

[Cite as *State v. Cantrell*, 2007-Ohio-6585.]

IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2006 CA 35
v.	:	T.C. NO. 2004 CR 144
	:	
SUSAN L. CANTRELL	:	(Criminal Appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	

**OPINION**

Rendered on the 7<sup>th</sup> day of December, 2007.

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DONOVAN, J.

{¶ 1} In her second appeal to this Court, Defendant-appellant Susan L. Cantrell appeals her conviction and sentence following guilty pleas to five counts of theft in office, three counts of money laundering, and two counts of tampering with records.

{¶ 2} Cantrell was initially sentenced to twelve and one-half years imprisonment.

Cantrell appealed her sentence to this Court, and we vacated the sentence and remanded the case to the trial court for re-sentencing in *State v. Cantrell* (January 27, 2006), Champaign App. No. 2005-CA-4, 2006-Ohio-404 (hereinafter “*Cantrell I*”). On March 15, 2005, the trial court re-sentenced Cantrell to an aggregate sentence of ten years imprisonment. Cantrell filed her notice of appeal with this Court on October 18, 2006.

## I

{¶ 3} We set forth the history of the case in *Cantrell I*, and now repeat it herein in pertinent part:

{¶ 4} “The foregoing charges stemmed from Cantrell’s theft of public funds and her attempts to conceal the crime over more than seven years while serving as clerk and income tax administrator for the village of Mechanicsburg. The cumulative amount of Cantrell’s theft was approximately \$81,000. Following the convictions, which involved nine third-degree felonies and one fourth-degree felony,<sup>1</sup> the trial court imposed an aggregate sentence of twelve and one-half years in prison, fined Cantrell \$1,000, and ordered her to pay restitution of \$106,605.76, which included the stolen funds and the cost of a special audit necessitated by the thefts. The prison sentence consisted of consecutive two-year terms on each of the four third-degree felony theft-in-office charges, a consecutive six-month term on the fourth-degree felony theft-in-office conviction, and consecutive two-year terms on the two counts of tampering with records. The trial court also imposed a two-year prison term for each of the three money laundering convictions but ordered those terms to be served concurrently.”

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<sup>1</sup>“One count of theft in office was charged as a fourth-degree felony due to the dollar amount at issue.”

{¶ 5} As previously stated, we vacated the twelve and one-half year sentence initially imposed by the trial court and remanded the matter back to the trial court for a re-sentencing hearing. In *Cantrell I*, we held that the record did not support the trial court's findings in support of its decision to impose consecutive sentences. We also held that Cantrell waived the issue of sentencing consistency as argued in her second assignment because she did not object at the trial level. Thus, we remanded the matter in order that a new sentence be imposed.

{¶ 6} Upon rehearing on March 15, 2006, the trial court re-sentenced Cantrell to an aggregate sentence of ten (10) years consisting of both concurrent and consecutive sentences. It is from this judgment that Cantrell now appeals.

## II

{¶ 7} Cantrell's first assignment of error is as follows:

{¶ 8} "THE TRIAL COURT ABUSED ITS DISCRETION BY SENTENCING APPELLANT TO A TEN YEAR PRISON TERM AS APPELLANT'S SENTENCE IS INCONSISTENT WITH SENTENCES OF SIMILAR OFFENDERS, AND A LESSER SENTENCE IS COMMENSURATE WITH AND WOULD NOT Demean THE SERIOUSNESS OF THE OFFENSE AND IMPACT ON THE VICTIM."

{¶ 9} In her assignment, Cantrell contends that the trial court erred when it sentenced her to ten years in prison upon rehearing. Specifically, she argues that, pursuant to R.C. §§ 2929.11 and 1919.12, her sentence is inconsistent with the sentences received by similar offenders who committed crimes similar to those for which she was convicted. It is undisputed that Cantrell did not object to the sentence imposed by the trial court at the rehearing.

{¶ 10} In overruling Cantrell's second assignment of error in *Cantrell I* which addressed the issue of sentencing consistency for similarly situated offenders, we stated in pertinent part:

{¶ 11} “\*\*\* As for her assignment of error premised on R.C. §2929.11(B), however, we note that she failed to bring the issue to the trial court's attention at the time of sentencing. In *State v. Bell*, Greene App. No. 2004-CA-5, 2005-Ohio-655, we addressed a similar situation and reasoned as follows:

{¶ 12} “R.C. 2929.11(B) imposes a duty upon the trial court to insure consistency among the sentences it imposes. \* \* \* [It is] also recognized, however, that trial courts are limited in their ability to address the consistency mandate, and appellate courts are hampered in their review of this issue, by the lack of a reliable body of data upon which they can rely. \* \* \* '[A]lthough a defendant cannot be expected to produce his or her own database to demonstrate the alleged inconsistency, the issue must at least be raised in the trial court and some evidence, however minimal, must be presented to the trial court to provide a starting point for analysis and to preserve the issue for appeal.' Having failed to raise this issue at sentencing, [the defendant] cannot now argue that the sentence imposed by the trial court was inconsistent with those imposed on similar offenders.” Id. at ¶140, quoting *State v. Roberts*, Cuyahoga App. No. 84070, 2005-Ohio-28, at ¶ 60.’

{¶ 13} “Because the appellant in *Bell* had failed to raise the sentencing-inconsistency issue in the trial court, we found it waived on appeal. Id. at ¶141. We reach the same conclusion here and, therefore, overrule Cantrell's second assignment of error.”

{¶ 14} In the instant case, Cantrell has, for a second time, failed to raise the “sentencing-inconsistency issue” in the trial court by properly lodging an objection at some point during the rehearing. Thus, the argument is waived, we need not entertain it, and Cantrell cannot now argue that the sentence imposed by the trial court was inconsistent with those imposed on similar offenders.

{¶ 15} Cantrell’s first assignment of error is overruled.

### III

{¶ 16} Cantrell’s second and final assignment of error is as follows:

{¶ 17} “APPELLANT’S TRIAL COUNSEL’S FAILURE TO OBJECT TO APPELLANT’S EXCESSIVE INCONSISTENT SENTENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.”

{¶ 18} In her final assignment, Cantrell contends that defense counsel’s failure to object to the ten year sentence imposed by the trial court upon rehearing rendered counsel’s performance deficient. Cantrell requests, that in light of her counsel’s alleged ineffective assistance, we should remand the matter to the trial court for re-sentencing. We disagree.

{¶ 19} “When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel’s essential duties to his client. Next, and analytically separate from the question of whether defendant’s Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel’s ineffectiveness.” *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, citing *State v. Lytle* (1976), 48 Ohio St.2d

391, 396-397, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135.

{¶ 20} The above standard contains essentially the same requirements as the standard set forth by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, supra, at 687-688. “Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* Thus, counsel’s performance will not be deemed ineffective unless and until counsel’s performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel’s performance. *Id.*

{¶ 21} For a defendant to demonstrate that he has been prejudiced by counsel’s deficient performance, the defendant must prove that there exists a reasonable probability that, absent counsel’s errors, the result of the trial would have been different. *Bradley*, supra, at 143. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, supra, at 694.

{¶ 22} In the instant case, Cantrell argues that defense counsel’s failure to object “to the excessive and inconsistency [sic] of Appellant’s sentence amounts to a serious deficiency in counsel’s performance.” Cantrell asserts that her counsel’s failure to object has adversely affected her right to due process. However, other than her bare assertion that she was denied effective assistance of counsel, Cantrell has

failed to provide us with any sound rationale which establishes that the outcome of the re-sentencing hearing would have been any different had defense counsel objected to length of the term of imprisonment imposed by the trial court. Our own review of the record establishes that counsel for Cantrell advocated to the court at some length for leniency on behalf of his client. Nevertheless, the trial court found it appropriate to impose an aggregate ten year sentence on Cantrell. Under the authority of the Ohio Supreme Court's decisions in *State v. Foster* (2006), 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, and *State v. Mathis* (2006), 109 Ohio St.3d 54, 846 N.E.2d 1, 2006-Ohio-855, both decisions having been issued in the span of time between Cantrell's initial sentencing hearing and the re-hearing, the trial court was not required to engage in judicial fact-finding before imposing sentence. Moreover, Cantrell has failed to establish that the sentence she received is contrary to law, and she has failed to demonstrate that a reasonable probability exists that she would have received a shorter prison term had defense counsel objected to the sentence imposed. Thus, defense counsel's performance was not rendered ineffective by his failure to object to the sentence imposed by the trial court.

{¶ 23} Cantrell's second and final assignment is overruled.

#### IV

{¶ 24} All of Cantrell's assignments of error having been overruled, the judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

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