

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	Nos. 08AP-581
		(C.P.C. No. 07CR-2407)
Plaintiff-Appellee,	:	08AP-582
		(C.P.C. No. 07CR-2358)
v.	:	08AP-709
		(C.P.C. No. 07CR-2358)
Michael W. Slager,	:	08AP-710
		(C.P.C. No. 07CR-2407)
Defendant-Appellant.	:	
		(REGULAR CALENDAR)
	:	

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D E C I S I O N

Rendered on September 9, 2010

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*Ron O'Brien*, Prosecuting Attorney, and *Kimberly M. Bond*,  
for appellee.

*Scott & Nemann Co., L.P.A.*, and *Adam Lee Nemann*, for  
appellant.

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APPEALS from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Michael W. Slager ("appellant"), is pursuing his reopened appeal of the sentence of incarceration he received in 2008. He assigns two errors for our consideration:

[I.] Appellate counsel was ineffective on the initial appeal for failing to raise an issue that had a reasonable probability of success.

[II.] The trial court erred by imposing a sentence that contravened the sentence previously agreed upon by the court and the parties.

{¶2} A panel of this court has already addressed the first assignment of error and allowed the appeal to be reopened. No further relief is appropriate. The first assignment of error is therefore moot and hence overruled.

{¶3} The second assignment of error calls upon us to interpret a set of verbal interchanges which occurred in open court in Franklin County before appellant entered a guilty plea and during the plea proceedings during which he pled guilty to a charge of failure to comply with a police officer's order and to a charge of failing to provide notice of a change of address. At the same time, he had separate felony cases pending in the Delaware County Court of Common Pleas.

{¶4} Before he entered his guilty pleas, appellant wanted to be released from custody, supposedly to get his personal affairs in order. The judge assigned to appellant's cases in Franklin County refused to seriously consider a release from custody.

{¶5} Appellant also wanted the term of imprisonment he would serve in Franklin County to run concurrently with the term of imprisonment he was to receive in Delaware County. The Franklin County judge who accepted appellant's guilty pleas agreed to do so and ultimately did do so.

{¶6} The issue on this re-opened appeal is whether the Franklin County judge also promised to limit the length of the term of incarceration appellant was to receive in

Franklin County to no more than the length of the term of incarceration appellant received in Delaware County.

{¶7} Appellant's understanding of the situation can be gleaned from a number of places in the transcript of proceedings. In the context of his request of a release from custody, he stated:

I would like to bring -- I understand that if I take the plea bargain, I'm subject up to, I think a maximum of ten years if I don't show up back to court. \* \* \*

(Tr. 39.)

{¶8} The judge later stated:

\* \* \* But that's where the Court is with being -- deferring your sentence, waiting to see what happens up in Delaware, running everything concurrent. I'm done. Okay?

(Tr. 42.)

{¶9} Additional interchange then occurred between Brian Simms, the assistant prosecuting attorney assigned to the case, and Mark J. Miller, appellant's defense attorney:

MR. MILLER: Judge, just to mention, that's no more additional time.

\* \* \*

MR. MILLER: -- concurrent with no additional time.

(Tr. 42, 43.)

{¶10} The trial court judge's attention seemed to have been more focused on the sentence in the two counties being run concurrently than on the length of the Franklin County sentences. Thus, the following was stated in open court:

THE COURT: But with that, you know -- and as your attorney has told you, Mr. Slager, if you care to proceed with your trial and your trial comes back with a guilty verdict, I will still put off your sentencing until Delaware County does it and then it won't be concurrent, just so you know that, it will be consecutive.

So, I suggest you go back, talk with your attorney and understand where the Court is right now and letting you get all your messes cleared up for the same amount of time.

(Tr. 43.)

{¶11} After appellant consulted with his counsel, he then entered the guilty pleas.

During actual plea proceedings, the following dialogue occurred:

THE COURT: Do you understand there are two types of sentences you can get here and the Court is going to order a presentence investigation before imposing a sentence but that this Court has made no promises as to what your sentence will be; do you understand that?

\* \* \*

THE DEFENDANT: Yes, Your Honor.

(Tr. 45-46.)

{¶12} After the guilty pleas were accepted, the case was held over for sentencing at a later date. At the later sentencing hearing, counsel for appellant stated:

MR. MILLER: Just briefly. As the Court recalls, I think, we were here a couple months ago, had a jury come in, impaneled the jury, and we were able to work the case out. The Court indicated at that time, I believe on the record, that if Mr. Slager pled guilty to the two F-3's and if he received four or five years up in Delaware County, that this Court would run his time concurrently.

\* \* \* Your Honor, we're asking this Court to consider sentencing him to concurrent time to his Delaware County case.

(Tr. 53, 54.)

{¶13} Defense counsel did not make any mention of an understanding that appellant's sentence was capped by the length of the Delaware County sentence of incarceration.

{¶14} Appellant, himself, addressed the court and asked for nothing but concurrent sentences. To quote his words:

THE DEFENDANT: Yes, Your Honor. I want to apologize to the Court and everybody else for my actions on that day, I do take full responsibility, and hope that the Court considers running my case concurrent.

(Tr. 55.)

{¶15} The judge then gave appellant a 5 year sentence of incarceration on the failure to comply with the order of a police officer case, with 273 days of jail-time credit to run concurrently with his sentence of incarceration in Delaware County. The judge then gave appellant a sentence of 2 years on the failure to provide notice case, and also gave 273 days of jail-time credit on that case. The second case was also to run concurrent with the Delaware County case, but consecutively to the sentence on the other Franklin County charge. Stated more concisely, appellant received a sentence of 7 years of incarceration on the Franklin County cases with 546 days of jail-time credit, or a total sentence of 5 1/2 years of custody to run concurrently with the 4.25 years of incarceration given in Delaware County.

{¶16} We do not find that the Franklin County trial court judge made a statement which irrevocably capped appellant's time of incarceration. Appellant indicated that he

knew he could receive a sentence of as much as 10 years of incarceration. When the plea was actually entered, no mention was made of a cap and the judge stated that she had "made no promises as to what your sentence will be[.]" (Tr. 45.)

{¶17} When the sentencing actually occurred, no mention was made by either defense counsel or appellant himself that his sentence was to be capped.

{¶18} Under the circumstance, we cannot find that the sentences given were in contravention of an agreement of the court and the parties. To the extent there was an enforceable agreement, the agreement was for the Franklin County sentences to run concurrently with the Delaware County sentences. The trial court honored that agreement.

{¶19} The second assignment of error is overruled.

{¶20} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT and BROWN, JJ., concur.

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