[Cite as *State v. Silver*, 2021-Ohio-4661.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

KEVIN ANTHONY SILVER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0042

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 19CR357

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

JUDGMENT:
Affirmed.

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

Atty. Wesley A. Johnston, P.O. Box 6041, Youngstown, Ohio 44501-6041, for Defendant-Appellant.

Dated: December 22, 2021

WAITE, J.

{¶1} Appellant, Kevin Anthony Silver, challenges his conviction and sentence entered in the Mahoning County Common Pleas Court. Appellant argues ineffective assistance of counsel for failing to file a motion to dismiss and for failing to utilize letters written in his support for mitigation purposes at sentencing. Appellant also contends the trial court judge erred in failing to recuse himself from the matter. For the following reasons, the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This appeal involves two separate trial court cases: 19 CR 253 and 19 CR 357. Appellant was sentenced on the two matters at a single sentencing hearing. However, the record reflects that the two were never consolidated, and this appeal was filed only under case number 19 CR 357. In case number 19 CR 253, Appellant pleaded guilty to one count of failure to comply, in violation of R.C. 2921.331(B), as a result of fleeing and eluding police after being observed driving recklessly in Boardman, Ohio in February of 2019. Because Appellant failed to file a notice of appeal in this case, the trial court's decision in the matter remains final.

{¶3} As to the matter actually on appeal, case number 19 CR 357, the record contains little factual information regarding the incident which led to Appellant's charges. We can discern that in April of 2019, Appellant was in a relationship with the victim. On April 28, 2019, the victim was at her home in Campbell, Ohio, with her two young sons and her female friend. The two women heard a loud noise in the basement and then saw

Appellant charging upstairs towards them in a threatening manner. (12/18/19 Sentencing Hrg. Tr., p. 4.) In the presence of the victim's 8 year-old son, Appellant began physically assaulting the victim, choking her until she became unconscious. (12/18/19 Sentencing Hrg. Tr., p. 5.) When she regained consciousness and was still lying on the ground, Appellant continued striking her face and body. The victim suffered serious physical injuries, including a large laceration to her chin; a laceration of her tongue; and broken teeth. (12/18/19 Sentencing Hrg. Tr., p. 5.) When police were called to the scene, Appellant fled by car. A search of the surrounding area was conducted and, once spotted, Appellant failed to stop and continued eluding police. He reached speeds of 70 miles per hour in a 25 mile-per-hour zone, nearly striking another vehicle. (12/18/19 Sentencing Hrg. Tr., p. 5.) Appellant entered the Ohio Turnpike, driving through the toll barrier. He drove his automobile at speeds in excess of 130 miles per hour before eventually being apprehended. (12/18/19 Sentencing Hrg. Tr., p. 6.)

{¶4} On May 23, 2019, Appellant was indicted on one count of aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree; one count of felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree; one count of failure to comply with an order or signal of police officer in violation of R.C. 2921.331(B), a felony of the third degree; one count of obstructing official business in violation of R.C. 2921.31(B), a felony of the third degree; and one count of vandalism in violation of R.C. 2909.05(B)(2), a felony of the fifth degree.

{¶5} On June 7, 2019, Appellant entered a plea of not guilty by reason of insanity. The trial court ordered a mental health evaluation. On July 25, 2019, a pretrial hearing was held. The parties stipulated to the finding and conclusion in the evaluation that while

Appellant, "has presented with symptoms of mental disease, these symptoms did not interfere with his knowing the wrongfulness of his acts at the time of the offense." (7/25/19 J.E.)

{¶6} On October 31, 2019, Appellant changed his plea to guilty on all charges. On December 18, 2019, the trial court sentenced Appellant as follows: on count 1, aggravated burglary, a minimum of seven years to a maximum of ten and one-half years of incarceration; on count 2, felonious assault, three years to be served concurrently with count 1; on count 3, failure to comply, one year consecutively to count 1; on count 4, obstructing official business, six months to be served concurrently with count 1. On count 5, vandalism, Appellant was sentenced to six months in prison to be served concurrently with count 1 and with count 4. Appellant was also sentenced at the same hearing to one year in prison for his conviction for failure to comply in case number 19 CR 253, to be served consecutively with count 1 but concurrently with count 3 in case number 19 CR 357.

{¶7} Appellant filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

> SILVER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY SECTION 10, ARTICLE I, OF THE OHIO CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENT OF UNITED STATES CONSTITUTION.

{¶8} The two-part test for an ineffective assistance of counsel claim requires us to consider whether trial counsel's performance was deficient and, if so, whether the

deficiency resulted in prejudice. *State v. White*, 7th Dist. Jefferson No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107. In order to prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Lyons*, 7th Dist. Belmont No. 14 BE 28, 2015-Ohio-3325, ¶ 11, citing, *Strickland* at 694. The appellant must affirmatively prove the alleged prejudice occurred. *Id.* at 693.

{¶9} As both are necessary, if one prong of the *Strickland* test is not met, an appellate court need not address the remaining prong. *Id.* at 697. The appellant bears the burden of proof on the issue of counsel's effectiveness, and in Ohio, a licensed attorney is presumed competent. *State v. Carter*, 7th Dist. Columbiana No. 2000-CO-32, 2001 WL 741571 (June 29, 2001), citing *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999).

{¶10} When a claim for ineffective assistance of counsel is made based on a failure to file an objection or a motion, the appellant is required to demonstrate that the objection or motion, if made, had a reasonable probability of success. If the objection or motion would not have been successful, then the appellant cannot prevail on the ineffective assistance of counsel claim. *State v. Adkins,* 161 Ohio App.3d 114, 2005-Ohio-2577, ¶ 14 (4th Dist.). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *State v. Bradley,* 42 Ohio St.3d 136, 142, fn. 1, 538 N.E.2d 373, quoting *Strickland,* at 693.

{¶11} Appellant challenges the effectiveness of trial counsel on two grounds: (1) a failure to investigate and seek dismissal of the aggravated burglary charge; and (2) failing to present letters of support at sentencing to mitigate his overall sentence.

{¶12} R.C. 2911.11(A) governs the charge of aggravated burglary and provides:

> (A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
>
> (1) The offender inflicts, or attempts or threatens to inflict physical harm on another[.]

{¶13} Appellant argues he did not trespass because he was the victim's boyfriend, lived in the home, had keys to the home, and received his mail at the residence where the offense occurred. He contends that since trespass requires the offender to "knowingly enter or remain on the land or premises of another" and is a required element of 2911.11(A), he could not be charged with aggravated burglary because he lived at the premises. R.C. 2911.21(A). Thus, Appellant's ineffective assistance claim alleges trial counsel was deficient in failing to investigate whether Appellant resided in the home where the offense occurred. He alleges he should not have been charged and could not be convicted of aggravated burglary because the incident occurred in his own home. Moreover, he claims counsel was also deficient in failing to seek a dismissal of the

aggravated burglary charge based on this claim. Appellant concedes that a dismissal of this charge, "may not have changed the end results of other counts" but argues that he may have received a lighter sentence without this additional conviction. (Appellant's Brf., p. 6.)

{¶14} The state responds that Appellant entered a guilty plea on all of the charges, and thus waived any right to challenge counsel's actions because counsel's conduct did not affect the knowing and voluntary nature of his plea.

{¶15} The record reflects that Appellant entered a plea of guilty to the aggravated burglary charge. "Entry of a voluntary guilty plea waives ineffective assistance of counsel claims except to the extent that counsel's performance causes the waiver of Defendant's trial rights and the entry of his plea to be less than knowing and voluntary." *State v. Fatula,* 7th Dist. Belmont No. 07 BE 24, 2008-Ohio-1544, ¶ 9, quoting *State v Kidd,* 2d Dist. Clark No. 03CA43, 2004-Ohio-6784, ¶ 16. A guilty plea represents a "break in the chain of events" that previously occurred in the case. *State v. Spates,* 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (1992). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Id.* Thus, in order to establish counsel's deficiency, Appellant may attack only the plea itself, showing that the advice he received from counsel affected the voluntary, knowing or intelligent nature of the plea. *State v. Fitzpatrick,* 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 77-79.

{¶16} Appellant raises no argument regarding the validity of his plea. His sole claim is that, if counsel had investigated the underlying facts regarding his status as a

resident in the home and filed a motion to dismiss the charge, the charge would have been dismissed. However, Appellant ignores that his guilty plea is a complete admission to all relevant facts. A review of the transcript does not reveal any irregularities in the plea process.

{¶17} The trial court's colloquy in this matter was thorough and complete, fully apprising Appellant of both his constitutional and nonconstitutional rights. Moreover, it is clear from Appellant's responses at the hearing that he understood the nature of the charge of aggravated burglary as well as the possible penalties.

> **THE COURT:** * * * The aggravated burglary is a felony of the first degree. In that matter you can face a period of sentence of between 11 and 16 and a half years. That is discretionary for the court to decide in that range what the court could give you.
>
> * * *
>
> So again, for Count One -- and this is confusing; that's why I want to make sure you understand it -- the maximum is 16 and a half years. The minimum is three years. The range is between 11 and 16 and a half as the maximum. Do you understand that?
>
> **THE DEFENDANT:** Yes, Your Honor.
>
> * * *

THE COURT: Kevin, do you understand what the state [sic] of Ohio alleged in each of these counts against you?

THE DEFENDANT: Yes.

THE COURT: Are you sure?

THE DEFENDANT: Yes.

THE COURT: Because if you're not, I'll have him go over it. I want to make sure you're clear about what they allege you've done.

THE DEFENDANT: I understand.

* * *

THE COURT: All right. So, Kevin, the reason I go through all of this is that I believe the law requires -- I know the law requires me to make sure that someone's plea is made knowingly, intelligently, and voluntarily. What I believe is that to me that means knowingly, do you understand all the allegations the state has made against you in these two matters?

THE DEFENDANT: Yes.

THE COURT: Okay. So you understand what they've indicted you on.

Intelligently means do you understand the rights you are giving up by entering a plea, relieving the state of their burden of proof, not calling any

witnesses, not confronting any witnesses? Do you understand what you're giving up?

THE DEFENDANT: Yes.

THE COURT: It also means do you understand the penalties that may be imposed upon you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And then finally voluntarily. I just want to make sure this is what you want to do. Is that a fair statement?

THE DEFENDANT: Yes.

(10/30/19 Tr., pp. 9, 10, 14, 20-21.)

{¶18} The record is clear that Appellant's guilty plea was made knowingly, intelligently and voluntarily. The evidence presented at sentencing supports the conclusion that Appellant trespassed for purposes of a conviction under the aggravated burglary statute. In her statement the victim explained that she was first alerted to Appellant's presence because of a loud noise in the basement. In gaining access, Appellant caused damage to the home, requiring her to replace doors broken in his intrusion. Appellant's assertion on appeal that he was a resident and had a key to the house is not borne out by the evidence presented regarding the damage caused by his forced entry. Moreover, as the state correctly notes, we have held that for purposes of the statute a trespass may still occur even after an initial lawful entry onto the premises if

the privilege to remain on the premises has been revoked. *State v. Petefish,* 7th Dist. Mahoning No. 10 MA 78, 2011-Ohio-6367, ¶ 22.

{¶19} Appellant next asserts that counsel's failure to present letters of support as mitigation evidence constitutes ineffective assistance. The presentation of mitigation evidence is a matter of trial strategy. *State v. Johnson,* 24 Ohio St.3d 87, 91, 494 N.E.2d 1061 (1986). "It is conceivable that the omission of such evidence in an appropriate case could be in response to the demands of the accused or the result of a tactical, informed decision by counsel, completely consonant with his duties to represent the accused effectively." *Id.*

{¶20} In his argument, Appellant says he provided counsel with two letters, but refers in his brief to only one letter, apparently written by his grandmother. Appellant does not specifically quote the alleged mitigation evidence contained in the letter of support, but claims that it provided information that Appellant suffered from an illness which affected his conduct. It is quite possible that after the original plea of not guilty by reason of insanity was unsuccessful, defense counsel made the tactical decision to forego that theory as a source of mitigation. Moreover, defense counsel did present mitigation evidence. In fact, counsel spoke at length regarding Appellant's troubled juvenile history:

> So one of the things that stands out in the presentence investigation is the defendant's substantial juvenile record. And as much as I understand that Revised Code Section 2929.11, and for that matter 12, look to whether or not the defendant has a juvenile record in terms of aggravating circumstances, I think to a certain extent, that mitigates here. I'll tell you why.

> Inasmuch as I've seen these things, sometimes we have somebody who winds up inside of the juvenile justice system or the adult justice system back of serious mental and emotional issues. And I understand we're not dealing with an NGRI case here, but we are dealing with somebody who has been battling a number of psychological circumstances since youth. I think that's one of the reasons that the offenses are -- came out as ugly as they were.

(12/18/19 Sentencing Hrg. Tr., pp. 12-13.)

{¶21} Thus, trial counsel's decision to focus on Appellant's troubled youth and history of psychological illness, as opposed to a letter from his grandmother, is a viable tactical strategy for mitigation purposes. This record supports a conclusion that Appellant was not deprived of the effective assistance of counsel in this matter.

{¶22} Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> SILVER WAS DENIED HIS DUE PROCESS RIGHTS WHEN THE TRIAL COURT JUDGE DID NOT DISQUALIFY HIMSELF.

{¶23} Appellant contends the trial court judge was biased against him based on statements made by the court at the sentencing hearing in response to defense counsel's use of Appellant's troubled juvenile record as mitigation evidence. Appellant misquotes the transcript in his brief, but in pertinent part it contains the following discussion by the court:

I guess it cuts two ways, Attorney Jones, in that I understand your argument about the juvenile system and his mental health issues. I know them better than anyone in this room, other than maybe Kevin, because I dealt with him, and I tried -- we have a mental health court. We tried numerous things to help him, over and over again, exhaustively. This is different. This is not about equality in the factors that I would maybe take a chance on someone because they're young and hope that I can change them or that they would change so that they would not be a danger to the community. This is about calling it like I see it.

I acknowledge that Kevin has had difficulties and he does have some issues to deal with, but he is a danger to our community, period. He's a danger to the people that are close to him and that he loves; breaking their teeth, breaking their jaw, breaking into their home, terrorizing them. If he would do that to someone he loves, what would he do to someone he doesn't even know?

Well, my answer is clear. He would drive 130 miles an hour, endangering people's lives, breaking through barriers and toll booths. How someone didn't get killed is maybe the biggest surprise to me in this whole case.

I'm not saying he's a bad person. I'm not saying that I wasn't pulling for him, and I did. I'm saying I have to acknowledge what he is. He is a dangerous person. Maybe not by his own accord, maybe so, I don't know anymore, but that's for me to figure out at this point. What's to figure out is

> how to protect the community from him for an amount of time so that no one gets hurt.
>
> The rehabilitation will be up to the State of Ohio. I disagreed with the PSI. It recommends that I consider judicial release in letting him out. I'm not going to do that. I'm giving him a sentence, and that's it. Of course, he can apply, but I'm telling everyone right now I have no intentions of doing that as long as I'm sitting here. I think that would be foolish of me to take a chance on someone who I've taken chances on and has just gotten more dangerous as he's gone.

(12/18/19, Sentencing Hrg. Tr., pp. 18-20.)

{¶24} It is well established that a criminal defendant who has been tried before a biased judge has been denied due process. *State v. LaMar,* 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 34. However, an appellate court is not vested with the authority to disqualify a trial court judge or to void a trial court judgment entry based on a claim of judicial bias. *Paparodis v. Snively,* 7th Dist. Columbiana No. 06-CO-5, 2007-Ohio-6910, ¶ 48. "The Chief Justice of the Supreme Court of Ohio, or [her] designee, has exclusive jurisdiction to determine a claim that a common pleas judge is biased or prejudiced." *Jones v. Billingham,* 105 Ohio App.3d 8, 11, 663 N.E.2d 657 (2d Dist.1995). Therefore, we cannot address Appellant's assigned error as it relates to the disqualification of the trial judge. Moreover, even if we construed Appellant's argument as an assertion that the trial court's sentence was contrary to law based on judicial bias, this record demonstrates no such bias. At sentencing, the trial court judge was discussing

the judge's history in working with Appellant in the past as a juvenile offender while the judge previously served as a magistrate in the juvenile court. Contrary to Appellant's assertion, the statements actually appear to demonstrate the trial court's thoughtful assessment of Appellant's past juvenile history, permitted under the sentencing statutes.

{¶25} Accordingly, Appellant's second assignment of error is without merit and is overruled.

{¶26} For the reasons stated above, Appellant's assignments of error are without merit and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are 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.