY: "Which would be her other Case [CR-]435815."

THE COURT: "Well, this is my error then. I think it's all moot. I had looked at this five times, and I didn't see that. So right. So [CR-]436927, the entry journalized November 4th, I guess, sort of scratched out, but November 4th, '03, run consecutive to [CR-]435815. Hmm."

MR. POWERS: "Your Honor?"

THE COURT: "It's - I think it's moot. But go ahead, Mr. Powers."

* * *

THE COURT: "For the reasons already discussed, that motion is denied then. The Court, from what I have seen, and really from all of this information, is attached to the state's July 23 motion, captioned supplemental

response, et cetera, the Court clearly intended a nine-year sentence.”⁶

{¶ 15} Although not dispositive of this case, this court notes that Hardnick filed a combined total of at least six motions for judicial release (in Case Nos. CR-435815 and CR-436927) in which she stated that she was serving a nine-year prison sentence. Hardnick had several previous opportunities to argue that her sentence was ambiguous, or that her sentence was not properly run consecutively; however, she neglected to do so.

{¶ 16} Hardnick’s motion was untimely and devoid of merit. Accordingly, we find no error on the part of the lower court in denying her motion.

{¶ 17} Hardnick’s assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of 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.

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

LARRY A. JONES, JUDGE

⁶See, July 24, 2009, hearing tr. pgs. 8-9, 14.

SEAN C. GALLAGHER, A.J., CONCURS;
COLLEEN CONWAY COONEY, J., CONCURS
IN JUDGMENT ONLY