[Cite as *State v. Vandersspool*, 2017-Ohio-962.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 104444 and 104512

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBIN A. VANDERSSPOOL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-588471-A

BEFORE: Celebrezze, J., Stewart, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 9, 2017

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Robin Vandessppool,[1] appeals from his entry of guilty pleas and resulting sentences in relation to the shooting death of Carlos Rivera-Burgos. He alleges that his convictions for manslaughter and aggravated robbery are allied offenses that should have merged at sentencing, and that the state withheld pertinent information that made his plea less than voluntary. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} On August 26, 2014, appellant was indicted along with Jose Rodriguez for the murder of Carlos Rivera-Burgos. Charges included aggravated murder, murder, felonious assault, aggravated robbery, kidnapping, and having weapons while under disability. Most charges carried one- and three-year firearm specifications, repeat violent offender specifications, and notices of prior convictions.

{¶3} On March 7, 2016, the court indicated that plea negotiations had been ongoing and allowed the parties until the following day to work something out or move forward with a suppression hearing and trial. The next day, the court conducted a change

[1] While this is the name set forth in the indictment, at the change of plea hearing, appellant stated his name was spelled "Robbin Vandessppooll," and the court indicated the indictment would be amended. However, a review of appellant's criminal record included in this case indicates that appellant has given several variations on the spelling of his name, including Robin Vandersspool.

of plea hearing. The agreement, as set forth by the state, required appellant to plead guilty to one count of manslaughter, a first-degree felony violation of R.C. 2903.03; one count of aggravated robbery, a first-degree felony violation of R.C. 2911.01(A)(1); and one count of having weapons under disability, a third-degree felony violation of R.C. 2923.13(A)(2). The first two counts carried one- and three-year firearm specifications, repeat violent offender specifications, and notices of prior conviction. The deal also included an agreed sentence of 27 years in prison.

{¶4} At the hearing, the court imposed the agreed sentence:

> For Mr. Vandessppooll, Count 3 is the voluntary manslaughter, felony of the first degree, 11 years at Lorain Correctional Institution. One- and three-year firearm specifications merge. The three-year firearm specification will be served prior to and consecutive to the 11 years, so that's 14 years on Count 3.
>
> In Count 6, aggravated robbery, felony of the first degree, 11 years in Lorain Correctional Institution plus the 3 years, 14 — No. I have to do 10 years in Lorain Correctional Institution plus 3 years is 13, plus the 14 years consecutive in Count 1[2] [sic], adds up to the 27 years, correct? No. The firearm specifications run concurrent to each other?
>
> [THE STATE]: Correct.
>
> THE COURT: All right. So Count 6 is 11 years at Lorain Correctional Institution. The firearm specification must run concurrent with Count 1 [sic] because it's the same transaction. So 14 plus 11 is 25.
>
> In Count 9, having weapons under disability, felony of the third degree, 2 years, 24 months, at Lorain Correctional Institution, consecutive to the terms in Counts 3 and 6.

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[2] The court inadvertently referred to Count 1 when it is clear from the record that the court meant Count 3. Count 1 was previously dismissed.

> The Court is finding and parties agree by the nature of the agreed recommended sentence that consecutive sentences are necessary to punish this defendant, are not disproportionate to the harm that was caused, that the Court also finds the harm is so great that a single term does not adequately reflect the seriousness of the conduct. Mr. Vandessppooll's prior criminal history shows consecutive sentences are necessary to protect the public.[3]

{¶5} Appellant then filed the instant appeal assigning two errors for review:

> I. The trial court erred when it did not find that voluntary manslaughter and aggravated robbery were allied offenses of similar import.
>
> II. The state improperly and unconstitutionally withheld exculpatory impeachment evidence from the defense in violation of the discovery rules and its obligation under *Brady v. Maryland*.

II. Law and Analysis

A. Allied Offenses

{¶6} Appellant first argues that voluntary manslaughter and aggravated robbery were allied offenses that should have merged prior to sentencing.

{¶7} Appellant agreed to a 27-year prison sentence in this case and that is what the trial court imposed. An agreed sentence is generally not subject to review on appeal. R.C. 2953.08(D). However, the sentence must be "authorized by law" in order to

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[3] The trial court issued two nunc pro tunc entries after the original sentencing entry, but these do not accurately reflect what occurred at the sentencing hearing. Therefore, they are a nullity.

preclude review. Appellant claims the court failed to merge allied offenses, so the sentence is not "authorized by law."

{¶8} To be "authorized by law," "a sentence must comport with all applicable mandatory sentencing provisions." *State v. Sergent*, Slip Opinion No. 2016-Ohio-2696, ¶ 29. Recently, the Supreme Court of Ohio stated that sentences are not void where an infirmity in the sentence involves a discretionary determination: "if the sentencing court had jurisdiction and statutory authority to act, sentencing errors do not render the sentence void, and the sentence can be set aside only if successfully challenged on direct appeal." *State v. Williams*, Slip Opinion No. 2016-Ohio-7658, ¶ 23. However, where the court ignores a mandatory sentencing provision, the sentence is void and may be attacked at any time. *Id*. at ¶ 27-28. Therefore, the court has equated "authorized by law" with a sentence that is not void for failure of the trial court to fulfill a mandatory duty.

{¶9} For reasons that are not altogether apparent, allied offenses fall within the category of sentencing obligations that are subject to forfeiture and are not void when a defendant fails to raise the issue during the sentencing hearing even though the trial court has a mandatory duty to merge allied offenses. *Williams* at ¶ 25-29; *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. There were no arguments made below and no finding here as to whether the offenses of manslaughter and aggravated robbery are allied offenses. As a result, the argument appellant now raises, that his manslaughter and aggravated robbery offenses are allied, does not mean his sentence is void. The sentence here is "authorized by law" and this court is precluded from

reviewing this assigned error based on appellant's agreement to the imposed sentence. R.C. 2953.08(D); *Sergent* at ¶ 30. Therefore, this assignment of error is overruled.

B. Knowing, Intelligent, and Voluntary Plea

{¶10} In his second assignment of error, appellant asserts that the state impermissibly withheld information regarding the criminal records of several witnesses. Appellant argues that he was not fully apprised of the case against him, which made his plea invalid.

{¶11} "'A defendant who enters a voluntary plea of guilty while represented by competent counsel waives all nonjurisdictional defects in prior stages of the proceedings.'" *Ross v. Common Pleas Court*, 30 Ohio St.2d 323, 323-324, 285 N.E.2d 25 (1972), quoting *Crockett v. Haskins*, 372 F.2d 475 (6th Cir.1966). Here, that means unless the alleged discovery violation would have caused appellant to not enter a plea, the error must be overruled.

{¶12} The state has a duty to disclose potentially exculpatory information to a criminal defendant. *Brady v. Maryland*, 373 U.S. 83, 86, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). "The *Brady* rule applies to evidence that is exculpatory in nature as well as evidence that a defendant could use at trial to impeach a government witness." *Bell v. Bell*, 512 F.3d 223, 232 (6th Cir.2008). Where the state fails to provide such material information and there is a likelihood of a different result due to that failure, a violation of a criminal defendant's due process rights occurs. *See Brady*. "A successful *Brady* claim requires a three-part showing: (1) that the evidence in question be favorable; (2)

that the state suppressed the relevant evidence, either purposefully or inadvertently; (3) and that the state's actions resulted in prejudice." *Bell* at 231, citing *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

{¶13} Here, appellant alleges that the state failed to provide him with the criminal histories of several witnesses. He argues that he could have used these records on cross-examination to impeach these witnesses.

{¶14} The state filed a motion to supplement the record with a tabulation of the discovery exchanged in this case using the open discovery system established in Cuyahoga County. This court granted the state's request to supplement the record, but the additional information provided by the state is not sufficient to completely bar arguments raised in a postconviction petition where this argument may be more thoroughly examined. This is because the nine-page document provided by the state is only a list of the discovery exchanged and does not include the actual documents. This court cannot view what was disclosed or not disclosed by the state. However, the document does indicate that the state provided appellant with the criminal history for seven out of a possible 91 witnesses. Further, the record contains other references to "OHLEG" reports, police reports, and other supplemental filings. The document includes numerous email notifications with no description of the content. Therefore, this court cannot determine whether the criminal histories of key witnesses were turned over prior to appellant pleading guilty.[4]

[4] Two documents attached to the state's motion to supplement appear to be

{¶15} According to pretrial hearings, appellant made several statements to others inculpating himself. Some criminal background information regarding these individuals was provided to appellant, but because this case ended with a plea agreement the record is not well-developed. This court cannot determine if there was a failure to properly disclose information and what effect that failure had on the present case.

{¶16} Appellant has not provided this court with the necessary information to determine this assignment of error in his favor. App.R. 9(B). Appellant points to things outside the record, even considering the state's supplement. Further, appellant has not alleged how the failure to provide any of the criminal backgrounds of certain witnesses prejudiced him. He baldly asserts that the state's failure resulted in prejudice. He does not explain how the lack of criminal histories of certain witnesses impacted his ability to properly address the merits of the state's case against him. Therefore, this court overrules the assigned error.

III. Conclusion

{¶17} Appellant's agreed sentence precludes sentencing review. Further, appellant has not provided this court with the necessary information to determine that his plea was less than knowing, intelligent, and voluntary.

{¶18} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

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the criminal histories of two proposed witnesses, but one of the documents is mostly illegible.

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 convictions 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.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., CONCURS;
SEAN C. GALLAGHER, J., CONCURS (SEE SEPARATE CONCURRING OPINION)

SEAN C. GALLAGHER, J., CONCURRING:

{¶19} I agree we are unable to review the sentences in this case for the stated rationale. I am compelled to write separately, however, in the attempt to clarify the law guiding sentencing review. Appellate review of sentences is being complicated by the growing divergence between "contrary to law" and "authorized by law" discussions. This is further complicated by the differing positions on appellate review provided in *Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860; and *Williams*, Slip Opinion No. 2016-Ohio-7658. In the former, appellate review over allied offense issues is limited to plain error, and absent any record of the underlying facts, we must affirm. In other words, the imposition of sentences is not void ab initio but is voidable upon

appellate review. In *Williams*, it was concluded that if a trial court concludes that two offenses are allied offenses of similar import but nonetheless imposes a sentence for each offense, the sentences are void as a matter of law. Voidness then turns on the moving target of interpreting the trial court's sentencing language.

{¶20} It is this second category upon which appellant relies. In this case, the voluntary manslaughter and aggravated robbery counts were both accompanied by firearm specifications, and both counts were predicated upon acts committed against a single victim. The trial court concluded that the firearm specifications were part of the same transaction, but instead of merging those sentences, the trial court imposed the sentences to be served concurrent to each other while the prison terms on the underlying felony counts were imposed consecutively because the voluntary manslaughter and the aggravated robbery caused separate harms. Appellant argues that because the court believed the specifications were part of the same transaction and against the same victim, the trial court was required to merge the underlying offenses as well.

{¶21} The trial court never mentioned merger. The trial court stated that the specifications must run concurrent to each other because "it's the same transaction." This sounds eerily like merger analysis, yet the trial court did not expressly provide that it was imposing the sentences to be served concurrently because of R.C. 2941.25 or based on the allied offense analysis. Perhaps the trial court was referencing R.C. 2929.14(B)(1)(b), in which the legislature provided that "a court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies

committed as part of the same act or transaction." There is one exception. R.C. 2929.14(B)(1)(a) does not apply if division (B)(1)(g) does. If an offender is convicted of aggravated robbery and any other felony, the court must impose a prison term for each of the two most serious specifications as listed under subdivision (a) and may also impose any other prison term for the remaining firearm specifications.

{¶22} In addition to all this, however, appellant agreed to serve 27 years in prison as part of his plea deal. A sentence imposed upon an offender, jointly recommended by the parties and actually imposed by the trial court is not subject to appellate review if it is authorized by law. R.C. 2953.08(D)(1). It has been concluded that the imposition of consecutive sentences is contrary to law unless the R.C. 2929.14(C)(4) findings are made at both the sentencing hearing and in the final sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. On the other side of that same coin, a sentence that is contrary to law, i.e., lacking the consecutive sentence findings, can be authorized by law for the purposes of R.C. 2953.08(D)(1) as long as the sentence "comports with all applicable mandatory sentencing provisions." *Sergent*, Slip Opinion No. 2016-Ohio-2696, at ¶ 29. Generally, the imposition of consecutive service is discretionary, and as a result, a trial court is authorized to impose consecutive sentences without making the statutorily required findings if the defendant agreed to that sentence. From this, it can be concluded that as long as the underlying sentence is authorized by law, errors in implementation of the sentence are not reviewable even if those errors would result in the sentence being contrary to law.

{¶23} If, as appellant argues, the trial court agreed that the specifications attached to the underlying counts should have merged but nonetheless imposed a sentence for each, the sentence is void as a matter of law, and generally nothing precludes this court or the trial court from considering appellant's arguments on the merits. *Williams*, Slip Opinion No. 2016-Ohio-7658. In addition, and not argued by appellant so this is purely academic, R.C. 2929.14(B)(1)(g) required the trial court to impose a sentence on both firearm specifications. Arguably, the trial court rendered a void sentence by ignoring the mandatory imposition of the sentences on the specifications. *State v. Young*, 8th Dist. Cuyahoga No. 102202, 2015-Ohio-2862, ¶ 9; *State v. Ellis*, 8th Dist. Cuyahoga No. 100896, 2014-Ohio-4812, ¶ 22.

{¶24} On the other hand, if the trial court did not intend to merge the sentences, then the sentences are merely voidable. If review is precluded by operation of R.C. 2953.08(D)(1), then we affirm because we cannot review to determine whether the sentence is voidable. *Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860 (voidable subject to appellate review if review is appropriate under R.C. 2953.08(D)(1)); *Williams* (void and therefore nothing precludes our review).

{¶25} The trial court did not expressly merge the specifications; the sentences were imposed to be concurrently served. The trial court, however, was required to impose the firearm specification on the aggravated robbery and voluntary manslaughter counts — the two most serious offenses. Appellant's merger issue is a red herring. Under the majority view in *Williams*, when a trial court disregards a mandatory

sentencing provision, the sentence is void ab initio instead of merely being voidable upon a timely appeal. If indeed a void sentence was imposed, the effect of R.C. 2953.08(D)(1) would be nullified. A void sentence is always subject to collateral or direct attack.

{¶26} The legislature manifested its intent that an offender cannot appeal an agreed sentence that is authorized by law. The Ohio Supreme Court has held that an offense can be authorized by law even if the sentence would be considered contrary to law in a direct appeal. "Contrary to law" has a distinct meaning separate and a part from "void." An imperfectly imposed sentence is not subject to appellate review if agreed to under R.C. 2953.08(D)(1). In *Sergent*, even though the trial court was statutorily required to make the R.C. 2929.14(C)(4) findings before imposing consecutive sentences, the failure to do so in situations invoking R.C. 2953.08(D)(1) is not fatal because the defendant has no right to appeal the sentence in the first place. In this case, the trial court was authorized to impose the agreed sentence of 27 years, but it did so imperfectly. Accordingly, because appellant agreed to the sentence imposed, although the trial court imperfectly imposed that sentence by imposing the sentence on each specification to run concurrently, we cannot review it under R.C. 2953.08(D)(1) to determine if error occurred according to our decisions in *Young* and *Ellis*. I fully concur.