

[Cite as *State v. Martin*, 2009-Ohio-3698.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JOSHUA T. MARTIN

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 09CAA020017

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
case No. 08CRI03175

JUDGMENT:

Affirmed; Portion of Sentence Vacated &
Judgment Entered

DATE OF JUDGMENT ENTRY:

July 27, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Farmer, P.J.

{¶1} On March 20, 2008, the Delaware County Grand Jury indicted appellant, Joshua Martin, on one count of trafficking in cocaine in the vicinity of a juvenile in violation of R.C. 2925.03, a second degree felony, and one count of possession of cocaine in violation of R.C. 2925.11, a fourth degree felony.

{¶2} On June 19, 2008, pursuant to a plea agreement, appellant pled guilty to trafficking in cocaine as a fourth degree felony. By nunc pro tunc judgment entry filed February 5, 2009, the trial court sentenced appellant to one year in prison. Because appellant was on post-release control at the time he committed the instant offense, the trial court ordered him to serve an additional 1,517 days, consecutive to the one year sentence.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "The trial court erred in concluding that a prison term for a fourth-degree drug offense is mandatory under R.C. 2929.13(F)(5)."

II

{¶5} "The trial court erred in concluding that when a person on post-release control commits a felony, a prison term is mandatory for the violation of post-release control under R.C. 2929.141(B)."

III

{¶6} "The trial court erred in concluding that when a person on post-release control commits a felony, the court is required to impose the full amount of the remaining period of post-release control as a prison term under R.C. 2929.141(B)(1)."

IV

{¶7} "The trial court erred in calculating the remaining period of post-release control when imposing a prison term for violating post-release control under R.C. 2929.141(B)(1)."

IV

{¶8} "Martin was deprived of the effective assistance of counsel because his trial counsel failed to object or correct the trial court when it indicated that it did not understand its sentencing discretion and when it imposed an extra eight days on the post-release control violation."

{¶9} At the outset, appellant argues he did not relinquish his right to appeal his sentence by entering into a plea agreement to a reduced charge. Pursuant to R.C. 2953.08(A)(2), we concur that appellant has not waived his right to appeal his sentence.

I

{¶10} Appellant claims the trial court erred in concluding a sentence was mandatory for a fourth degree felony drug offense. We disagree.

{¶11} During the June 19, 2008 plea hearing, the trial court did not indicate a mandatory prison sentence, but did set forth the statutory range for imprisonment. June 19, 2008 T. at 17, 26. The trial court specifically mentioned the possibility of probation or community control. Id. at 25, 26-27.

{¶12} Appellant argues it is apparent from the trial court's following statement during the July 28, 2008 sentencing hearing that it considered a sentence of imprisonment to be mandatory:

{¶13} "The court would take all that information into account. He was also – I believe he was convicted one time for not appearing for sentencing and under the sentencing factors, he has a past, obviously, criminal history, served a prison sentence. Also in this particular case, even though this is an F-4 because it was more than five grams but less than 25 grams, it's mandatory prison. That means the court must impose a prison sentence." July 28, 2008 T. at 3-4.

{¶14} We find the above statement was conclusory because it was preceded by the trial court's recitation of appellant's lengthy criminal history and followed by a discussion on recidivism and appellant's release from prison just prior to the instant offense:

{¶15} "In the recidivism factors on the score, he's moderately high risk for recidivism, according to their scoring system they have, considering all these types of factors. So the court will take all that information into account in imposing sentence in this case." Id. at 4.

{¶16} The trial court invited defense counsel to argue in mitigation as to the imposition of a mandatory sentence. Id. Following defense counsel's arguments, the trial court concluded a mandatory sentence was in order, but imposed the median sentence of one year. T. at 9, 11.

{¶17} Upon review, we find no error in the sentencing of appellant.

{¶18} Assignment of Error I is denied.

II, III

{¶19} Appellant claims the trial court erred in determining that a person on post-release control who commits a felony should receive a mandatory prison term for the violation, and erred in determining it was required to impose the full amount of the remaining period of post-release control as a prison term. We disagree.

{¶20} R.C. 2929.141(B)(1) and (2) state the following:

{¶21} "(A) Upon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, the court may terminate the term of post-release control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on post-release control:

{¶22} "(1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board as a post-release control sanction. A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony. The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.

{¶23} "(2) Impose a sanction under sections 2929.15 to 2929.18 of the Revised Code for the violation that shall be served concurrently or consecutively, as specified by the court, with any community control sanctions for the new felony."

{¶24} The trial court referenced these provisions during the sentencing hearing. The trial court concluded that appellant's record and the current felony commitment so soon after release from prison left it no choice:

{¶25} "You're the one who's going to have to decide what you do out on the street and you, obviously, made some – it didn't take you long to get in trouble once you got back on the street. Now those are your choices, not the court's choices, but the bottom line is here that if you keep violating the law, you're going to go back to jail and each time it's going to be longer. It's just that simple." July 28, 2008 T. at 10-11.

{¶26} We fail to find any abrogation of the trial court's discretion, nor do we find that the appellant's sentence of one year and imposition of additional time for violating post-release control pursuant to R.C. 2929.141 were in error.

{¶27} Assignments of Error II and III are denied.

IV

{¶28} Appellant claims the trial court erred in calculating his remaining time on post-release control. We agree.

{¶29} The state conceded that the correct calculation was 1,509 days. This assignment is granted and the trial court's February 5, 2009 nunc pro tunc judgment entry is corrected to read "1509 days" remaining on post-release control to be served consecutively to the sentence in the case.

{¶30} Assignment of Error IV is granted.

V

{¶31} Appellant claims his trial counsel was deficient in failing to object to the trial court's reference to a "mandatory sentence" and the computation of post-release control time. We disagree.

{¶32} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶33} "2. 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. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶34} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶35} As we found in Assignments of Error I, II, and III, the trial court used its discretion in imposing a one year sentence on a multiple convicted felon and gave him the median sentence. The record demonstrates that defense counsel argued at length on mitigation of the sentence. July 28, 2008 T. at 4-6.

{¶36} Upon review, we fail to find that defense counsel was deficient.

{¶37} As for the computation of post-release control time, we corrected the calculation error under Assignment of Error IV.

{¶38} Assignment of Error V is denied.

{¶39} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed. However, the portion of the trial court's February 5, 2009 nunc pro tunc judgment entry referencing "1517 days" is vacated and judgment is entered to reflect "1509 days" remaining on post-release control to be served consecutively to the sentence in the case.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

JUDGES

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JOSHUA T. MARTIN	:	
	:	
Defendant-Appellant	:	CASE NO. 09CAA020017

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio is affirmed. However, the portion of the trial court's February 5, 2009 nunc pro tunc judgment entry referencing "1517 days" is vacated and judgment is entered to reflect "1509 days" remaining on post-release control to be served consecutively to the sentence in the case. Costs to appellant.

JUDGES