

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92769

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LARRY WILLIAMS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-489137

BEFORE: Blackmon, J., Cooney, P.J., and Jones, J.

RELEASED: February 25, 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).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Larry Williams appeals the trial court's decision revoking his community controlled sanctions and sentencing him to prison.

Williams assigns the following errors for our review:

"I. The trial court erred at the community control revocation hearing by imposing a four year prison sentence upon Mr. Williams, because that sentence was not reasonably calculated to punish Mr. Williams for not immediately informing his probation officer of a change of address."

"II. The trial court violated Mr. Williams's due process rights by failing to give him proper notice of the alleged violation for which the trial court based its decision to revoke Mr. Williams's community control sanctions."

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On December 1, 2006, the Cuyahoga County Grand Jury returned an eight count indictment against Williams for various weapons and drug offenses, as well as for tampering with evidence. On September 4, 2007, pursuant to a plea agreement, Williams pled guilty to one count of drug trafficking, a fourth degree felony, and one count of tampering with evidence, a third degree felony. The State dismissed the remaining charges.

{¶ 4} On November 14, 2007, the trial court sentenced Williams to five years of community controlled sanctions. The trial court advised Williams to abide by the rules and regulations of the probation department and advised him that a violation could expose him to more restrictive sanctions and a sentence of up to four years in prison.

{¶ 5} On December 30, 2008, police officers from the city of Euclid executed a search warrant at Williams's last known address. Williams was present at the home when the search ensued. During the execution of the warrant, the police recovered several guns and illegal drugs in the home. The police subsequently arrested Williams, and his probation officer notified the court of this alleged violation.

{¶ 6} On January 8, 2009, the trial court conducted a probation violation hearing. At the hearing, it was established that along with the pending case resulting from the guns and drugs recovered at Williams's last known address during the execution of the search warrant, Williams had also failed to notify his probation officer of his new address. In addition, Williams had failed to obtain and maintain verifiable employment.

{¶ 7} The trial court found Williams in violation of the previously ordered community controlled sanctions and sentenced him to four years in prison. Williams now appeals.

Review of Sentence

{¶ 8} In the first assigned error, Williams argues the trial court erred in imposing a four-year prison sentence that is not reasonably calculated to punish him for not immediately reporting a change of address.

{¶ 9} Preliminarily we note that Williams does not contest the trial court's determination that he violated the terms of the previously ordered

community controlled sanctions. Instead, Williams argues the sentence was contrary to law. We disagree.

{¶ 10} In *State v. Foster*,¹ the Ohio Supreme Court found certain provisions of Ohio's sentencing statute unconstitutional in light of *Blakely v. Washington*,² because said provisions required judicial fact finding to exceed the sentence allowed simply as a result of a conviction or plea. The Court therein concluded “that trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.”³

{¶ 11} Thus, post-*Foster*, we now apply an abuse of discretion standard in reviewing a sentence that is not contrary to law.⁴

{¶ 12} An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable.⁵ When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court.⁶

¹109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

²(2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403.

³Id. at ¶ 100.

⁴*State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

⁵*Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

⁶*State v. Murray*, 11th Dist No. 2007-L-098, 2007-Ohio-6733, citing *Pons v. Ohio*

{¶ 13} In *Foster*,⁷ the Ohio Supreme Court held that R.C. 2929.11 must still be followed by trial courts when sentencing offenders. The Ohio Supreme Court held that R.C. 2929.11 does not mandate judicial fact-finding; rather, the trial court is merely to “consider” the statutory factors set forth in this section prior to sentencing.⁸

{¶ 14} R.C. 2929.11(A) provides that a trial court that sentences an offender for a felony conviction must be guided by the “overriding purposes of felony sentencing.”⁹ Those purposes are “to protect the public from future crimes by the offender and others and to punish the offender.”¹⁰ R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.¹¹

{¶ 15} In the case sub judice, Williams pled guilty to and was convicted of one fourth degree and one third degree felony. A third degree felony is punishable by one, two, three, four, or five years in prison. It was within the

State Med. Bd., 66 Ohio St.3d 619, 621, 1993-Ohio-122, 614 N.E.2d 748.

⁷109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

⁸*Id.*

⁹*State v. McCarroll*, Cuyahoga App. No. 89280, 2007-Ohio-6322.

¹⁰*Id.*

¹¹*Id.*

trial court's discretion to consider any penalty within the foregoing range as long as the penalty was considered in light of the factors of R.C. 2929.11 and 2929.12. As a result of the probation violation, the trial court sentenced Williams to four years in prison, which is within the statutory range for the more serious of the two offenses to which he pled guilty.

{¶ 16} Prior to sentencing Williams, the trial court heard from Williams's defense counsel, who spoke in mitigation and indicated that Williams had not tested positive for any illegal substances while on probation.

However, as previously stated, the record established that Williams failed to report a change of address, failed to obtain verifiable employment, and, most significantly, within a year of being placed on probation, Williams was arrested at his last known address, where guns and drugs were found.

{¶ 17} Here, we find no abuse of discretion. Williams does not contest that he has violated the terms of the previously ordered community controlled sanctions; thus it was within the trial court's discretion to impose a prison sentence for the instant violation. Further, the sentence the trial court imposed is within the statutory range for the instant offenses. Accordingly, we overrule the first assigned error.

Due Process

{¶ 18} In the second assigned error, Williams argues he was denied due process when the trial court terminated his community controlled sanctions without written notification of the alleged violations. We disagree.

{¶ 19} A trial court must comply with the following six minimum due process requirements in a probation revocation case:

“(a) written notice of the claimed violations of parole (probation); (b) disclosure to the parolee (probationer) of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a ‘neutral and detached’ hearing body * * * and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking * * * parole (probation).”¹²

{¶ 20} In the instant case, Williams claims he was not given written notice of his alleged violations. We note that although the preferred course is for a trial court to give the probationer notice of the claimed probation violations in written form, oral statements that explain the basis of the revocation proceeding may be sufficient where the statements provide adequate notice to the probationer and also a record for appellate review of the revocation proceeding.¹³

¹²*State v. Hayes*, Cuyahoga App. No. 87642, 2006-Ohio-5924, quoting *State v. Miller* (1975), 42 Ohio St.2d 102, 104, 326 N.E.2d 259.

¹³*State v. Lenard*, Cuyahoga App. No. 93373, 2010-Ohio-81, citing *Lakewood v. Sullivan*, Cuyahoga App. No. 79382, 2002-Ohio-2134, ¶ 26, appeal not allowed, 96 Ohio St.3d 1514, 2002-Ohio-4950, 775 N.E.2d 852, citing *State v. Jordan* (Nov.

{¶ 21} While Williams was not provided with formal written charges, the revocation hearing was conducted and arguments were presented in a manner that suggests Williams was not prejudiced by the failure to receive written notice of the violation.

{¶ 22} As previously stated, Williams was arrested at his last known address after a search warrant uncovered guns and drugs on the premises. At the revocation hearing, Williams's defense counsel informed the trial court that Williams no longer lived at that address. Williams proceeded to explain to the trial court that he had been living at the address on record, but that his girlfriend had asked him to leave around Thanksgiving 2008.

{¶ 23} It was at this juncture that the probation officer indicated that he had met with Williams on December 1, 2008, shortly after he claimed to have been asked to leave the previous residence, but Williams failed to provide a new address. Consequently, the trial court found, among other things, that Williams was in violation for failing to provide the probation department with a change of address.

{¶ 24} We conclude Williams has raised a purely formal defect and fails to demonstrate any negative impact on his ability to prepare a defense to the charge. Even though there was a lack of written notice, Williams fails to

demonstrate and the record is devoid of how he was prejudiced by such a defect.

{¶ 25} Accordingly, we overrule the second assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction 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.

PATRICIA ANN BLACKMON, JUDGE

COLLEEN CONWAY COONEY, P.J., and
LARRY A. JONES, J., CONCUR