

[Cite as *State v. Waugh*, 2010-Ohio-1976.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92896

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHAWN WAUGH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511174

BEFORE: McMonagle, J., Gallagher, A.J., and Celebrezze, J.

RELEASED: May 6, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

John T. Castele
1310 Rockefeller Building
614 West Superior Avenue
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Carrie Heindrichs
Assistant Prosecuting Attorney
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, OH 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant Shawn Waugh appeals his convictions for firearm specifications and aggravated robbery, and the consecutive nature of his sentence. We affirm.

Procedural History

{¶ 2} Waugh was indicted as follows: Counts 1 and 2, aggravated robbery (R.C. 2911.01(A)(1) and 2911.01(A)(3), respectively), each count with one- and three-year firearm specifications and a forfeiture specification; Count 3, kidnapping with one- and three-year firearm specifications; Count 4, carrying a concealed weapon with a forfeiture specification; and Count 5, having a weapon while under disability with a forfeiture specification. The forfeiture specifications related to a Raven .25 caliber semi-automatic pistol.

{¶ 3} After negotiations with the state, Waugh withdrew his previously entered plea of not guilty to the charges and pleaded guilty to Count 1, aggravated robbery with a one-year firearm specification, and Count 5, having a weapon while under disability with a forfeiture specification. The remaining counts were dismissed.

{¶ 4} On the day of sentencing, however, Waugh made an oral motion to withdraw his plea and the court granted the motion. The case proceeded to a jury trial on all counts except the having a weapon while under disability,

which was tried to the court. At the conclusion of its case, the State dismissed the kidnapping count and all the forfeiture specifications. Count 2, aggravated robbery, was dismissed in accordance with Waugh's Crim.R. 29 motion.

{¶ 5} The jury found Waugh guilty of aggravated robbery under Count 1 and carrying a concealed weapon; the court found him guilty of having a weapon while under disability. The court sentenced him to three years on the aggravated robbery, consecutive to three years on the firearm specification, concurrent to nine months on the carrying a concealed weapon, consecutive to one year on the having a weapon while under disability, for a seven-year sentence.

Facts

{¶ 6} The victim, Walter Williams, testified at trial that he was robbed on April 1, 2008, at approximately 12:30 p.m., outside his Bedford apartment building, the Colony Club. He stated that as he walked out of the building he saw a man whom he did not know, but whom he later identified as Waugh, outside the building. Williams walked to his car, and as he attempted to unlock it, Waugh pointed a gun at him and said "[p]ut it down. Give me everything." Williams put everything he had down and ran to a nearby gas station where he called the police.

{¶ 7} The police responded to the gas station and drove Williams back to the scene. Some of Williams's belongings were still there; however, his money and a duffel bag were not. Williams stated to the police that his robber was wearing a white coat with printing and stitching, a hat, and had braids and a goatee. Williams made a written statement to the police on the day of the incident, but it could not be located at the time of trial. Williams identified Waugh from a police line-up about a month after the incident and made another written statement.

{¶ 8} Williams told his close friend, Joe Chapman, of the robbery the day it occurred. Chapman, who worked with Waugh, encountered Waugh at work approximately two weeks after the robbery. The two were talking and the topic of conversation became robbery. Chapman testified that Waugh told him he committed a robbery at gunpoint at the Colony Club apartments in Bedford. Waugh stated that he had used a .380 gun to commit the robbery. Chapman testified that he was aware that Waugh had a .380 gun and, in fact, Waugh had previously shown it to him.

{¶ 9} After his conversation with Waugh, Chapman told Williams that he knew who had robbed him. The two contemplated engaging in "vigilante justice," but eventually decided against it and Chapman went to the police.

{¶ 10} Another one of Waugh's co-workers, Isaac Wilson, lived at the Colony Club apartments where the robbery occurred. Wilson testified that he and Waugh were friendly and Waugh had visited him at his apartment on a couple of occasions. Wilson also knew Williams and Williams told Wilson about the robbery and described the robber. Wilson testified that he initially did not associate Waugh with the robbery, but then did when the police showed him Waugh's picture.

{¶ 11} In May 2008, the police obtained an arrest warrant for Waugh, as well as a search warrant for his apartment. Upon arriving at the apartment to execute the warrants, the police learned from Waugh's girlfriend that they had moved to another apartment unit, and the police then obtained her consent to search it. A white leather coat with designs stitched on it and ammunition for a .380 gun were recovered during the search of the apartment.

{¶ 12} Waugh was arrested and searched; a loaded, operable .25 caliber gun was recovered from his person. During transport, Waugh told the police that he does "not even go into Bedford," he had only been to the Colony Club apartments once in January, and he had not been involved in a robbery.

Law and Analysis

{¶ 13} For his first assigned error, Waugh contends that the State failed to present sufficient evidence to sustain the convictions on the firearm

specifications. Specifically, Waugh contends that “the only evidence of operability necessary to sustain a conviction on the firearm specifications was presented on the firearm which was found on [him] at the time of his arrest. All evidence presented at trial indicated that a .380 handgun was used in the robbery[.]”

{¶ 14} An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt.

The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 15} The Ohio Supreme Court has held that “[a] firearm enhancement specification can be proven beyond a reasonable doubt by circumstantial evidence. In determining whether an individual was in possession of a firearm and whether the firearm was operable or capable of being readily rendered operable at the time of the offense, the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm.” *Id.* at

paragraph one of the syllabus; see, also, *State v. Williams*, Cuyahoga App. No. 83920, 2004-Ohio-5602, ¶11.

{¶ 16} Here, Williams testified that Waugh came up to him with a gun pointed at him and told him to “[p]ut it down. Give me everything.” Williams testified that he dropped everything and ran because he was scared the robber would shoot him. Further, Williams’s testimony was corroborated by Chapman, who stated that Waugh told him that he robbed someone at gunpoint at the Colony Club apartments. The fact that he pointed the gun, demanded that Williams turn over his property, and was found with .380 bullets were all relevant facts sufficient to prove that Waugh was in possession of an operable firearm and, accordingly, the first assignment of error is overruled.

{¶ 17} Waugh contends in his second assignment of error that the conviction for aggravated robbery was against the manifest weight of the evidence. Waugh cites the following in support of his contention: (1) the police officer’s testimony that he did not remember Williams telling him that his duffel bag was stolen during the robbery; (2) Chapman’s description of the gun used as silver and black versus Williams’s description that it was silver; (3) Williams’s initial description of the gun used as revolver, then later statement that he was not sure what type of gun it was versus Chapman’s description that it was an automatic weapon; (4) Williams contacting the

police after he “must have known that Waugh had already been arrested for the crime,” to tell them that his robber was on the streets; and (5) Wilson’s testimony that he initially did not consider Waugh as the possible perpetrator, and only did so after the police showed him Waugh’s photo.

{¶ 18} To warrant reversal from a verdict under a manifest weight of the evidence claim, this court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Thompkins*, supra, at 387.

{¶ 19} Although we review credibility when considering the manifest weight of the evidence, the credibility of witnesses is primarily a determination for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact is best able “to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶24, citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81, 461 N.E.2d 1273.

{¶ 20} Upon review, the testimony was not so incredible that the judgment must be reversed and a new trial ordered. In regard to the duffel

bag, Williams testified that he told the police on the scene that the bag had been stolen. The police officer, however, testified that he did not *remember* Williams telling him about the bag; he did not deny that Williams told him, and Williams's statement from that day was lost. Furthermore, there was nothing so incredible about Williams's and Chapman's descriptions of the gun — both described it at least as being silver, and Williams testified that he did not own a gun and was not that familiar with them.

{¶ 21} Moreover, Waugh's belief that Williams contacted the police after he "must have known that Waugh had already been arrested for the crime," is speculative and unsubstantiated by the record. And there was nothing so incredible about the fact that Wilson did not initially consider Waugh as the possible perpetrator. Accordingly, on this record, the aggravated robbery conviction was not against the manifest weight of the evidence and the second assignment of error is overruled.

{¶ 22} For this third assignment of error, Waugh contends that "the sentence imposed by the court is inconsistent with the principles and purposes of sentencing * * * and therefore is contrary to law." We disagree.

{¶ 23} As required by *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, we review felony sentences to determine whether there is statutory compliance with sentencing and whether the court abused its discretion by imposing sentence. *Id.* at ¶4. Waugh's seven-year

sentence was within the statutory range — he received the minimum three years on the aggravated robbery, consecutive to three years on the firearm specification, concurrent to nine months on the carrying a concealed weapon (sentencing on which ranged between six to 18 months), to be served concurrently with the aggravated robbery, and the minimum one year on having a weapon while under disability, to be served consecutively to the aggravated robbery. We also determine that the court did not abuse its discretion when imposing sentence.

{¶ 24} Waugh contends that his sentence was excessive in light of his age at sentencing (22) and that this was his first adult felony conviction. Waugh was not, however, entitled to a presumption of the shortest available prison term as a first-time offender. In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court severed former R.C. 2929.14(B) relating to minimum terms of incarceration. *Id.* at paragraph two of the syllabus. Accordingly, the trial court was vested with the discretion to sentence Waugh to any prison term allowable by law under R.C. 2929.14(A). *Id.* at paragraph seven of the syllabus.

{¶ 25} In its sentencing journal entry, the court noted that it considered all required factors of the law and that a prison term for Waugh would be consistent with the purposes of R.C. 2929.11.¹ The court sentenced Waugh

¹R.C. 2929.11 states: “(A) A court that sentences an offender for a felony shall

to the minimum sentence on the aggravated robbery and having a weapon while under a disability. Although the court sentenced him to more than the minimum on the carrying a concealed weapon, and ordered the having a weapon while under disability to be served consecutively to the aggravated robbery, the sentence was not excessive. In imposing the sentence, the court noted in particular that Waugh has been involved with the criminal justice system since 1999 and the public needed protection from him. In light of the above, the court did not abuse its discretion in sentencing Waugh. The third assignment of error is therefore overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's

be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

“(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.”

conviction having been affirmed, any bail pending appeal is terminated.

Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR