

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

State of Ohio

Appellee

Court of Appeals Nos. L-08-1242
L-08-1243
L-08-1244

v.

Trial Court Nos. CR200802353
CR200802352
CR200802365

Corion Brackette

Appellant

DECISION AND JUDGMENT

Decided: June 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

James D. Valtin, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from three February 4, 2010 nunc pro tunc judgments of the Lucas County Court of Common Pleas, which sentenced appellant, Corion Brackette, after his no contest pleas were accepted by the trial court as to three separate incidents in

three separate cases. He was convicted in the first case (CR200802353/L-08-1242) by the court of violating R.C. 2911.02(A)(2), robbery. He was convicted in the second case (CR200802352/L-08-1243) by the court of violating R.C. 2911.01(A)(1), aggravated robbery, and R.C. 2903.11(A)(2), felonious assault, both of which carried a firearm specification pursuant to R.C. 2941.145. He was convicted in the third case (CR200802365/L-08-1244) by the court of violating R.C. 2911.02(A)(2), robbery, and R.C. 2903.11(A)(2), felonious assault, both of which carried a firearm specification pursuant to R.C. 2941.141. Appellant was sentenced to an aggregate sentence of 41 years. Upon consideration of the assignments of error, we affirm the decision of the lower court as to case Nos. L-08-1242 and L-08-1243. We reverse the decision of the lower court as to case No. L-08-1244. Appellant asserts the following assignments of error on appeal:

{¶ 2} "ASSIGNMENT OF ERROR NO. 1. APPELLANT WAS DEPRIVED OF HIS RIGHTS UNDER ARTICLE ONE, SECTION TEN OF THE OHIO CONSTITUTION AND ARTICLE ONE, SECTION TEN OF THE UNITED STATES CONSTITUTION TO AN [SIC] FAIR AND IMPARTIAL TRIER OF FACT.

{¶ 3} "ASSIGNMENT OF ERROR NO. 2. APPELLANT WAS DEPRIVED OF HIS RIGHTS UNDER ARTICLE ONE, SECTION TEN OF THE OHIO CONSTITUTION AND CRIMINAL RULE 43(A) WHEN THE COURT MODIFIED APPELLANT'S SENTENCE OUTSIDE OF HIS PRESENCE."

{¶ 4} In his first assignment of error, appellant argues that his sentence was excessive and should be reversed because the trial court was prejudiced and did not base its decisions on a fair and impartial hearing. Appellant points to several statements by the trial court judge to support his argument. First, at the beginning of the hearing, the trial court judge explained to appellant that the prosecution would be making a statement of the facts in this case and if they fit the crimes charged, appellant would be convicted of the charges. The judge went on to state: "He's done this in my courtroom numerous times. There's no reason to believe that he'll get it wrong today. So, when he makes the recitation of those facts, I'm going to accept those, and [sic] 99.9 percent chance you will be found guilty; do you understand that?" After the recitation of the facts by the prosecutor, the judge stated: "Do you have any questions or anything you need to say? You need to do it now because I'm about to do what the Prosecutor tells me."

{¶ 5} Upon examination of the entire plea hearing, we find that the trial judge's statements do not reflect a bias attitude. The court went to great length to make sure appellant understood what he was doing by entering a plea. These statements were made to emphasize to appellant that the prosecutor knew what he was doing and that once the prosecutor made his statement, the court would almost certainly find that the factual evidence presented would establish all of the elements of the crimes. Therefore, we find appellant's first assignment of error not well-taken.

{¶ 6} In his second assignment of error, appellant argues the trial court erred as a matter of law when it modified his sentence outside of his presence to reduce the length

of imprisonment in one of the cases by three years. This assignment of error relates only to the third case. At the sentencing hearing, the judge sentenced appellant in case No. CR200802365/ L-08-1244 to nine years of imprisonment for the robbery conviction and an additional three years of imprisonment for the firearm specifications. However, by law, appellant could only be sentenced to a maximum of eight years of imprisonment for the robbery charge because it was a felony of the second degree and not a felony of the first degree as the court had incorrectly stated. Furthermore, the robbery and felonious assault charges carried firearm specifications based upon R.C. 2941.141 and, therefore, only a one-year mandatory prison term could be imposed. The trial court's error added three additional years to appellant's sentence. After appellant was removed from the courtroom, the error was brought to the court's attention. Appellant's counsel waived appellant's presence and the court proceeded to correct its error by reducing appellant's sentence by three years.

{¶ 7} Crim.R. 43(A)(1) requires the physical presence of a defendant during sentencing or a hearing to modify a defendant's sentence. *Columbus v. Rowland* (1981), 2 Ohio App.3d 144, 145. Failure to comply with Crim.R. 43(A) results in reversible error whether the sentence is increased or not. *State v. Hill*, 5th Dist. No. 98CA67, 2002-Ohio-227, at 10 (even when the parties agreed and the modified sentence was better for the defendant), and *State v. Cook* (Apr. 16, 1998), 7th Dist. No. 96 CA 101 (modification of sentence outside appellant's presence from consecutive to concurrent prison terms is automatic error). Cf. *State v. McCornell*, 8th Dist. No. 81581,

2003-Ohio-2474, at 3 (court of appeals found a sentence modified outside of defendant's presence to correct an error to which neither party objected on appeal and resulted in a reduction of sentence need not be set aside).

{¶ 8} In the case before us, appellant objects to the modification of his sentence even though the modification resulted in less imprisonment. Because the sentence was modified outside of appellant's presence, the sentence must be reversed. Furthermore, since the prior sentence was contrary to law, it cannot be reinstated. Therefore, we find appellant's second assignment of error well-taken only as to case No. L-08-1244.

{¶ 9} Having found that the trial court did commit error prejudicial to appellant in case No. L-08-1244 and that substantial justice has not been done, the judgment of the Lucas County Court of Common Pleas is reversed in case No. L-08-1244. This case is remanded to the lower court for resentencing. The judgments in case Nos. L-08-1242 and L-08-1243 are affirmed. Appellee is hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENTS REVERSED IN PART
AND AFFIRMED IN PART.

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

State v. Brackette
C.A. Nos. L-08-1242,
L-08-1243, L-08-1244

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, 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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.