[Cite as *State v. Payton*, 2017-Ohio-7865.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	Case No. 17CA3788
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
DANIEL G. PAYTON,	:	**RELEASED: 09/18/2017**
Defendant-Appellant.	:	

APPEARANCES:

Daniel G. Payton, Chillicothe, Ohio, pro se appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

Harsha, J.

{¶1} Daniel G. Payton agreed to plead guilty to three counts of rape and a sexually-violent-predator specification; he received an aggregate prison term of 30 years to life and classification as a sexual predator. Over 12 years later, he contested the legality of his sentence in a motion to correct sentence, which the trial court denied.

{¶2} We reject Payton's assignment of error because his agreed sentence was not subject to review; it was jointly recommended by the parties, authorized by law, and imposed by the sentencing court. We overrule Payton's assignment of error and affirm the judgment of the trial court.

I. FACTS

{¶3} The Scioto County Grand Jury returned an indictment charging Daniel G. Payton with four counts of rape of a child under 13 years of age and accompanying force and sexually-violent-predator specifications. Payton subsequently pleaded guilty to three of the rape counts and one of the sexually-violent-predator specifications. In

February 2004, the court entered a judgment convicting Payton upon his guilty plea, after finding that his plea was voluntarily, knowingly, and intelligently made. The court also declared Payton to be a sexual predator and sentenced him to an aggregate mandatory sentence of 30 years to life in prison. The court stated that "[t]his is an agreed sentence pursuant to [R.C.] 2953.08(D)." Payton did not appeal from his sentencing entry.

{¶4} Instead, over 12 years later, in November 2016, he filed a "Verified Motion to Correct Sentence," which conceded that he was "not challenging his convictions nor his guilty plea." Instead, he claimed without any evidentiary support that "there was no agreed sentence," and that "[n]one of the required language to impose mandatory or consecutive terms were part of the proceedings or cited in the Judgment Entry as required * * *." He also claimed that the trial court failed to notify him in its sentencing entry of his right to appeal those parts of his sentence that were contrary to law. The trial court denied the motion, noting that it had "reviewed the recordings of the Plea Hearing and the Sentencing Hearing, as well as the record docket" and that Payton "was plainly and explicitly told at his Plea and at his Sentencing that this was an Agreed Sentence and the terms of the agreement were plainly and explicitly stated in open court with the Defendant present." In the alternative, the court noted that it did make the requisite sentencing findings even though it did not need to do so.

II. ASSIGNMENT OF ERROR

{¶5} Payton assigns the following error for our review:

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED AND OVERRULED DEFENDANT-APPELLANT'S VERIFIED MOTION TO CORRECT SENTENCE, WITHOUT HOLDING A HEARING TO OBTAIN EVIDENCE AND FACTS OUTSIDE THE RECORD TO GIVE

THE DEFENDANT-APPELLANT THE OPPORTUNITY TO SPEAK WITHOUT THE INFLUENCE OF PSYCHOTROPIC DRUGS.

III. LAW AND ANALYSIS

{¶6} Payton asserts that the trial court erred by denying his motion to correct his sentence, which contests the felony sentence for his rape convictions.

{¶7} As the trial court concluded, Payton cannot contest his agreed sentence. Under R.C. 2953.08(D)(1), "[a] sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by the sentencing judge." Therefore, appellant's felony sentence is not reviewable "if it was (1) jointly recommended, (2) authorized by law, and (3) imposed by the sentencing judge." *State v. Coleman*, 4th Dist. Highland No. 16CA11, 2017-Ohio-1067, ¶ 5.

{¶8} Payton's sentence was jointly recommended by the parties and imposed by the sentencing judge. The record contains the trial court's unrebutted statement in Payton's 2004 sentencing entry that the sentence it imposed constituted "an agreed sentence pursuant to [R.C.] 2953.08(D)." Although Payton claimed that it was not an agreed sentence in his motion, the transcripts of his plea and sentencing hearings, which the trial court reviewed in ruling on his motion, are not part of the record on appeal.[1] We thus presume the validity of the trial court's statement in its sentencing entry. *See State v. Lamb*, 4th Dist. Highland No. 14CA3, 2014-Ohio-2960, ¶ 14, quoting *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980) (" 'When portions of the transcript necessary for the resolution of assigned errors are

[1] The trial court denied Payton's motion to prepare and file complete transcripts in the case, noting that he could file a motion in this court for these transcripts. But Payton did not file any comparable motion in this court and does not contest the trial court's ruling on appeal.

omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assignments of error, the court has no choice but to presume the validity of the lower court's proceedings, and affirm' "). In fact, on appeal, Payton appears to concede that the sentence was an agreed sentence by phrasing one of his issues presented for review as "[w]hen a Defendant enters into an Agreed Sentence arrangement with the State of Ohio * * *."

{¶9} Therefore, the remaining issue is whether Payton's sentence was "authorized by law." " 'A sentence is "authorized by law" and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all mandatory sentencing provisions.' " (Emphasis omitted.) *State v. Sergent*, 148 Ohio St.3d 94, 2016-Ohio-2696, 69 N.E.2d 627, ¶ 26, quoting *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, paragraph two of the syllabus.

{¶10} In his motion to correct sentence Payton raised three sentencing claims: (1) the trial court did not make the findings required to impose mandatory prison terms under R.C. 2929.13(F); (2) the trial court did not make the requisite findings to impose consecutive sentences under R.C. 2929.14(C)(4) [former R.C. 2929.14(E)(4)]; and (3) the trial court did not notify him of his right to appeal from the sentence under R.C. 2953.08(B).

{¶11} However, our review of the record indicates that the trial court properly imposed mandatory prison terms for his rape convictions because Payton violated R.C. 2907.02(A)(1)(b). *See* R.C. 2929.13(F)(2).

{¶12} Moreover, the trial court made the requisite findings to impose consecutive sentences for the rape convictions. *See* R.C. 2929.14(C)(4). For the latter contention,

even if the court had not made the required findings, the Supreme Court held in *Sergent* at ¶ 43, that "in the context of a jointly recommended sentence that includes nonmandatory consecutive sentences, a trial court is not required to make the consecutive-sentence findings set out in R.C. 2929.14(C)(4)," so "when a trial judge imposes such an agreed sentence without making those findings, the sentence is nevertheless 'authorized by law' and not reviewable on appeal pursuant to R.C. 2953.08(D)(1)."

{¶13} Finally, the trial court did not violate R.C. 2953.08 by failing to notify Payton in the sentencing entry that he could appeal his agreed sentence if he believed it to be contrary to law. *See State v. Berecz*, 4th Dist. Washington No. 16CA15, 2017-Ohio-266, ¶ 23 ("Although R.C. 2953.08 confers on a defendant the right to appeal from the sentence, it contains no requirement that the court notify the defendant of that right").

{¶14} Therefore, Payton's motion to correct sentence was meritless. Consequently, the trial court did not err by holding that his agreed sentence was not reviewable, and denying his motion to correct sentence.

{¶15} Insofar as Payton attempts to raise various new claims contesting the trial court's sentencing entry on appeal, he forfeited them by failing to raise them in his motion to correct sentence. *See generally State v. Quarterman,* 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15 (2014) (It is a well-established rule that " 'an 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 a waiver of such issue and a deviation from this

state's orderly procedure, and therefore need not be avoided or corrected by the trial court.' "); *State v. Awan,* 22 Ohio St.3d 120, 489 N.E.2d 277 (1986) (failure to raise an issue at the trial court level, which issue is apparent at the time of the proceeding, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal).

{¶16} We overrule Payton's assignment of error and affirm the judgment of the trial court denying his motion to correct sentence.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.