[Cite as *State v. Hensley*, 2023-Ohio-2910.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. JUSTIN HENSLEY Appellant	C.A. Nos. 22CA011872 22CA011920 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 20CR102273

DECISION AND JOURNAL ENTRY

Dated: August 21, 2023

STEVENSON, Judge.

{¶1} Appellant, Justin Hensley ("Hensley"), appeals from the judgments of the Lorain County Court of Common Pleas. This Court affirms in part, and reverses in part.

I.

{¶2} In April 2020, Hensley was indicted on one count of aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree; one count of aggravated burglary in violation of R.C. 2911.11(A), a felony of the first degree; one count of aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree; and one count of robbery, in violation of R.C. 2911.02(A)(2), a felony of the second degree.

{¶3} Those charges stemmed from a burglary and armed robbery that occurred on March 7, 2020. Hensley entered the residence of a friend without permission, pointed a gun at his friend, and demanded money. Hensley took the money and a safe before fleeing the residence. The police responded and captured Hensley as he hid in a nearby yard.

{¶4} In May 2020, Hensley pled guilty to the indictment, was found guilty by the trial court, and was released on a personal bond. Hensley appeared for sentencing on July 10, 2020, and the trial court indicated it intended to impose a three to-four-and one-half-year mandatory prison term on count one, aggravated robbery.[1] The trial court merged the three remaining charges.

{¶5} During the sentencing hearing, Hensley requested a jail report date so that he could attend a residential in-patient substance abuse treatment program and spend time with his mother, who was terminally ill. A very lengthy colloquy took place between the trial court, Hensley, and his counsel regarding his request. While the trial court was willing to allow Hensley to obtain treatment and spend time with his mother, it repeatedly admonished him that if he failed to complete treatment, failed to report to jail, or incurred any new charges during that time, he would not receive the three-year sentence and would be facing a maximum term of 11-16.5 years. Hensley stated affirmatively that he understood the risks and ramifications of failing to fulfill the conditions, waived his rights, voluntarily accepted the plea, and elected to enter residential treatment. The trial court gave him a jail report date of August 14, 2020.

{¶6} The sentencing entry regarding the July 10, 2020, hearing was not signed by the trial court nor filed with the Clerk, but instead, at the State's request, was held pending Hensley's fulfillment of the required conditions. On July 14, 2020, the trial court issued a judgment entry journalizing the proceedings as follows:

> As [Hensley] * * * has been sentenced by this court to prison and has also been given a report date of AUGUST 14, 2020, BY NOON to start his prison sentence, the Lorain County Sheriff's Dept. is ordered to notify this court when [Hensley] has turned himself in. At which time this court will file the sentencing entry imposed at the time of sentencing. (Emphasis in original.)

[1] Based on Hensley's prior record, which included an F2 robbery conviction in 2009, the trial court was required to impose a prison term pursuant to R.C. 2929.13(F)(6).

{¶7} Hensley appeared at the jail on the afternoon of August 14, 2020, a Friday, but was told to come back the following Monday when the clerk's office was open so that the jail could obtain the necessary paperwork from the trial court. However, over the weekend, Hensley was charged with four new offenses: aggravated burglary, illegal conveyance of weapons, possession of controlled substances, and receiving stolen property. Consequently, Hensley did not report to jail the following Monday, and a capias was issued for his arrest.

{¶8} Hensley was arrested three days later, on August 17, 2020. He came before the trial court for sentencing on August 27, 2020. The trial court imposed a sentence of eight to twelve years in prison. At the conclusion of the hearing, Hensley requested appellate representation. After explaining to Hensley his limited appellate rights because of his plea and the mandatory sentence, the trial court agreed, upon the request of his counsel, that Hensley could submit a letter explaining why he thought he deserved representation for a discretionary appeal. The sentencing entry, filed on August 28, 2020, indicated "taken under advisement" in the section regarding the appointment of appellate counsel. Hensley did not timely appeal the August 28, 2020, sentencing entry.

{¶9} Nearly two years later, on May 15, 2022, Hensley wrote a letter to the trial court in which he requested "an appeal or a postconvition (sic)." He further wrote, "[y]ou also told me the court would pay for appeallite counsol (sic)." The trial court treated his letter as a petition for post-conviction relief and a request for appellate counsel. On May 23, 2022, the trial court denied Hensley's request for post-conviction relief but granted his request for appellate counsel.

{¶10} Hensley timely appealed from the trial court's May 23, 2022, entry under Case Number 22CA011872. He subsequently filed a notice of appeal and motion for leave to file a delayed appeal under Case Number 22CA001920, both of which challenge the trial court's original

sentencing entry dated August 28, 2020. This Court granted Hensley's motion for leave to file the delayed appeal under case number 22CA0011920 and consolidated the appeals.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED WHEN IT RECALLED THE CASE FOR SENTENCING AFTER ALREADY HAVING SENTENCED MR. HENSLEY AND RE-SENTENCING HIM TO MORE THAN DOUBLE THE PRISON TERM IN VIOLATION OF R.C. 2929.11.

{¶11} In this assignment of error, Hensley argues that the trial court was limited to the sentence that it orally pronounced on July 10, 2020, at the first sentencing hearing because it did not file the sentencing entry. He claims, therefore, that the trial court did not have the authority to hold him accountable for failure to report to jail and picking up new charges, and in turn, re-sentencing him to more than the minimum three to four-and-a half years.

{¶12} It is well-settled that "[w]here there has been no journalization of [a criminal] sentence, a sentence announced in open court may be amended without formal judgment entry." *State v. Overstreet*, 9th Dist. Summit No. 21367, 2003-Ohio-4530, ¶ 8, citing *State v. Ismail*, 9th Dist. Summit No. 15007, 1991 WL 161351, *3 (Aug. 21, 1991). Consistent with that principle, this Court has previously held that "'[c]ourts may increase sentences when the sentence does not constitute a final order." *Id*.

{¶13} Here, the trial court conducted a sentencing hearing on July 10, 2020, at which time it indicated its intent to sentence Hensley to a prison term of three to four-and-a half years provided he satisfied several criteria, including reporting to jail on August 14, 2020, and not committing any other criminal offenses. Four days later, the trial court filed a journal entry ordering the Lorain County Sheriff to notify it when Hensley turned himself in to the jail, noting that it would file the final sentencing entry upon actual imposition of the sentence. That entry was devoid of any

information regarding the fact of Hensley's convictions or the length of the sentence, both of which would have been necessary for that entry to be final. *See State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, paragraph one of the syllabus; Crim.R. 32(C).

{¶14} Therefore, because the trial court never issued a final sentencing entry prior to the August 28, 2020, judgment entry, it had the authority to increase Hensley's sentence to eight to twelve years. *Overstreet* at ¶ 9 ("the trial court amended appellant's sentence before it was journalized. Therefore, the trial court did not enhance appellant's sentence after he was originally sentenced."); *State v. Singfield*, 9th Dist. Summit No. 24576, 2009-Ohio-5945, ¶ 25 (trial court had full authority to alter defendant's sentence and increase the terms when the journal entry pertaining to his oral sentence was not journalized before the trial court orally altered his sentence or before the court journalized that altered sentence.)

{¶15} Here, because the sentence originally pronounced was not a final order, the trial court did not err when it subsequently entered a final sentencing order that increased Hensley's sentence. Thus, Hensley's claim that the trial court improperly re-sentenced him is not well-taken. Hensley's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER THE PRINCIPLES OF SENTENCING PURSUANT TO R.C. 2929.11, AND WHEN IT FAILED TO BALANCE THE FACTORS OF SERIOUSNESS AND RECIDIVISM PURSUANT TO R.C. 2929.12(D) AND R.C. 2929.12(E) PRIOR TO SENTENCING.

{¶16} Hensley argues in his second assignment of error that his sentence was contrary to the Ohio Revised Code's sentencing guidelines. Specifically, he maintains that the trial court failed to consider and properly weigh the principles of sentencing and the recidivism factors. He claims

that the record establishes by clear and convincing evidence that the trial court did not review those factors. He asks this Court to modify his sentence and impose the original three-year prison term.

{¶17} The Supreme Court has held that "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶ 1; R.C. 2953.08(G)(2). "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 477 (1954).

{¶18} Trial courts may impose a prison sentence within the statutory range and are not "required to make findings or give their reasons for imposing * * * more than the minimum sentences." *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, paragraph seven of the syllabus. "Nevertheless, 'the court must carefully consider the statutes that apply to every felony case[,]' including 'R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender.'" *State v. Lucas*, 9th Dist. Summit No. 29077, 2019-Ohio-2607, ¶ 13, quoting *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶19} "'Unless the record shows that [a] court failed to consider the factors, or that the sentence is 'strikingly inconsistent' with the factors, the court is presumed to have considered the statutory factors if the sentence is within the statutory range.'" *State v. Fernandez*, 9th Dist. Medina No. 13CA0054-M, 2014-Ohio-3651, ¶ 8.

{¶20} We note preliminarily that Hensley's counsel did not challenge the trial court's finding that Hensley picked up new charges and did not timely report to jail despite numerous

previous admonishments, stating to the trial court, "I believe the Court summarized everything and read from the record, Your Honor. It does speak for itself."

{¶21} After noting those items, the trial court stated that it "has considered the entire record, the oral statements presented, the presentence report, and the overriding purposes and principles of felony sentencing; consider (sic) the seriousness and recidivism factors relevant to the offense and the offender, and the need for deterrence, incapacitation, rehabilitation, and restitution." The sentencing entry also affirmatively states "[t]he court has considered the factors under Ohio Rev. Code §2929.13(B) and §2929.12 * * *."

{¶22} As outlined above, there is no indication whatsoever, much less by clear and convincing evidence, that the trial court failed to consider the relevant statutory factors or that the sentence was unsupported by the evidence. To the contrary, the court orally and in writing stated its affirmative consideration of the necessary sentencing and recidivism factors.

{¶23} Wherefore, Hensley's argument that the trial court failed to consider the required sentencing factors or that the sentence is unsupported by the Ohio Revised Code's sentencing guidelines is not well-taken. His second assignment of error is overruled.

ASSIGNMENT OF ERROR III

MR. HENSLEY'S PLEA WAS OBTAINED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND OHIO CRIMINAL RULE 11(C).

{¶24} Hensley maintains in this assignment of error that he was "ambushed" to plead guilty. Hensley argues that the trial court erred because it induced a plea, then failed to comply with the agreement by imposing a conditional sentence. We disagree.

{¶25} "[A defendant's] plea must be made knowingly, intelligently, and voluntarily." *State v. Engle*, 74 Ohio St.3d 525, 527 (1996). "If a criminal defendant claims that his guilty plea

was not knowingly, voluntarily, and intelligently made, the reviewing court must review the totality of the circumstances in order to determine whether or not the defendant's claim has merit." *State v. Daugherty*, 9th Dist. Wayne No. 05CA0058, 2006-Ohio-2684, ¶ 5, citing *State v. Nero*, 56 Ohio St.3d 106, 108 (1990). A judge's comments during the plea-bargaining process must not be considered in isolation, but rather, the record must be considered in its entirety to determine the voluntariness of the guilty plea. *State v. Jabbaar*, 8th Dist. Cuyahoga No. 98218, 2013-Ohio-1655, ¶ 29.

{¶26} Here, Hensley's argument is based on the false premise that the trial court made a promise to sentence him to a shorter term. During the May 14, 2020 plea hearing, the trial court was clear that there was no promise or guarantee of a minimum prison term:

> THE COURT: Do you understand that there is no sentencing guarantee or promise in your case, even though I have given you an indication that I would consider a lowest range sentence, that's depending on number of factors?
>
> THE DEFENDANT [HENSLEY]: Yes, Your Honor
>
> * * *
>
> THE COURT: Do you understand that there's no sentencing agreement, Mr. Hensley. And even though I have given you an indication that if you do everything I tell you to do, I would consider sentencing you on -- sentencing you on the low range. That is not a promise or guarantee on sentencing. Do you understand that?
>
> THE DEFENDANT [HENSLEY]: Yes, Your Honor.

{¶27} Thus, the trial court indicated its inclination to sentence Hensley to the minimum sentence (three-to-four and a half years), *but only if* he complied with all the court's requirements, i.e., reporting to jail as ordered and not incurring additional criminal charges. Following the above exchange, the trial court reiterated to Hensley that after his release from jail on bond, he would have to comply with the court's conditions. Upon review of those conditions, the waiver of his

rights, and the penalties associated with the relevant offenses, Hensley pleaded guilty. The trial court concluded that it found Hensley's plea to be knowing, intelligent, and voluntary.

{¶28} Other similar cases provide guidance on this issue. In *State v. Swaney*, 2d Dist. Montgomery Nos. 28357 & 28515, 2020-Ohio-210, the trial judge explained the maximum sentence that the defendant faced when pleading guilty but also stated it was "'looking at community control sanctions for you if you screw it up between now and when you're supposed to come back that may not be my first option.'" *Id*. at ¶ 19. The Second District held that this statement "merely emphasized to [the defendant] that any failure to comply with the conditions of the own-recognizance bond would negatively affect [the] ultimate sentence" and that "[a]t no time did the trial court promise that [the defendant] would receive a particular sentence or encourage [the defendant] to enter a guilty plea in order to receive a more lenient sentence." *Id.; see also State v. Korecky*, 8th Dist. Cuyahoga No. 108328, 2020-Ohio-797, ¶ 13-14 (holding that the defendant's plea was not coerced where the trial court only provided its inclination for a sentence before the plea was made.)

{¶29} Wherefore, based upon the applicable law and our review of the record, we conclude that the trial court's statements do not constitute improper coercion or inducement of a guilty plea. The trial court clearly explained during the plea colloquy that its conditional sentence did not amount to a definite promise. Thus, Hensley's claim that his plea was not voluntary because the trial court reneged on a promised sentence is not supported by the record. Hensley's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

THE COURT ERRED IN TREATING MR. HENSLEY'S MOTION FOR APPELLATE COUNSEL AS A PETITION FOR POST-CONVICTION RELIEF.

{¶30} In his fourth assignment of error, Hensley argues that the trial court erred by treating his May 15, 2022, letter as a petition for post-conviction relief because the trial court itself directed Hensley at sentencing to send it a letter that would not be treated as a formal motion but would only be used to consider the issue of appointing appellate counsel. Hensley argues specifically that he requested appellate counsel at sentencing, at which time the trial court advised that it would consider his request, and despite later finding it appropriate after submission of the letter, the trial court never appointed appellate counsel to appeal the original sentence. He maintains that but for the trial court's two-year delay in granting him appellate counsel, he would have timely filed his appeal.

{¶31} The trial court told Hensley that because he pleaded guilty and was not given the maximum sentence, he did not have an automatic right to appellate counsel, but that the trial court had discretion provided he demonstrated good cause by submitting a letter identifying the claims he might raise on appeal. For the reasons set forth below, we conclude that the trial court erred by imposing that condition. The trial court further erred by treating Hensley's letter as a petition for post-conviction relief because the letter was not a no-name motion, but instead, a request for appellate counsel that was sent at the behest of the trial court.

{¶32} In his letter, Hensley wrote in relevant part (with original spelling and grammar), "I'm sending this letter to you today regarding an delayed appeal. You told me in open court that I did not have to summit a motion I could summit a letter. Today Im asking for an appeal or a postconvition. You also told me the court would pay for appealite counsol." Hensley also identified several grounds for his appeal, including the violation of his constitutional right to confront his accusers and to a speedy trial; that his plea was not knowing, voluntary, and intelligent; and ineffective assistance of counsel.

{¶33} This Court recently addressed this issue with the same trial court in *State v. Diamond*, 9th Dist. Lorain No. 22CA011837, 2023-Ohio-40. Although the defendant in *Diamond* entered a no-contest plea rather than a guilty plea, it is a distinction without merit on this issue. In *Diamond*, the thirty-day period to file a direct appeal had expired and Mr. Diamond filed several post-conviction pro se motions, including a motion for the appointment of counsel to file a delayed appeal. *Id*. at ¶ 4. The trial court denied the motion, explaining that "there was no statute or case law giving him the right to court-appointed counsel 'after his no-contest plea.'" *Id*. This Court held that the trial court "wrongly concluded * * * that '[a] plea of no-contest does not vest [Mr. Diamond] with a direct appeal as of right or the concurrent right to the appointment of counsel[,]'" but that the trial court nonetheless correctly denied the motion because the time for a direct appeal had expired and Mr. Diamond had not yet filed a motion for delayed appeal. *Id*. at ¶ 12.

{¶34} In the instant case, Hensley expressed his desire for appellate counsel on the record at the sentencing hearing, and thus, the time for a direct appeal had not expired. Therefore, under *Diamond*, Hensley should have been granted appellate counsel at the hearing.

{¶35} The United States Supreme Court has also spoken on this issue. *See Garza* v. *Idaho*, 139 S.Ct. 738, 744 (2019) (appeal waiver does not serve as an absolute bar to all appellate claims; defendants retain the right to challenge whether the waiver itself is valid and enforceable on the grounds that it was unknowing or involuntary); *Halbert v. Michigan*, 545 U.S. 605 (2005) (defendant had a right to appointed counsel after guilty plea even though under Michigan system appeals from guilty pleas were by leave of appellate court; defendant could not, via his plea, waive due process and equal protection rights to appointed counsel).

{¶36} In *Garza*, the United States Supreme Court refused to put any requirement on the defendant to articulate what claims would be raised on appeal, noting that "while it is the

defendant's prerogative whether to appeal, it is not the defendant's role to decide what arguments to press." *Id*. at 748. "[T]he choice of what specific arguments to make within that appeal belongs to appellate counsel." *Id* at 746. The *Garza* Court further stated that it would be unfair and ill-advised for a pro se defendant "'to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal.'" *Id*. at 749, quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000).

{¶37} Based on the foregoing, the applicable law squarely rejects the trial court's requirement that Hensley submit a letter identifying the grounds for appeal. On a direct appeal as of right, a criminal defendant has the right to appellate counsel even though that conviction was obtained following a guilty plea. Hensley should have been granted appellate counsel when he requested it at the hearing. However, even though the trial court erred by failing to do so, the remedy for that error is an opportunity to appeal and the appointment of appellate counsel, which Hensley has now received. Thus, Hensley ultimately got his requested remedy, rendering those issues moot.

{¶38} Nonetheless, the trial court committed reversible error in treating Hensley's letter as a petition for post-conviction relief. As we have just explained, it was the trial court that improperly required the letter as a condition for obtaining appellate counsel when it was contrary to law to impose that requirement. That error is significant here because once Hensley's letter was treated as a petition for post-conviction relief and denied, if he later wanted to file an actual petition for post-conviction relief, it would be considered a successive petition under R.C. 2953.23 (Second or successive petitions; order; appeal), making it very difficult for him to succeed.

{¶39} Therefore, we sustain Hensley's fourth assignment of error only as it relates to the trial court's treatment of the letter as a petition for post-conviction relief and reverse the judgment on that basis.

III.

{¶40} The judgments of the Lorain County Court of Common Pleas are affirmed in part, reversed in part.

Judgment affirmed in part,
reversed in part.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

SCOT STEVENSON
FOR THE COURT

SUTTON, P. J.
CARR, J.
CONCUR.

APPEARANCES:

GIOVANNA V. BREMKE, Attorney at Law, for Appellant.

J.D. TOMLINSON, Prosecuting Attorney, and C. RICHLEY RALEY, JR., Assistant Prosecuting Attorney, for Appellee.