

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals Nos. L-08-1114
L-08-1429

Appellee

Trial Court Nos. CR0200703561
CR0200503647

v.

Gregory Kamer

DECISION AND JUDGMENT

Appellant

Decided: November 13, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael E. Narges, Assistant Prosecuting Attorney, for appellee.

Megan K. Mattimoe, for appellant.

* * * * *

ABOOD, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas which sentenced appellant, Gregory Kamer, on two counts of domestic violence and a community control violation.

{¶ 2} In support of his appeal, appellant sets forth three assignments of error.

FIRST ASSIGNMENT OF ERROR

{¶ 3} "APPELLANT DID NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTER HIS GUILTY PLEA BECAUSE THE TRIAL COURT FAILED TO SUBSTANTIALLY COMPLY WITH THE MANDATES SPECIFIED IN THE OHIO RULES OF CRIMINAL PROCEDURE, RULE 11 ('CRIM.R. 11'). SPECIFICALLY, THE TRIAL COURT FAILED TO ADVISE APPELLANT OF THE MAXIMUM PENALTY THE COURT COULD IMPOSE AND INCORRECTLY INFORMED APPELLANT THAT CONSECUTIVE SENTENCES WERE MANDATORY."

SECOND ASSIGNMENT OF ERROR

{¶ 4} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED APPELLANT TO CONSECUTIVE PRISON TERMS. FIRST, CONSECUTIVE SENTENCES ARE NOT REQUIRED UNDER OHIO LAW AND WHEN IMPOSING CONSECUTIVE SENTENCES, THE TRIAL COURT MUST CONSIDER CERTAIN FACTORS. HERE, THOSE FACTORS WEIGH AGAINST CONSECUTIVE SENTENCES. SECOND, THE TRIAL COURT VIOLATED R.C. 2929.19 WHEN IT IMPROPERLY ADVISED APPELLANT THAT IT WOULD IMPOSE CONSECUTIVE SENTENCES, DURING THE COLLOQUY AT APPELLANT'S PLEA HEARING, AND BEFORE SENTENCING."

THIRD ASSIGNMENT OF ERROR

{¶ 5} "APPELLANT'S TRIAL COUNSEL FAILED TO EFFECTIVELY ASSIST APPELLANT IN HIS DEFENSE BECAUSE COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED APPELLANT. FIRST, COUNSEL FAILED TO EXPLAIN TO APPELLANT THAT THE ONLY SUBJECT OF THE PLEA AGREEMENT WAS APPELLANT'S DOMESTIC VIOLENCE CHARGES. APPELLANT RELIED ON THE PLEA AGREEMENT, AS HE UNDERSTOOD ITS TERMS AS EXPLAINED BY COUNSEL, AND WOULD NOT HAVE PLED NO COUNSEL BUT FOR COUNSEL'S ADVICE. SECOND, CONSIDERING THE STATE AGREED NOT TO OBJECT TO CONCURRENT SENTENCING, COUNSEL WAS DEFICIENT FOR FAILING TO ARGUE IN FAVOR OF CONCURRENT SENTENCING. THIRD, COUNSEL FAILED TO ARGUE CERTAIN FACTS IN MITIGATION AS SPECIFICALLY REQUESTED BY APPELLANT. FINALLY, COUNSEL FAILED TO OBJECT TO THE TRIAL COURT'S FAILURE TO COMPLY WITH CRIM.R. 11."

{¶ 6} The undisputed facts that are relevant to the issues raised on appeal are as follows. On March 20, 2006, appellant appeared before Judge James D. Jensen and entered a plea of no contest to one count of theft pursuant to R.C. 2913.02(A)(1) and (B)(2), a felony of the fifth degree. On April 21, 2006, the trial court sentenced appellant to three years of community control.

{¶ 7} On December 7, 2007, appellant appeared before Judge Jensen for hearing on charges that he had violated the terms of the community control. Twice during the hearing, the judge informed appellant that he could serve up to 12 months in prison if he was found guilty of violating his community control. Appellant, thereafter, waived formal hearing and admitted to the violation. The court entered a finding that appellant had violated the terms of his community control and continued sentencing to December 21, 2007, to assess the status of other charges that were pending against appellant.

{¶ 8} On December 10, 2007, appellant was indicted on two counts of domestic violence pursuant to R.C .2919.25(A) and (D)(3), with each count charged as a felony of the fourth degree. Upon consideration of the new charges, Judge Jensen vacated appellant's sentencing hearing for the community control violation and transferred the case to Judge James Bates who had been assigned to appellant's domestic violence case.

{¶ 9} On January 29, 2008, appellant appeared before Judge Bates and entered pleas of no contest to both counts of domestic violence in accordance with a plea agreement in which the state had agreed that it would not object to community control or concurrent sentences on the domestic violence charges.

{¶ 10} The trial court then engaged in a colloquy with appellant in which it discussed certain issues related to sentencing:

{¶ 11} "THE COURT: Your attorney has just entered pleas of no contest to two counts of domestic violence which are felonies of the fourth degree; do you understand that?

{¶ 12} "[APPELLANT]: Yes.

{¶ 13} "THE COURT: Do you understand that each of those carry a possible penalty of anywhere between 6 months to a maximum of 18 months and a discretionary fine up to \$5,000; do you understand that[?]

{¶ 14} "[APPELLANT]: Yes."

{¶ 15} "THE COURT: Do you understand that those sentences could be run concurrently, which means together or they could be run together or consecutively[,] which means one after another; do you understand that?

{¶ 16} "[APPELLANT]: Yes.

{¶ 17} "THE COURT: Do you understand that part of the plea agreement is that the State has no objection to community control or concurrent sentences? Do you understand that's their position? It's my function to actually impose whatever sentence I think is appropriate as relates to these cases; do you understand that?

{¶ 18} "[APPELLANT]: Yes, Your Honor.

{¶ 19} "THE COURT: Have there been any other promises or threats made to you to get you to enter these please [sic] of no contest?

{¶ 20} "[APPELLANT]: No.

{¶ 21} "[THE COURT]: You are presently on probation to Judge Jensen which has been transferred to this Court. Do you understand your pleas today would, in fact, be a violation of the terms and conditions of the community control previously granted to you by Judge Jensen; do you understand that?

{¶ 22} "[APPELLANT]: Yes.

{¶ 23} "THE COURT: Do you understand that the sentences imposed in this case will be in addition to or consecutive with any sentence that's still pending from Judge Jensen's case; do you understand that?

{¶ 24} "[APPELLANT]: Yes.

{¶ 25} "THE COURT: Do you understand that each of these particular offenses also carry with it up to three years of post-release control? * * *

{¶ 26} "[APPELLANT]: Yes."

{¶ 27} Following the colloquy, the trial court found appellant guilty on both counts of domestic violence, ordered a presentence investigation report, and set all matters for sentencing on February 12, 2008.

{¶ 28} At the February 12, 2008 hearing, Judge Bates heard arguments relating to both the community control violation and the domestic violence convictions. The judge noted that he had received and reviewed the presentence investigation report and that he was prepared to proceed with sentencing on both matters. After hearing arguments in mitigation from appellant's attorney, the trial court sentenced appellant to 12 months in prison for violating community control and 14 months in prison on each of the two

counts of domestic violence. The sentences for the domestic violence charges were ordered to be served concurrent to one another but consecutive to the 12 month sentence for the community control violation.

{¶ 29} Appellant argues in his first assignment of error that he did not knowingly, voluntarily and intelligently enter his guilty plea, because the trial court: (1) failed to advise him of the maximum penalty the court could impose; and (2) incorrectly informed him that consecutive sentences were mandatory.

{¶ 30} The underlying purpose of Crim.R. 11(C) is to ensure that courts give criminal defendants enough information to allow them to make an intelligent, voluntary and knowing decision before entering a plea of guilty or no contest to charges that have been placed against them. See *State v. Pate*, 8th Dist. No. 90313, 2008-Ohio-5736, ¶ 4. Crim.R. 11(C) involves protection of both constitutional and non-constitutional rights. See *State v. Garcia*, 6th Dist. No. F-07-018, 2008-Ohio-4284, ¶ 11. Strict compliance with the provisions of Crim.R. 11 is required when constitutional rights are involved; substantial compliance with the provisions of Crim.R. 11 is required when non-constitutional rights are involved. *State v. Pate*, supra. Where "substantial compliance" is required, if, under the totality of the circumstances, it is apparent the defendant subjectively understood the implications of his plea and the rights he was waiving, the plea should not be disturbed on appeal. See *State v. Abuhashish*, 6th Dist. No. WD-07-048, 2008-Ohio-3849, ¶ 33, citing *State v. Nero* (1990), 56 Ohio St.3d 106, 108. We note further that, "[e]ven if the trial court failed to meet this burden, * * * this court

will not overturn the sentence imposed unless appellant demonstrates that he was prejudiced by the court's failure to substantially comply with the rule." *Id.*, citing *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶ 12. In order to show such prejudice, appellant must show that he would not have entered the plea if he had known the consequences. *Id.*

{¶ 31} Crim.R. 11(C)(2)(a) requires that the trial court inform the defendant of the maximum penalty, including any mandatory prison term. *Id.*, at ¶ 34. This mandate does not involve a constitutional right and, therefore, requires substantial compliance with the rule. See *State v. Pate*, *supra*, at ¶ 6. In determining whether or not that requirement was met, "[t]he key is whether the defendant had actual notice of the maximum sentence involved." *State v. Abuhashish*, *supra*, at ¶ 35. Actual notice may be found where, as here, there was a correctly written plea agreement, the appellant was questioned as to whether he understood the agreement, and the appellant was given the opportunity to question any perceived discrepancy between the statements contained in the plea agreement and the statement of the trial court. *Id.*

{¶ 32} Upon review of the record of proceedings in the trial court, it is clear that, contrary to appellant's claim, he was, in fact, advised of the maximum penalties that could be imposed for both the community control violation and the domestic violence offenses. Before accepting appellant's plea on the community control violation, Judge Jensen advised him of the maximum penalty that could be imposed. Before accepting appellant's plea on the domestic violence charges, Judge Bates advised him of the

maximum penalties that could be imposed on those charges and that that sentence would be served in addition to any sentence that would be imposed on the community control violation charge. That this information came to appellant in separate hearings does not constitute a failure of the court to substantially comply with the requirements of Crim.R. 11.

{¶ 33} As to appellant's claim that he was incorrectly informed that consecutive sentences were mandatory, our review of the transcript of the January 29, 2008 plea hearing reveals no such statement by the trial court. While the judge did indicate his intention to impose the sentence on the domestic violence offenses consecutive to any sentence on the community control violation, such statement does not constitute a violation Crim.R. 11.

{¶ 34} In accordance with the foregoing, we find that appellant has not shown that there was a failure of compliance with the requirements of Crim.R. 11 that caused him to be prejudiced in the trial court proceedings and, therefore, appellant's first assignment of error is found not well-taken.

{¶ 35} Appellant argues in his second assignment of error that the trial court abused its discretion when it sentenced him to consecutive prison terms; first, because consecutive sentences are not required under Ohio law and second, because "the trial court violated R.C. 2929.19" when, during the colloquy at appellant's plea hearing, "it improperly advised Appellant that it would impose consecutive sentences."

{¶ 36} The law is clear that trial courts now have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than minimum sentences. See *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, ¶ 7. Courts need only consider the basic purposes and principles of sentencing and determine the most effective way to comply with those purposes and principles. *Id.*; see, also, R.C. 2929.11(A) and (B) (the overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender through reasonable and proportionate sentences); and R.C. 2929.12 (grants the trial court discretion in sentencing and guides that discretion with a nonexclusive list of seriousness factors to consider except where a mandatory sentence is required). Whether a prison sentence within the statutory range shall run consecutively or concurrently is wholly within the trial court's discretion and inherent authority to determine. *State v. Bates*, *supra*, at ¶ 19.

{¶ 37} In this case, appellant argues that the judge's statement at the plea hearing that the sentence on the domestic violence charges would be consecutive to the sentence on the community control violation constitutes proof that the court prematurely and improperly determined appellant's sentence prior to the sentencing hearing. Upon review of the record of proceedings in the trial court, we find that, although the court did state as early as the plea hearing that the sentence on the domestic violence charge would be consecutive to the sentence on the community control violation, the record clearly indicates that the sentence was not imposed until after the court had received and

reviewed the presentence investigation report. The trial court stated in a judgment entry dated February 13, 2008, that, in sentencing appellant, it had considered "the record, oral statements, any victim impact statement and pre-sentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11," and had "balanced the serious and recidivism factors under R.C. 2929.12."

{¶ 38} In accordance with the foregoing, this court finds that the trial court made it clear that it had considered all of the necessary factors in imposing sentence and, therefore, appellant's second assignment of error is not well-taken.

{¶ 39} Appellant argues in his third assignment of error that his trial counsel was ineffective because: (1) counsel failed to explain to appellant that the only subject of his plea agreement was appellant's domestic violence charges, and appellant relied on the plea agreement, as he understood its terms as explained by counsel, and would not have pleaded no contest but for counsel's advice; (2) considering the state agreed not to object to concurrent sentencing, counsel was deficient for failing to argue in favor of concurrent sentencing; (3) counsel failed to argue certain facts in mitigation (specifically, that appellant was suicidal at the time of the offenses), as specifically requested by appellant; and (4) counsel failed to object to the trial court's failure to comply with Crim.R. 11.

{¶ 40} In order to establish a claim for ineffective assistance of counsel, a defendant must demonstrate: (1) that counsel's performance was deficient or unreasonable under the circumstances; and (2) that the deficient performance prejudiced

the defendant. *State v. Kole* (2001), 92 Ohio St.3d 303, 306, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687.

{¶ 41} To show that counsel's conduct was deficient or unreasonable, the defendant must overcome the presumption that counsel provided competent representation and must show that counsel's actions were not trial strategies prompted by reasonable professional judgment. *State v. Sanders*, 3d Dist. No. 1-09-1, 2009-Ohio-5437, ¶ 60. Counsel enjoys a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675. In general, tactical or strategic trial decisions, even if unsuccessful, do not constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558. Instead, the errors complained of must amount to a substantial violation of counsel's essential duties to his client. *State v. Sanders*, supra. Prejudice results when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, citing *Strickland*, 466 U.S. 691. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; *Strickland*, 466 U.S. at 694.

{¶ 42} Appellant argues that, as a result of his counsel's explanation of the terms of the plea agreement, he erroneously believed the agreement to include all charges before the court, including his community control violation.

{¶ 43} A review of the record of proceedings in the trial court clearly indicates that appellant was specifically informed by the trial court that the plea he was entering was as

to the two domestic violence charges, that the state had agreed that it would not object to community control or concurrent sentences and that the sentence on those offenses would be consecutive to the sentence on the community control violation.

{¶ 44} In accordance with the foregoing, this court finds that, even if appellant could show that his counsel failed to adequately explain the plea agreement to him, it was fully explained by the court prior to the acceptance of appellant's plea and there was no resulting prejudice.

{¶ 45} Appellant's next two arguments involve allegations that if different arguments in mitigation of sentence had been made by his counsel at the sentencing hearing, he may have received a more favorable sentence. As indicated above, tactical or strategic decisions, even if unsuccessful, do not generally constitute ineffective assistance. *State v. Carter*, supra.

{¶ 46} Upon consideration thereof, this court cannot find that counsel herein committed a substantial violation of his essential duties to appellant or that there is a reasonable probability that, if counsel had made the arguments that appellant claims he should have made, the results would have been different.

{¶ 47} Finally, appellant argues that trial counsel's performance was deficient because counsel "failed to recognize the trial court's failure to comply with Crim.R. 11." This court has already found in its consideration of appellant's first assignment of error that there has been no showing of a failure of compliance with Crim.R. 11 in the trial court proceedings.

{¶ 48} In accordance with the foregoing, this court finds that appellant's third assignment of error is not well-taken.

{¶ 49} For all of the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Charles D. Abood, J.
CONCUR.

JUDGE

Judge Charles D. Abood, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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