

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 95233**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DAVID KING**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-395587

**BEFORE:** Blackmon, P.J., Stewart, J., and Jones, J.

**RELEASED AND JOURNALIZED:** March 10, 2011

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant David King appeals the sentence the trial court imposed at his resentencing and assigns the following errors for our review:

**“I. The trial court violated Crim.R. 32 when there was an unnecessary delay in sentencing the appellant.”**

**“II. The trial court abused its discretion in sentencing appellant to the maximum penalty without considering the overriding purposes of felony sentencing or the mandatory sentencing factors.”**

**“III. The trial court abused its discretion in sentencing appellant to the maximum period of incarceration without articulating judicially reviewable reasons for imposition of the sentence.”**

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

{¶ 3} On August 25, 2000, the Cuyahoga County Grand Jury issued a 27-count indictment against King. On March 15, 2001, pursuant to a plea bargain, King pleaded guilty to five counts of gross sexual imposition, two counts of rape, and one count of felonious assault. In addition, pursuant to the plea bargain, King agreed to an aggregate prison term of 18 years. The trial court accepted the agreed sentence and imposed sentence accordingly.

{¶ 4} Following his conviction and sentence, King filed a myriad of post-conviction motions, including three petitions for writs of mandamus, which were denied. *State ex rel. King v. Boyko* (Apr. 2, 2001), Cuyahoga App. No. 79394; *S/O ex rel. King v. Boyko* (June 21, 2001), Cuyahoga App. No. 79177; and *People ex rel. King v. Boyko*, Cuyahoga App. No. 84927, 2004-Ohio-5743.

{¶ 5} On March 25, 2010, King filed a motion for a new sentencing hearing on the grounds that the trial court had failed to state that the five years of postrelease control was mandatory. On May 18, 2010, the trial court convened a hearing, resentenced King to

the agreed aggregate sentence of 18 years, and advised him that the five years of postrelease control was mandatory. King now appeals.

### **Criminal Rule 32**

{¶ 6} In the first assigned error, King argues the delay between sentencing and resentencing violated Criminal Rule 32.

{¶ 7} Crim.R. 32(A) states that a sentence “shall be imposed without unnecessary delay.” *State v. Hawkins*, Cuyahoga App. No. 94294, 2011-Ohio-74. The Supreme Court of Ohio has recognized that delay for a reasonable time does not invalidate a sentence. *Id.*, citing *Neal v. Maxwell* (1963), 175 Ohio St. 201, 202, 192 N.E.2d 782. We have previously held that Crim.R. 32(A) does not apply in cases where an offender must be resentenced. *State v. Huber*, Cuyahoga App. No. 85082, 2005-Ohio-2625, ¶8. “This logic, as it relates to Crim.R. 32(A), recognizes the distinction between a trial court refusing to sentence an offender and a trial court improperly sentencing an offender.” *State v. Spears*, 9th Dist. No. 24953, 2010-Ohio-1965, at ¶19. Furthermore, the Supreme Court of Ohio has held that a trial court retains continuing jurisdiction to correct a void sentence. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, at ¶19, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, 471 N.E.2d 774.

{¶ 8} The circumstances here do not implicate Crim.R. 32(A) as this is not a case where the trial court refused to sentence King. Where there is a delay between the sentence and a resentencing occasioned by the failure to include a required term of postrelease control in the original entry, such matter involves the correction of a void

sentence and not a delay in imposing the original sentence. *State v. Jaffal*, Cuyahoga App. No. 93142, 2010-Ohio-4999.

{¶ 9} To support his position, King cites to our decision in *State v. Mack*, Cuyahoga App. No. 92606, 2009-Ohio-6460, appeal not allowed 124 Ohio St.3d 1540, 2010-Ohio-1557, 924 N.E.2d 844, but *Mack* is not applicable to the instant case. In *Mack*, we held that the trial court lost jurisdiction to impose sentence when a two-year delay existed between a finding of guilt and pronouncement of sentence.

{¶ 10} In this case, there was not a long delay between the finding of guilt and the pronouncement of sentence. King pleaded guilty in March 2001 and was sentenced immediately. King filed his motion for resentencing in March 2010 and was resentenced in May 2010.

{¶ 11} In this matter, the trial court did not delay imposing the original sentence. Rather, in this instance, the trial court was required to resentence King because the trial court's original sentence failed to state that the five year period of post- release control was mandatory. The trial court had continuing jurisdiction to correct its error and did not violate Crim.R. 32(A). Accordingly, we overrule the first assigned error.

### **Sentence**

{¶ 12} Having a common basis in law and fact, we shall simultaneously address King's second and third assigned errors. King argues the trial court abused its discretion by imposing a maximum sentence and by failing to articulate its reasons for imposing said sentence. We find no merit to King's assertions.

{¶ 13} R.C. 2953.08(D) provides: “A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.” *State v. Pannell*, Cuyahoga App. No. 89352, 2008-Ohio-956. Thus, under this statute, an appellate court has a limited ability to review agreed upon jointly recommended sentences. *State v. Spurling*, 1st Dist. No. C-060087, 2007-Ohio-858, ¶15.

{¶ 14} A sentence is authorized by law when it is within the statutory range of available sentences. *State v. Baker*, 6th Dist. No. WD-05-033, 2006-Ohio-3611, ¶5. As a result, R.C. 2953.08(D) precludes an appellate court from engaging in a review of any agreed sentence so long as it is within the statutory range. *State v. Eskridge*, 6th Dist. No. L-06-1013, 2007-Ohio-4712, ¶15.

{¶ 15} In the instant case, the record reflects that King pleaded guilty to five counts of gross sexual imposition, third degree felonies, and the trial court imposed five-year maximum concurrent prison sentences. King also pleaded guilty to one count of felonious assault, a first degree felony, and the trial court imposed the minimum term of three years in prison. In addition, King pleaded guilty to two counts of rape, first degree felonies, and the trial court imposed ten-year maximum concurrent prison sentences. Further, the trial court ordered the sentences to be served consecutively for an aggregate prison term of 18 years. All these sentences were within the statutory range.

{¶ 16} Finally, King and the state made a joint stipulation during the plea hearing that King would be sentenced to an aggregate of 18 years in prison. Since King agreed to

serve 18 years in prison for the crimes he committed, we are precluded from reviewing the reasonableness of his prison sentence. *State v. Hall*, Cuyahoga App. No. 87059, 2007-Ohio-414. Accordingly, we overrule the second and third assigned errors.

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.

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PATRICIA ANN BLACKMON, PRESIDING JUDGE

MELODY J. STEWART, J., and  
LARRY A. JONES, J., CONCUR