

[Cite as *State v. Lockhart*, 2011-Ohio-936.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95093

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ISAAC LOCKHART

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-353508

BEFORE: Rocco, J., Cooney, P.J., and Keough, J.

RELEASED AND JOURNALIZED: March 3, 2011

ATTORNEY FOR APPELLANT

Brian R. McGraw
1370 Ontario Street
Suite 2000
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Thorin O. Freeman
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant Isaac Lockhart appeals from the trial court’s decision to impose consecutive terms at his resentencing hearing conducted pursuant to *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568.

{¶ 2} Lockhart presents three assignments of error. He argues that the journal entry is flawed because it fails to reflect the trial court’s intention with respect to a “companion case,” that consecutive terms require judicial “fact finding” pursuant to *Oregon v. Ice* (2009),

555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, and that the aggregate sentence imposed upon him constitutes both “cruel and unusual punishment” and an abuse of discretion.

{¶ 3} Since a review of the record demonstrates the trial court committed no error, however, Lockhart’s assignments of error are overruled. His sentence in this case is affirmed.

{¶ 4} Lockhart’s original convictions were reviewed by this court in *State v. Lockhart* (Sept. 16, 1999), Cuyahoga App. No. 74113. Therein, this court stated in relevant part as follows:

{¶ 5} “ * * * Lockhart appeals from his convictions, entered subsequent to a plea of guilty, for one count of aggravated burglary in violation of R.C. 2911.11, and two counts of attempted murder in violation of R.C. 2903.02. The appellant was sentenced to a term of incarceration of ten years for aggravated burglary and ten years to be served on each count of attempted murder. Each of these crimes constitute a first-degree felony and the court imposed the sentences consecutively [for a total of thirty years].

{¶ 6} “The appellant brutally attacked and injured Dejeanette Westbrooks in the home of her grandmother. During the attack, the appellant injured Robert Smith, Ms. Westbrooks’ uncle, who intervened to save her. The altercation ceased only when Ms. Smith, Ms. Westbrooks’ grandmother and Robert’s mother, hit the appellant with a flowerpot. Present during the attack was Ms. Westbrooks’ child. The appellant was charged with two counts of

felonious assault, two counts of aggravated burglary, and two counts of attempted murder. The appellant pled guilty to the attempted murders of both Ms. Westbrooks and Mr. Smith and pled guilty to one count of aggravated burglary. The remaining counts were nolle.

{¶ 7} “ * * *

{¶ 8} “ * * * [T]he probation department, informed the court that the appellant had previously been convicted of drug trafficking and carrying a concealed weapon. His sentence of one and one-half years on each count, concurrent, was suspended and the appellant had been placed on three years probation. The appellant admitted that he was a probation violator.”

{¶ 9} In his assignments of error, Lockhart challenged the trial court’s imposition of maximum and consecutive terms for all three of his convictions. He neither appealed from nor put forward any argument regarding his drug case.

{¶ 10} Although this court affirmed his convictions and found no error in imposing maximum consecutive sentences, it found Lockhart’s third assignment of error to have merit. Due to the trial court’s failure to “make a finding that gives its reasons for selecting the sentence imposed” when it chose maximum and consecutive terms, as required by the statutes then in effect, Lockhart’s case was “remanded for resentencing.”

{¶ 11} On remand, the trial court conducted a hearing and then issued a terse journal entry stating that the “violent nature” of Lockhart’s crimes “require[d] a maximum, consecutive sentence.” The trial court, however, failed to include any mention of postrelease control in its journal entry.

{¶ 12} The record reflects that in 2005, Lockhart filed a pro se “motion to vacate sentence” pursuant to *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. The trial court denied Lockhart’s motion.

{¶ 13} In 2009, Lockhart filed another pro se motion; this time, he sought “sentencing” pursuant to *Simpkins*. In its response brief, the state acknowledged the flaw in Lockhart’s journal entry of sentence. The trial court, therefore, ordered Lockhart returned for a sentencing hearing. The court also appointed counsel to represent Lockhart. Both Lockhart and his attorney filed sentencing memoranda for the court’s consideration.

{¶ 14} When the proceeding took place, the trial court conducted a full hearing. Initially, the court stated in relevant part as follows:

{¶ 15} “THE COURT: Now, there was an issue about a probation violation in * * 327336. * * * [The former trial judge] found Mr. Lockhart to be in violation of his probation * * and ordered his sentence in that case be consecutive to the sentence in [this case. * * * The two counts] were run concurrent with each other. As I said, it was run consecutive to this.

{¶ 16} “Now that sentence has long expired, so I wasn’t going to address it unless anybody has a great need for me to do so.”

{¶ 17} The trial court went on to comment that it did not “think legally [it could] resentence him on that case, 327336, so we are not going to address it here, but to the extent there could be an argument, my intention would be to run that concurrent. So that case would be run concurrent to this one * * * .”

{¶ 18} Thereafter, the trial court listened to defense counsel, Lockhart, and the prosecutor, then permitted both victims and also Lockhart’s son, who had witnessed the attack, to speak. The trial court then addressed Lockhart, stating that it had considered “the felony sentencing statutes,” the “need for incapacitation, deterrence, rehabilitation, and restitution,” and “the impact” on the victims. The court further stated it had “come up with a sentence that’s consistent with what others have received for similar crimes.” The court listed each factor in R.C. 2929.12(B), (D), and (E) that it believed applied. Finally, the trial court indicated it had considered Lockhart’s prison record.

{¶ 19} The trial court thereupon imposed consecutive sentences of nine years for each count of attempted murder, and seven years for the aggravated burglary charge, for “an aggregate sentence of 25 years” rather than the original thirty years. Lockhart received credit

for time served, the court waived all costs and fines, and informed Lockhart of postrelease control requirements.

{¶ 20} Lockhart appeals from the trial court’s order of sentence with three assignments of error.

{¶ 21} **“I. The Trial Court’s sentencing Journal Entry is erroneous as it fails to reference the change from consecutive to concurrent sentencing regarding the companion case.**

{¶ 22} **“II. Imposition of consecutive sentences under the current Ohio statutes violates the United States Supreme Court finding in *Oregon v. Ice*.**

{¶ 23} **“III. The imposition of a 25 year aggregate sentence is an abuse of discretion and violates Lockhart’s 8th Amendment right against Cruel and Unusual Punishment.”**

{¶ 24} In his first assignment of error, Lockhart complains that the journal entry of sentence fails to reflect the trial court’s intention to impose the sentence in this case concurrently with the sentence imposed in “327336.” Lockhart demands that this court should order the trial court “to correct the sentence.”

{¶ 25} However, he provides no legal authority to support his demand, as required by App.R. 16(A)(7). Moreover, this court lacks jurisdiction to consider an argument related to a

case that Lockhart neither appealed from in a timely manner nor designated in his notice of appeal. App.R. 4(A), 5(A). Consequently, Lockhart’s first assignment of error is overruled.

{¶ 26} Lockhart argues in his second assignment of error that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 has been abrogated by *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, and therefore, the trial court was required to make findings and provide reasons for imposing consecutive terms. The Ohio Supreme Court, however, recently has rejected Lockhart’s argument in *State v. Hodge*, _ Ohio St.3d _ , 2010-Ohio-6320, _ N.E.2d _ , paragraphs two and three of the syllabus. Accordingly, Lockhart’s second assignment of error also is overruled.

{¶ 27} In his third assignment of error, Lockhart argues his twenty-five-year aggregate sentence violates the Eighth Amendment to the United States Constitution and constitutes an abuse of discretion. This court disagrees.

{¶ 28} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court set forth a two-step procedure for reviewing felony sentences, as follows:

{¶ 29} “ * * * First, [appellate courts] 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 in imposing the term of imprisonment is reviewed under the abuse of discretion standard.” Id.

{¶ 30} The supreme court further stated that a sentence is not “clearly and convincingly contrary to law” in cases in which the trial court considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12, properly applied postrelease control, and sentenced for the offense within the permissible range. Id. at ¶18. In addition, when the record reflects the trial court gave careful and substantial deliberation to the relevant statutory considerations, the sentencing decision will not be deemed an abuse of discretion. Id. at ¶ 20.

{¶ 31} A review of the record in this case demonstrates the trial court complied with the foregoing requirements. The trial court stated that it considered Lockhart’s acts to be particularly egregious in light of the physical and emotional damage he inflicted. *State v. Bell*, Cuyahoga App. No. 91234, 2009-Ohio-1084. Nevertheless, the trial court imposed less than the maximum term for each conviction, resulting in a twenty-five-year sentence instead of the original thirty-year sentence.

{¶ 32} Under these circumstances, this court cannot find the sentence constitutes either “cruel and unusual” punishment or an abuse of discretion. *State v. Moon*, Cuyahoga App. No. 93673, 2010-Ohio-4483, ¶ 25-28, citing *State v. Hairston*, 118 Ohio St.3d 289,

2008-Ohio-2338, 888 N.E.2d 1073. Consequently, Lockhart’s third assignment of error also is overruled.

{¶ 33} Lockhart’s sentence is 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.

KENNETH A. ROCCO, JUDGE

COLLEEN CONWAY COONEY, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR