

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio
Appellee

Court of Appeals Nos. L-10-1240
L-10-1241
L-10-1225

v.
Donald Atwell

Trial Court Nos. CR0200902671
CR0200903452
CR0201001889

Appellant

DECISION AND JUDGMENT

Decided: September 30, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Kevin A. Pituch, Assistant Prosecuting Attorney, for appellee.

Eric Allen Marks, for appellant.

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OSOWIK, P.J.

{¶ 1} This is a consolidated appeal of the Lucas County Court of Common Pleas stemming from a two-year array of felony criminal activity occurring from 2009-2010, for which appellant was ultimately indicted on multiple felony offenses. Subsequent to

the initial set of crimes, appellant was indicted on one count of theft, in violation of R.C. 2913.02(A)(1) and (B)(2) and 2913.71(A), a fifth degree felony; one count of attempted failure to comply with an order or signal of a police officer, in violation of R.C. 2921.331(B) and (C)(5)(a)(ii), a fourth degree felony; one count of robbery, in violation of R.C. 2911.02(A)(2), a second degree felony; one count of failure to comply with an order or signal of a police officer, in violation of R.C. 2921.331(B) and (C)(5)(a)(ii), a third degree felony; and a second count of robbery, in violation of R.C. 2911.02(A)(2), a second degree felony.

{¶ 2} Pursuant to a negotiated plea agreement encompassing all of the initial charges, appellant entered guilty pleas to theft and attempted failure to comply in exchange for dismissal of the remaining charges. In addition, appellant agreed to serve as a witness for appellee in unrelated criminal cases. Appellant was released under a supervised own recognizance ("SOR") bond.

{¶ 3} Three days after being released on bond, appellant robbed a female patron at a Toledo gas station of \$300 in cash. This incident was captured and recorded on the station's video surveillance system. Following this incident, appellant was indicted on a new count of robbery, in violation of R.C. 2911.02(A)(2), a felony of the second degree. In July 2010, appellant pled guilty to robbery pursuant to a second plea agreement encompassing all cases. Appellant was sentenced to a total term of incarceration of eight and one-half years. A timely notice of appeal was filed.

{¶ 4} From that judgment, appellant sets forth the following assignment of error:

{¶ 5} "1. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING MAXIMUM, CONSECUTIVE SENTENCES ON TWO CHARGES, CONSECUTIVE SENTENCES OVERALL, AND A 20-YEAR SUSPENSION OF APPELLANT'S OPERATOR'S LICENSE."

{¶ 6} The following undisputed facts are relevant to this appeal. Donald Atwell, appellant, has an extensive criminal history. On August 28, 2009, appellant was recorded on video surveillance stealing a purse from a bar patron and fleeing the bar premises. Appellant conveyed the victim's credit cards and purse to an accomplice, who subsequently purchased items at a Best Buy store with the stolen funds.

{¶ 7} In addition, appellant fled from the Toledo Police in a car which he did not own nor have the permission to use. Appellant refused to stop the motor vehicle, drove at speeds upwards of 90 miles per hour, drove the vehicle towards oncoming police officers, and finally crashed the vehicle. Following the crash, appellant fled the scene and led the police on a foot chase prior to being apprehended.

{¶ 8} On April 26, 2010, appellant entered a no contest plea to theft and to an amended charge of attempted failure to comply with an order or signal of a police officer. As a condition of this agreement, appellant agreed to testify as a witness for appellee in an unrelated criminal case. In exchange, the state agreed to dismiss the remaining charges. Pursuant to this agreement, the trial court released appellant from custody under his own recognizance.

{¶ 9} On May 6, 2010, while released on bond, appellant approached a woman at a gas station. Appellant told the victim to give him her money. She refused and a struggle ensued. Appellant forcibly stole in excess of \$300 from the victim. The victim had just cashed a check. The entire incident was recorded on video security surveillance at the gas station. Appellant was indicted for one count of robbery, in violation of R.C. 2911.02(A)(2), a felony of the second degree.

{¶ 10} Appellant entered into another plea agreement. He entered a plea of no contest to the new robbery offense. In exchange, the state agreed to dismiss the repeat violent offender specification of this charge at the sentencing hearing.

{¶ 11} On July 26, 2010, the trial court proceeded to sentencing. Appellant was explicitly warned of the potential maximum sentencing. Following a thorough and clear explanation of all of the potential consequences of the plea agreement, appellant affirmed his agreement to the negotiated plea deal. The record reflects that the trial court considered the record, oral statements, victim impact statement and presentence report, as well as the principles and purposes of sentencing under R.C. 2929.11. The trial court also factored in the clear threat of recidivism under R.C. 2929.12 given that appellant committed his second act of robbery within a few weeks of being released on his own recognizance.

{¶ 12} Following the full consideration of all of these facts and circumstances, the trial court ordered a total prison term of eight and one-half years. Pursuant to the second plea agreement, the trial court issued a nolle prosequi to indictment III and to the repeat violent offender specification within indictment IV.

{¶ 13} In the sole assignment of error, appellant contends the trial court erred in its maximum consecutive sentencing imposition. We do not concur. It is well-established that a trial court's sentencing determination may not be disturbed absent an abuse of discretion.

{¶ 14} As the Supreme Court declared in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 11, appellate courts reviewing felony sentences must apply a two-step approach. First, they 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 shall be reviewed under an abuse-of-discretion standard. *Id.*

{¶ 15} The term abuse of discretion connotes more than an error of law or judgment. It implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Further, when applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶ 16} As established by *Foster*, the trial court is vested with full discretion to impose any sentence within the statutory range without any corollary requirement to issue specific reasons or findings prior to imposition of such a sentence. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 100.

{¶ 17} In conjunction with this, the trial court must still consider R.C. 2929.11 and R.C. 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38. These two statutes serve as the guiding parameters for trial judges to consider in fashioning an appropriate sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 17.

{¶ 18} Appellant contends that because the trial court did not explicitly refer to R.C. 2929.12 in the record before sentencing, that it did not consider these guiding statutes. We do not concur. The overruling purpose of felony sentencing is to protect the public from future crime by the offender and others and to punish the offender. Definite or express articulations of those considerations are not necessary conditions precedent to the imposition of a greater-than-minimum sentence. *State v. Wilder*, 6th Dist. No. L-06-1321, 2007-Ohio-4186, ¶ 39.

{¶ 19} As the record amply reflects, the trial court considered the record, oral statements, the victim impact statement, the extensive presentence report prepared, as well as the principles and purposes of sentencing pursuant to R.C. 2929.11. In conjunction with this, the trial court was faced with a serious, recent felony recidivism incident shortly after appellant pled no contest and was released on his own recognizance. As such, the trial court found appellant was not amenable to community control.

{¶ 20} Appellant was convicted of theft, a fifth degree felony. Pursuant to R.C. 2929.14, the maximum prison sentence permissible for a fifth degree felony is 12 months. Appellant was likewise convicted of attempted failure to comply with an order or signal of a police officer, a felony of the fourth degree. Pursuant to R.C. 2929.14, the maximum

permissible prison sentence for a fourth degree felony is 18 months. Lastly, appellant was convicted of robbery, a second degree felony, for a crime committed just two weeks after being placed on his own recognizance and having a previous robbery charge dismissed pursuant to the initial plea agreement. The maximum statutory prison term is six years for a second degree felony.

{¶ 21} Thus, the total permissible consecutive prison term for these convictions is eight and one-half years. That was the term of imprisonment imposed. Thus, the disputed sentence was not contrary to law. It did not exceed the statutory parameters. It did not constitute an abuse of discretion. The sole assignment of error is not well-taken.

{¶ 22} Wherefore, we find that substantial justice has been done in this matter. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
