[Cite as *State v. Johnson*, 2020-Ohio-7025.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TRAYLOR C. JOHNSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0008

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 19 CR 48

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor*, Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Joseph W. Gardner, 19 E. Front Street, Youngstown, Ohio 44503 for Defendant-Appellant.

Dated: December 23, 2020

Robb, J.

{¶1} Defendant-Appellant Traylor C. Johnson appeals the sentence entered by the Mahoning County Common Pleas Court after he pled guilty to voluntary manslaughter with a firearm specification. He seeks resentencing based upon his contention that the court failed to consider whether he had a disability. He points to the portion of the presentence investigation report (PSI) stating he had an individualized education program (IEP) when he was a student. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On November 29, 2018, Derrick Franklin was about to exit a bar on Mahoning Avenue in Youngstown, Ohio when he was shot multiple times by a shooter located outside of the bar. The bar's video surveillance system showed Appellant interacted with the victim in a threatening manner and the victim was later shot from the direction of the door after Appellant exited.

{¶3} Within days, Appellant was charged in the Youngstown Municipal Court with aggravated murder. Appellant was represented at the preliminary hearing by Attorney John Juhasz, who continued as defense counsel throughout the trial court proceedings. Appellant was indicted on February 8, 2019 for aggravated murder with a firearm specification. It was alleged that he purposely caused the victim's death with prior calculation and design in violation of R.C. 2903.01(A).

{¶4} On October 25, 2019, the state agreed to amend the charge in exchange for Appellant's guilty plea to voluntary manslaughter, a first-degree felony in violation of R.C. 2903.03(A), and the firearm specification. The written plea agreement recited the state's recommendation of a maximum sentence of eleven years plus three years on the gun specification. The court ordered a PSI at the October 31, 2019 plea hearing and set the case for sentencing.

{¶5} At the December 12, 2019 sentencing hearing, the prosecutor explained the state's rationale for the amended charge. Although there were many witnesses, only one witness spoke to the police. This witness was fearful, and the state was concerned he would not appear for trial. The state disclosed that the victim was at the bar for a memorial

when Appellant initiated the encounter and gestured in a manner indicating he had a gun on his person. The victim's mother spoke to the court, opining the maximum sentence recommended by the state was insufficient.

{¶6} Defense counsel argued a "mid-range" sentence would be more appropriate than a maximum sentence as the victim was arguing with Appellant over a woman and the situation was not likely to recur. He also said the video indicated the victim may have been reaching for something as Appellant moved out of the bar. Counsel then pointed to Appellant's minimal criminal record. He opined Appellant had matured since the incident and had a good chance of rehabilitation due to his youth. Appellant was 21 (almost 22) years old when the offense took place and 22 (almost 23) years old at sentencing.

{¶7} In exercising his allocution right, Appellant gave a coherent presentation of his position stating: he was remorseful and took full responsibility; the victim was upset because of Appellant's relationship with a woman; the victim shot at him on two prior occasions causing bullet holes in his vehicle; and he did not shoot the victim without provocation but defended himself after feeling there was no other way out of the situation. Appellant said he intended to use prison as a stepping stone to rehabilitate himself, decrease anger in his life, and become a productive member of society.

{¶8} The court opined the reason for the feud was senseless and Appellant should not have visited the bar or indicated he was "packing" if he was that afraid of the victim. The court framed the plea as a "compromise resolution" where both sides had much to risk by going forward. After voicing the purposes and principles of sentencing and the seriousness and recidivism factors were considered, the court imposed a sentence of eleven years for voluntary manslaughter plus three years for the firearm specification, which was the maximum sentence recommended by the state. Appellant filed a timely notice of appeal from the December 13, 2019 sentencing entry.

FELONY SENTENCING REVIEW

{¶9} Before addressing Appellant's assignment of error, we review the pertinent law. A defendant has the right to appeal a felony sentence if it was the maximum definite prison term allowed, the maximum was not required, and the sentence was imposed for only one offense. R.C. 2953.08(A)(1)(a).[1] Division (G)(2) of this statute provides that the

[1] This division applies to other types of sentences as well. R.C. 2953.08(A)(1).

court hearing such an appeal "shall review the record, including the findings underlying the sentence * * * given by the sentencing court." This same division provides:

> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under [R.C. 2929.13(B),(D), R.C. 2929.14(B)(2)(e),(C)(4), or R.C. 2929.20(I)], whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

R.C. 2953.08(G)(2).

{¶10} In *Marcum*, the Supreme Court said the plain language of R.C. 2953.08(G)(2) totally prohibits the application of the abuse of discretion standard to felony sentencing issues and rejected the argument that abuse of discretion is a proper second-tier analysis merely because the statute begins by stating, "In addition to any other right to appeal * * *." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 10, 18. The Court held "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.* at ¶ 1.

{¶11} The sentence under review in *Marcum* was a "near-maximum" ten-year sentence imposed for a single first-degree felony. *Id.* at ¶ 4-5.[2] The statutory divisions listed in R.C. 2953.08(G)(2)(a) were not at issue. The statutes governing the sentencing court were R.C. 2929.11, which contains the overriding purposes and principles of felony sentencing, and R.C. 2929.12, which contains the seriousness and recidivism factors.

[2] *Marcum* involved a single *non-maximum* sentence, while the case at bar involves a single *maximum* sentence appealable under division (A), which is referred to in (G)(2) before the standard of review is set forth. We note the statutes listed in R.C. 2953.08(G)(2)(a) are not at issue in this appeal, and the trial court is not required to make findings for imposing a maximum sentence. As Appellant raises the trial court's consideration of R.C. 2929.11, the principle in *Marcum* at ¶ 23-24 is relevant to this case, and its application may be less controversial than in a case with a non-maximum sentence.

{¶12} A unanimous Court ruled: "Marcum's ten-year prison term is not clearly and convincingly contrary to law. Accordingly, the Fourth District could have modified or vacated her sentence only if it found by clear and convincing evidence that the record did not support the sentencing court's decision." *Id.* at ¶ 7. The Court explained:

> some sentences do not require the findings that R.C. 2953.08(G) specifically addresses. Nevertheless, it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court. That is, an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence.

Marcum, 146 Ohio St.3d 516 at ¶ 23.

{¶13} The Court concluded: "The Fourth District correctly held that it could not modify or vacate Marcum's sentence unless it clearly and convincingly found that the record did not support the sentence. Its review of the record revealed that the facts amply supported the sentence." *Id.* at ¶ 24. This was one of the grounds for affirming the appellate court's decision as can be seen in the final holding: "Accordingly, given that we have answered the certified-conflict issue in the negative *and we agree that the record supports the sentence*, we affirm the Fourth District's judgment." (Emphasis added.) *Id.*

{¶14} Thereafter, in *Gwynne*, the Supreme Court considered a state's appeal asking whether R.C. 2953.08(G)(2) allows the reviewing court to consider if the imposition of consecutive sentence was supported by the purposes and principles of felony sentencing in R.C. 2929.11 and by the seriousness and recidivism factors in R.C. 2929.12 pursuant to the *Marcum* case. *State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E.3d 169, ¶ 1. Relying on ¶ 23 of *Marcum*, the Fourth District had reversed consecutive sentences upon finding the aggregate sentence was not supported by R.C. 2929.11 and 2929.12; the court modified the aggregate sentence of 65 years to 15 years, while finding some consecutive sentences were warranted. *Id.* at ¶ 6, 14. The Supreme Court reversed and remanded the *Gwynne* case to the Fourth District.

{¶15} In doing so, a plurality of the Court emphasized that the defendant did not challenge an individual sentence (all of which were below the maximum) but challenged

the total length of the consecutive sentences. *Id.* at ¶ 15. The plurality opined: "Because R.C. 2953.08(G)(2)(a) specifically mentions a sentencing judge's findings made under R.C. 2929.14(C)(4) as falling within a court of appeals' review, the General Assembly plainly intended R.C. 2953.08(G)(2)(a) to be the exclusive means of appellate review of consecutive sentences." *Id.* at ¶ 16. It was also observed that R.C. 2929.11 and 2929.12 only apply to a sentence for an individual offense and have no relevance to the question of whether sentences for multiple offenses should be served consecutively; the Court ruled that consecutive sentences are exclusively governed by the findings in R.C. 2929.14(C)(4). *Id.* at ¶ 17. The Court accordingly concluded: "Paragraph 23 of *Marcum* has no application to this case" without addressing whether it was correct or dicta. *Id.* at ¶15.

{¶16} A concurring opinion said the Court should hold that ¶ 23 of *Marcum* was incorrect dicta as R.C. 2953.08(G)(2) does not authorize an appellate court to review a sentencing court's determinations under R.C. 2929.11 and 2929.12. *Gwynne*, 158 Ohio St.3d 279 at ¶ 36-44 (Kennedy, J., concurring; joined by DeWine, J.). Another justice concurred in judgment only without opinion. A dissenting justice said the Court should hold that R.C. 2953.08 does not prohibit an appellate court using the principles and factors in R.C. 2929.11 and 2929.12 as part of the analysis in reviewing any sentence (individual or consecutive). *Id.* at ¶ 56, 60, 88-89 (Donnelly, J.).

{¶17} Considering the totality of the facts and holdings in *Marcum*, this court utilizes ¶ 23 of *Marcum* to review an appeal where the defendant cites R.C. 2929.11 or R.C. 2929.12 and argues the record does not support a sentence. *See, e.g., State v. Seaman*, 7th Dist. Mahoning No. 18 MA 0103, 2019-Ohio-2709, ¶ 25; *State v. Hudson*, 2017-Ohio-645, 85 N.E.3d 371, ¶ 33 (7th Dist.). The *Marcum* Court specifically agreed with the appellate court's application of R.C. 2953.08(G) to review a single (non-maximum) sentence and with the appellate court's conclusion that the defendant did not meet the standard requiring the reviewing court to find by clear and convincing evidence that the record did not support the sentence. *Marcum*, 146 Ohio St.3d 516 at ¶ 7, 24.

{¶18} As the *Gwynne* Court did not reject ¶ 23 of *Marcum* (only two justices opined that it was incorrect and dicta), we continue to review appellate arguments that a sentence is not supported by the principles and purposes of sentence in R.C. 2929.11 or the seriousness and recidivism factors in R.C. 2929.12. In doing so, we are barred from vacating or modifying a sentence unless we find "by clear and convincing evidence that

the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Marcum*, 146 Ohio St.3d 516 at ¶ 1.

{¶19} A sentence can be challenged due to the violation of a constitutional right at sentencing such as the right to effective assistance of counsel; this may be considered under the "contrary to law" portion of the statute or as an independent right. *See generally State v. Davis*, 159 Ohio St.3d 31, 2020-Ohio-309, 146 N.E.3d 560, ¶ 1 (the standard test applies to a claim of ineffective assistance of counsel at sentencing). A claim of ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If the performance was not deficient, then there is no need to review for prejudice and vice versa. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

{¶20} In evaluating an alleged deficiency in performance, our review is highly deferential to counsel's decisions as there is a strong presumption counsel's conduct was within the wide range of reasonable professional assistance. *State v. Bradley*, 42 Ohio St.3d 136, 142-143, 538 N.E.2d 373 (1989) (there are "countless ways to provide effective assistance in any given case"), citing *Strickland*, 466 U.S. at 689. A court should not second-guess the strategic decisions of counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶21} On the prejudice prong, a lawyer's errors must be so serious that there is a reasonable probability the result of the proceedings would have been different. *Id.* Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d at 142, fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding was fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

ASSIGNMENT OF ERROR

{¶22} Appellant's sole assignment of error contends:

"The Sentencing Judge should have considered the defendant-appellant's disability before sentencing the defendant-appellant."

{¶23} Appellant contends the court violated R.C. 2929.11(A) by failing to consider that he may have a disability. In support, he points to a statement in the PSI which said

he had an IEP in place when he was a student in school. Appellant also suggests counsel was ineffective for failing to disclose the reason for the IEP to the court.

{¶24} Pursuant to R.C. 2929.11(A), the overriding purposes of felony sentencing are to protect the public from future crime by the defendant and others and to punish the defendant using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on government resources. This requires a trial court to "consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both." R.C. 2929.11(A).

{¶25} Pursuant to division (B) of R.C. 2929.11, a felony sentence shall be reasonably calculated to achieve the purposes of felony sentencing in alignment with 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. In exercising discretion to determine the most effective way to comply with the purposes and principles of sentencing under R.C. 2929.11, the sentencing court is instructed to consider the seriousness and recidivism factors in R.C. 2929.12(B)-(E). R.C. 2929.12(A).

{¶26} When considering the purposes and principles of sentencing under R.C. 2929.11, the trial court need not place findings on the record. *State v. Hudson*, 2017-Ohio-645, 85 N.E.3d 371, ¶ 34 (7th Dist.), citing *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31. Likewise, the trial court is not required to make findings on the record regarding the seriousness and recidivism factors in R.C. 2929.12. *Hudson*, 2017-Ohio-645 at ¶ 36, citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 42 (the instruction in R.C. 2929.12 is to "consider" the statutory factors; there is no mandate for judicial fact-finding in this general guidance statute).

{¶27} Where the record is silent, we employ a rebuttable presumption that the sentencing court considered the purposes and principles of sentencing and the seriousness and recidivism factors, unless the record affirmatively shows otherwise or the sentence is strikingly inconsistent with the factors. *State v. James*, 7th Dist. Columbiana No. 07CO47, 2009-Ohio-4392, ¶ 38–51 (explaining the history of this principle in detail), applying *State v. Adams*, 37 Ohio St.3d 295, 297, 525 N.E.2d 1361 (1988). Here, the record is not silent.

{¶28} The sentencing entry explicitly said the court considered the purposes and principles of sentencing and the seriousness and recidivism factors. Moreover, at the

sentencing hearing, the court expressly stated the purposes and principles of sentencing and the seriousness and recidivism factors were being considered and cited the relevant statutes. (Sent.Tr. 22, 24).

{¶29} The court also made various observations at the sentencing hearing. For instance, the court said Appellant should not have visited the bar or indicated he was "packing" if he was as afraid of the victim as he claimed. The court spoke of the need for the victim's family to see that justice was done. The court commented on the R.C. 2929.11 topics of incapacitation of an offender, deterrence, and rehabilitation. (Sent.Tr. 24-25). Appellant focuses on the court's conclusion:

> Finally, rehabilitation. *This is not a case where that is central to me because you can't rehabilitate someone for doing something that was senseless.* There is not an addiction I can address. *There is not a mental health issue I can address.* This was right or wrong. This was pride or whatever it was that got in the way of good judgment. That's not something I can fix, and I don't think I have to try. The ODRC will handle any rehabilitation during his time there and when he is released.

(Emphasis added.) (Sent.Tr. 25). The court then weighed the factors to find Appellant was not amenable to community control.

{¶30} Appellant believes the emphasized comments in the above quote show the sentencing court failed to consider the statement in the PSI about Appellant having an IEP in place at his former school. He says this statement should have alerted the court as to why he acted in a "senseless" manner on the day of the shooting and suggests having an IEP indicates a "mental health issue" which would be contrary to the court's findings. Appellant reasons that if a person had an IEP in school, then he must have had a disability relevant to sentencing. He cites Ohio Admin. Code 3301-51-07(A), which requires a school to adopt procedures to ensure an IEP is "developed and implemented for each child with a disability."[3] Appellant believes the court was looking for mitigating

[3] R.C. 3323.011 defines an IEP as "a written statement for each child with a disability" which lists certain specified information. A "child with a disability" is defined as one who needs special education due to "an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, another health impairment, a specific learning disability (including dyslexia), deaf-blindness, or multiple disabilities * * *." R.C. 3323.01(A).

evidence to impose a lesser sentence but failed to realize there was such evidence before the court in the PSI, which his counsel should have investigated and emphasized to show he had a disability.

{¶31} Appellate counsel outlines certain actions he took after he was appointed on appeal in order to obtain information outside of the record and alludes to the contents of an IEP he received from Appellant's former school. However, Appellant cannot rely on information outside of the record to support his appellate argument on whether counsel investigated the contents of the IEP or what information his specific IEP contained. *See State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 171 (it is impermissible in the direct appeal of a sentence to rely on evidence outside the record); *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001) (if establishing ineffective assistance of counsel requires proof outside the record, then such claim is not appropriately considered on direct appeal); *State v. Ishmail*, 54 Ohio St.2d 402, 406, 377 N.E.2d 500 (1978) (appellate review is limited to what transpired below as reflected by the record on direct appeal).

{¶32} We also note that a trial attorney can consult with his own adult client to obtain information or explanation about his client's current or former condition rather than automatically seeking copies of documents from a former school without first ascertaining if the client believes they may be helpful. The discussions between Appellant and his counsel about Appellant's school background and the sentencing strategy are not on the record.

{¶33} Next, the fact that a person had an IEP in place at school does not mean they had or still have a "mental health issue." Moreover, the court's comment must be read in context. Appellant promised to spend his time in prison rehabilitating himself, and the court noted the prison would "handle" rehabilitation. In addition to acknowledging rehabilitation was one of the purposes and principles of sentencing in R.C. 2929.11, the court explained that the comments on rehabilitation were part of the court's weighing of whether Appellant was amenable to being sentenced to community control instead of prison. Appellant does not make arguments on the decision refusing to impose community control, and at sentencing, the defense argued for a mid-range prison sentence (not a non-prison sentence).

{¶34} Notably, the court made various other statements regarding the sentence, including a suggestion that the original charge appeared to be warranted and the plea

was a “compromise resolution” as both sides had much to risk by going forward (since there was an issue with finding cooperative witnesses). Appellant was indicted for aggravated murder where the maximum sentence was life in prison.

{¶35} In addition to the judge’s statements orally and in writing that he read the PSI, defense counsel also indicated at sentencing that he read the PSI. Counsel specifically said he had no issue with the PSI except for a conclusion about the victim’s death making the offense more serious (as that was an element of the offense).

{¶36} “The presentation of mitigating evidence is a matter of trial strategy.” *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 189 (strategic sentencing decisions by counsel do not demonstrate deficient performance where nothing in the record shows the presentation of other evidence would have assisted). Defense counsel chose what topics to focus on for his strategy of seeking a mid-range sentence, noting that a younger adult is more likely to be reckless but is also more susceptible to rehabilitation and Appellant had matured since the offense.

{¶37} In addition to focusing on rehabilitation under R.C. 2929.11, defense counsel and Appellant focused on the seriousness and recidivism factors, including arguments such as: victim inducement; a defendant acting under provocation; although the victim died, this was an element of the offense to which he pled; the offense was committed under circumstances not likely to recur; he had a minimal criminal record; and he expressed genuine remorse. *See* R.C. 2929.12(B)-(E).

{¶38} Another factor making an offense less serious is where “[t]here 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). There is no indication on the record that having an IEP in school was a substantial ground to mitigate the conduct at issue here. And, there is no indication that whatever specific “disability” caused the issuance of an IEP when Appellant was a student contributed to the commission of the offense or was otherwise particularly relevant to sentencing. *Compare* R.C. 2929.14(F) (“The sentencing court shall consider the offender's military service record and whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses.”).

{¶39} Appellant was almost 22 years of age at the time of the offense and was almost 23 years of age at the time of sentencing. It is also notable that Appellant

exercised his allocution right in a well-organized and well-spoken manner. (Sent.Tr. 8-12).

{¶40} In sum, the record shows the trial court considered the contents of the PSI, which disclosed Appellant's prior IEP in school. The comment about the lack of a mental health issue the court could address did not show the court ignored the simple statement in the PSI about the existence of an IEP in Appellant's past. Therefore, it cannot be said that the record shows the court failed to consider some important mitigating aspect of the PSI in sentencing. And, the record does not show the failure to further investigate the IEP prejudiced Appellant. We cannot find by clear and convincing evidence that the record does not support the trial court's sentence after considering R.C. 2929.11 (and R.C. 2929.12). See *Marcum*, 146 Ohio St.3d 516 at ¶ 7, 23.

{¶41} Moreover, the record does not demonstrate: (1) a serious error by counsel in failing to disclose the reason for Appellant's former IEP to the court; or (2) a reasonable probability that Appellant received a higher sentence due to the failure to explain the reason for the IEP. *See, e.g., State v. Baker*, 7th Dist. Belmont No. 11 BE 40, 2013-Ohio-900, ¶ 26 (the evidence and arguments presented or omitted at sentencing are often the product of a strategic decision). At sentencing, counsel explained that he normally spoke before his client but decided to have Appellant speak first because Appellant would be speaking about items that counsel "would like to work into the sentencing law." (Sent.Tr. 8). Counsel prepared to focus on what he saw as the strongest arguments. In reading the transcript of Appellant's speech to the court, it is apparent the sentencing strategy was coordinated and planned between counsel and Appellant. Deficient performance and prejudice are not apparent.

{¶42} For the foregoing reasons, Appellant's assignment of error is overruled, and the trial court's judgment is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.