[Cite as *State v. Loar*, 2010-Ohio-1359.]

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

State of Ohio — Court of Appeals No. L-09-1029

Appellee — Trial Court No. CR0200803949

v.

Michael Loar — **DECISION AND JUDGMENT**

Appellant — Decided: March 31, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, Jennifer M. Lambdin and Evy M. Jarrett, Assistant Prosecuting Attorneys, for appellee.

Stephen D. Long, for appellant.

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HANDWORK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas. Appellant, Michael Loar, asserts the following assignments of error:

{¶ 2} "Appellant was denied effective assistance of counsel."

{¶ 3} "The trial court abused its discretion where it sentenced appellant to maximum consecutive sentences."

{¶ 4} The facts underlying appellant's conviction are undisputed. Starting in 2003, Loar began engaging in sexual activity with his ten-year-old daughter by fondling her breasts and either digitally penetrating her vagina or placing objects in the child's vagina. This conduct continued for five years. In 2008, the girl told a friend at church about her father's sexual activities. At that point, the girl's mother, who was married to and resided with appellant and the victim, contacted the police.

{¶ 5} Appellant was arrested and charged with (1) one count of rape, a violation of R.C. 2907.029(A)(1)(b) and (B), a felony of the first degree; and (2) three counts of sexual battery, all violations of R.C. 2907.03(A)(5) and (B) and felonies of the third degree. Appellant waived his right to the presentment of this cause to the Lucas County Grand Jury and entered no contest pleas to all four charges set forth in an Information. The trial court found that him guilty of all four charges and sentenced him to ten years in prison on the conviction for rape, with the serving of this sentence being a mandatory ten years. As to the convictions for sexual battery, the trial court sentenced Loar to five years in prison for each count and ordered that all sentences are to be served consecutively for a total of 25 years of incarceration.

{¶ 6} In his first assignment of error, appellant claims that he received ineffective assistance of counsel because trial counsel's strategy in this case was "self-defeating."

{¶ 7} In *Strickland v. Washington* (1984), 466 U.S. 668, 687, the United States Supreme Court devised a two-part test to determine ineffective assistance of counsel. In order to demonstrate ineffective assistance of counsel, an accused must satisfy both prongs. Id. First, he must show that his trial counsel's performance was so deficient that the attorney was not functioning as the counsel guaranteed by the Sixth Amendment of the United States Constitution. Id. Second, he must establish that counsel's "deficient performance prejudiced the defense." Id. The failure to prove either prong of the *Strickland* two-part test makes it unnecessary for a court to consider the other prong. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, citing *Strickland* at 697.

{¶ 8} Furthermore, a strong presumption exists that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, citing *Strickland* at 689. Thus, in fairly assessing an attorney's performance, a court must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland* at 689.

{¶ 9} Appellant first argues that trial counsel's strategy in advising his client to quickly enter a plea and then asking the first trial judge assigned to this cause to recuse himself, thereby delaying the process, was "deficient and unreasonable." We first observe that there is no evidence in the record of this case showing that appellant's trial counsel ever asked the initial trial judge to recuse himself. There is, however, a

document in the record in which that judge states that he was recusing himself due to a conflict of interest. Thus, even if trial counsel was the individual who brought this conflict of interest to the lower court's attention, it was actually for the benefit of his client rather than prejudicial to his case.

{¶ 10} Moreover, there is no evidence in this record tending to demonstrate that there was any delay in these proceedings due to the recusal. Specifically, the Information was filed on December 18, 2008, and the first trial judge recused himself on December 31, 2008. Appellant entered his no contest plea on January 9, 2009, approximately three weeks after the Information was filed. Again, we can find no prejudice to appellant by this alleged "delay." For these reasons, we find that trial counsel's performance was not deficient in this respect.

{¶ 11} Appellant further urges, however, that trial counsel's performance was ineffective because counsel was aware of the fact that appellant served in Iraq when he was in the military but never investigated appellant's "mental status post-Iraq service." In addition, appellant contends that his counsel failed in his duty to his client because he had family members and appellant's pastor submit letters telling the court that Loar was a good man.

{¶ 12} We can find nothing in the record of the case to indicate that appellant had any mental problems as a result of serving in Iraq. Consequently, trial counsel's failure to investigate appellant's post-Iraq mental status did not constitute the breach of any duty owed by that counsel to his client.

{¶ 13} As to the letters, counsel's strategy was to portray appellant as basically a good man who had made a terrible mistake. While this tactic may have appeared to have had the opposite effect on the trial court, appellant fails to show how that tactic affected his sentence, that is, prejudiced the defense. Notably, after informing the family that their focus should be on helping the victim rather than the offender, the trial judge declared:

{¶ 14} "I will sentence you the way the facts of this case requires me to sentence you. So, I have accepted your statement[s] in mitigation, purely for the statements in mitigation that they are Mr. Loar. I do have a greater concern here for your daughter and the people that will be left here to take care of her, I'm asking them at this point, to think differently. So please accept if there is a way we can minimize any damage that has happened here * * * that's what I'm asking of your family, do you understand that?"

{¶ 15} After appellant responded that he did understand the trial judge's point, she then went on to sentence him pursuant to R.C. Chapter 2929. Thus, we cannot say that having appellant's friends and family file letters on his behalf pointing out his good qualities prejudiced appellant's case. Accordingly, we conclude that trial counsel's representation of his client was not ineffective, and appellant's first assignment of error is, therefore, found not well-taken.

{¶ 16} In his second assignment of error, appellant urges that the trial court abused its discretion in sentencing him to maximum consecutive sentences.

{¶ 17} In deciding whether the trial court erred in imposing a 25 year sentence, we must take a two step approach. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4;

State v. Miller, 6th Dist. No. H-08-029, 2009-Ohio-2933, ¶ 8. First, we must ascertain whether the court below complied "with all applicable rules and statutes in imposing sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶ 4. If the trial court did comply with the applicable rules and statutes, the trial court's decision on sentencing shall be reviewed under an abuse of discretion standard. Id. at ¶ 4. An abuse of discretion means that a trial court's decision is premised on more that an error in law or judgment; rather, it signifies that the court's attitude in reaching that judgment was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St .2d 151, 157, citing *Steiner v. Custer* (1940), 137 Ohio St. 448.

{¶ 18} In the present case, appellant admits that the trial court complied with the relevant rules and statutes and, therefore, his sentence is not contrary to law. Upon a review of the record, we agree. Specifically, the trial court expressly stated that it considered the principles and purposes of sentencing pursuant to R.C. 2929.11, as well as the seriousness and recidivism factors set forth in R.C. 2929.12. Moreover, the trial court appropriately applied mandatory postrelease control of five years. The sentences imposed were within the ranges set forth for rape, a felony of the first degree, and three counts of sexual battery, all felonies of the third degree. See R.C. 2929.14(A)(1) and 2929.14(A)(3). Therefore, appellant's sentence is not clearly and convincingly contrary to law. As a result, the only question before us is whether the trial court abused its discretion in sentencing appellant to the maximum sentences.

{¶ 19} A trial court does not abuse its discretion in rendering a sentence so long as it gives "careful and substantial deliberation to the relevant statutory considerations." *Kalish* at ¶ 20. It is evident from the record that the trial court bore in mind the pertinent statutory considerations. Furthermore, based upon the facts in this case, we cannot conclude that the trial court abused its discretion in imposing the maximum sentences. Appellant engaged in unlawful sexual activity with his daughter for five years and neither sought help for his problem nor informed his family about the situation until he was caught. If his daughter had not told a friend and, as a consequence, her mother learned of appellant's criminal acts, this atrocious circumstance likely would have continued with the father causing his daughter great emotional and physical harm. We cannot say, therefore, that the trial court's attitude in imposing maximum sentences was unreasonable, arbitrary or unconscionable. Appellant's second assignment of error is found not well-taken,

{¶ 20} 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(A).

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.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, P.J.
CONCUR.

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JUDGE