

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93766

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JEFFREY J. PALICKA, JR.

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521708-A

BEFORE: Blackmon, P.J., Boyle, J., and Cooney, J.

RELEASED AND JOURNALIZED: August 12, 2010

ATTORNEY FOR APPELLANT

Kevin Cafferkey
2000 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

Brian R. Radigan
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, P.J.:

Appellant Jeffrey J. Palicka, Jr. appeals his sentence and assigns the following error for our review:

“I. The trial court erred in imposing a term of incarceration that is not proportionate to similarly situated offenders.”

Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

On March 3, 2009, a Cuyahoga County Grand Jury indicted Palicka, along with codefendants Brian L. Prince and Aaron S. Sigley, on two counts of

burglary, two counts of theft, and one count of possession of criminal tools. Palicka pleaded not guilty at his arraignment, and several pretrials followed.

On June 3, 2009, pursuant to a plea agreement with the state, Palicka withdrew his not guilty pleas and pleaded guilty to two counts of burglary. Prince and Sigley also withdrew their not guilty pleas and also pleaded guilty on two counts of burglary. The trial court ordered a presentence investigation report and advised Palicka that he would have to submit to a drug test when he returned for sentencing.

On July 15, 2009, at the sentencing hearing, the trial court sentenced Palicka to prison for five years on each count to be served consecutively for a total imprisonment of 10 years. The trial court also sentenced codefendant Prince to two years on each burglary count to be served consecutively for a total prison term of four years. In addition, the trial court sentenced codefendant Sigley to six years on each burglary count to be served consecutively for a total prison term of 12 years, but to run concurrent with a three-year sentence for a probation violation. Palicka now appeals.

Sentence

In the sole assigned error, Palicka argues that his sentence was not consistent with those imposed on other offenders who committed similar offenses.

Preliminarily, we note that under current Ohio law, a trial court “now has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently.” *State v. Sturgill*, Cuyahoga App. No. 93158, 2010-Ohio-2090, quoting *State v. Elmore*, 122 Ohio St.3d 472, 480, 2009-Ohio-3478, 912 N.E.2d 582. See, also, *State v. Bates*, 118 Ohio St.3d 174, 178, 2008-Ohio-1983, 887 N.E.2d 328. Although recognized, the Ohio Supreme Court has yet “to address fully all ramifications of [*Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517.]” In *Elmore*, the court followed its *Foster* decision, and reiterated that trial courts “are no longer required to make findings or give their reasons for maximum, consecutive, or more than the minimum sentences.” *Elmore*, supra at 482, quoting *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Until the Ohio Supreme Court states otherwise, this court will continue to follow *Foster*. *State v. Pinkney*, Cuyahoga App. No. 91861, 2010-Ohio-237; *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564.

In the instant case, Palicka’s sentences are within the statutory range for the offenses charged and thus, not contrary to law.

This court has also held that in order to support a contention that his or her sentence is disproportionate to sentences imposed upon other offenders, a defendant must raise this issue before the trial court and present some evidence, however minimal, in order to provide a starting point for analysis

and to preserve the issue for appeal. *State v. Sistrunk*, Cuyahoga App. No. 91470, 2009-Ohio-1689, citing *State v. Breeden*, Cuyahoga App. No. 84663, 2005-Ohio-510, citing *State v. Woods*, Cuyahoga App. No. 82789, 2004-Ohio-2700. Palicka did not raise this issue with the trial court, nor did he present any evidence to the trial court.

Thus, there is nothing in the record to indicate that his sentence is impermissibly disproportionate to sentences imposed on similar offenders with similar offenses. Further, the goal of felony sentencing pursuant to R.C. 2929.11(B) is to achieve “consistency” not “uniformity.” *State v. Klepatzki*, Cuyahoga App. No. 81676, 2003-Ohio-1529.

Nonetheless, Palicka argues that his sentence was completely at odds with one of his codefendants who was on probation for a previous burglary. We note that codefendant Sigley was sentenced to a total prison term of 12 years. We also note that the trial court indicated that Palicka had tested positive for marijuana on the day of sentencing despite being warned that he would be drug tested.

In addition, the trial court indicated that in 1998, Palicka had been adjudicated delinquent for burglary and menacing and in 2003, he was charged with making a false alarm, as well as discharging a firearm. The trial court further indicated that Palicka was subsequently charged with receiving stolen property, drug trafficking, possession of drugs, and drug paraphernalia.

A review of the record reveals that the trial court considered the overriding purposes of felony sentencing, which are to protect the public from future crime by the offender and others and to punish the offender. Since the sentences imposed were within the statutory range for the crimes committed, Palicka's sentences are not contrary to law.

Finally, given that Palicka failed to raise the claim of the alleged disproportionate sentence before the trial court, he has failed to preserve this issue for appeal. Accordingly, we overrule the sole assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MARY J. BOYLE, J., and
COLLEEN CONWAY COONEY, J., CONCUR

