

[Cite as *State v. Shaw*, 2009-Ohio-5469.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TONY SHAW, SR.

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 09CA52

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Richland County Court of
Common Pleas, Case No. 2007CR798D

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

October 12, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

JAMES J. MAYER, JR.
PROSECUTING ATTORNEY
RICHLAND COUNTY, OHIO

SHERYL M. GROFF
415 Park Avenue West
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By: KIRSTEN L. PSCHOLKA-GARTNER
Assistant Richland County Prosecutor
38 South Park Street
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Hoffman, P.J.

{¶1} Defendant-appellant Tony Shaw, Sr. appeals his sentence entered December 21, 2007, by the Richland County Court of Common Pleas following his plea of guilty to one count of felonious assault. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 10, 2007, Appellant was involved in a fight with Mike Todd, a neighbor. During the incident, Appellant had a loaded .38 caliber revolver in the waistband of his pants. Appellant was upset Todd had loaned a can opener to his girlfriend. At some point during the altercation, the gun fell out of Appellant's waistband and landed on the floor. Appellant grabbed the gun and struck Todd on the side of the head with the weapon. The gun then discharged, lodging a bullet in the door of a nearby apartment. As a result Todd suffered ringing in his ears but no other visible injuries.

{¶3} Pursuant to a negotiated plea agreement, Appellant entered a plea of guilty to one count of felonious assault. The trial court delayed sentencing, ordering a presentence investigation, and placed Appellant on electronically monitored supervision. At an office visit while on supervision, Appellant was found to be in possession of alcohol with a blood alcohol level of .10. Appellant was arrested and placed in custody. Three hours after his release, Appellant again tested positive for alcohol and was taken back into custody.

{¶4} The trial court sentenced Appellant on December 21, 2007 to five years in prison.

{¶5} Appellant now appeals, assigning as his sole error:

{¶16} “I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO SENTENCE APPELLANT IN A MANNER CONSISTENT WITH SENTENCES PREVIOUSLY RENDERED FOR THE SAME CONDUCT.”

{¶17} In *State v. Foster*, the Supreme Court of Ohio, in striking down parts of Ohio's sentencing scheme, held that “[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.” 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, paragraph seven of the syllabus. Thus, an appellate court reviews felony sentences for an abuse of discretion. *Id.* An abuse of discretion implies the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When applying an abuse of discretion standard, an appellate court may not generally substitute its judgment for that of the trial court. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748.

{¶18} In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶19} Here, Appellant entered a plea of guilty to one count of felonious assault. The trial court sentenced Appellant within the statutory range for the offense. See, R.C. § 2929.14(A).

{¶10} At the sentencing hearing, the trial court set forth its rationale for the sentence imposed:

{¶11} “Again, there are a number of aspects about this that gives me the impression that you went there with a criminal intent, and that you knew what you were doing was criminal, the way you hid things and so forth afterwards.

{¶12} “Again, I am troubled with your prior record which includes this aggravated assault conviction in Michigan. The others include drug abuse, operating a motor vehicle under the influence, intoxication, reckless operation. Most of the other stuff is alcohol type stuff. And then the violence incident we talked about, which was dismissed.

{¶13} “Taking a gun to a fight is just really dangerous behavior, Mr. Shaw. What I hoped is that you were going to show me that you were really serious about behaving yourself when we put you, on this case, I believe it was electronic monitoring, that you would show me that you were serious about behaving yourself. Instead, over and over again, you use alcohol. You’ve defied our rules. It just shows me that you are not prepared at this time to exercise enough self-government to stay out of trouble on the street. Serious assaultive crimes like this, using a gun on the street, plus that kind of behavior, it would be irresponsible of me to put you on the street.

{¶14} “In terms of the factors I’m required to weigh, there are a number of recidivism factors present in your case. You have a prior history of criminal convictions. You failed to respond favorably in the past, including when you have been convicted of assaultive-type crimes, here you are doing the same thing again, using the same bad judgment.

{¶15} “In terms of seriousness factors, there is physical injury here, and although it may not be in the nature of a permanent injury, it is an injury which is serious enough to be hit in the head with a gun and then you have a gun shot off right next to your ear. Apparently there is something about your relationship with the victim that provoked or facilitated the offense.

{¶16} “Given all those factors, I believe a prison term is indicated. I don’t think you are a maximum term type guy. Given your age, I hope this is something that will get straightened out, but you show very high risk in every category, both in the SAQ and on the generalized risk assessment instrument. Consequently, I think you are a mid-range sentence person. I sentence you to five years prison. You have three years Post Release Control for felonious assault.”

{¶17} Tr. at 9-11.

{¶18} Based upon the above, we find the trial court did not abuse its discretion in sentencing Appellant, and Appellant’s sentence entered by the Richland County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Wise, J. and

Delaney, J. concur

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ John W. Wise

HON. JOHN W. WISE

s/ Patricia A. Delaney

HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
TONY SHAW, SR.	:	
	:	
Defendant-Appellant	:	Case No. 09CA52

For the reasons stated in our accompanying Opinion, Appellant’s sentence entered by the Richland County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY