

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-09-080

Appellee

Trial Court No. 08 CR 614

v.

James Casares

**DECISION AND JUDGMENT**

Appellant

Decided: December 17, 2010

\* \* \* \* \*

Paul A. Dobson, Wood County Prosecuting Attorney, and  
Gwen Howe-Gebbers, Chief Assistant Prosecuting Attorney, and  
David E. Romaker, Jr., Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

\* \* \* \* \*

SINGER, J.

{¶ 1} Appellant, James Casares, appeals from a judgment of the Wood County Common Pleas Court convicting him of trafficking in cocaine and of intimidation of a crime victim or witness. For the reasons that follow, we affirm in part and reverse in part.

{¶ 2} On September 14, 2009, appellant entered guilty pleas to one count of trafficking in cocaine, a violation of R.C. 2925.03(A)(1) and (C)(4)(e), and two counts of intimidation of a crime victim or witness, violations of R.C. 2921.04(B). On October 22, 2009, he was sentenced to eight years in prison. Appellant now appeals setting forth the following assignments of error:

{¶ 3} "I. Appellant's consecutive sentence violated appellant's right to due process under the sixth and fourteenth amendment of the United States Constitution and section five and sixteen, article I and section four, article IV of the Ohio Constitution.

{¶ 4} "II. The trial court abused its discretion and erred to the prejudice of appellant at sentencing by imposing a prison term in excess of the minimum in violation of appellant's right to due process under the sixth and fourteenth amendments of the United States Constitution.

{¶ 5} "III. Appellant received ineffective assistance of counsel in violation of his rights under the sixth and fourteenth amendments to the United States Constitution and article I §10 of the constitution of the State of Ohio.

{¶ 6} "IV. Appellant's sentence is void as a result of the trial court's failure to adequately inform appellant of post release control requirements at sentencing hearing."

{¶ 7} Appellant's first two assignments of error will be considered together. In his first assignment of error, appellant contends that the court erred in ordering his sentences to be served consecutively. In his second assignment of error, appellant

contends that the court erred in imposing a sentence that was in excess of the minimum sentence required.

{¶ 8} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio relevantly held that "[t]rial courts [now] 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."

{¶ 9} Appellant was convicted of trafficking in cocaine, a felony of the second degree. He was sentenced to serve six years in prison. Pursuant to R.C. 2929.14 (A)(2), the maximum sentence for a second degree felony is eight years. Appellant was also convicted on two counts of intimidating a crime victim or witness, both third degree felonies. Pursuant to R.C. 2929.14(A)(3), the maximum sentence for a third degree felony is five years. As appellant's sentence was well within the statutory range, we find no abuse of discretion. Appellant's first and second assignments of error are not well-taken.

{¶ 10} In his third assignment of error, appellant contends he was denied effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. This standard requires appellant to satisfy a two-prong test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness.

Second, appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. This test is applied in the context of Ohio law that states that a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476.

{¶ 11} Appellant contends that his counsel was ineffective in that counsel failed to file an affidavit of indigency before appellant entered a plea to trafficking in cocaine.

{¶ 12} The failure to file an affidavit of indigency prior to sentencing may constitute ineffective assistance of counsel in a case where the record establishes a reasonable probability that the trial court would have found the defendant indigent, thereby relieving him of the obligation to pay a mandatory fine. *State v. Gilmer*, 6th Dist. No. OT-01-015, 2002-Ohio-2045.

{¶ 13} The record in this case shows that the court imposed a mandatory fine based on the information contained in appellant's presentence investigation report. Specifically, the court considered appellant's age of 34, the fact that he has held a job before, the fact that he graduated from high school and the fact that he will be on postrelease control following his release from prison. As such, we cannot find that there is a reasonable probability that the court would have found differently had counsel filed an affidavit of indigency. Appellant's third assignment of error is found not well-taken.

{¶ 14} In his fourth assignment of error, appellant contends that his sentence is void due to the trial court's failure to adequately inform appellant of the postrelease control requirements of his sentence.

{¶ 15} Pursuant to R.C. 2929.19(B)(3)(d), if a sentencing court:

{¶ 16} " \* \* \* determines at the sentencing hearing that a prison term is necessary or required, the court shall \* \* \* [N]otify the offender that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree \* \* \*."

{¶ 17} In *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶ 22, the Ohio Supreme Court held, "the distinction between discretionary and mandatory postrelease control is one without a difference with regard to the duty of the trial court to notify the offender at the sentencing hearing and to incorporate postrelease control notification into its journal entry."

{¶ 18} The transcript of appellant's sentencing shows he was informed that he was subject to a mandatory three year term of postrelease control because of his conviction for a second degree felony. Appellant correctly asserts that he was not informed at his sentencing hearing that he could be subject to up to three years of postrelease control from each of his felony three convictions. Accordingly, appellant's sentences on two counts of intimidating a crime witness or victim are void. See *State v. Lee*, 6th Dist. No.

L-09-1279, 2010 -Ohio- 1704. Appellant's fourth assignment of error is found well-taken.

{¶ 19} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed in part and reversed in part and remanded for resentencing in accordance with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART  
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

\_\_\_\_\_  
JUDGE

Thomas J. Osowik, P.J.

\_\_\_\_\_  
JUDGE

Keila D. Cosme, J.  
CONCUR.

\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.