[Cite as *State v. Kent*, 2021-Ohio-4593.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

CHRISTOPHER KENT,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0049

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2017 CR 511

BEFORE:
David A. D'Apolito, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

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

Atty. Christopher P. Lacich, Roth, Blair, Roberts, Strasfeld, & Lodge, 100 East Federal Street, Suite 600, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: December 9, 2021

D'Apolito, J.

{¶1} Appellant, Christopher Kent, appeals from the March 13, 2020 judgment of the Mahoning County Court of Common Pleas sentencing him to a total of four years in prison on two counts of gross sexual imposition and labeling him a Tier II Sex Offender following a guilty plea. On appeal, Appellant takes issue with his sentence and with the representation provided by his trial counsel. Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

{¶2} On May 11, 2017, Appellant was indicted by the Mahoning County Grand Jury on five counts: count one, rape, a felony punishable by life in prison, in violation of R.C. 2907.02(A)(1)(b) and (B); and counts two through five, gross sexual imposition, felonies of the third degree, in violation of R.C. 2907.05(A)(4).[1] Appellant was appointed counsel, pleaded not guilty at his arraignment, waived his right to a speedy trial, and was found to be competent to stand trial.

{¶3} Appellant subsequently entered into plea negotiations with Appellee, the State of Ohio. A change of plea hearing was held on December 30, 2019. Appellant withdrew his former not guilty plea and entered a guilty plea to counts two and three, gross sexual imposition, felonies of the third degree, in violation of R.C. 2907.05(A)(4). Appellant understood that he could be sentenced up to five years in prison on each count. The trial court accepted Appellant's guilty plea after finding it was made in a knowing, intelligent, and voluntary manner pursuant to Crim.R. 11. The court dismissed counts one, four, and five, ordered a PSI, and deferred sentencing.

{¶4} A sentencing hearing was held on February 20, 2020**.** After considering the record, the oral statements, the purposes and principles of sentencing under R.C. 2929.11, the seriousness and recidivism factors under R.C. 2929.12, and the guidelines contained in R.C. 2929.13, the trial court concurrently sentenced Appellant to four years

[1] The charges stem from Appellant's involvement in which he engaged in sexual conduct/contact with his minor daughter, S.K., d.o.b. 9/22/2007 ("the victim").

in prison on each count, for a total of four years, with 275 days credit.[2] The court labeled Appellant a Tier II Sex Offender and notified him that post-release control is mandatory for a period of five years.[3]

{¶5} Appellant filed a delayed appeal and raises two assignments of error.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED AND IMPOSED A SENTENCE CLEARLY AND CONVINCINGLY CONTRARY TO LAW, BY FAILING TO GRANT A SENTENCE OF TIME-SERVED/COMMUNITY CONTROL GIVEN HE HAD NO PRIOR RECORD.

{¶6} This court utilizes R.C. 2953.08(G) as the standard of review in all felony sentencing appeals. *State v. Michaels*, 7th Dist. Mahoning No. 17 MA 0122, 2019-Ohio-497, ¶ 2, citing *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1.

{¶7} R.C. 2953.08(G) states in pertinent part:

> (2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> 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 division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section

[2] Appellant voluntarily waived the PSI.

[3] The trial court denied Appellant's subsequent motion for judicial release/suspension of sentence.

> 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.

R.C. 2953.08(G)(2)(a)-(b).

{¶8} Although trial courts have full discretion to impose any term of imprisonment within the statutory range, they must consider the sentencing purposes in R.C. 2929.11 and the guidelines contained in R.C. 2929.12.

{¶9} R.C. 2929.11(A) provides that the overriding purposes of felony sentencing are (1) "to protect the public from future crime by the offender and others"; and (2) "to punish the offender * * * using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." Further, the sentence imposed shall 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).

{¶10} R.C. 2929.12 provides a nonexhaustive list of sentencing factors the trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses. The court that imposes a felony sentence "has discretion to determine the most effective way to comply with the purposes and principles of sentencing." R.C. 2929.12(A). The factors a trial court may consider include the "more serious" factors, such as "[t]he physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim" and "[t]he victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense." R.C. 2929.12(B)(1) and (2). The court may also consider the "less serious" factors, any recidivism factors, and any mitigating factors listed in R.C. 2929.12(C)-(F).

> R.C. 2929.11 does not require the trial court to make any specific findings as to the purposes and principles of sentencing. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31. Similarly, R.C. 2929.12

> does not require the trial court to "use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors." *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000).

State v. Shaw, 7th Dist. Belmont No. 15 BE 0065, 2017-Ohio-1259, ¶ 36.

{¶11} "'The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum or more than minimum sentences.' *State v. King,* 2013-Ohio-2021, 992 N.E.2d 491, ¶ 45 (2d Dist.)." *State v. Burkhart*, 7th Dist. Belmont No. 18 BE 0020, 2019-Ohio-2711, ¶ 16.

{¶12} In *State v. Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, the Supreme Court of Ohio has indicated that the language in *Marcum* is dicta. *Id.* at ¶ 27 ("The statements in *Marcum* at ¶ 23 suggesting that it would be 'fully consistent' with R.C. 2953.08(G) for an appellate court to modify or vacate a sentence when the record does not support the sentence under R.C. 2929.11 or 2929.12 were made only in passing and were not essential to this court's legal holding.") In *Jones,* the Court held that "R.C. 2953.08(G)(2)(b) * * * does not provide a basis for an appellate court to modify or vacate a sentence based on its view that the sentence is not supported by the record under R.C. 2929.11 and 2929.12." *Id.* at ¶ 39. The Court explained that "an appellate court's determination that the record does not support a sentence does not equate to a determination that the sentence is 'otherwise contrary to law' as that term is used in R.C. 2953.08(G)(2)(b)." *Id.* at ¶ 32. Thus, under *Jones*, an appellate court errs if it relies on the dicta in *Marcum* and modifies or vacates a sentence "based on the lack of support in the record for the trial court's findings under R.C. 2929.11 and 2929.12." *Id.* at ¶ 29; *see also State v. Dorsey*, 2nd Dist. Montgomery No. 28747, 2021-Ohio-76, ¶ 17.

{¶13} Pursuant to *Jones*, when reviewing felony sentences that are imposed solely after considering the factors in R.C. 2929.11 and R.C. 2929.12, appellate courts shall no longer analyze whether those sentences are unsupported by the record. Rather, we simply must determine whether those sentences are contrary to law. *See Dorsey, supra,* at ¶ 18.

> A sentence is considered to be contrary to law if it falls outside of the statutory range for the particular degree of offense; if the trial court failed to properly consider the purposes and principles of felony sentencing as enumerated in R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12; or if the trial court orders consecutive sentences and does not make the necessary consecutive sentence finding.

Burkhart, *supra,* at ¶ 12.

{¶14} In this case, Appellant alleges his four-year prison sentence is contrary to law. Appellant stresses he should have instead received time-served/community control because he had no prior record. Appellant maintains he entered a guilty plea with the overtone of innocence due to the potential life sentence he faced. Appellant also claims that the victim's mother (his ex-wife) had an "ulterior motive" against him. (7/14/2021 Appellant's Brief, p. 6).

{¶15} Contrary to Appellant's assertions, his four-year prison sentence is not contrary to law. Appellant entered a guilty plea which the trial court accepted after finding it was made pursuant to Crim.R. 11. At the sentencing hearing, the judge heard from the prosecutor on behalf of the State, from defense counsel on behalf of Appellant, from the victim's mother (Appellant's ex-wife), and from Appellant. The judge concluded by stating the following:

> THE COURT: Thank you. Let the record reflect the defendant was present this date in court for a sentencing hearing and it was held pursuant to Ohio Revised Code 2929.19. The defendant was present, represented by Attorney Zena; the State was represented by Attorney McLaughlin.
>
> The defendant was afforded all his rights pursuant to Criminal Rule 32.
>
> Court has considered the matter, the oral statements made, the victim's statement, and the principles and purposes of sentencing under Ohio Revised Code 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code 2929.12.

The Court finds defendant did plead guilty to two counts of gross sexual imposition, violations of Ohio Revised Code 2907.05(A)(4), felonies of the third degree.

Court further finds defendant is not amenable to community control and prison is consistent with the principles and purposes of sentencing.

Therefore, it's the order of this Court the defendant be sentenced to four years in the Department of Rehabilitation and Corrections, with credit for any time served as of this date, along with any future days in custody while he awaits transportation to the appropriate state institution.

Mr. Kent, when you're released from prison, you will be subject to mandatory post-release control time of five years. If placed on post-release control and you violate any term or condition of that, the time you're on post-release control can be increased, the sanctions against you could be increased, or you can be placed back in prison.

You do have the right to appeal this sentence. If you cannot afford an attorney, one will be appointed to represent you in that appeal.

All fines and costs are suspended.

Mr. Kent, I also have before me a judgment entry entitled Notice of Duty to Register as a Sex Offender. You did go through this with your attorney?

THE DEFENDANT: Yes.

THE COURT: And you understand you must register when being released from prison as a Tier II sex offender for a period of 25 years for every 180 days?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And this is your signature on this document?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Court will accept defendant's signature of the notice of duties.

Is there anything further from the State?

[THE PROSECUTOR]: I calculate jail-time credit at 275 days, Your Honor. Does defense agree?

[DEFENSE COUNSEL]: Agreed.

[THE PROSECUTOR]: Thank you, Your Honor.

THE COURT: Thank you.

[DEFENSE COUNSEL]: Thank you, Your Honor. Nothing further.

THE COURT: Thank you.

(2/20/2020 Sentencing Hearing T.p., p. 14-17).

{¶16} Also, in its March 13, 2020 judgment, the trial court stated:

> The Court has considered the record, oral statements, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12. * * * The Court believes the Defendant is not amenable to community control and that prison is consistent with the purposes of R.C. 2929.11. * * * Defendant has been given notice under R.C. 2929.19(B)(3) and of appellate rights under R.C. 2953.08.

(3/13/2020 Judgment Entry, p. 1-2).

{¶17} The record in this case reflects the trial court gave due deliberation to the relevant statutory considerations. The court considered the purposes and principles of felony sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12.

{¶18} In addition, Appellant was concurrently sentenced to four years in prison following a guilty plea on two counts of gross sexual imposition, felonies of the third degree, in violation of R.C. 2907.05(A)(4). Thus, Appellant's four-year (48-month) sentence is within the statutory range for the felony offenses. *See* R.C. 2929.14(A)(3)(a) ("For a felony of the third degree that is a violation of section * * * 2907.05 * * * of the Revised Code * * * the prison term shall be a definite term of twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.") Also, the record reveals the trial court properly advised Appellant regarding post-release control.

{¶19} Accordingly, because the trial court considered the purposes and principles of felony sentencing under R.C. 2929.11 and balanced the seriousness and recidivism factors under R.C. 2929.12, and because Appellant's four-year prison sentence is within the authorized statutory range for third-degree felonies, his sentence is not contrary to law.

{¶20} Appellant's first assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

PLEA COUNSEL WAS INEFFECTIVE FOR FAILING TO STRONGLY ADVOCATE AS WELL AS PREPARE HIS CLIENT AT TIME OF SENTENCING, WHEN NO EXPLANATION WAS GIVEN AS TO WHY A TIME-SERVED SENTENCE WAS APPROPRIATE.

{¶21} "[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052 (1984).

> In order to demonstrate ineffective assistance of counsel, Appellant must show that trial counsel's performance fell below an objective standard of reasonable representation, and prejudice arose from the deficient performance. *State v. Bradley*, 42 Ohio St.3d 136, 141-143, 538 N.E.2d 373 (1989), citing *Strickland* [*, supra*]. Both prongs must be established: If counsel's performance was not deficient, then there is no need to review for prejudice. Likewise, without prejudice, counsel's performance need not be

considered. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

In Ohio, a licensed attorney is presumed to be competent. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999). In evaluating trial counsel's performance, appellate review is highly deferential as there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Bradley* at 142-143, citing *Strickland* at 689. Appellate courts are not permitted to second-guess the strategic decisions of trial counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

Even instances of debatable strategy very rarely constitute ineffective assistance of counsel. *See State v. Thompson*, 33 Ohio St.3d 1, 10, 514 N.E.2d 407 (1987). The United States Supreme Court has recognized that there are "countless ways to provide effective assistance in any given case." *Bradley* at 142, citing *Strickland* at 689.

To show prejudice, a defendant must prove his lawyer's deficient performance was so serious that there is a reasonable probability the result of the proceeding would have been different. *Carter* at 558. "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 136 at fn. 1, 538 N.E.2d 373, quoting *Strickland* at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding was fundamentally unfair as a result of the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, 651 N.E.2d 965, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

* * *

[A]n ineffective assistance of counsel claim cannot be predicated upon supposition. *State v. Watkins*, 7th Dist. Jefferson No. 07 JE 54, 2008-Ohio-

> 6634, ¶ 15. Likewise, proof of ineffective assistance of counsel requires more than vague speculations of prejudice. *Id.* ¶ 55, citing *State v. Otte*, 74 Ohio St.3d 555, 565, 1996-Ohio-108, 660 N.E.2d 711.

State v. Rivers, 7th Dist. Mahoning No. 17 MA 0078, 2019-Ohio-2375, ¶ 20-23, 27.

{¶22} The extent to which counsel presents mitigation evidence at a sentencing hearing is generally a matter of trial strategy. *State v. Johnson*, 7th Dist. Mahoning No. 20 MA 0008, 2020-Ohio-7025, ¶ 36. "While counsel may advocate for any sentence or diversion, there is no objective requirement that defense counsel request a particular sanction or present arguments in a specific manner." *State v. Cascarelli*, 7th Dist. Mahoning No. 13 MA 145, 2014-Ohio-5403, ¶ 7.

{¶23} Appellant alleges his trial counsel was constitutionally ineffective, "in terms of weak advocacy and preparation," in that he failed to offer a better argument at sentencing. (7/14/2021 Appellant's Brief, p. 12). To the contrary, Appellant failed to establish that a different argument was even available and that if one were, it would have altered the outcome. The record reveals that trial counsel negotiated and litigated Appellant's exposure from a possible life sentence down to a four-year prison term through the plea agreement with the State.

{¶24} At sentencing, trial counsel asked the court to "entertain the thought of time served" for Appellant. (2/20/2020 Sentencing Hearing T.p., p. 11). Trial counsel "provided the Court with a memorandum" and indicated that there were numerous good-character letters submitted on behalf of Appellant by third parties. (*Id.* at 12). Trial counsel noted that Appellant entered into the plea to avoid potentially receiving a much longer and "extremely severe" sentence. (*Id.* at 13). In light of everything, trial counsel "ask[ed] the Court to consider a time-served sentence." (*Id.*)

{¶25} Thereafter, Appellant gave a short statement to the court: "Your Honor, I just want to say that I would never do anything to hurt my daughter. You know, I worked, you know, 20 years as a roofer, I just - - all I ever wanted to do was provide for my family. I mean, it's disgusting to even think that I did that to her." (*Id.*)

{¶26} Thus, the trial court heard from both trial counsel and Appellant at sentencing. Upon consideration, the record establishes that trial counsel's representation

was constitutionally effective and his performance was neither deficient nor prejudicial. Appellant fails to demonstrate ineffective assistance of counsel. *See Strickland, supra.*

{¶27} Appellant's second assignment of error is without merit.

CONCLUSION

{¶28} For the foregoing reasons, Appellant's assignments of error are not well-taken. The March 13, 2020 judgment of the Mahoning County Court of Common Pleas sentencing Appellant to a total of four years in prison on two counts of gross sexual imposition and labeling him a Tier II Sex Offender following a guilty plea 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 to be 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.