

[Cite as *State v. Bailey*, 2010-Ohio-2632.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

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| STATE OF OHIO | : | |
| | : | Appellate Case No. 2009-CA-51 |
| Plaintiff-Appellee | : | |
| | : | Trial Court Case Nos. 2006-CR-1447 |
| v. | : | 2006-CR-0336 |
| | : | |
| MICHAEL E. BAILEY | : | |
| | : | (Criminal Appeal from |
| Defendant-Appellant | : | Common Pleas Court) |
| | : | |

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OPINION

Rendered on the 11th day of June, 2010.

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FAIN, J.

Defendant-appellant Michael E. Bailey appeals from his conviction and sentence, following a guilty plea, upon one count of Felonious Assault, with a firearm specification, and one count of Having a Weapon While Under a Disability. Bailey contends that the trial court failed to consider the purposes and principles of

sentencing, including the seriousness and recidivism factors set forth in R.C. 2929.12, and further contends that the trial court abused its discretion in imposing maximum, consecutive sentences for the offenses.

We conclude that the record does not portray Bailey's claim that the trial court failed to consider the purposes and principles of sentencing. Even if Bailey were correct in arguing that he did not commit the worst forms of the offenses, or that his conduct was less serious than conduct normally constituting the offenses, the trial court appropriately considered Bailey's likelihood of recidivism, as exemplified by his extensive criminal record, including several incarcerations in the Ohio Penitentiary. We cannot say that the trial court abused its discretion in imposing maximum, consecutive sentences. Consequently, the judgment of the trial court is Affirmed.

I

Bailey was charged by indictment, in three separate cases, with one count of Attempted Murder, with a firearm specification; nine counts of Felonious Assault, all of which had firearm specifications, and eight of which had repeat violent offender specifications; three counts of Having a Weapon While Under a Disability; one count of Vandalism, with a firearm specification; one count of Tampering with Evidence, with a firearm specification; one count of Carrying a Concealed Weapon; one count of Illegal Possession of a Firearm in Liquor Permit Premises, with firearm and repeat violent offender specifications; and one count of Obstructing Official Business, with a firearm specification. Bailey pled guilty to one count of Felonious Assault, with a firearm specification, and to one count of Having a Weapon While Under Disability.

All other counts and specifications were dismissed.

Because Bailey pled guilty, the facts are not developed in the record, but the probable cause affidavits for Bailey's arrest are contained in the pre-sentence investigation report, which the trial court considered, and which are in the record on appeal. The charges appear to be based upon two separate incidents at two different bars.

The more serious incident, in the early morning hours one night in early December, 2006, was reported as follows:

“ * * * * . The witnesses were all standing just inside the entrance to the bar behind the locked front doors advising the individuals outside that they would not be allowing anymore [sic] people inside. The defendant was one of the subjects outside demanding entry along with several other unidentified suspects. The def became angry and began kicking and striking the doors to the business along with a few other unidentified black males. Witness 5 cracked opened [sic] the front door to tell the defendant and other suspects to leave and stop pounding and kicking the doors, and that the police had been called. The def and the rest of the suspects tried to force their way into the business. During this process, an unidentified black male struck wit 5 in the left eye with his fist. The witnesses were able to again shut and lock the doors. The def and other suspects began pounding and kicking the doors once again. The def had taken off his shirt at this point and was yelling and cursing. An unidentified male walked up and handed the defendant a 40 cal semi-automatic pistol. The defendant fired the pistol into the front doors directly in front of the muzzle of the firearm being discharged. A 40 cal projectile entered the

door through the glass just a couple of feet off the ground. The glass apparently stripped the copper jacketing off of the projectile. The copper jacketing struck Witness 1 in the side of the right knee, tearing wit 1's jeans and causing a scrape on the side of the witness's knee. The lead projectile struck the floor of the entry way and embedded in the floor mat just inside. A 40 cal brass casing was found just outside of the front entrance on the sidewalk. Witness report [sic] hearing more than one shot being fired. Witnesses also report that some of the unidentified suspects picked up some of the other brass casings from the sidewalk before all fleeing in different directions. * * * * .”

The other incident occurred at a different bar in the early morning hours four months later. This involved a report that Bailey was carrying a concealed firearm. The police were summoned. One of the officers responding to the call saw what looked like a firearm concealed on Bailey's person, and took hold of Bailey's right wrist. Bailey “jerked violently from the officer's grasp and jumped over the railing of the patio onto the sidewalk several feet below. During the ensuing pursuit, one of the officers slipped, fell, and was injured, requiring medical attention at a hospital. The pursuit continued, at the end of which, Bailey “stopped, pivoted * * * , reached into the front of his pants, pulled out a ‘Bersa’ 380 Semi-Automatic pistol. Officer Hold saw the movement and stopped at a distance of approximately 20 feet * * * , and began to draw his service weapon. [Bailey] threw the pistol approximately 15 feet up into the air.” The pistol was ultimately recovered and was found to have been loaded with seven rounds of ammunition.

Bailey was sentenced to the maximum sentence of five years for Having a

Weapon While Under a Disability, to the maximum sentence of eight years for Felonious Assault, and to the mandatory sentence of three years for the firearm specification. The three-year firearm specification sentence was required by statute to be served consecutively. The trial court ordered the principal felony sentences to be served consecutively, for a maximum, aggregate sentence of sixteen years.

Bailey appealed from his sentence, arguing that the trial court had abused its discretion in imposing maximum, consecutive sentences, and that the trial court erred by failing to inform him, as part of the sentence imposed at the sentencing hearing, of the penalties he would face for violating post-release control. We reversed the sentence, upon the latter ground, and remanded for re-sentencing. We concluded that Bailey's argument that the imposition of maximum, consecutive sentences constituted an abuse of discretion, was moot. *State v. Bailey*, Clark App. No. 2007 CA 121, 2008-Ohio-5357.

Upon remand, the trial court again imposed maximum, consecutive sentences, aggregating sixteen years, this time including in its colloquy an explanation of the penalties for violating post-release control. From this sentence, Bailey appeals.

II

Bailey's sole assignment of error is as follows:

"THE TRIAL COURT FAILED TO CONSIDER THE PURPOSES AND PRINCIPLES OF SENTENCING AND THE SERIOUSNESS AND RECIDIVISM FACTORS AND ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM CONSECUTIVE PRISON SENTENCE OF SIXTEEN YEARS."

Unless the record demonstrates otherwise, it is presumed that a trial court, in imposing a sentence for a felony, has given proper consideration to the principles and purposes for felony sentencing set forth in R.C. 2929.11 and 2929.12. *State v. Kalish*, 120 Ohio St.3d 23, 27, n.4. Far from demonstrating otherwise, the transcript of Bailey's sentencing hearing suggests that the trial court gave appropriate consideration to the principles and purposes of sentencing.

One important principle of sentencing is the risk that an offender is likely to commit future crimes. R.C. 2929.12(D). One factor expressly recited by the statute as bearing upon this issue is that "the offender has not responded favorably to sanctions previously imposed for criminal convictions." R.C. 2929.12(D)(3). That the trial court considered this factor is clear from its statement immediately preceding the imposition of sentence:

"I have reviewed the defendant's pre-sentence investigation that I had ordered to be prepared at the time of the original disposition. I had reviewed it at that time and I've reviewed it again today.

"And I note for the record that including commitments to the department of youth services the defendant has served seven prior prison terms before we even get to these new cases.

"In 1988, he was sentenced to six months in DYS for breaking and entering. In 1989, he was sentenced to three months in DYS as a result of parole violations. In 1990, he was sentenced to three months in DYS as a result of parole violations. In 1990, he was sentenced to one year in the Ohio State Penitentiary for an aggravated assault conviction.

“In 1991, he was sentenced to four to ten years in the Ohio State Penitentiary for a tampering with evidence conviction. In 1999, he was sentenced to six months in the Ohio State Penitentiary for a fleeing and eluding conviction.

“In November of 2001, he was sentenced to six months in the Ohio State Penitentiary for a weapons under disability conviction. In 2003, he was sentenced to fifteen months in the Ohio State Penitentiary for an aggravated assault conviction.”

We conclude that there is nothing in the record to overcome the presumption that the trial court followed the statutory principles and purposes of felony sentencing. We also conclude that the sentence imposed is not an abuse of discretion.

Bailey argues that neither offense was as serious as conduct normally constituting the offense. Other than agreeing, obviously, that conduct constituting either offense could be worse, we do not find Bailey’s argument all that persuasive. Bailey’s reckless act of firing a gun through a door behind which he knew, or should have known, that a number of people had just been, and might still be, may be marginally less reprehensible than a deliberate attempt to shoot someone might have been, but it is not much less reprehensible. And while one can imagine worse scenarios constituting Having a Weapon While Under a Disability, Bailey did not just have a loaded firearm on his person, he took off when confronted by the police, pulled the firearm out of his waistband at the end of the chase, thereby risking a potentially lethal confrontation with the police officers who had been chasing him, and threw the loaded pistol high into the air.

In any event, even if the offenses Bailey committed were not the worst

imaginable forms of either offense, that is only part of the sentencing calculus. Another important consideration is the risk that the offender will re-offend. Here, Bailey's record of not merely multiple felony convictions and juvenile adjudications, but multiple incarcerations, as well, militates in favor of a lengthy sentence. Bailey's record does not demonstrate his amenability to rehabilitation, which justifies the sentencing court in giving greater weight to the protection of the public from future offenses that Bailey is likely to commit.

We cannot say that the maximum, consecutive sentences the trial court imposed in this case constitute an abuse of discretion.

Bailey's sole assignment of error is overruled.

III

Bailey's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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- Hon. Douglas M. Rastatter