

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-09-068

Appellee

Trial Court No. 2006CR0402

v.

Edward Martinez

DECISION AND JUDGMENT

Appellant

Decided: May 7, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
David E. Romaker, Jr., Assistant Prosecuting Attorney, for appellee.

Joanna M. Orth, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Edward Martinez, appeals from a decision of the Wood County Court of Common Pleas where he was sentenced to serve 4 years and 11 months in prison for theft and failing to comply with an order or signal of a police officer. For the reasons that follow, we affirm.

{¶ 2} On September 20, 2006, appellant was indicted on one count of theft, a violation of R.C. 2913.02(A)(1), one count of failing to comply with an order or signal of a police officer, a violation of R.C. 2921.33.1(B), and two counts of receiving stolen property, violations of R.C. 2913.51(A). On October 3, 2006 appellant pled not guilty to the indictment. He was released on a \$40,000 cash bond on the condition that he appear in court for a pretrial conference on October 10, 2006. On October 10, 2006, appellant's bond was modified and he was released on his own recognizance.

{¶ 3} On April 3, 2007, appellant entered guilty pleas to one count of theft and one count of failing to comply with an order or signal of a police officer. His sentencing was scheduled for June 12, 2007. On that date, appellant failed to appear for his sentencing. A warrant was issued for his arrest.

{¶ 4} Approximately two years later, appellant was brought to the court for sentencing on this matter. He was sentenced to 11 months in prison for the theft charge and 4 years for failing to comply with an order or signal of a police officer. The sentences were ordered to be served consecutively. Appellant now appeals and sets forth the following assignment of error:

{¶ 5} "Defendant/Appellant's sentence should be vacated as there was an unreasonable two year, four month delay between defendant's guilty plea and sentencing thereby divesting the trial court of jurisdiction to sentence Defendant/Appellant."

{¶ 6} Under Crim.R. 32(A)(1), a sentence shall be imposed without unnecessary delay. An unreasonable delay between a plea and a sentencing, which cannot be

attributed to the defendant, will invalidate that sentence. *State v. Brown*, 152 Ohio App.3d 8, 2003-Ohio-1218, ¶ 31. *City of Willoughby v. Lukehart* (1987), 39 Ohio App.3d 74. The remedy for an unreasonable delay in sentencing is the vacation of the sentence. *Brown*, supra at 26-28.

{¶ 7} In his sole assignment of error, appellant contends the two year and four month delay between his guilty plea and sentencing divested the trial court of jurisdiction to sentence him, even though it was appellant who initially failed to appear at his first sentencing hearing.

{¶ 8} In support, appellant cites *State v. Tucker* (May 2, 1989), 10th Dist. No. 88AP-550. Tucker was convicted of receiving stolen property and a sentencing date was scheduled. Tucker failed to appear for his sentencing so a warrant was issued for his arrest. Three weeks later, in November of 1987, Tucker turned himself in. He was not sentenced for his receiving stolen property until May of 1988. The Tenth District Court of Appeals found this was an unreasonable delay despite the fact that it was Tucker who initially failed to appear at his first sentencing date. The appellate court noted the record showed that the trial court in this case knew where Tucker was between the time he turned himself in and the date of his sentencing. Specifically, the trial court knew that shortly after Tucker turned himself in, he pled guilty in another pending case and had been serving his sentence since November 1987. Given the trial court's knowledge of Tucker's whereabouts and the lack of an excuse on the record for the lengthy delay from

November 1987, to May 1988, the court of appeals found that the trial court was divested of jurisdiction to impose a sentence against Tucker.

{¶ 9} Another case appellant cites in support is *State v. Johnson*, 12th Dist. No. CA2002-07-016, 2003-Ohio-6261. Johnson was convicted in 1995 of cocaine trafficking. When he failed to appear twice for sentencing, his bond was revoked and a warrant for his arrest was issued. While he was being sought in Ohio, he was arrested in Kentucky on unrelated charges. He was tried and convicted in Kentucky and sentenced to ten years in prison. He was finally sentenced on the Ohio trafficking charges in June 2002. The Twelfth District Court of Appeals found that six and one-half years constituted an unreasonable delay in sentencing, which divested the trial court of jurisdiction to sentence appellant. The court explained:

{¶ 10} "[T]he record shows that as early as March 1996, the state knew [Johnson] was incarcerated in Kentucky. Beginning in June 1996, on five different occasions, including his motion to dismiss, [Johnson] alerted the Clerk of Courts about his case and his desire to have final disposition. Each time, the state was apprised of [Johnson's] request or inquiry either by the Clerk of Courts or by the trial court itself. Indeed, in June 1996, the trial court ordered the state to evaluate [Johnson's] request for a final disposition, to determine what needed to be done to accommodate [Johnson's] request, and to report to the trial court. In August 1999, the trial court ordered the state to respond to [Johnson's] motion to dismiss. Both times, the state did nothing." *Id.* at ¶ 15.

{¶ 11} The court further commented that the state could have resorted to traditional extradition procedures or could have requested a waiver from Johnson of his right to be physically present at the sentencing hearing and that there is no explanation from the record why the state failed to explore other options to sentence Johnson.

{¶ 12} Appellant also cites to *State v. Brown*, supra., a case similar to *Johnson* in that the court found there to be an unreasonable delay in sentencing where the state had knowledge of Brown's incarceration in another jurisdiction, yet waited 20 months to act on that knowledge.

{¶ 13} Here, appellant also failed to appear at his initial sentencing. On June 26, 2009, appellant filed a "sentencing memorandum" asking the court to set a date for sentencing him in this case. He explained that shortly after he failed to appear for his Wood County sentencing, he was arrested on unrelated charges in Lucas County and ultimately was sent to prison where he has resided for more than two years.

{¶ 14} Appellant contends that, like the cases he has cited, appellee had some knowledge of his whereabouts, or at the very least, some very good clues which would enable appellee to find appellant and bring him back to the jurisdiction for a timely sentence. Appellant bases his contention on the fact that on March 27, 2007, appellee filed a motion to revoke appellant's bond because appellant had allegedly been charged with a new felony in Lucas County. At appellant's April 3, 2007 plea hearing, the prosecutor addressed the issue of new charges:

{¶ 15} "Your honor, I was informed by police officers that defendant was picked up recently * * * on a new felony count out of Lucas County. [Appellant's lawyer] then had the opportunity to speak to [appellant] and then conveyed to me he did not believe that to be a true statement. I contacted the officer again, he did some checking and he was unable to find any additional felony counts. * * * the motion the state filed in regard to new felonies that does not appear to be the case."

{¶ 16} The facts in this case are distinguishable from the facts in the cases cited by appellant. In the latter cases, the state and or the trial court were shown to have relevant, specific information of the defendants' whereabouts yet they simply failed to act on said information in a timely manner. Furthermore, the records in those cases showed the state and or the trial court had no valid excuse for their inaction.

{¶ 17} The record in this case shows that appellee had no notice of appellant's whereabouts until appellant filed his "sentencing memorandum" in 2009. We find appellant's contention that appellee had knowledge of his whereabouts is without merit. The prosecutor, as shown on the record, had received vague information in 2007 about possible pending charges in Lucas County but then became convinced, based on his own investigation, that there were no such charges. Thus, the prosecutor had no reason to seek out appellant in the State penal system. Accordingly, we find appellant's delay in sentencing is solely attributable to his failure to appear at his initial sentencing date. Appellant's assignment of error is found not well-taken.

{¶ 18} The judgment of the Wood County Court of Common pleas is affirmed.

Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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