

[Cite as *State v. Santiago*, 2015-Ohio-1824.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101640

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EDWIN SANTIAGO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-578780-A

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

RELEASED AND JOURNALIZED: May 14, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Edwin Santiago (“Santiago”) appeals his sentence and assigns the following three errors for our review:

I. The trial court imposed an excessive sentence that subjects appellant to cruel and unusual punishment in violation of the Ohio State Constitution Art. 1, § 9.

II. The trial court erred by imposing consecutive sentences.

III. The sentence issued via journal entry, which was conveyed to the Department of Corrections, was considerably different than the one issued in the transcript by the trial court.

{¶2} Having reviewed the record and pertinent law, we remand the matter to the trial court for clarification of the sentence. The apposite facts follow.

{¶3} The Cuyahoga County Grand Jury indicted Santiago for three counts of rape, four counts of kidnapping, one count for aggravated robbery, one count for felonious assault, two counts of grand theft, and one count for improperly handling a firearm in a vehicle. Santiago was 17 years old when he committed the offenses, but was bound over from the juvenile court to the common pleas court.

{¶4} The charges arose from Santiago attacking a woman who was removing snow from her car during the early morning hours. He choked the woman and dragged her to her backyard where he repeatedly raped and threatened her. He then stole her car that had been running while she was brushing the snow. The car contained a firearm.

Santiago was apprehended several days later dressed as a female to disguise himself. He was attempting to flee to New York City.

{¶5} Santiago entered in a plea agreement and pleaded guilty to one count each of rape, kidnapping with a sexual motivation specification, aggravated robbery, and improperly handling a firearm in a vehicle. He also pleaded guilty to two counts of grand theft. As part of the plea agreement, it was agreed that the rape and kidnapping counts would not merge. The remaining counts were nolle. The trial court sentenced Santiago to 28 years in prison.

Cruel and Unusual Punishment

{¶6} In his first assigned error, Santiago argues that his sentence of 28 years constitutes cruel and unusual punishment because it is disproportionate to the crimes he committed.

{¶7} In *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, the Ohio Supreme Court held that “where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment.” *Id.* at syllabus. In the instant case, none of the individual sentences imposed on Santiago were grossly disproportionate to its respective offenses. Each sentence was within the statutory range for each offense. In fact, a maximum sentence would have totaled 47 years. Accordingly, the aggregate prison term

resulting from the consecutive imposition of those sentences was not unconstitutional. Santiago's first assigned error is overruled.

Consecutive Sentences

{¶8} In his second assigned error, Santiago argues that the trial court failed to make the required findings pursuant to R.C. 2929.14(C) prior to imposing consecutive sentences.

{¶9} R.C. 2929.14(C)(4) requires that a trial court engage in a three-step analysis in order to impose consecutive sentences. First, the trial court must find that "consecutive service is necessary to protect the public from future crime or to punish the offender." *Id.* Second, the trial court must find that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* Third, the trial court must find that at least one of the following applies:

- (a) the offender committed one or more of the multiple offenses while awaiting trial or sentencing, while under a sanction, or while under postrelease control for a prior offense;
- (b) at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the offenses was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct; [or]
- (c) the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶10} Santiago contends the trial court failed to make findings consistent with the second and third steps. That is, the court failed to find that the consecutive sentences were not disproportionate to his conduct and failed to find one of the three factors in the last step applied.

{¶11} The trial court in the instant case stated that it “found that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and that consecutive sentences are not disproportionate to the danger the offender poses to the public.” Tr. 40-41. We cannot say that the trial court erred by making this finding given Santiago’s prior criminal history and the fact his behavior has escalated from burglaries to rape. Therefore, the trial court properly made the finding required by the second step.

{¶12} As for the third step, the trial court found that Santiago’s criminal history demonstrated that consecutive sentences were necessary to protect the public from future crime. Tr. 42. This satisfies R.C. 2929.14(C)(4)(c). It is true that Santiago was a juvenile; however, Santiago had just turned 18, therefore, his juvenile record is a relevant indicator regarding his likelihood of recidivism. According to the trial court, many of his prior offenses would have been felonies if committed by an adult. He has also violated probation numerous times. The trial court fully complied with the requirements pursuant to R.C. 2929.14(C). Santiago’s second assigned error is overruled.

Sentencing Entry

{¶13} In his third assigned error, Santiago argues that the trial court's sentencing entry imposing 28 years does not reflect the sentence of 22 years imposed at the sentencing hearing.

{¶14} In the instant case, the trial court originally sentenced Santiago to 11 years each for rape, kidnapping, and aggravated robbery, three years for the grand theft felony of the third degree, 18 months each for the grand theft felony of the fourth degree and the improper handling of a firearm in a motor vehicle. All of the counts were ordered to be served consecutively with each other. Tr. 39-40. This totals 39 years; however, the trial court stated it was 37 ½ years and Santiago's attorney stated it was 33 years.

{¶15} Santiago's attorney immediately objected to the sentence arguing that it was disproportionate to the crimes committed. The trial court and Santiago's counsel then engaged in a lengthy conversation regarding what sentence would be proportional. Santiago's attorney's argument can be summarized by his following statements:

Attorney: I'm suggesting to you, your Honor, give him the 15 and a half, which is all consecutive. It's the 11 [years], the three-and-a-half [years] and the 18 [months]. Or the three [years] and the one and a half [years]. That's 15 and a half. That's ample opportunity for him. And if he violates, he goes back for another seven and a half. He's going to be on post control for five years. He'll have a great opportunity for the system to supervise him. If he makes a mistake, he'll go back again.

{¶16} The state argued that the original consecutive sentence was proportionate given Santiago's voluminous criminal history and the fact this was a "stranger rape."

The state stressed that the community needed protection from Santiago. The court then stated:

Court: What I will reduce it to is 22 [years], but I'm not going to reduce it to 15 [years]. So I will run two of them concurrent. But I can't do any more than that.

{¶17} In its sentencing entry, the trial court then imposed a sentence of 28 years, consisting of a concurrent sentence of 11 years for the rape and kidnapping counts, with the remaining counts running consecutively as follows: 11 years for the aggravated robbery, 36 months for the grand theft felony of the third degree, 18 months for the grand theft felony of the fourth degree, and 18 months for the improper handling of a firearm in a motor vehicle.

{¶18} “A trial court errs when it issues a judgment entry imposing a sentence that differs from the sentence pronounced in the defendant’s presence.” *State v. Culver*, 160 Ohio App.3d 172, 2005-Ohio-1359, 826 N.E.2d 367, ¶ 70 (2d Dist.); *State v. Ranieri*, 84 Ohio App.3d 432, 434, 616 N.E.2d 1191 (8th Dist.1992). In the instant case, it is unclear the amount of time Santiago was sentenced to at the sentencing hearing. The trial court’s original sentence totaled 39 years; however, the trial court stated it was 37 and one-half years, and Santiago’s attorney stated it was 33 years. The court then stated it would reduce the sentence to 22 years. Because of this confusion, it is unclear what sentence the defendant was to receive at the sentencing hearing. The trial court’s entry sentenced Santiago to 28 years.

{¶19} A defendant is entitled to know his sentence at the sentencing hearing. Crim.R. 43; *State v. Quinones*, 8th Dist. Cuyahoga No. 89221, 2007-Ohio-6077, ¶ 5; *State v. Robinson*, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068. Due to the confusion at the sentencing hearing, we remand the matter for the trial court to conduct a hearing to clarify on the record the sentence imposed. Pursuant to Crim.R. 43(A), the defendant must be present for the imposition of the corrected sentence. *State v. R.W.*, 8th Dist. Cuyahoga No. 80631, 2003-Ohio-1142. Accordingly, Santiago's third assigned error is sustained.

{¶20} Judgment affirmed and the matter remanded for proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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 resentencing.

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

PATRICIA ANN BLACKMON, JUDGE

LARRY A. JONES, SR., P.J., and
MARY EILEEN KILBANE, J., CONCUR