

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

State of Ohio

Court of Appeals No. S-13-017

Appellee

Trial Court No. 09 CR 864

v.

Jimmy L. Houston

DECISION AND JUDGMENT

Appellant

Decided: March 7, 2014

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas, which sentenced appellant to an aggregate term of incarceration of 21 years in prison. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Jimmy Houston, sets forth the following single assignment of error:

In fashioning the sentence, the trial court violated Mr. Houston's constitutional rights guaranteed by the 8th Amendment to the United States Constitution and his statutory rights under R.C. § 2929.11.

{¶ 3} The following undisputed facts are relevant to this appeal. Appellant, Jimmy Houston, recruited several accomplices and co-defendants, Ronald Ruby and Paul Bidwell, to break into the Sandusky County residence of James and Mary Kohler. On July 2, 2009, Ruby and Bidwell entered the home in accordance with the scheme. The Kohlers were physically beaten and threatened. The Kohlers were subsequently restrained and tied up while in excess of 30 firearms were stolen from the residence. The Kohlers, an elderly couple, were targeted based upon appellant's understanding that a cache of firearms and cash were kept inside the home.

{¶ 4} Subsequent to these crimes, appellant was indicted on 43 felony charges. On April 26, 2010, pursuant to a negotiated plea agreement, appellant pled guilty to two counts of attempted murder, in violation of R.C. 2903.02(A) and 2923.02, one count of kidnapping, in violation of R.C. 2905.01(A)(2), and one count of aggravated burglary with a firearm specification, in violation of R.C. 2911.11(A)(1), all felonies of the first degree, and one count of grand theft, in violation of R.C. 2913.02(A)(1) and (B)(4), a felony of the third degree. In exchange, the remaining counts were dismissed.

{¶ 5} On May 11, 2010, appellant was sentenced to a total term of incarceration of 23 years. Appellant’s initial sentence was previously before this court due to the trial court’s alleged failure to merge two offenses of similar import. We concurred and the matter was remanded for resentencing on those two counts. *State v. Houston*, 6th Dist. Sandusky No. S-10-027, 2013-Ohio-323. Accordingly, on February 1, 2013, the case was remanded back to the trial court for resentencing. At the resentencing, appellant was sentenced to a total term of incarceration of 21 years, two years less than the initial sentence. This appeal ensued.

{¶ 6} In the sole assignment of error, appellant contends that the sentence imposed by the trial court was somehow disproportionate and improper. At the outset, we note that this court no longer utilizes the two-step analysis delineated in *State v. Kalish*, 120 Ohio St.2d 23, 2008-Ohio-4912, 896 N.E.2d 124, in felony sentence review. Rather, this court now applies the statutory standard set forth in R.C. 2953.08(G)(2), which took effect on March 22, 2013. This new statute directly defines and establishes the proper appellate standard of review in felony sentencing cases. It clearly states, “an appellate court may properly increase, reduce, modify, or vacate and remand a dispute if it clearly and convincingly finds either of the following:

- a. That the record does not support the sentencing court’s findings under division (B) or (D) of section 2929.13(B) or (D), 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;

b. That the sentence is otherwise contrary to law.

{¶ 7} We now consider the propriety of the disputed sentence in this case pursuant to the statutory parameters of R.C. 2953.08(G)(2). The record reflects that although appellant was originally indicted on over 40 felony counts, he entered into a plea agreement through which he pled guilty to five felony counts. The five counts to which appellant pled guilty included four felonies of the first degree and one felony of the third degree.

{¶ 8} The permissible term of incarceration for a felony of the first degree, such as an aggravated burglary conviction, ranges from three to eleven years. R.C.2929.14(A)(1). The permissible term of incarceration for a felony of the third degree, such as grand theft, ranges from one to five years. R.C. 2929.14(A)(3). The record clearly shows that the sentence imposed upon resentencing in no way breached any of the statutory sentencing ranges. Furthermore, the record clearly shows that the disputed sentence was consistent with the sentences imposed upon the accomplices.

{¶ 9} Appellant contends that the trial court's resentencing violated his statutory rights under R.C. 2929.11. This court recently considered consistency and proportionality requirements under R.C. 2929.11(B) stating, “[c]onsistency does not necessarily mean uniformity; rather, consistency has a goal of similar sentences for similar offenses.” *State v. Dahms*, 6th Dist. Sandusky No. S-11-028, 2012-Ohio-3181,

¶ 21. In order to demonstrate that a sentence is inconsistent, appellant must show that the trial court did not properly consider applicable sentencing criteria found in R.C. 2929.11.

Id.

{¶ 10} In fashioning the original sentence, the trial court properly took into consideration appellant's extensive history of criminal convictions, as well as the extremely serious and violent nature of the underlying home invasion. The trial court expressly noted that, "[t]he Court's first and foremost job is to protect the public, or attempt to protect the public from future crime and impose the appropriate punishment upon conviction."

{¶ 11} Notably, the record shows that the April 18, 2013 resentencing resulted in a reduced sentence for the appellant. The original sentence of 23 years in prison was reduced by two years to a total term of incarceration of 21 years. The court stated that the length of sentence was largely based upon appellant's orchestration of the crimes. The trial court emphasized at resentencing, "you [appellant] were the architect * * * but for you being the prime mover, nobody would have been at that house, nobody would have been injured, and those guns would not have been taken."

{¶ 12} Based upon all of the foregoing, we find that appellant has failed to demonstrate that the disputed sentence upon remand was clearly and convincingly contrary to law or in breach of the provisions of R.C. 2953.08(G)(2).

{¶ 13} Lastly, appellant asserts that his modified, lowered sentence violates his Eighth Amendment right to be free of cruel or unusual punishment. The Ohio Supreme Court has held that,

[P]unishments which are prohibited by the Eighth Amendment are limited to torture or other barbarous punishments, degrading punishments unknown at common law, and punishments which are so disproportionate to the offense as to shock the moral sense of the community. *McDougle v. Maxwell*, 1 Ohio St.2d 68, 203 N.E.2d 334 (1964).

However, contrary to appellant's contention, a sentence which squarely falls within the valid statutory range cannot amount to a cruel and unusual punishment. *State v. Dombrowsky*, 6th Dist. Lucas No. L-06-1234, 2007-Ohio-1194. Nothing in the record reflects that appellant's sentence can reasonably be construed as shocking or barbaric. Appellant's single assignment of error is found not well-taken.

{¶ 14} The judgment of the Sandusky County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal 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.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

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