

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOSEPH SOLOMON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0124

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 18 CR 442

BEFORE:

Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:

Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Wesley A. Johnston, P.O. Box 6041, Youngstown, Ohio 44501, for Defendant-Appellant.

Dated: September 18, 2019

WAITE, P.J.

{¶1} Appellant Joseph Solomon appeals his sentence following conviction in the Mahoning County Court of Common Pleas on one count of violating a protection order. Appellant argues that the trial court improperly based his sentence on an unproven allegation that he violated his bond in the instant matter by contacting the victim and stealing her license plate. Appellant also argues that his right to allocution was compromised by Fifth Amendment concerns. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On May 17, 2018, Appellant was indicted on one count of burglary, a felony of the second degree in violation of R.C. 2911.12(A)(2), and one count of violating a protection order, a felony of the third degree in violation of R.C. 2919.27. On August 27, 2018, Appellant pleaded guilty to violating a protection order. The state dismissed the burglary charge. Appellant was released on his own recognizance pending sentencing on the condition that he have no contact with the victim.

{¶3} While Appellant was on bond, the victim filed a police report accusing him of violating the protection order and stealing her license plates. The following facts are taken from the September 25, 2018 police report which was attached to the state's motion to revoke bond. According to the victim, Appellant texted her "[g]ood luck taking the kids to school with no plates." (7/26/19 Motion to Revoke Bond, Exh. 1.) The victim inspected her car to find that her back license plate was missing. Appellant's mother informed the victim that Appellant had taken the plate to her home and that the victim could pick it up

there. The victim reported the incident to police, who accompanied her to retrieve her license plate. When they arrived at Appellant's mother's residence, Appellant's mother could be seen holding the plate as she stood on the driveway. When Appellant's mother saw the police, she began shouting at the victim, complaining that she told her not to involve the police. Both Appellant's mother and Appellant acted aggressively as officers arrested Appellant. Appellant admitted that he took the plates, but contended that he attempted to give them back. He also claimed that he did not violate the protection order, because the victim's car was at his brother's house when he removed the plate. Appellant's mother admitted that Appellant took the plates, but said she did not believe police had a right to arrest Appellant because he was attempting to return them.

{¶4} On September 26, 2018, the state filed a motion to revoke Appellant's bond based on his violation of the trial court's order to not contact the victim, attaching the police report. The court granted the state's motion.

{¶5} On October 25, 2018, the trial court held a sentencing hearing. At the hearing, the state requested Appellant be incarcerated rather than receive community control due to Appellant's conduct while on bond. The court was initially reluctant to consider Appellant's conduct without a better understanding of the facts. The state referred the court to the police report, which contained Appellant's confession that he took the victim's plates, but his denial that his conduct was unlawful. After hearing the details of the incident, the trial court sentenced Appellant to two years of incarceration. Appellant timely appeals the trial court's entry, filed October 29, 2018.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO [SIC] WHEN IT CONSIDERED UNCHARGED AND VAGUE ALLEGATIONS OF CRIMINAL CONDUCT DURING THE SENTENCING.

{¶6} While Appellant concedes that a trial court is permitted to consider unindicted acts during sentencing, he argues that such acts cannot form the sole basis for his sentence. Appellant claims that the trial court based his sentence solely on the bond violation, for which he was not indicted. Appellant also argues that although the court offered him the opportunity to allocute, he could not make any statement regarding the incident for fear of incriminating himself, particularly after the state announced its intention to file charges following the incident.

{¶7} The state responds that a trial court is permitted to consider evidence of other crimes whether or not the defendant has been indicted on those crimes. Ohio caselaw allows a trial court to consider an indictment, a bill of particulars, the victim's in-court statements, trial testimony if the matter proceeded to trial, and any presentence investigation report when determining a sentence. The state also cites to Seventh District precedent that it is proper for a trial court to consider whether a defendant violated bond while awaiting sentencing.

{¶8} We agree that "[i]t is well established that sentencing courts may consider arrests and even prior allegations that did not result in conviction before imposing sentence." *State v. Craig*, 7th Dist. Belmont No. 18 BE 0001, 2019-Ohio-1092, ¶ 9, citing *State v. Martin*, 7th Dist. Mahoning No. 16 MA 0160, 2018-Ohio-862, ¶ 7; *State v. Hutton*, 53 Ohio St.3d 36, 43, 559 N.E.2d 432 (1990). We have determined that a trial court may properly consider a defendant's violation of bond when considering a sentence, because

this evidence indicates the defendant's likelihood of recidivism. *State v. Williams*, 7th Dist. Mahoning No. 11 MA 131, 2012-Ohio-6277, ¶ 78.

{¶9} Appellant claims that the trial court exclusively relied on his bond revocation in determining his sentence. However, the record does not support Appellant's claim. First, the trial court stated that it considered Appellant's violation of bond was relevant on the issue of whether he was amenable to community control, acknowledging that this violation was only one consideration in his sentencing. (2/7/19 Sentencing Hrg., p. 8.) Further, the trial court considered postponing the sentencing hearing to allow the state to present additional material which might have assisted the court in weighing and considering the sentencing statutes. This reflects the trial court's understanding that it was required to consider and weigh all relevant statutes, instead of relying on a single fact like Appellant's violation of bond.

{¶10} The trial court only imposed sentence in this matter after it was satisfied that facts had been offered demonstrating that Appellant did not contest the behavior that resulted in the bond revocation. (2/7/19 Sentencing Hrg., p. 8.) For instance, the police report attached to the motion to revoke bond included statements from officers who witnessed the victim's retrieval of her property and also included an admission of guilt from Appellant and his mother.

{¶11} The trial court specifically stated it relied on the bond violation in considering whether Appellant was amenable to community control. This shows that the trial court relied on other evidence in weighing and considering the remaining statutory factors. The trial court indicated that, in addition to the bond revocation proceedings, it considered the presentence investigation report and the case file.

{¶12} As to Appellant’s concern that his right to allocution was impacted by his desire to retain his Fifth Amendment rights, the trial court did offer the opportunity to allocute to Appellant. The court acknowledged that Appellant had to be mindful new charges might be filed during his allocution, and it does not appear that the trial court looked unfavorably on the fact that Appellant was hindered in any discussion of his conduct related to the bond violation. (2/7/19 Sentencing Hrg., p. 13.)

{¶13} As the trial court indicated that it considered the conduct related to the bond revocation only as regards one aspect of the sentencing guidelines, Appellant cannot demonstrate that the trial court exclusively relied on that conduct when it imposed his sentence. Because a trial court is permitted to consider Appellant’s bond violation when determining a sentence, the trial court did not err. Appellant’s argument is without merit and is overruled.

Conclusion

{¶14} Appellant argues that the trial court relied on an unproven allegation that he violated his bond when determining his sentence. Appellant also argues that his right to allocution was compromised by Fifth Amendment concerns. For the reasons provided, Appellant’s arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

D’Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.