[Cite as *State v. Davis*, 2010-Ohio-4488.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93856

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIE DAVIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514855

BEFORE: Sweeney, J., Kilbane, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: September 23, 2010

FOR APPELLANT

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Willie Davis ("defendant"), appeals his plea of guilty to two counts of rape and one count of kidnapping. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On August 22, 2008, defendant was indicted for various sex offenses allegedly involving three victims, who were foster children under the age of 13, living in the same house as defendant between the fall of 2005 and the summer of 2008. On September 2, 2008, the court ordered a psychiatric evaluation of defendant pursuant to R.C. 2945.371 to determine his competency to stand trial and his sanity at the time the offenses were allegedly committed. Additionally,

on October 20, 2008, the court ordered the psychiatric clinic to determine defendant's eligibility as a mentally retarded offender, after concerns were raised by defense counsel regarding defendant's I.Q. The results of defendant's psychiatric evaluation indicated that he was competent to stand trial.

{¶ 3} On March 12, 2009, defendant pled guilty to two counts of rape in violation of R.C. 2907.02(A) and one count of kidnapping in violation of R.C. 2905.01(A)(4). The court sentenced defendant to an agreed upon 25 years in prison with no possibility of early release.

{¶ 4} Defendant filed a pro se notice of appeal and requested counsel, which this court appointed. On December 1, 2009, defendant's appellate counsel filed an *Anders* brief, requesting that he be allowed to withdraw as counsel, because, after reviewing the record, he found no errors upon which an appeal could be based. See *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. In the *Anders* brief, defense counsel followed the procedure this Court set forth in *State v. Duncan* (1978), 57 Ohio App.2d 93, 385 N.E.2d 323 and identified any issues in the record that arguably could support an appeal. Specifically, counsel noted that defendant "is not confident he was given proper discovery regarding DNA test results."

{¶ 5} On May 24, 2010, defendant filed a pro se brief, alleging two assignments of error. In Ohio, a pro se litigant "is presumed to have knowledge of the law and of correct legal procedure and is held to the same standard as all

other litigants." *Kilroy v. B.H. Lakeshore Co.* (1996), 111 Ohio App.3d 357, 363, 676 N.E.2d 171.

{¶ 6} Defendant's first assignment of error states that:

{¶ 7} "I. Appellant's constitutional rights were violated due to the ineffective assistance of counsel."

{¶ 8} Specifically, defendant argues that his trial counsel was ineffective for failing to: (a) have DNA evidence tested; (b) interview potentially exculpatory witnesses; (c) object to the indictment; and (d) investigate a potential diminished capacity defense.

{¶ 9} Defendant entered a guilty plea; therefore, he waived the right to claim ineffective assistance of counsel, "except to the extent the defects complained of caused the plea to be less than knowing and voluntary." *State v. Barnett* (1991), 73 Ohio App.3d 244, 249, 596 N.E.2d 1101.

{¶ 10} To substantiate a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) the performance of defense counsel was seriously flawed and deficient and (2) the result of the defendant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. In *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, the Ohio Supreme Court truncated this standard, holding that reviewing courts need not examine counsel's performance if a defendant fails to prove the second prong of

prejudicial effect. “The object of an ineffectiveness claim is not to grade counsel’s performance.” Id. at 143.

{¶ 11} Defendant’s allegations of ineffective assistance of counsel are based on facts that are not in the record and a misunderstanding of Ohio law. For example, the DNA evidence in the instant case was tested by the Ohio Bureau of Criminal Identification and Investigation. The results, which were made available to defendant during discovery, showed that defendant’s DNA is consistent with the DNA extracted from the semen found on the sheets from one of the victim’s beds. Additionally, no exculpatory witnesses were identified in the record or on appeal. Furthermore, the indictment against defendant is not based on undifferentiated counts, as envisioned in *Valentine v. Kontah* (C.A.6, 2005), 385 F.3d 626. Defendant was charged with five distinct offenses against the first victim; four distinct offenses against the second victim; and four distinct offenses against the third victim. Indeed, defendant was not charged with more than one count of the same crime against each victim. Finally, Ohio law does not recognize “diminished capacity” as a defense to a criminal charge. *State v. Wilcox* (1982), 70 Ohio St.2d 182, 199, 436 N.E.2d 523.

{¶ 12} As none of defendant’s allegations of ineffective assistance of counsel could have plausibly caused him to involuntarily plead guilty to three of the 13 counts he was charged with, his first assignment of error is without merit and is overruled.

{¶ 13} In defendant’s second assignment of error, he argues as follows:

{¶ 14} "II. The court erred in accepting a plea of guilty, as the defendant was not competent to enter such a plea."

{¶ 15} Specifically, defendant argues that "[b]ased on the presentence investigation report ordered by the Court, the psychologist found the Defendant's I.Q. was below 70, which clearly indicates mental retardation," and, as a result, the court should not have accepted his plea or should have ordered a hearing to determine competency.

{¶ 16} There is no presentence investigation report in the record, nor does the docket reflect that one was ordered.

{¶ 17} Defendant's competency evaluation, which was conducted by a court appointed psychiatrist, determined that defendant understood "the nature and objectives of the proceedings against him" and was "able to assist counsel in his defense." Defendant presented no evidence to rebut the finding that he was competent to stand trial. See *State v. Scott*, 92 Ohio St.3d 1, 2001-Ohio-148, 748 N.E.2d 11, ¶6-7 (holding that competency to stand trial is presumed and a defendant is required to "shoulder the burden of proving his incompetence by a preponderance of the evidence"), citing *Medina v. California* (1992), 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353.

{¶ 18} Accordingly, defendant's second assignment of error is overruled.

{¶ 19} After conducting an independent review of the merits of this case pursuant to our duty under *Anders* and addressing defendant's pro se assignments of error, we affirm defendant's convictions.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR