

[Cite as *State v. Bowling*, 2020-Ohio-813.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 19CA2
 :
 vs. :
 :
 CHRISTOPHER BOWLING, : DECISION AND JUDGMENT ENTRY
 :
 :
 Defendant-Appellant. :

APPEARANCES:

Jessica M. Ismond, Wellston, Ohio, for appellant.¹

Justin Lovett, Jackson County Prosecuting Attorney, and Paul David Knipp, Jackson County Assistant Prosecuting Attorney, Jackson, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED: 2-26-20

ABELE, J.

{¶ 1} This is an appeal from a Jackson County Common Pleas Court judgment of conviction and sentence. Christopher Bowling, defendant below and appellant herein, pleaded guilty to one count of unlawful sexual conduct with a minor and received a sixty month prison sentence and five years of post-release control. Appellant assigns two errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO A PRISON TERM OF FIVE YEARS WHEN SUCH A SENTENCE RUNS CONTRARY TO THE PURPOSES AND PRINCIPLES OF THE

¹ Different counsel represented appellant during the trial court proceedings.

FELONY SENTENCING GUIDELINES.”

SECOND ASSIGNMENT OF ERROR:

“TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO REQUEST A WAIVER TO THE IMPOSED COURT COSTS.”

{¶ 2} In April 2018, a Jackson County Grand Jury returned an indictment that charged appellant with one count of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A), a third-degree felony. Appellant pleaded not guilty and the trial court released him on a recognizance bond. On October 2, 2018, appellant pleaded guilty to the charge in the indictment. During appellant’s release on bond, however, the victim’s mother reported that appellant had contact with the victim in violation of the terms of his bond. Thus, prior to sentencing appellee requested an arrest warrant due to the alleged bond violation. At first, the trial court modified the bond with an order for a *capias*, but then revoked the bond after appellant admitted that he had contact with the victim. Additionally, due to the nature of the bond violation, appellee argued for a more severe sentence.

{¶ 3} On January 8, 2019, the victim’s mother spoke at the sentencing hearing about how appellant’s conduct impacted the victim’s family. Appellant’s father also spoke on appellant’s behalf. At the conclusion of the hearing, the trial court observed that, although appellant had been ordered to have no contact whatsoever with the victim, he, instead, violated the conditions of his bond. The trial court further observed “She comes to your house and you don’t send her away. You hang out, there are photographs of this . . . that’s a problem.”

{¶ 4} At the conclusion of the hearing, and after the trial court considered the pertinent statutory factors, the court ordered appellant to serve 60 months in prison with five years of post release control. This appeal followed.

I.

{¶ 5} In his first assignment of error, appellant asserts that his five year prison sentence is contrary to the purposes and principles of the felony sentencing guidelines. In particular, appellant argues that the trial court considered R.C. 2929.11 and 2929.12, highlighted appellant's relationship with the victim, opined that recidivism is more likely, and indicated that appellant has a history of criminal convictions, including a disputed domestic violence conviction. Additionally, appellant claims that the court considered appellant's continued contact with the victim during the pendency of the case. Appellant further argues that (1) the court did not discuss, on the record, any R.C. 2929.12(E) mitigating factors; and (2) although appellant had been charged with domestic violence in municipal court, he had not been convicted (but he did acknowledge that he was serving probation for a conviction in municipal court). Appellant further maintains that, although his relationship with the victim facilitated the offense, a five year prison sentence is improper because the circumstances that surround the relationship between appellant and the victim and the victim's age upon appellant's likely release "diminishes the likelihood of recidivism." Appellant contends that, because the victim was age fifteen at the time appellant victimized her, she would be at least age 18 if appellant is judicially released, and would be age 20 after appellant serves a five year sentence. Lastly, appellant argues that he has shown genuine remorse, has taken responsibility for his actions and, once again, points out that the victim's age makes the circumstances "not likely to recur."

{¶ 6} When reviewing felony sentences, appellate courts apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Prater*, 4th Dist. Adams No. 18CA1069, 2019-Ohio-2745, at ¶ 12, citing *State v. Graham*, 4th Dist. Adams No. 17CA1046, 2018-Ohio-1277, at ¶ 13. Under R.C. 2953.08(G)(2), "[t]he appellate court's standard for review is not whether the sentencing court

abused its discretion.” Instead, R.C. 2953.08(G)(2) specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either:

- (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
- (b) That the sentence is otherwise contrary to law.

“[C]lear and convincing evidence is that measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. Thus, an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law if the appellate court concludes, by clear and convincing evidence, that the record does not support the sentence.

{¶ 7} The Supreme Court of Ohio has summarized the applicability of R.C. 2929.11 and 2929.12 as follows:

In Ohio, two statutory sections serve as a general guide for every sentencing. First, R.C. 2929.11(A) provides that the overriding purposes of felony sentencing “are to protect the public from future crime by the offender and others and to punish the offender.” To achieve these purposes, the trial court “shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution.” *Id.* The sentence must be “commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.” R.C. 2929.11(B). * * *

Second, R.C. 2929.12 specifically provides that in exercising its discretion, a trial court must consider certain factors that make the offense more or less serious and that indicate whether the offender is more or less likely to commit future offenses. * * *

[A]n offender's conduct is considered less serious when there are “substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.” R.C. 2929.12(C)(4). R.C. 2929.12(C) and (E) also permit a trial court to consider “any other relevant factors” to determine that an offense is less serious or that an offender is less likely to recidivate.

State v. Day, ___ N.E.3d ___, 2019-Ohio-4816, ¶ 15 (4th Dist.), quoting *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 17–18. This court has held that, generally, a sentence is not contrary to law if a trial court considered the R.C. 2929.11 purposes and principles of sentencing, as well as the R.C. 2929.12 seriousness and recidivism factors, properly applied post-release control, and imposed a sentence within the statutory range. *State v. Prater*, *supra*, at ¶ 20; *State v. Graham*, *supra*, at ¶ 16; *State v. Perry*, 4th Dist. Pike No. 16CA863, 2017-Ohio-69, ¶ 21; *State v. Brewer*, 2014-Ohio-1903, 11 N.E.3d 317, ¶ 38 (4th Dist.).

{¶ 8} In the case sub judice, the trial court stated that it considered the R.C. 2929.11 and 2929.12 sentencing factors and determined that “the conduct is more serious because of the offender’s relationship with the Victim facilitated this offense. The Court also finds recidivism is more likely.” The court further indicated that it reviewed the pre-sentence investigation report, took into account the parties’ arguments as well as the victim impact statement, and considered appellant’s father’s testimony. Although the court may have also considered the municipal court domestic violence charge to be a conviction rather than a pending charge, we recognize that the court’s discussion throughout the proceedings centered around the various facts present in the case at bar. Furthermore, “[I]t is well established that sentencing courts may consider arrests and even prior allegations that did not result in conviction before imposing sentence.” *State v. Craig*, 7th Dist. Belmont No. 18 BE 0001, 2019-Ohio-1092, ¶ 9, citing *State v. Martin*, 7th Dist. Mahoning No. 16 MA 0160, 2018-Ohio-862, ¶ 7; *State v. Hutton*, 53 Ohio St.3d 36, 43, 559 N.E.2d 432 (1990).

Here, appellant pleaded guilty to a third-degree felony that subjected him to a maximum five year prison term. Appellant victimized an underage victim, then, while released on bond, had additional contact with her in direct violation of the conditions of bond. In general, a court may properly consider a defendant's violation of bond when deciding an appropriate sentence because a violation may indicate a defendant's likelihood of recidivism. *State v. Williams*, 7th Dist. Mahoning No. 11 MA 131, 2012-Ohio-6277, ¶ 78.

{¶ 9} After our review, we conclude that the trial court complied with all pertinent sentencing requirements, reviewed and considered the presentence investigation report, the victim impact statement, the sentencing hearing testimony, and arrived at a sentence that falls within the statutory range. We believe that the record supports the sentence and the sentence is not contrary to law. Obviously, in addition to all other factors, appellant's conduct during the pendency of the case demonstrates a complete disregard of the trial court's orders, exhibits a lack of recognition and appreciation for the seriousness of the offense and indicates that recidivism is likely.

{¶ 10} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II.

{¶ 11} In his second assignment of error, appellant asserts that trial counsel's failure to request a waiver of court costs constitutes ineffective assistance of counsel.

{¶ 12} The Sixth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution, provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean that a criminal defendant is entitled to the "reasonably effective assistance" of

counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Id.* at 687. To show deficient performance, a defendant must prove that counsel's performance fell below an objective level of reasonable representation. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95. Moreover, courts need not analyze both prongs of the Strickland test if a claim can be resolved under only one prong. *See State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000); *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, ¶ 17; *State v. Blair*, 4th Dist. Athens No. 18CA24, 2019-Ohio-2768, ¶ 58.

{¶ 13} When determining whether counsel's representation amounts to deficient performance, “a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” *Strickland* at 689. Because a properly licensed attorney is presumed to execute his duties in an ethical and competent manner, *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were “so serious” that counsel failed to function “as the ‘counsel’ guaranteed * * * by the Sixth Amendment.” *Strickland* at 687.

{¶ 14} In the case sub judice, appellant contends that (1) when the trial court imposed court costs, trial counsel did not request a waiver even though counsel knew that appellant was indigent, and (2) the failure to request a waiver falls below an objective standard per *Strickland*.

{¶ 15} R.C. 2947.23 provides for costs to be included in a criminal sentence. In all criminal cases a judge must include in the sentence the costs of prosecution and render a judgment against the

defendant for such costs, even if the defendant is indigent. R.C. 2947.23(A)(1)(a). However, a trial court retains jurisdiction to waive, suspend, or modify the payment of the costs “at the time of sentencing or at any time thereafter.” R.C. 2947.23(C). As we held in *Blair, supra*:

In all criminal cases, a judge must include in the sentence the costs of prosecution and render a judgment against the defendant for such costs, even if the defendant is indigent. R.C. 2947.23(A)(1)(a); *State v. Mack*, 4th Dist. Washington No. 17CA35, 2018-Ohio-5165; *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. However, a trial court retains jurisdiction to waive, suspend, or modify the payment of the costs “at the time of sentencing or at any time thereafter.” R.C. 2947.23(C). A trial court may waive court costs - but it is not required - if a defendant is indigent. *Mack*, citing *State v. Hawkins*, 4th Dist. Gallia No. 13CA3, 2014-Ohio-1224, ¶ 18; *State v. Walker*, 8th Dist. Cuyahoga No. 101213, 2014-Ohio-4841, ¶ 9.

State v. Blair, supra, at ¶ 60.

{¶ 16} Under our previous decisions, we would have found no merit in appellant’s assertion that he received ineffective assistance of counsel. Because R.C. 2947.23(C) provides the ability to seek waiver of costs at any time, including after sentencing, appellant has not been prejudiced by counsel’s failure to request a waiver at sentencing. Appellant is not foreclosed from filing a request at a later time. *See also State v. Davis*, 5th Dist. Licking No. 17-CA-55, 2017-Ohio-9445, ¶ 31; *accord State v. Szarell*, 5th Dist. Licking No. 2019 CA 00028, 2019-Ohio-5175, ¶ 22.

{¶ 17} However, very recently in *State v. Davis*, Slip Opinion No. 2020-Ohio-309, the Ohio Supreme Court addressed this issue and held that, when an indigent defendant makes an ineffective-assistance-of-counsel claim based upon counsel’s failure to request a waiver of court costs, a court must objectively consider the facts and circumstances to determine whether the defendant established the necessary prejudice sufficient to support that claim (i.e. but for counsel’s deficient performance, a reasonable probability exists that the result of the proceeding would have

been different). The court also pointed out that a determination of indigency alone does not rise to the level of creating a reasonable probability that the trial court would have waived costs had defense counsel requested the court to do so. For example, if a court finds that a defendant has the ability to work and pay court costs in the future, the court may decide to not waive court costs.

{¶ 18} In the case sub judice it is difficult for this court to fully and objectively review all pertinent facts and evidence to determine whether appellant has demonstrated that a reasonable probability exists that, had his trial counsel moved the trial court to waive court costs, the trial court would have granted the motion. *Davis*, supra. We recognize, however, that the record on this particular issue is somewhat sparse and should be further developed in order to facilitate the full examination of all relevant facts and evidence.

{¶ 19} Therefore, based upon the foregoing, we sustain appellant's second assignment of error and remand this matter so that the parties and the trial court may consider anew the imposition of court costs issue in light of *Davis* and all pertinent facts and evidence.

{¶ 20} Accordingly, based upon the foregoing reasons, we affirm the trial court's judgment in part, reverse the judgment in part, and remand this matter so that the trial court may fully consider the imposition of court costs.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED
FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Appellant shall recover of appellee the 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 Jackson County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.