[Cite as *State v. Cossack*, 2009-Ohio-3327.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 161
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
MICHAEL COSSACK,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Youngstown Municipal Court, Case No. 02CRB2960.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 29, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Michael Cossack appeals the decision of the Youngstown Municipal Court sentencing him to an aggregate sentence of 120 days for his convictions of resisting arrest, a violation of R.C. 2921.33(A), a second degree misdemeanor; obstructing official business, a violation of R.C. 2921.31, a second degree misdemeanor; and two counts of assault in violation of R.C. 2903.13(A), first degree misdemeanors. Two issues are raised in this appeal. The first of which is whether the trial court abused its discretion in sentencing Cossack to consecutive sentences. The second issue is whether defense counsel was ineffective at the sentencing hearing when he did not ask for community control instead of a jail term. For the reasons expressed below, the judgment of the trial court is affirmed.

STATEMENT OF CASE

¶{2} This appeal is related to a previous appeal out of this court, *State v. Cossack*, 7th Dist. No. 03MA263, 2005-Ohio-965. In 2002, Youngstown police officers ticketed cars parked in the street in front of Cossack's business. Id. Cossack approached the officers regarding the parking tickets and a verbal altercation ensued between Cossack and the two officers; during this altercation Cossack became confrontational and irate. Id. As a result, the officers attempted to arrest him, but he fled, refused to cooperate with the police, threw tools at them and attempted to punch them. Id.

¶{3} Due to these actions, Cossack was charged with two counts of assault, first degree misdemeanors in violation of R.C. 2903.13(A); one count of resisting arrest, a second degree misdemeanor in violation of R.C. 2921.33(A); and one count of obstructing official business, a second degree misdemeanor in violation of R.C. 2921.31. Id. This case was assigned municipal court case number 02CRB2960.

¶{4} The case proceeded to a jury trial and Cossack was found guilty of all counts. Sentencing occurred in December 2003. Cossack received 180 days for each assault; those sentences were ordered to be served concurrent with each other. He also received 30 days for resisting arrest and 30 days for obstructing official business; those sentences were ordered to be served consecutive to each other and consecutive to the sentences for the assault convictions. Id. Thus, in total, he was sentenced to 240 days in jail.

¶{5} Cossack appealed the conviction and the trial court stayed the sentence pending appeal. Id. He raised five assignments of error in that appeal all addressing the conviction; none addressed the sentence issued by the court. We affirmed the conviction. Id.

¶{6} Following that direct appeal, Cossack appealed the case to the Ohio Supreme Court, but it did not accept the appeal for review. *State v. Cossack*, 106 Ohio St.3d 1484, 2005-Ohio-3978.

¶{7} Then in 2008, the municipal court called the case back for reimposition of the sentence that was stayed pending the appeal. It appears that the court became aware that the stay had not been lifted and the sentence had not been reimposed when Cossack was called to court for a 2008 traffic citation. A sentencing hearing for case 02CRB2960 was held August 7, 2008 and at that hearing, the state dismissed the traffic case and reimposed a sentence for 02CRB2960. However, the sentence imposed at that sentencing hearing was not the same as the sentence that was ordered in December 2003. Instead of receiving an aggregate sentence of 240 days, Cossack received an aggregate sentence of 120 days, half of the sentence he received in 2003. This 120 day sentence was composed of 90 days for each assault conviction, 15 days for resisting arrest and 15 days for obstructing official business. 08/07/08 J.E. The assault sentences were ordered to be served concurrent with each other, while the resisting arrest and obstructing official business sentences were ordered to be served consecutive to each other and consecutive to the assault convictions. 08/07/08 J.E. Cossack timely appeals from the sentence imposed on August 7, 2008.

FIRST, SECOND, THIRD AND
FOURTH ASSIGNMENTS OF ERROR

¶{8} "DEFENDANT/APPELLANT'S SENTENCES ARE CONTRARY TO LAW AS THEY DO NOT SERVE THE OVERRIDING PURPOSES AND PRINCIPLES OF SENTENCING AS EXPRESSED IN ORC 2929.21."

¶{9} "THE DEFENDANT/APPELLANT'S SENTENCES WERE NOT PROPORTIONAL RELATIVE TO THE DEFENDANT'S CONDUCT LEADING TO THE CHARGES AND THEREFORE THE SENTENCES ARE CONTRARY TO LAW."

¶{10} "THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES UPON DEFENDANT/APPELLANT."

¶{11} "THE TRIAL COURT'S IMPOSITION OF JAIL SENTENCES AND/OR CONSECUTIVE SENTENCES IN THE PRESENT CASE IS CONTRARY TO LAW AND/OR VIOLATES THE MANDATES OF ORC 2929.13(A) AND 2929.22(A)."

¶{12} The first four assignments of error are addressed together due to the commonality of the arguments. However, prior to addressing the merits, we first must discuss whether the trial court had jurisdiction at the August 2008 sentencing hearing to change/modify the original sentence that was ordered at the December 2003 sentencing hearing.

¶{13} It has been explained that, "Once a sentence has been executed, the trial court loses jurisdiction to amend or modify the sentence." *State v. Carr*, 167 Ohio App.3d 223, 2006-Ohio-3073, ¶3, citing *State v. Garretson* (2000), 140 Ohio App.3d 554. See, also, *State v. Evans*, 161 Ohio App.3d 24, 2005-Ohio-2337, ¶12 (stating the only means a trial court has to suspend or modify a sentence once it has been executed is limited to those instances specifically provided by the General Assembly). However, when execution of the sentence has not begun, the trial court possesses authority to modify or change the sentence. *Evans*, 161 Ohio App.3d 24, 2005-Ohio-2337, at ¶15-17; *State v. Lambert*, 5th Dist. No. 03CA65, 2003-Ohio-6791, ¶14. This is so because prior to execution, the sentence lacks the constitutional finality of a verdict of acquittal. *State v. Dawkins*, 8th Dist. No. 88022, 2007-Ohio-1006, ¶7, citing *State v. Meister* (1991), 76 Ohio App.3d 15, 17; *Evans*, 161 Ohio App.3d 24, 2005-Ohio-2337, at ¶11, citing *United States v. DiFrancesco* (1980), 449 U.S. 117; *State v. Vaughn* (1983), 10 Ohio App.3d 314.

¶{14} Consequently, in this instance, if the sentence ordered in December 2003 had not been executed, the trial court had the authority to modify/change that sentence at the August 2008 sentencing hearing. Execution of the sentence commences when the defendant is delivered to the institution where the sentence is to be served. *Garretson*, 140 Ohio App.3d 554; *State v. Addison* (1987), 40 Ohio App.3d 7.

¶{15} Here, prior to his appeal in 03MA263, Cossack was not delivered to the Mahoning County Jail to serve his sentence because the municipal court stayed his sentence pending appeal. After his unsuccessful appeal, Cossack was not given a report date; he did not receive a report date until the August 7, 2008 sentencing hearing. Thus, there was no execution of sentence in this instance.

¶{16} The fact that Cossack appealed from the initial conviction and sentence, does not affect the trial court's authority to modify or amend the sentence prior to execution. *Evans*, 161 Ohio App.3d 24, 2005-Ohio-2337, ¶17 (state's appeal). That said, it is acknowledged that Cossack did not raise any issue in the initial appeal with the December 2003 sentence. If that same sentence was imposed, an appeal of the reimposition of that sentence would most likely be barred by res judicata. However, since the same sentence was not imposed and thus could not have been brought before this court in the initial appeal to rule on the propriety of that sentence, res judicata does not bar this appeal. Furthermore, the fact that Cossack received a less harsh sentence also does not hinder this appeal. As the *Evans* court explained:

¶{17} "We believe that the trial court possessed the authority to modify appellee's sentence. At the time the court modified appellee's sentence, the sentence had not yet commenced, as he had not been delivered to the custody of a penal institution. Although the cases cited above generally involve a court resentencing a defendant to a harsher sentence, we believe that prior to the commencement of the execution of sentence, trial courts also retain the authority to resentence defendants to less harsh sentences. This is a matter for which trial courts should have discretion. From time to time, facts and evidence may come to light prior to the commencement of execution of a sentence that may have a significant bearing in fashioning an appropriate sentence. Trial courts should retain the authority to modify a sentence under appropriate circumstances." Id. at ¶15.

¶{18} Consequently, as the trial court had the authority to modify/change the sentence, we will now address the merit arguments concerning the August 2008 sentence.

¶{19} These four assignments of error all contend that the trial court erred in sentencing Cossack because the trial court failed to consider the misdemeanor sentencing statutes, R.C. 2929.21 and 2929.22, when it sentenced Cossack to consecutive sentences and when it did not impose or consider imposing community control instead of a jail term.

¶{20} We review misdemeanor sentences for an abuse of discretion. *State v. Robles*, 7th Dist. No. 06MA112, 2007-Ohio-5241, ¶69, quoting *State v. Crable,* 7th Dist. No. 04BE17, 2004-Ohio-6812, at ¶23. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *State v. Joseph* (1996), 109 Ohio App.3d 880, 882.

¶{21} The misdemeanor sentencing statutes, R.C. 2929.21 and 2929.22, set forth considerations for the trial court to weigh when sentencing an individual. R.C. 2929.21 sets forth purposes and principles of misdemeanor sentencing, which are "to protect the public from future crime by the offender and others and to punish the offender" and in order to achieve those purposes, "the sentencing court shall consider the impact of the offense upon the victim and the need for changing the offender's behavior, rehabilitating the offender, and making restitution to the victim of the offense, the public, or the victim and the public." R.C. 2929.21(A). R.C. 2929.22(B) sets forth factors for the court to consider before imposing a sentence and those factors include the nature and circumstances of the offense, the offender's history of criminal conduct, the condition of the victim and the likelihood that the offender will commit crimes in the future. Furthermore, R.C. 2929.22(C) indicates that the trial court should consider the appropriateness of community control prior to issuing a jail sentence. *City of Youngstown v. Cohen*, 7th Dist. No. 07MA16, 2008-Ohio-1119, ¶81.

¶{22} In considering the R.C. 2929.22 factors, we have explained that while a court must consider the factors, "the trial court is not required to recite on the record its reasons for imposing the sentence. *State v. Baker* (1984), 25 Ohio Misc.2d 11, 13, citing *State v. Bentley* (May 6, 1981), 1st Dist. No. C-800378. Failure to consider the sentencing criteria is an abuse of discretion; but when the sentence is within the statutory limit, a reviewing court will presume that the trial judge followed the standards in R.C. 2929.22, absent a showing otherwise. *Wagner,* 80 Ohio App.3d at 95-96. * * * A silent record raises the presumption that the trial court considered all of the factors listed in R.C. 2929.12. *State v. Fincher* (1991), 76 Ohio App.3d 721, 727, citing *State v. Adams* (1988), 37 Ohio St.3d 295." *Robles*, 7th Dist. No. 06MA112, 2007-Ohio-5241, ¶70, quoting *Crable,* 7th Dist. No. 04BE17, 2004-Ohio-6812, at ¶24.

¶{23} Similarly, the Ninth Appellate District has explained, regarding a trial court failing to indicate that it considered the principles and purposes behind misdemeanor sentencing and the factors in R.C. 2929.22, that:

¶{24} "While it is preferable that the trial court state on the record that it has considered the statutory criteria, the statute imposes no requirement that it do so. Instead, in the case of a silent record, the presumption exists that the trial court has considered the statutory criteria absent an affirmative showing by Defendant that it did not." *State v. Raby,* 9th Dist. No. 05CA0034, 2006-Ohio-1314, at ¶9 (Internal citations omitted).

¶{25} And likewise, the Eighth Appellate District has explained that when a trial court fails to indicate on the record its consideration of the factors in R.C. 2929.22, if the sentence was within the range and there was no affirmative showing that the trial court did not consider the factors, then no abuse of discretion will be found, even on a silent record. *State v. Hunter*, 8th Dist. No. 87750, 2006-Ohio-6440, ¶1.

¶{26} Here, Cossack was sentenced within the applicable range. For each of the first degree misdemeanors (assaults) he received 90 days; the maximum sentence allowed for a first degree misdemeanor is 180 days. R.C. 2929.24(A)(1). For each of the second degree misdemeanors (resisting arrest and obstructing official business) he received 15 days; the maximum sentence allowed for a second degree misdemeanor is 90 days. R.C. 2929.24(A)(2).

¶{27} That said, the record is silent as to the trial court's consideration of R.C. 2929.21 and 2929.22; it did not state at the August 7, 2008 sentencing hearing or in its sentencing judgment that it considered the purposes and principles of misdemeanor sentencing or discuss the factors in R.C. 2929.22 that were applicable. The trial court merely indicated that Cossack was found guilty by a jury, that he appealed that decision and that appeal was affirmed, and that statements were taken from him prior to sentencing. (08/07/08 Tr. 6). The court then stated the sentence.

¶{28} However, it can be gleaned from the record that the trial court had some of the sentencing factors before it for consideration. During sentencing, while the facts of the case were not discussed by the trial court, the prosecutor or defense counsel, Cossack did discuss what he wanted to receive as a sentence. He stated "I am asking for, as far as the sentencing goes if there could be some leniency if you feel that I have to be punished for whatever took place. " (08/07/08 Tr. 5). Then he requested "garage arrest," which would be equivalent to house arrest, so that he could work (he operates a garage) and continue to pay his bills.

¶{29} His statement concerning "garage arrest" can be considered a request for community control, a factor to be considered in R.C. 2929.22(C). Thus, community control was before the trial court for consideration. Although, the trial court did not state reasons why it did not impose it, as the above case law indicates, it was not required to do so.

¶{30} Furthermore, from the record, it can also be gathered that the trial court considered Cossack's likelihood of recidivism, a factor in R.C. 2929.22(B). At the sentencing hearing, Cossack's recent traffic citation was brought to the court's

attention. The fact that it was dismissed does not negate the ability of the trial court to consider it. *State v. Gray*, 7th Dist. No. 07MA156, 2008-Ohio-6591, ¶27-28.

¶{31} Thus, even though the trial court did not directly indicate that it considered R.C. 2929.22 when sentencing Cossack, the record shows factors under R.C. 2929.22 that it could have considered. Thus, there is no affirmative showing that the trial court did not consider the R.C 2929.22 factors. Furthermore, we note that there is nothing in the misdemeanor sentencing statutes that prohibits the trial court from ordering consecutive sentences. Thus, since the sentence was within the range of applicable sentences, even with a record as silent as the one before this court, we cannot find that the trial court abused its discretion in ordering consecutive sentences and in denying Cossack's request for community control instead of jail time. These assignments of error lack merit.

FIFTH ASSIGNMENT OF ERROR

¶{32} "DEFENDANT/APPELLANT WAS DENIED DUE PROCESS AND A FAIR SENTENCING HEARING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL."

¶{33} Cossack argues that defense counsel was ineffective for failing to make an effort to mitigate the sentence at the August 2008 sentencing hearing.

¶{34} To demonstrate ineffective assistance of counsel, an accused must satisfy both parts of the two-prong test found in *Strickland v. Washington* (1984), 466 U.S. 668, 687. The defendant must first show that his trial counsel's performance was so deficient that the attorney was not functioning as the counsel guaranteed by the Sixth Amendment to the United States Constitution. Id. Second, the accused must establish that counsel's "deficient performance prejudiced the defense." Id. The failure to prove either prong of the *Strickland* test is fatal to a claim of ineffective assistance. *State v. Madrigal,* 87 Ohio St.3d 378, 389, 2000-Ohio-448, citing *Strickland,* 466 U.S. at 687.

¶{35} Admittedly, during the sentencing hearing, defense counsel only made two statements. The first statement was that he was not the original counsel at trial, he was just recently appointed for sentencing and that Cossack wanted to speak prior to the court's "reimposition" of the sentence. (08/07/08 Tr. 2). His second statement was made at the end of the hearing and, at that point, he asked for a reporting date for his client to serve the sentence. (08/07/08 Tr. 7).

¶{36} Despite the lack of argument from counsel, we do not find that his performance was deficient for two reasons. First, the "presentation of mitigating evidence is a matter of trial strategy." *State v. Stiles*, 3d Dist. No. 1-08-12, 2009-Ohio-089, quoting *State v. Were,* 118 Ohio St.3d 448, 2008-Ohio-2762, ¶241, citing *State v. Keith* (1997), 79 Ohio St.3d 514, 530. Tactical or strategic trial decisions, even if unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

¶{37} Second, from the record it appears that the prosecutor and defense counsel were under the belief that they were there **only for reimposition of the original sentence**. Although, it does appear that neither defense counsel or the prosecutor knew that the original sentence was 240 days.

¶{38} "MR. HARTUP [prosecutor]: That is correct. In regards to Case 02 CR 2960 it is my understanding this matter had gone up to the Court of Appeals. It has been brought back for **reimposition of sentence** the Court has already imposed. It is my understanding further after speaking to Counsel that the original sentence was approximately 130 to 180 days in jail. Based upon the **reimposition of that jail time**, Your Honor, the State would move to dismiss Case 08 TRD 2190.

¶{39} "MR. VIVO [defense counsel]: I was recently appointed for the purpose of having counsel present at sentencing. I was not the original counsel. In speaking with my client I do know that prior to the Court's **reimposition of sentencing** he would request that the Court permit him to make a statement to the Court." (08/07/08 Tr. 2) (Emphasis added).

¶{40} Thus, neither counsel appeared to believe that they were there to discuss modifying the original sentence.

¶{41} Consequently, for the above two reasons, we do not find that counsel's performance was deficient.

¶{42} Regardless, even if we deemed it to be deficient, the prejudice prong of *Strickland* is not met in this case. While counsel made no arguments concerning mitigation, Cossack made those arguments for himself. Not only did he ask for "garage arrest" as is discussed above, but he also brought to the court's attention that he has two children he must support and has a "balloon" payment on his business that must be paid. (08/07/08 Tr. 5-6). For those reasons, he did not want any jail time so that he could continue to work to support himself and his children. (08/07/08 Tr. 6). Thus, the information was before the trial court and, as such, it cannot be concluded

that the result would have been different if counsel also made those same arguments. Therefore, prejudice cannot be shown. This assignment of error lacks merit.

CONCLUSION

¶{43} In conclusion, the trial court had the authority to modify/change the sentence at the August 2008 sentencing hearing. However, the trial court did not abuse its discretion in ordering the sentence that it did. All assignments of error are meritless

¶{44} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
Waite, J., concurs.