[Cite as *State v. Macko*, 2010-Ohio-3360.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-125**
- vs -	:	
JOHN S. MACKO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 000402.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Mary I. Malone, Lindsay II Professional Center, 6990 Lindsay Drive, Suite 7, Mentor, OH 44060 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, John S. Macko, appeals the judgment entered by the Lake County Court of Common Pleas. The trial court sentenced Macko to an aggregate prison term of six years for his conviction for having a weapon while under disability with a firearm specification. On appeal, Macko challenges the trial court's imposition of sentence and its denial of his motion for public payment of an expert witness. For the following reasons, we affirm.

{¶2} In May 2009, Macko was on postrelease control as a result of being released from prison after completing his sentence for an unrelated felony offense. As a convicted felon on postrelease control, Macko was prohibited from possessing firearms.

{¶3} On May 23, 2009, Macko was walking near Erie Street in Willoughby when he encountered Robert Strickland. Macko and Strickland began arguing with each other. Macko revealed that he had a handgun by showing it to Strickland. When Macko was arrested a short time later, he did not have the handgun on his person. The handgun was eventually recovered from the Chagrin River, where Macko had disposed of it.

{¶4} Macko was indicted on one count of aggravated menacing, in violation of R.C. 2903.21 and a first-degree misdemeanor; one count of carrying a concealed weapon, in violation of R.C. 2923.12(A)(2) and a fourth-degree felony; one count of having a weapon while under disability, in violation of R.C. 2923.13(A)(2) and a third-degree felony; and one count of tampering with evidence, in violation of R.C. 2921.12(A)(1) and a third-degree felony. In addition, the having a weapon while under disability charge carried a firearm specification.

{¶5} Macko pled guilty to one count of having a weapon while under disability, with the attached firearm specification. Upon recommendation of the state, the remaining charges were dismissed.

{¶6} Macko was referred to the Lake County Adult Probation Department for a presentence investigation ("P.S.I.") and a psychological examination. Jeffrey Rindsberg, a licensed clinical psychologist, conducted the psychological examination.

{¶7} Macko filed a motion for "public payment of expert to complete psychiatric evaluation for purposes of sentencing." Therein, Macko requested that the trial court authorize public payment so he could receive an independent psychiatric evaluation. The trial court denied this motion. Thereafter, Macko filed a motion asking the trial court to reconsider its decision denying his motion for public payment of an expert. Upon reconsideration, the trial court again denied Macko's motion.

{¶8} Macko submitted a sentencing memorandum for the trial court's consideration. He argued for leniency in sentencing, arguing that his "history of mental disorders and substance abuse," among other factors, warranted a shorter prison term.

{¶9} The trial court sentenced Macko to prison for the remainder of his term of postrelease control, until January 22, 2013, a term of approximately three and one-half years. In addition, the court sentenced Macko to a five-year prison term for his conviction for having a weapon while under disability. Also, the trial court imposed a one-year prison term for the firearm specification, which it ordered to be served consecutively to the underlying term. Thus, Macko's aggregate prison term for the instant matter is six years. However, this six-year aggregate term was ordered to be served subsequent and consecutive to the three and one-half year sentence for the violation of postrelease control.

{¶10} Macko raises four assignments of error. We address his assigned errors out of numerical order. His fourth assignment of error is:

{¶11} "The trial court erred to the prejudice of the defendant-appellant when it twice denied defendant's motion for an independent consultation with a mental health professional denying defendant-appellant the ability to present mitigating evidence at sentencing."

{¶12} A determination on a defendant's motion for public payment of an expert witness lies within the discretion of the trial court. *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, at ¶23, citing *State v. Mason* (1998), 82 Ohio St.3d 144, 150. It will not be disturbed absent an abuse of that discretion. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶13} "Pursuant to *Ake* and *Mason*, it is appropriate for a court to consider the following factors in determining whether the provision of an expert witness is necessary: '(1) the effect on the defendant's private interest in the accuracy of the trial if the requested service is not provided, (2) the burden on the government's interest if the service is provided, and (3) the probable value of the additional service and the risk of error in the proceeding if the assistance is not provided.'" *State v. Brady*, 2008-Ohio-4493, at ¶22, quoting *State v. Mason*, 82 Ohio St.3d at 149, citing *Ake v. Oklahoma* (1985), 470 U.S. 68, 78-79.

{¶14} In analyzing these factors, this court has concluded that "a defendant must present more than a mere possibility that an expert will provide assistance." *State v. Williams*, 11th Dist. Nos. 2005-L-213 & 2005-L-214, 2007-Ohio-212, at ¶38. (Citations omitted.)

{¶15} Macko was not asserting mental illness as a defense to the commission of the underlying crime. Instead, he wished to have an independent evaluation for support to use in arguing for mitigation of his sentence. The psychological report indicates that Macko informed Rindsberg that he had been previously diagnosed with bipolar disorder

and posttraumatic stress disorder. Thus, the record contains references to Macko's purported mental health disorders for the trial court's consideration.

{¶16} Moreover, Rindsberg's psychological report indicates that Macko had been treated by several mental health professionals in the two years prior to his arrest. Had Macko wished to offer evidence of any prior mental health diagnosis, he could have requested a report from one of those individuals.

{¶17} In this matter, there was a mental health evaluation conducted by Rindsberg. In addition, Macko, through statements he made to Rindsberg and assertions contained in his sentencing memorandum, made references to his prior diagnoses for the trial court's consideration. The expense to the state for an additional mental health examination would have been significant. Accordingly, we cannot say that the risk of error—by not providing additional funding for Macko to obtain another mental health examination—was so great that the potential value of an additional examination outweighed the government's burden of providing additional funding and incurring the additional expense.

{¶18} The trial court did not abuse its discretion by denying Macko's motion for public payment of an expert witness.

{¶19} Macko's fourth assignment of error is without merit.

{¶20} Macko's first assignment of error is:

{¶21} "Appellant's sentence is contrary to law due to the [trial] court's failure to consider all required factors listed under Ohio Revised Code 2929.11 and 2929.12; due to the [trial] court denying defendant-appellant the ability to present mitigating evidence at sentencing."

{¶22} The Supreme Court of Ohio, in a plurality opinion, has recently held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The *Kalish* Court held:

{¶23} "First, [appellate courts] 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 is reviewed under the abuse-of-discretion standard." Id.

{¶24} In this matter, the trial court stated it considered "the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12." The trial court indicated it considered the requisite factors, which suggests Macko's sentence is not contrary to law. See, e.g., *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶18.

{¶25} Macko argues that due to his request for an additional mental health assessment being denied, the trial court was not provided with adequate information to properly consider the factors contained in R.C. 2929.11 and 2929.12. We disagree. As noted above, Rindsberg's psychological report indicates that Macko reported that he had been previously diagnosed with bipolar disorder and posttraumatic stress disorder. Accordingly, this information was in the record for the trial court's consideration. Macko argues that these mental health disorders constitute mitigating factors in favor of a shorter sentence. Depending on the circumstances, mental health disorders may constitute a mitigating factor. See, e.g., R.C. 2929.12(C)(4). However, in this matter, as noted in his appellate brief, Macko was "self medicating with illegal drugs." Thus, instead of recognizing his purported mental health disorders and taking prescribed

medicine, Macko chose to take illegal drugs. This factor substantially diminishes the weight to be given in mitigation for his purported mental health disorders.

{¶26} R.C. 2929.12(D) provides several factors the trial court shall consider, which suggest the offender is more likely to commit a future crime. In this matter, there was evidence pertaining to several of these factors. Macko was on postrelease control at the time of the instant offense. R.C. 2929.12(D)(1). Macko has a significant record of juvenile offenses and prior felony convictions for aggravated robbery and burglary, for which he served a prison term. R.C. 2929.12(D)(2). In addition, Macko had two convictions—resisting arrest and possession of marijuana—in the 16-month period between his release from prison and his commission of the instant offense, suggesting that he has not responded favorably to previously-imposed sanctions. R.C. 2929.12(D)(3). Finally, while Macko argues that his drug and alcohol abuse should be viewed as a mitigating circumstance, we note that the P.S.I. report reveals Macko stated he planned on trading the handgun for heroin on the day of the instant offense. This suggests his drug abuse was related to the instant offense. R.C. 2929.12(D)(4). Moreover, the P.S.I. report indicates that despite prior treatment and attending drug and alcohol classes in prison, Macko used several illegal drugs after his release from prison, including using marijuana, cocaine, and heroin daily in the months prior to the instant offense. Id.

{¶27} The record supports the trial court's statement that it properly considered the factors in R.C. 2929.12 and the purposes and principles of sentencing set forth in R.C. 2929.11. Thus, Macko's sentence is not contrary to law. See, e.g., *State v. Spencer*, 11th Dist. No. 2008-L-002, 2008-Ohio-3906, at ¶19-23.

{¶28} Macko's first assignment of error is without merit.

{¶29} Macko's second assignment of error is:

{¶30} "Appellant's sentence is contrary to law because it is inconsistent with and disproportionate to other similar defendants sentenced for a similar offense."

{¶31} This court has held that a "numerical comparison to other sentences is not dispositive of the issue of consistency" of felony sentences. *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶52. In addition, this court has previously held:

{¶32} "[S]entencing consistency is not derived from the trial court's comparison of the current case to other sentences given to similar offenders for similar crimes. *** Rather, it is the trial court's proper application of the statutory sentencing guidelines that ensures consistency. *** Thus, in order to show a sentence is inconsistent, a defendant must show the trial court failed to properly consider the statutory factors and guidelines.

{¶33} "*** [U]nder controlling case law, consistency is not derived from a numerical comparison to the sentences imposed on similar offenders for similar offenses, but rather from the court's consideration of the purposes and principles of felony sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12." *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, at ¶24-25. (Internal citations omitted.)

{¶34} As noted above, the record reveals the trial court adequately considered the requisite statutory sentencing factors. Thus, the statutory requirement for consistency has been met in this matter.

{¶35} On appeal, Macko cites several cases that he argues support his contention that his prison term is disproportionate. We note that Macko did not present these cases to the trial court for its consideration. This court has previously held:

{¶36} "We believe the better rule is, if a criminal defendant requests that the sentencing court consider a specific case for the proportionality analysis, the burden is on the defendant, as is the case with any other evidentiary submissions, to provide the court with sufficient information regarding the case to permit the court to properly analyze it." *State v. Goodnight*, 11th Dist. No. 2008-L-029, 2009-Ohio-2951, at ¶37.

{¶37} Since Macko did not present the cited cases to the trial court, we are not bound to consider them on appeal.

{¶38} However, upon consideration, we determine the cases cited by Macko on appeal are all distinguishable. Macko cites several cases in which he argues the conduct of the defendant was more serious than his conduct in the instant case, yet the defendants in those cases received a sentence for having a weapon while under disability that was the same, or less than, the sentence he received. *State v. Howard*, 174 Ohio App.3d 562, 2007-Ohio-4334, at ¶2; *State v. Pianowski*, 2d Dist. No. 21069, 2006-Ohio-3372, at ¶5; *State v. Bailey*, 2d Dist. No. 2007 CA 121, 2008-Ohio-5357, at ¶2; *State v. Nowden*, 2d Dist. 07CA0120, 2008-Ohio-5383, at ¶7; *State v. Elwell*, 9th Dist. No. 06CA008923, 2007-Ohio-3122, at ¶6; *State v. McGeary*, 4th Dist. No. 08CA3063, 2009-Ohio-3175, at ¶4; *State v. Gray*, 8th Dist. No. 90981, 2009-Ohio-1782, at ¶14; and *State v. Foster*, 1st Dist. No. C-080399, 2009-Ohio-1698, at ¶23. However, we note that the defendants in these other cases were also convicted of additional crimes and the aggregate sentences they received were longer than Macko's aggregate six-year term. Id. Thus, they are all distinguishable from the case sub judice.

{¶39} Macko also cites the Eighth Appellate District's decision in *State v. White*, 8th Dist. No. 90839, 2008-Ohio-6152. Macko argues that the facts of that case were much more serious than the instant action, as gunshots were fired at a residence.

However, it is important to note that the defendant was found *not guilty* of the counts alleging felonious assault and discharging a firearm at or into a habitation. Id. at ¶7. Instead, he was only convicted of two counts of having a weapon while under disability with firearm specifications and received an aggregate ten-year prison term. Id. at ¶1. Accordingly, due to the underlying factual and procedural differences, *State v. White* is distinguishable from the instant matter.

{¶40} Finally, we address Macko's contention regarding *State v. Ramey*, 4th Dist. No. 2007 CA 130, 2009-Ohio-425. Macko argues that the defendant in that case only received a five-year prison term for a conviction for having a weapon while under disability, while he received an aggregate six-year term, even though the defendant in *Ramey* killed someone. It is critical to note that while Ramey killed another individual, the jury found him *not guilty* of aggravated murder, felony murder, and attempted aggravated murder, finding that he acted in self-defense. Id. at ¶1-9. Thus, the defendant was not found to be culpable for the death. Id. Accordingly, Macko's reliance on *State v. Ramey* is not persuasive.

{¶41} Macko's second assignment of error is without merit.

{¶42} Macko's third assignment of error is:

{¶43} "The trial court failed to fully explain its reasoning for maximum sentencing, which violates the appellant's rights under the Ohio Revised Code and the U.S. Constitution and closes the possibility of meaningful appeal."

{¶44} Macko claims the trial court abused its discretion for imposing the maximum prison term.

{¶45} After the *State v. Foster* decision, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make

findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph seven of the syllabus.

{¶46} In our analysis of Macko's first and second assignments of error, we concluded that the trial court's imposition of sentence was not contrary to law. We review this assigned error under the abuse of discretion standard.

{¶47} The trial court heard evidence regarding Macko's extensive criminal record, including crimes that were committed while he was on postrelease control. In addition, there was evidence presented indicating that Macko has a significant drug and alcohol problem. In light of this and the remaining evidence in this matter, and for the reasons previously set forth in this opinion, we conclude the trial court did not abuse its discretion by imposing the maximum sentence.

{¶48} Macko's third assignment of error is without merit.

{¶49} The judgment of the Lake County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.