

[Cite as *State v. McCauley*, 2016-Ohio-5411.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103681

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL McCAULEY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-593580-A

BEFORE: Laster Mays, J., E.A. Gallagher, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: August 18, 2016

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant, Michael McCauley (“McCauley”), appeals his sentence and asks this court to remand the matter to the trial court with an order for resentencing. We affirm the trial court’s decision.

{¶2} McCauley pled guilty to two counts of trafficking drugs, a first-degree felony, in violation of R.C. 2925.03(A)(2), and possessing criminal tools, a fourth-degree felony, in violation of R.C. 2923.24(A). The trial court sentenced McCauley to eight years incarceration.

I. Facts

{¶3} In a prior case, Cuyahoga C.P. No. CR-14-586116, McCauley was indicted for various charges including murder and drug trafficking. McCauley was acquitted of all charges except drug trafficking. He was sentenced to two years of community control. The trial judge in Cuyahoga C.P. No. CR-14-586116 is the same trial judge that presided over McCauley’s current case.

{¶4} In this case, McCauley pleaded guilty to trafficking and possessing criminal tools. Before sentencing, the trial judge stated,

The fact of the matter is, you know, you dodged a bullet in that other case. I mean, I understand why. I think you were less culpable. I do. I heard what the jury said, but you did have the guts to go to trial on that. I expected I would never see you again, quite frankly. (Tr. 16.)

The trial court then sentenced McCauley to eight years imprisonment for Count 5 trafficking, 18 months imprisonment for the Count 7 trafficking, and 12 months for Count 9 possessing criminal tools, to be served concurrently for a total of eight years. He was also fined \$10,000.

{¶5} As a result of the statement made by the court during sentencing, the appellant has filed this timely appeal and asserts his sole assignment of error for our review:

I. The trial court erred in considering acquitted conduct in imposing its sentence upon defendant in derogation of defendant's right to due process of law, as protected by Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 16 of the Ohio Constitution.

II. Standard of Review

{¶6} R.C. 2953.08(G)(2) provides, in part, that when reviewing felony sentences, the appellate court's standard of review is not whether the sentencing court abused its discretion; rather, if this court clearly and convincingly finds that (1) the record does not support the sentencing court's findings under R.C. 2929.14(C)(4), or that (2) the sentence is otherwise contrary to law, then we may conclude that the court erred in sentencing. *State v. Heineman*, 8th Dist. Cuyahoga No. 103184, 2016-Ohio-3058, ¶ 78.

III. Law and Analysis

{¶7} McCauley argues that the trial court erred in considering acquitted conduct in imposing its sentence upon defendant in derogation of defendant's right to due process of law, as protected by Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 16 of the Ohio Constitution.

A sentence is not clearly and convincingly contrary to law where the trial court considers the purposes and principles of sentencing under R.C. 2929.11 as well as the seriousness and recidivism factors listed in R.C. 2929.12, properly applies post-release control, and sentences a defendant within the permissible statutory range.

Id. at ¶ 79.

{¶8} McCauley contends that the judge’s statement about McCauley “dodging a bullet” is evidence that the trial judge used McCauley’s acquittal in the previous case as a factor to sentence him in the current case. In other words, the judge’s words constituted judicial bias.

Due process requires that a criminal defendant be tried before an impartial judge. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio- 2128, 767 N.E.2d 166, ¶ 34. If the record evidence indicates that the trial was infected by judicial bias, the remedy is a new trial. *State v. Dean*, 127 Ohio St.3d 140, 2010-Ohio-5070, 937 N.E.2d 97, ¶ 2. Judicial bias is defined as a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge * * * . *Id.* at ¶ 48, quoting *State Ex. Rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph four of the syllabus. Judicial bias is contradistinguished from an open state of mind which will be governed by the law and the facts. *Id.*, quoting *Pratt* at paragraph four of the syllabus.

State v. Hough, 2013-Ohio-1543, 990 N.E.2d 653, ¶ 10 (8th Dist.).

It has been determined that:

[i]f the trial judge forms an opinion based on facts introduced or events occurring during the course of the current or prior proceedings, this does not rise to the level of judicial bias, unless [the opinions] display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Id. at ¶ 11.

{¶9} The trial judge’s language did not show a spirit of ill will because McCauley was acquitted of murder in a prior case. Nor did the trial court show favoritism toward the defendant that would spill over to the current case. The trial judge’s comments did not display a deep-seated antagonism that made fair judgment impossible. We find that the trial judge’s comments did not rise to the level of judicial bias.

{¶10} The trial judge sentenced McCauley to a term of incarceration that was within the permissible statutory range, and he properly applied postrelease control. However, despite McCauley’s claims, “unindicted acts or not guilty verdicts can be considered in sentencing without resulting in error when they are not the sole basis for the sentence.” *State v. Cook*, 8th Dist. Cuyahoga No. 87265, 2007-Ohio-625, ¶ 69. The trial court did not state that McCauley’s not guilty verdict was used as the sole basis for the sentence.

{¶11} Therefore, we find that McCauley’s sentence is not clearly and convincingly contrary to law. We affirm the trial court’s sentence, and overrule McCauley’s sole assignment of error.

{¶12} Judgment is affirmed.

It is ordered that the appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry out this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of

the Rules of Appellate Procedure.

ANITA LASTER MAYS, JUDGE

EILEEN A. GALLAGHER, P.J., and
SEAN C. GALLAGHER, J., CONCUR