[Cite as *State v. Heard*, 2018-Ohio-4869.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106791

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEKARI HEARD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-618582-A

BEFORE: Laster Mays, J., E.A. Gallagher, A.J., and Jones, J.

RELEASED AND JOURNALIZED: December 6, 2018

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ANITA LASTER MAYS, J.:

{¶1} Appellant-defendant Dekari Heard ("Heard") pleaded guilty to charges arising from the June 12, 2017 death of 17 year-old Ben Martin that resulted in an 18-year prison sentence. Heard appeals the sentence. We affirm the trial court's decision.

I. Background and Facts

{¶2} On November 8, 2017, Heard pleaded guilty to: (1) voluntary manslaughter (R.C. 2903.03(A)), a felony of the first-degree, with both one-year and three-year firearm specifications (R.C. 2941.141(A) and 2941.145(A)); (2) discharge of a firearm over prohibited premises (R.C. 2923.162(A)(3)), a felony of the first-degree; (3) having a weapon while under disability (R.C. 2923.13(A)(2)), a felony of the third-degree; and (4) tampering with evidence (R.C. 2921.12(A)(1)), a felony of the third-degree.

{¶3} On December 11, 2017, Heard was sentenced to three years for the firearm specification to be served prior to a consecutive nine-year sentence for voluntary manslaughter;[1] nine years for discharging a firearm to be served concurrent to the voluntary manslaughter charge; 36 months for having a weapon under disability and 36 months for tampering with evidence to be served consecutively. The trial court then stated that judicial release is prohibited until 15 years have been served.

II. Assignments of Error

{¶4} Heard poses two assigned errors:

I. The trial court's sentence was contrary to law.

II. The trial court erred when it ordered that judicial release would not be considered until the appellant served fifteen (15) years in prison.

III. Discussion

A. Contrary to Law

{¶5} "An appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23.

> Appellate review of felony sentences is governed by R.C. 2953.08. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 16. R.C. 2953.08(G)(2) provides that when reviewing felony sentences, a reviewing court may increase, reduce, or modify a sentence, or it may vacate and remand the matter for resentencing, only if we clearly and convincingly find that either the record does not support the sentencing court's statutory findings or the sentence is contrary to law. A sentence is contrary to law if the sentence falls outside the statutory range for the particular degree of offense or the trial court failed to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors in R.C. 2929.12. *State v. Hinton*, 8th Dist.

[1] The three-year specification merged with the one-year specification for purposes of sentencing.

> Cuyahoga No. 102710, 2015-Ohio-4907, ¶ 10, citing *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 13.

State v. Martin, 8th Dist. Cuyahoga No. 104354, 2017-Ohio-99, ¶ 7.

{¶6} Heard contends in the first assigned error that his sentence is contrary to law because the trial court failed to properly consider R.C. 2929.11 and 2929.12 in imposing the sentence, and the sentence is not clearly and convincingly supported by the record.

> R.C. 2929.11(A), governing the purposes and principles of felony sentencing, provides that a sentence imposed for a felony shall be reasonably calculated to achieve two overriding purposes of felony sentencing: (1) to protect the public from future crime by the offender and others, and (2) to punish the offender using the minimum sanctions that the court determines will accomplish those purposes. Furthermore, the sentence imposed shall be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim, and consistent with sentences imposed for similar crimes by similar offenders." R.C. 2929.11(B).
>
> R.C. 2929.12 delineates the seriousness and recidivism factors for the sentencing court to consider in determining the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11. The statute provides a non-exhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.

Id. at ¶ 9-10.

{¶7} This court has previously held that

> [a] trial court "fulfills its duty under the statutes by indicating that it has considered the relevant sentencing factors." [*State v*.] *Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, at ¶ 14, citing *State v. Saunders*, 8th Dist. Cuyahoga No. 98379, 2013-Ohio-490, ¶ 4. The trial court "need not go through each factor on the record — it is sufficient that the court acknowledges that it has complied with its statutory duty to consider the factors without further elaboration." *Id.*, citing *State v. Pickens*, 8th Dist. Cuyahoga No. 89658, 2008-Ohio-1407, ¶ 6. In fact, consideration of the appropriate factors set forth in R.C. 2929.11 and 2929.12 can be presumed unless the defendant affirmatively shows to the contrary. *State v. Jones*, 8th Dist. Cuyahoga No. 99759, 2014-Ohio-29, ¶ 13.

Martin at ¶ 11.

{¶8} The record supports the trial court's meticulous consideration of the requisite factors in determining whether the sentences should be imposed concurrently or consecutively:

> COURT: Now, the other thing that I have to decide is whether I run these sentences, these four matters at the same time, which would — which we call concurrent; so if I ordered these sentences to run concurrent to each other, he would be serving one or more of them at the same time so a day on one sentence would count a day on the other counts as well. My other choice is to run them consecutive, which means he would spend time on one, finish that; start the next one, finish that and continue. And continue until all four are done. And I can combine them, some concurrent some consecutive; so those are the decisions that I have to make based on the facts and circumstances of the case.
>
> To reach that decision I have to look at the seriousness of the charge and follow the guidelines that are in place for all of the judges, and is this case more serious than what I might otherwise expect, and are there factors I have to look at — there are factors that I have to look at in reaching that decision — or are there circumstances that should — that I should take into consideration that reduces the seriousness of it either because of the conduct of the victim himself * * * or other circumstances that caused me to think of it in a less serious manner than what I might otherwise expect.
>
> And here [defense counsel] is suggesting that there were circumstances that while a serious matter that resulted in an unfortunate death of [the victim], there were circumstances that I should take into account to reduce his sentence because of those circumstances. I have to weigh that out and make a decision. The other part of my decision is very different than that and I have to look at the criminal record of Mr. Heard. And I have to answer the question, or attempt to answer the question is Mr. Heard a risk to the community? Is he likely to cause or be charged with a crime in the future? And if that is a high risk, then that is a factor for sentencing purposes.
>
> If that's a low risk, then that's a factor that benefits Mr. Heard to impose a lesser sentence. So after I've done all of that analysis, I'm able to render a sentence in the case.

(Tr. 53-55.)

{¶9} The trial court continued:

> [C]onsecutive sentences has to be subject to a specific finding because the law presumes a concurrent sentence unless circumstances are different. And I think circumstances are different in this case, multiple prison terms are imposed in this situation and consecutive service is necessary to protect the public from future crime and to punish the offender, and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public if the [c]ourt finds any of the following:
>
> One, that the — the offense was committed when Mr. Heard was awaiting trial, sentencing, or under sanction imposed by one of a number of factors; including [postrelease] [c]ontrol. Simply stated, Mr. Heard was on [p]arole at the time, or what people normally refer to as [p]arole, or formerly known as [postrelease] [c]ontrol at the time these events ccurred which means he had been released from prison and was subject to those sanctions, so that is the factor that supports consecutive sentences and that is the case in this situation.
>
> His criminal history also demonstrates that consecutive sentences are necessary to protect the public from future crime so I have two of the three reasons to make that a consecutive sentence. I only need one, so I think for those reasons there is ample evidence that consecutive sentences are appropriate in this case, so a total of 18 years is warranted.

(Tr. 57-59.)

{¶10} The sentencing journal entry also recites the consecutive sentencing findings:

> The court imposes prison terms consecutively finding that consecutive service is necessary to protect the public from future crime or to punish defendant; that the consecutive sentences are not disproportionate to the seriousness of defendant's conduct and to the danger defendant poses to the public; and that, the defendant committed one or more of the multiple offenses while the defendant was awaiting trial or sentencing or was under a community control or was under post-release control for a prior offense, or at least two of the multiple offenses were committed in this case as part of one or more courses of conduct, and the harm caused by said multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of defendant's conduct, or defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by defendant.

Journal entry No. 102048055 (Jan. 12, 2018), p. 1.

{¶11} After a thorough review of the record, we find that the trial court weighed and considered all the factors under R.C. 2929.11 and 2929.12 when imposing sentence, and the sentence is clearly and convincingly supported by the record.

{¶12} The first assigned error lacks merit.

B. Judicial Release

{¶13} Heard argues that the trial court lacked authority to bar him from applying for judicial release pursuant to R.C. 2929.20 until he has served 15 years of his sentence. R.C. 2929.20 provides that an "eligible offender" may move for judicial release resulting in the reduction by the sentencing court of the movant's "aggregated nonmandatory prison term or terms." R.C. 2929.20(B).

{¶14} Heard concedes "that judicial release is not a program which he is entitled to take part in, and that any future trial court could deny a motion for judicial release." Appellant's Brief, p. 12. However, Heard offers that he would be eligible to apply for judicial release after serving nine years pursuant to R.C. 2929.20(C)(4)-(5) and asserts that the trial court had no authority to bind subsequent judicial administrations.

{¶15} Heard further argues that the issue is ripe for appeal at this time due to this court's determination in *State v. Gondeau-Guttu*, 8th Dist. Cuyahoga No. 94027, 2010-Ohio-3321, that the denial of judicial release is a special proceeding that is not a final appealable order because it does not affect a substantial right. Since there is no statutory authority for appeal, Heard asserts that the instant appeal serves as the only opportunity that he has to address the trial court's order.

{¶16} The defendant in *State v. Brown*, 1st Dist. Hamilton No. C-130120, 2016-Ohio-310, posed a similar argument to that advanced by Heard. Brown pleaded guilty to voluntary manslaughter with a firearm specification. The parties also agreed to an aggregate

12-year term, that nine years of the term was not mandatory and that Brown would not be eligible for "transitional control," "earned days of credit," "judicial release, or any other sentence reduction or modification programs in prison." *Id*. at ¶ 2.

{¶17} Brown's case was ultimately accepted for appeal under App.R. 26(B) and partially reversed based on a recent opinion by the appellate court holding that a trial court lacked authority to limit a defendant's ability to earn days of credit. *Id*. at ¶ 12, citing *State v. Livingston*, 2014-Ohio-1637, 9 N.E.3d 1117 (1st Dist.).

{¶18} Brown's appeal included a challenge to the judicial release agreement, contending that the "sentence was unauthorized by law because the trial court declared him ineligible for judicial release as a part of its sentence, before he had the opportunity to prove the appropriateness of judicial release" under R.C. 2929.20. *Id*. at ¶ 18. The appellate court determined that the judicial release portion of the sentence was authorized by law because it was part of the negotiated plea agreement. *Id*. at ¶ 19.

{¶19} Judicial release "'is distinct from sentencing because it operates to reduce a prison term the court has imposed.'" *State v. Mitchell*, 11th Dist. Trumbull No. 2004-T-0139, 2006-Ohio-618, ¶ 14, quoting *State v. White*, 2d Dist. Greene No. 04CA120, 2005-Ohio-5906, ¶ 22. *See also State v. Pate*, 8th Dist. Cuyahoga No. 90313, 2008-Ohio-5736. "'Unless incorporated into a plea agreement, the trial court is not under an obligation to inform a defendant regarding his eligibility for judicial release.'" *Pate* at ¶ 13, quoting *Mitchell at* ¶ 14.

{¶20} We find that the facts in this case are distinguishable. Heard did not jointly agree on a sentence in this case and a sentence modification was not part of Heard's plea. We reiterate that judicial release is "'distinct from sentencing because it operates to reduce a prison term the court has [previously] imposed.'" *Mitchell* at ¶ 14, quoting *White* at ¶ 22.

{¶21} The Ohio Supreme Court has recognized that:

> Judicial release is a privilege, not an entitlement. "'There is no constitutional or inherent right * * * to be conditionally released before the expiration of a valid sentence.'" *State ex rel. Hattie v. Goldhardt*, 69 Ohio St.3d 123, 125, 630 N.E.2d 696 (1994), quoting *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). Courts have no inherent power to suspend execution of a sentence, and they must strictly construe statutes allowing such relief. *State v. Smith*, 42 Ohio St.3d 60, 61, 537 N.E.2d 198 (1989).

State v. Ware, 141 Ohio St.3d 160, 2014-Ohio-5201, 22 N.E.3d 1082, ¶ 12.

{¶22} A strict construction of the plain language of R.C. 2929.20 reveals that the trial court's wide discretion to approve or deny judicial release is triggered upon motion of the defendant or the sentencing court by or regarding an "eligible offender." R.C. 2929.20(B). Further, the motion must be entertained within the time frames set forth in the statute.

{¶23} We agree that the trial court lacked authority to impose the prohibition on application for judicial release under R.C. 2929.20. However, the statement does not affect Heard's substantial rights and therefore, shall be disregarded. Crim.R. 52(A). Furthermore, the issue is not ripe for review. "'Only if appellant files a motion for judicial release, and only if the motion is denied on the grounds of res judicata, would his present argument become theoretically ripe for review.'" *State v. Hale*, 8th Dist. Cuyahoga No. 106343, 2018-Ohio-2301, ¶ 6, quoting *State v. Wiggins*, 10th Dist. Franklin No. 16AP-170, 2017-Ohio-62, ¶ 25.

{¶24} The second assignment of error is overruled.

IV. Conclusion

{¶25} The trial court's judgment is affirmed.

It is, therefore, 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.

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

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ANITA LASTER MAYS, JUDGE

EILEEN A. GALLAGHER, A.J., and
LARRY A. JONES, SR., J., CONCUR