[Cite as *State v. Rose*, 2015-Ohio-2907.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2015-L-006**
ALBERT D. ROSE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 12 CR 000866.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Albert D. Rose, pro se, PID: A642-213, Lake Erie Correctional Institution, P.O. Box 8000, 501 Thompson Road, Conneaut, OH 44030 (Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Albert D. Rose appeals from the judgment entry of the Lake County Court of Common Pleas, denying his post sentence motion to withdraw a guilty plea. Mr. Rose contends the trial court erred by including in his sentence a term of imprisonment for a repeat violent offender specification. Finding no error, we affirm.

{¶2} In the early morning hours of November 15, 2012, Mr. Rose attempted to rob a CVS Pharmacy in Willoughby, Ohio. He knocked down the clerk, and cut her with a knife. January 22, 2013, the Lake County Grand Jury returned an indictment against him in six counts, including one for aggravated robbery, two for robbery, one for felonious assault, and two for failing to comply with the order or signal of a police officer. The first four counts all included repeat violent offender specifications, pursuant to R.C. 2941.149. Mr. Rose has a long criminal history. Prior to this case, he had been convicted five times for aggravated robbery since 1974, and once, for robbery.

{¶3} January 25, 2013, Mr. Rose entered a plea of not guilty to all counts. Motion practice ensued. April 23, 2013, Mr. Rose changed his plea to guilty on the aggravated robbery and its attendant repeat violent offender specification; he also pled guilty to one count of failing to comply. On motion of the state, the trial court nolled the remaining counts. By a judgment entry filed June 5, 2013, the trial court sentenced Mr. Rose to a mandatory 11 year term of imprisonment for the aggravated robbery, a first degree felony. It sentenced him to three years imprisonment on the repeat violent offender specification. Finally, it sentenced him to 1 year imprisonment for failure to comply. The terms run consecutively.

{¶4} November 22, 2013, Mr. Rose moved us for leave to file a delayed appeal, pursuant to App.R. 5. By a decision filed June 23, 2014, we dismissed the appeal. *State v. Rose*, 11th Dist. Lake No. 2013-L-107, 2014-Ohio-2705, ¶13 ("*Rose* I"). This writer concurred in part, and dissented in part. *Id.* at ¶14-24.

{¶5} July 14, 2014, Mr. Rose again moved this court for leave to file a delayed appeal. We again dismissed the appeal. *State v. Rose*, 11th Dist. Lake No. 2014-L-065, 2014-Ohio-4986, ¶10 ("*Rose* II"). This writer dissented. *Id.* at ¶11-15.

{¶6} December 11, 2014, Mr. Rose moved the trial court to withdraw his guilty plea. December 30, 2014, the trial court filed its judgment entry denying the motion. Mr. Rose timely noticed this appeal, assigning a single error: "The trial court abused its discretion by sentencing Mr. Rose to additional prison time on the repeat violent offender specifications."

{¶7} "[T]his court utilizes R.C. 2953.08(G) as the standard of review in all felony sentencing appeals." *State v. Hettmansperger*, 11th Dist. Ashtabula No. 2014-A-0006, 2014-Ohio-4306, ¶14. That division provides:

{¶8} "(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

{¶9} "The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

{¶10} "(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

{¶11} "(b) That the sentence is otherwise contrary to law."

{¶12} Crim.R. 32.1, governing motions to withdraw guilty pleas, provides: "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." Consequently, a motion to withdraw a post sentence guilty plea may only be granted to prevent manifest injustice. *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, ¶26.

{¶13} Mr. Rose contends he has been subjected to manifest injustice, due to the trial court imposing the three year term of imprisonment for the repeat violent offender specification to which he pled guilty. He cites to R.C. 2929.14(B)(2)(b) in support. That division requires the trial court to impose a prison term for repeat violent offenders who have pled guilty or been convicted within the preceding 20 years to at least three offenses of violence. R.C. 2929.14(B)(2)(b)(ii). Mr. Rose observes that, prior to this conviction, he only had one other conviction for an offense of violence within the past 20 years.

{¶14} We disagree that the division cited by Mr. Rose applies. As the learned trial court stated, regarding the repeat violent offender specification, it sentenced Mr. Rose pursuant to R.C. 2929.14(B)(2)(a), which provides, in pertinent part:

{¶15} "(2) (a) If division (B)(2)(b) of this section does not apply, the court *may* impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

{¶16} "(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

{¶17} "(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is * * * any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole * * *.

{¶18} "(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

{¶19} "(iv) The court finds that the prison terms imposed pursuant to division (B)(2)(a)(iii) of this section and, if applicable, division (B)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

{¶20} "(v) The court finds that the prison terms imposed pursuant to division (B)(2)(a)(iii) of this section and, if applicable, division (B)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense." (Emphasis added.)

{¶21} In sum, R.C. 2929.14(B)(2)(a) permits a sentencing court to impose a prison term of the length set forth in that division for a repeat violent offender if the court makes all of the findings set forth in R.C. 2929.14(B)(2)(a)(i)-(v). The trial court did make these findings in its judgment entry of sentence, thus justifying the statutory term of imprisonment imposed – three years.

{¶22} There is no showing of manifest injustice. The assignment of error lacks merit.

{¶23} I respectfully note that this appeal provides support for a position I took in my concurrence and dissent in *Rose* I, and my dissent in *Rose* II: delayed appeals should be liberally granted. In *Rose* I, I observed the Staff Note to the 1994 Amendment to App.R. 5(A) informs us that an important reason for allowing delayed appeals is to avoid a multiplicity of subsequent, ancillary actions stemming from a criminal conviction. *Rose* I, at ¶19-20. I also noted that it saves time, money, and resources to deal with alleged errors by way of delayed appeal, rather than by proceedings such as this, or motions for postconviction relief. *Id.* at ¶23. I reiterated that point in *Rose* II. *Id.* at ¶14. If we had accepted jurisdiction of either of the prior appeals, the issue raised by Mr. Rose might have been dealt with, thus saving the valuable time of the trial court and prosecutor's office in dealing with it presently.

{¶24} The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.