

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94335

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RALPH THOMAS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-525366

BEFORE: Gallagher, J., Stewart, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: January 20, 2011
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SEAN C. GALLAGHER, J.:

{¶ 1} Appellant, Ralph Thomas, appeals the judgment of the Cuyahoga County Court of Common Pleas that denied his motion to withdraw his guilty plea. Further, he appeals his sentence. For the reasons stated herein, we affirm the decision of the trial court.

{¶ 2} The underlying facts supporting Thomas's convictions show that Thomas performed some home repairs for his neighbor, Thiah Herd. Thomas claims that Ms. Herd agreed to pay him and his crew from insurance money she collected, but that she refused to pay him even after she received reimbursement. According to Ms. Herd, Thomas called her at all hours of the day and night, stalked her in the neighborhood, and threatened to hurt her and her son. After Ms. Herd filed a complaint against Thomas, he was arrested and charged.

{¶ 3} Thomas was indicted on five counts: one count of telecommunications harassment; two counts of intimidation; one count of disrupting public services; and one count of inducing panic. Thomas initially entered a not guilty plea. On October 9, 2009, he pleaded guilty to telecommunications harassment, in violation of R.C. 2917.21(B), with a prior conviction for the same offense, making it a fifth-degree felony, and one count of intimidation, in violation of R.C. 2921.03(A), a third-degree felony. The state dismissed the remaining three counts.

{¶ 4} At the plea hearing, the state set forth the charge, maximum penalties, and plea discussions on the record. The trial court engaged Thomas in a Crim.R. 11 colloquy. During the colloquy, Thomas affirmatively expressed that he understood his rights, and that he understood he was giving up those rights by entering a guilty plea. He also affirmatively expressed

that he understood the nature of the charge and the maximum penalties the court could impose, in this case, six to 12 months for telecommunications harassment and one to five years for intimidation. Thomas also indicated he was not under the influence of drugs, alcohol, or medication that affected his judgment. He further stated that no threats or promises had been made to induce his plea and that he was satisfied with his representation. The trial court determined that Thomas's plea was knowingly, intelligently, and voluntarily made, and accepted Thomas's plea.

{¶ 5} On November 13, 2009, after the court had reviewed the presentence investigation report, both Thomas and Ms. Herd were given a chance to address the court. Thomas expressed remorse for his actions but maintained that he behaved as he did in order to get paid for the work he had completed for the victim. He insisted that he never meant to offend her and that he forgave her for not paying him and his work crew. Ms. Herd stated that Thomas threatened her and her son, that he spied on her in her home, followed her in the neighborhood, and called her home constantly throughout the day and night. Because of Thomas's behavior, Ms. Herd claimed she experienced severe emotional distress.

{¶ 6} The trial court then sentenced Thomas to 12 months for telecommunications harassment and two years for intimidation, to be served concurrently. On December 1, 2009, Thomas filed a motion to withdraw his

guilty plea, asserting that he had been offered a plea deal with an agreed sentence of one year; he also stated that he would not have pleaded guilty if he had known the court would sentence him to more than one year. The trial court denied his motion without a hearing.

{¶ 7} Thomas appealed, citing two assignments of error for our review.

{¶ 8} “I. The trial court erred by denying appellant’s motion to withdraw his guilty plea and by failing to conduct an evidentiary hearing.”

{¶ 9} In his first assignment of error, Thomas argues he was promised a one-year prison sentence; therefore, he was entitled to withdraw his plea after the court sentenced him to two years. We disagree.

{¶ 10} Crim.R. 32.1 addresses the withdrawal of a plea and provides as follows: “A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.”

{¶ 11} A defendant who moves to withdraw a guilty plea after sentence has been imposed bears the additional burden of demonstrating manifest injustice. *State v. Jackson*, Cuyahoga App. No. 92013, 2009-Ohio-3293, citing *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324. Manifest injustice is “a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through

another form of application reasonably available to him or her.” *State v. Sneed*, Cuyahoga App. No. 80902, 2002-Ohio-6502.

{¶ 12} We review a trial court’s denial of a postsentence motion to withdraw guilty plea for an abuse of discretion. *State v. Cochran*, Cuyahoga App. Nos. 91768, 91826, and 92171, 2009-Ohio-1693, citing *State v. Makupson*, Cuyahoga App. No. 89013, 2007-Ohio-5329. An abuse of discretion connotes more than an error of law or judgment, but implies a decision that is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 13} The transcript of the plea hearing reflects that the trial court asked Thomas several times whether he had been promised anything in exchange for his guilty plea and whether he understood the maximum sentences that he could receive on the charged offenses. Thomas responded that he had not been promised anything and that he understood the possible penalties.

{¶ 14} Thomas’s motion to withdraw his plea is premised on a change of heart, only after he was sentenced. A change of heart is not a legitimate basis for the withdrawal of a plea. *State v. Bradley*, 2d Dist. No. 22542, 2008-Ohio-6033, citing *State v. Davis* (Jan. 5, 2001), 2d Dist. No. 18172.

{¶ 15} Furthermore, a hearing on a postsentence motion to withdraw a guilty plea is not required where the record, on its face, conclusively and

irrefutably contradicts the allegations in support of withdrawal. *State v. Harris*, Cuyahoga App. No. 89559, 2007-Ohio-6080, ¶ 8. Upon review of the plea hearing transcript, Thomas's motion to withdraw his plea contradicts what is conclusively and irrefutably made clear in the Crim.R. 11 colloquy between him and the trial court.

{¶ 16} The trial court did not err by failing to hold a hearing on Thomas's motion, nor did it err in denying his motion. Thomas's first assignment of error is overruled.

{¶ 17} "II. The trial court abused its discretion and imposed a two-year prison sentence that is contrary to law because it is not supported by adequate reasons and the trial court did not consider proportionality or consistency as required by law."

{¶ 18} In his second assignment of error, Thomas argues that the trial court failed to support its decision on the record to impose a two-year prison term. We find his argument has no merit.

{¶ 19} R.C. 2929.11(B) reads as follows: "(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(A) provides that the

“overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender.”

{¶ 20} While R.C. 2929.11 does not require a trial court to make findings on the record, a record must nevertheless adequately demonstrate that the trial court considered the objectives of R.C. 2929.11(B). *State v. Turner*, Cuyahoga App. No. 81449, 2003-Ohio-4933. As we recognized in *State v. Georgakopoulos*, Cuyahoga App. No. 81934, 2003-Ohio-4341, “trial courts are given broad but guarded discretion in applying these objectives to their respective evaluations of individual conduct at sentencing.”

{¶ 21} Under R.C. 2929.12, a court imposing a sentence upon a felony offender has the discretion to determine the most effective way to comply with the purposes and principles of sentencing. See R.C. 2929.12(A). The court must, therefore, consider the factors set forth in divisions (B) and (C) relating to the seriousness of the offender’s conduct, as well as the factors set forth in divisions (D) and (E) relating to the likelihood of recidivism, along with any other relevant factors. R.C. 2929.12(A).

{¶ 22} At sentencing, the trial court explained its reasons for imposing 12-month and two-year sentences for Thomas’s convictions. Specifically, the court noted that Thomas had previous convictions for menacing by stalking and telecommunications harassment in 2007. It also noted that the facts indicated that Thomas was out of control the evening he was arrested for the

instant offenses. We find that these factors, coupled with the victim's statements to the court at the sentencing hearing, support the trial court's decision to sentence Thomas to a two-year prison term.

{¶ 23} Furthermore, we note that Thomas did not raise the issue of whether his sentence was consistent with similarly situated offenders at his sentencing hearing, and has thus waived this issue on appeal.

{¶ 24} The goal of felony sentencing pursuant to R.C. 2929.11(B) is to achieve "consistency" not "uniformity." *State v. Klepatzki*, Cuyahoga App. No. 81676, 2003-Ohio-1529. The court is not required to make express findings that the sentence is consistent with other similarly situated offenders. *State v. Richards*, Cuyahoga App. No. 83696, 2004-Ohio-4633; *State v. Harris*, Cuyahoga App. No. 83288, 2004-Ohio-2854. This court has also determined that in order to support a contention that his or her 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. Woods*, Cuyahoga App. No. 82789, 2004-Ohio-2700.

{¶ 25} Thomas failed to present any evidence of other similarly situated offenders who received lesser sentences. Without a starting point for the trial court to begin analysis, the issue has not been preserved for appeal, and we decline to address it.

{¶ 26} Thomas'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 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.

SEAN C. GALLAGHER, JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR