[Cite as *State v. Ervin*, 2009-Ohio-6382.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NOS. 2009-L-025**
- vs -	:	**and 2009-L-026**
JAMES D. ERVIN,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Lake County Court of Common Pleas, Case Nos. 08 CR 000038 and 08 CR 000556.

Judgment: Affirmed

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, James D. Ervin, appeals the decision of the Lake County Court of Common Pleas, sentencing him to an aggregate prison term of twelve years for crimes more particularly described below. For the following reasons, we affirm the decision of the court below.

{¶2} There are two trial court cases underlying the present appeal.

{¶3} In Lake County Court of Common Pleas No. 03-CR-000038, the Lake County Grand Jury returned a seven-count indictment against Ervin. The indictment was based on the Burglary of two residences on Hartshire Drive in Willoughby, Ohio; the Breaking and Entering of a residence on Ridge Road in Willoughby, Ohio; Grand Theft Auto of a 2002 Dodge Ram; Receiving as Stolen Property a 1998 Toyota Avalon and a 1997 Chevrolet Cavalier; and the Theft of credit cards.

{¶4} On September 29, 2003, Ervin pled guilty to one count of Burglary, a fourth degree felony in violation of R.C. 2911.12(A)(4), one count of Burglary, a second degree felony in violation R.C. 2911.12(A)(1), one count of Breaking and Entering, a fifth degree felony in violation of R.C. 2911.13(A), one count of Grand Theft of a Motor Vehicle, a fourth degree felony in violation of R.C. 2913.02(A)(1), and one count of Receiving Stolen Property, a fourth degree felony in violation of R.C. 2913.51(A). A nolle prosequi was entered on the remaining counts of the indictment.

{¶5} On November 14, 2003, the trial court sentenced Ervin to serve a five-year prison term for the second-degree felony Burglary count and eleven months for the remaining counts, all sentences to be served concurrently. The court also ordered Ervin to pay restitution, which part of the sentence was the subject of an earlier appeal. *State v. Ervin*, 11th Dist. No. 2003-L-207, 2005-Ohio-687. As part of the sentence, Ervin was subject to post release control: "The Defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control."

{¶6} Ervin finished serving his prison term in Case No. 03-CR-000038 on July 20, 2008.

{¶7} On August 29, 2008, Ervin was arrested by patrolmen of the Willoughby Police Department, initiating Willoughby Municipal Court No. 08-CR-000556, later transferred to the Lake County Court of Common Pleas.

{¶8} On October 30, 2008, Ervin was indicted on one count of Attempted Grand Theft of a Motor Vehicle, a felony of the fifth degree in violation of R.C. 2923.02, two counts of Receiving Stolen Property, felonies of the fifth degree in violation of R.C. 2913.51(A); one count of Possessing Criminal Tools, a felony of the fifth degree in violation of R.C. 2923.24; one count of Theft, a felony of the fifth degree in violation of R.C. 2913.02(A)(1); four counts of Breaking and Entering, felonies of the fifth degree in violation of R.C. 2911.13(B); one count of Burglary, a felony of the second degree in violation of R.C. 2911.12(A)(1); one count of Burglary, a felony of the fourth degree in violation of R.C. 2911.12(A)(4); and one count of Resisting Arrest, a misdemeanor of the second degree in violation of R.C. 2921.33(A).

{¶9} The indictment was based on crimes committed on August 28 and 29, 2008, specifically the Attempted Theft of a 1995 Buick Century; the Burglary of a residence on North Beachview Road in Mentor; the Breaking and Entering into premises on Cedarwood Road in Mentor and Mentor-on-the-Lake, and on South Beachview Road in Willoughby; and the Theft of two wallets.

{¶10} On December 11, 2008, Ervin entered a Written Plea of Guilty to Attempted Grand Theft, two counts of Receiving Stolen Property, one count of Breaking and Entering, and to a reduced charge of Burglary, being a felony of the third degree in violation of R.C. 2911.12(A)(3). As part of the Plea, Ervin acknowledged "the maximum

prison term would be 9 years *** + 3 yrs. for violation of PRC for a total of 12 yrs in prison."

{¶11} On January 15, 2009, a sentencing hearing was held pursuant to R.C. 2929.19. At the hearing, Ervin addressed the trial court, in part, as follows:

{¶12} I'd like to apologize to the Court and to the people I have hurt in this morning of stupidity. *** And I was running off fear. I didn't want to catch another case out here, and I didn't want to be out here, period. I wish I could take it back. *** I went to go to a party with a family member. And the party wasn't what it was. I drunk, and I took some drugs while I was there. But then I tried to get myself out of the situation, and just made the situation worser [sic]. *** This case at hand, it wasn't premeditated. I didn't plan none of it. It was just, I was running off fear. And me being impaired off of alcohol and drugs, it didn't make it no better. *** And I think of scaring that lady, that's what scares me the most. *** Anything, *** she could have had a heart attack or seizure, anything. *** That five years, I didn't just sit on my butt. I went to trade school, I took college. *** I didn't intend to come home and go right back to prison. I didn't. And I just hope that you can find it in your heart to not send me away a long time again.

{¶13} At the close of the hearing, the trial court sentenced Ervin to twelve months in prison for each count of Attempted Grand Theft, Receiving Stolen Property (two counts), and Breaking and Entering, and five years in prison for Burglary. Additionally, the court sentenced Ervin to three years in prison for the post release control violation in Case No. 03-CR-000038. All prison sentences were ordered to be served consecutively for an aggregate prison sentence of twelve years. Additionally, the court ordered Ervin to pay restitution in the amount of $387.48.

{¶14} The trial court journalized Ervin's sentence on January 22, 2009.

{¶15} On February 18, 2009, Ervin filed Notices of Appeal from both Case No. 03-CR-000038 (Appeals Ct. No. 2009-L-025) and Case No. 08-CR-000556 (Appeals Ct. No. 2009-L-026). The two appeals have been consolidated for all purposes.

{¶16} On appeal, Ervin raises the following assignments of error:

{¶17} "[1.] The trial court erred by sentencing the defendant-appellant to maximum and consecutive terms of imprisonment."

{¶18} "[2.] The trial court violated defendant-appellant's rights under the Ohio and United States Constitution[s] when it sentenced him to an additional prison term for a violation of post-release control under R.C. 2929.141, which operates as a constitutionally-prohibited bill of attainder."

{¶19} "[A]ppellate courts must apply a two-step approach when reviewing felony sentences. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26.

{¶20} The overriding purposes of felony sentencing in Ohio "are to protect the public from future crime by the offender *** and to punish the offender." R.C. 2929.11(A). A sentencing court "has discretion to determine the most effective way to comply with the purposes and principles of sentencing." R.C. 2929.12(A). "In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing." R.C. 2929.12(A).

{¶21} It is well-established that R.C. 2929.12(A) does not require a sentencing court to make specific findings regarding the seriousness and recidivism factors. *Kalish*,

2008-Ohio-4912, at ¶17 ("R.C. 2929.11 and 2929.12 *** are not fact-finding statutes"). Ohio's felony sentencing law only requires the trial court to "consider" the mitigating circumstances in the exercise of its discretion. *State v. Glenn*, 11th Dist. No. 2003-L-022, 2004-Ohio-2917, at ¶47 ("[a] trial court is only required to *consider* mitigating factors") (emphasis sic). Thus, the Ohio Supreme Court has characterized the mandate of R.C. 2929.12(A) as a "general judicial guide for every sentencing *** grant[ing] the sentencing judge discretion 'to determine the most effective way to comply with the purposes and principles of sentencing.'" *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶¶36-37 (citation omitted). "It is important to note that there is no mandate for judicial factfinding in the general guidance statutes. The court is merely to 'consider' the statutory factors." Id. at ¶42.

{¶22} Ervin does not assert that his sentence was contrary to law. Rather, he argues the trial court failed to give "careful and substantial deliberation to the relevant statutory considerations." *Kalish*, 2008-Ohio-4912, at ¶20. Specifically, the court failed to give appropriate consideration to the fact Ervin acted under strong provocation, did not expect to cause harm or property damage, and demonstrated genuine remorse for his conduct.

{¶23} We find no merit to Ervin's allegations. At the sentencing hearing, the trial court stated that it considered the statements made by Ervin, his counsel, as well as those of the victims and prosecutor, the overriding purposes of felony sentencing, and the seriousness and recidivism factors. In light of these considerations, the court found it "incredible that after receiving a long prison term [in Case No. 03-CR-000038], that it would only take [Ervin] thirty-nine days to go out and commit a slew of other crimes."

The court further observed that nobody "could rationally argue that Mr. Ervin does not pose the greatest likelihood of recidivism."

{¶24} There is no evidence that the trial court failed to give appropriate consideration to the relevant factors. Accordingly, it was within the court's discretion to impose a sentence within the statutory range. *State v. Holin*, 174 Ohio App.3d 1, 2007-Ohio-6255, at ¶34 ("the trial court is not obligated, in the exercise of its discretion, to give any particular weight or consideration to any sentencing factor") (citations omitted); *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, at paragraph three of the syllabus ("[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences").

{¶25} The first assignment of error is without merit.

{¶26} Ervin raises two arguments under the second assignment of error. The first is that the imposition of an additional prison term for the post release control violation, pursuant to R.C. 2929.141, constitutes a constitutionally impermissible bill of attainder. *Cummings v. Missouri* (1866), 74 U.S. 277, 323 (defining attainder as "a legislative act which inflicts punishment without a judicial trial").

{¶27} Revised Code 2929.141(A)(1) provides: "Upon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, *** the court may[,] *** [i]n addition to any prison term for the new felony, impose a prison term for the post-release control violation."

{¶28} This argument is not properly before this court inasmuch as Ervin failed to raise a constitutional challenge to R.C. 2929.141 at the time he entered his plea and

was advised of the possibility of an additional sentence, or at the time of sentencing. In the record before us, there is no recognizable argument that R.C. 2929.141 is a bill of attainder or is otherwise constitutionally defective. At most, defense counsel stated at the sentencing hearing that she does not "agree with the statute" and has done "significant research" but, "that's neither here nor there."

{¶29} "The question of constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court." *State v. Awan* (1986), 22 Ohio St.3d 120, 122. "[A]n appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." Id. (citations omitted). See *State v. Mullins*, 12th Dist. No. CA2007-01-028, 2008-Ohio-1995, at ¶18 (appellate court would not consider the argument that R.C. 2929.141 constitutes an unconstitutional bill of attainder when it was not raised before the sentencing court).

{¶30} Ervin argues, alternatively, that the imposition of an additional sentence for the post release control violation constitutes "structural error," as defined in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, inasmuch as neither an Indictment nor any Specification to the Indictment was brought against him with respect to the violation. As Ervin correctly notes, structural errors cannot be waived. Id. at ¶20.

{¶31} Contrary to this position, it was not necessary to indict Ervin for violating post release control before the trial court acquired jurisdiction to impose an additional sentence pursuant to R.C. 2929.141. The Ohio Supreme Court has held that "the General Assembly has indicated its clear intent that the prison term imposed for the

violation of post-release control is a reinstatement of part of the original sentence for violating the conditions of supervision, and is not meant to be a separate criminal punishment." *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, at ¶19; *Woods v. Telb*, 89 Ohio St.3d 504, 512, 2000-Ohio-171 ("post-release control is part of the original judicially imposed sentence"). Inasmuch as a prison term imposed for the violation of post release control is not a "separate criminal punishment," there is no need for a separate criminal indictment.[1]

{¶32} The second assignment of error is without merit.

{¶33} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, sentencing Ervin to an aggregate prison term of twelve years, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

1. The fact that a prison term imposed for the violation of post release control does not constitute "separate criminal punishment" precludes the possibility of R.C. 2929.141 being a bill of attainder. As noted in Ervin's brief, "[l]egislative acts *** that *** inflict punishment *** without a judicial trial are bills of attainder prohibited by the Constitution." *United States v. Lovett* (1946), 328 U.S. 303, 315. As part of the offender's original sentence, the prison term is not imposed without a judicial trial. Moreover, the *Martello* Court, which was considering whether R.C. 2929.141 violated the Double Jeopardy Clause, held that "the term of incarceration for a postrelease control violation must be classified as civil in nature, since it is definitely not meant to be a 'criminal punishment.'"