

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 107589
 v. :
 :
 ANDRE B. ELLIOTT, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 18, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-621919-A

Appearances:

Andre B. Elliott, *pro se*, for appellant.

Michael C. O'Malley, Cuyahoga County Prosecutor, Brad Meyer, Assistant County Prosecutor, for appellee.

ANITA LASTER MAYS, J.:

{¶ 1} Defendant-appellant Andre B. Elliott (AElliott@) appeals his sentence and asks this court to vacate his sentence and remand to the trial court for further proceedings. We affirm the trial court's sentence.

{¶ 2} Elliott pled guilty to two counts of burglary, both second-degree felonies. The trial court sentenced him to four years on each count, to be served concurrently for an aggregate sentence of four years.

{¶ 3} We first note that Elliott has not filed a transcript of the sentencing hearing, and has not explained or demonstrated the reason for his failure to include the transcript in the record. Elliott also did not submit a statement of record pursuant to App.R. 9(C). “The duty to provide a transcript for appellate review falls upon the appellant. *State v. Haley*, 1st Dist. Hamilton No. C-150748, 2016 Ohio App. LEXIS 3525, 2 (Sept. 2, 2016), citing *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).@ *Parma v. Brown*, 8th Dist. Cuyahoga No. 104219, 2016-Ohio-7963, & 6.

{¶ 4} However, Elliott states in his brief that he appeared before the court on June 5, 2018, and when he entered his plea, the trial court asked him if there were any plea offers made in exchange for a guilty plea. Elliott claims that he stated he was informed that he would receive either probation or the minimum prison term of two years. According to Elliott, the trial court stated that it could impose the maximum term allowed by law. Elliott acknowledged that fact, and entered a guilty plea. The trial court sentenced Elliott to four years imprisonment. As a result, Elliott has filed this appeal and assigns one error for our review:

- I. The trial court erred in sentencing defendant to more than an agreed upon term.

I. Sentencing and Plea Agreements

A. Standard of Review

{¶ 5} We review felony sentences under the standard set forth in R.C. 2953.08(G)(2). *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. *State v. Martin*, 8th Dist. Cuyahoga No. 104354, 2017-Ohio-99, & 7. 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. Cuyahoga No. 102710, 2015-Ohio-4907, & 10, citing *State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, & 13.

State v. Najar, 8th Dist. Cuyahoga No. 106802, 2018-Ohio-5348, 66.

B. Law and Argument

{¶ 6} In Elliott's sole assignment of error, he argues that the trial court erred in sentencing him to four years imprisonment. Elliott claims that he was informed that he would receive either probation or the minimum prison term of two years. According to Elliott, the state remained silent when he explained that to the trial court and the trial court informed him that it could impose the maximum term allowed by law.

{¶ 7} Again, we note that Elliott did not provide a transcript of the proceedings, and did not state why the transcript is not a part of the record. Elliott

did not submit a statement of record under App.R. 9(C). “[A]bsent a transcript or alternative record, we must presume regularity in the proceedings below. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).” *State v. Ali*, 8th Dist. Cuyahoga No. 97612, 2012-Ohio-2510, & 6.

{¶ 8} However, we understand that

[i]n the criminal justice system, plea agreements are essential. *State v. Casper*, 11th Dist. Ashtabula No. 2018-A-0023, 2018-Ohio-4375, & 16. “At its core, a plea agreement is contractual in nature and subject to contract-law standards.” *State v. Vari*, 7th Dist. Mahoning No. 07MA142, 2010-Ohio-1300, ¶ 24, citing *Santobello v. New York*, 404 U.S. 257, 92 S.Ct.495, 30 L.Ed.2d 427 (1971); *Baker v. United States*, 781 F.2d 85, 90 (6th Cir.1986). *State v. James*, 4th Dist. Ross No. 13CA3371, 2013-Ohio-5322, & 12.

State v. Reynolds, 8th Dist. Cuyahoga No. 106979, 2019-Ohio-630, & 8.

{¶ 9} The state argues, however, that no agreement was made with Elliott. Even if there was an agreement between the state and Elliott, the trial court is not bound by that agreement. Generally, plea agreements are made between defendants and the state. *See State v. Sage*, 2d Dist. Montgomery No. 25453, 2013-Ohio-3048, & 23. Unless the court involves itself in the plea negotiations or agrees to the terms of the agreement, the trial court is not bound by the plea agreement, and the court may determine the appropriate sentence for the charges to which the defendant has pled guilty or no contest. *Id.*, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, & 28. *State v. Fyffe*, 2018-Ohio-112, 109 N.E.3d 51, & 22 (2d Dist.).

{¶ 10} In Elliott=s brief, he quotes *State v. Gilroy*, 195 Ohio App.3d 173, 2011-Ohio-4163, 959 N.E.2d 19, & 22 (2d Dist.), stating, A[w]hen a trial court promises a certain sentence, the promise becomes an inducement to enter a plea, and unless that sentence is given, the plea is not voluntary.@ (Citations omitted.) However, according to Elliott, the trial court never promised a certain sentence. In fact, according to Elliott, the trial court stated that it could sentence him to the maximum term allowed by law. Elliot pleaded guilty to two second-degree felonies. The trial court could have sentenced Elliot from two to eight years on each count. R.C. 2929.14(A)(2)(a). The trial court elected to sentence Elliot to an aggregate term of four years. We find that Elliot=s sentence is not contrary to law.

{¶ 11} Therefore, we overrule Elliott=s sole assignment of error.

{¶ 12} Judgment is 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 conviction having been affirmed, any bail pending appeal is terminated.

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

ANITA LASTER MAYS, JUDGE

**SEAN C. GALLAGHER, P.J., and
EILEEN A. GALLAGHER, J., CONCUR**