

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	No. 10AP-923
	:	(C.P.C. No. 09CR-08-4744)
Plaintiff-Appellee,	:	No. 10AP-924
	:	(C.P.C. No. 09CR-05-3165)
v.	:	No. 10AP-925
	:	(C.P.C. No. 10CR-04-2477)
Trevaughn L. Lucas,	:	No. 10AP-926
	:	(C.P.C. No. 10CR-06-3523)
Defendant-Appellant.	:	No. 10AP-927
	:	(C.P.C. No. 09CR-08-4852)
	:	
	:	(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on July 12, 2011

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*,
for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for
appellant.

APPEALS from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Trevaughn L. Lucas, appeals from the judgments of the Franklin County Court of Common Pleas convicting him of two counts of burglary,

one count of receiving stolen property, one count of breaking and entering, one count of aggravated burglary, one count of possessing criminal tools, and one count of tampering with evidence. For these convictions, the trial court imposed an aggregate sentence of 17 years incarceration.

{¶2} Appellant's convictions arise out of five separate incidents and are contained in five separate case numbers. The first incident concerns appellant's alleged involvement in a robbery that occurred at 2695 Brownfield Drive ("the McClary residence") on September 24, 2007, at which time appellant was 17 years old and the boyfriend of the victim's granddaughter. It was alleged that on September 24, appellant and the victim's grandson, also a juvenile, waited in the car while two adults entered the home to rob the occupants. Specifically, it was alleged that Beatrice McClary awoke to someone in her bedroom brandishing a gun and instructing her to give him money and drugs. Ms. McClary and her adult daughter, Stephanie Burgess, were taken into a bathroom where they were repeatedly threatened about money and drugs. Additionally, two-year old William was brought from his bedroom, had a gun put to his head, and was threatened to be shot unless the men were given money and drugs. The residence was then ransacked and the men took various items, including guns, ATM cards, and a DVD player. However, the men left when they discovered Terry McClary's Columbus Police Department hat in one of the closets. At this time, the men fled the building and returned to the car whereupon they divided the stolen items among the participants.

{¶3} Though appellant was arrested and charged in juvenile court on October 1, 2007, the charges were dismissed on November 20, 2007. On December 29, 2008, plaintiff-appellee, state of Ohio, charged appellant in juvenile court with one count of

aggravated burglary, one count of aggravated robbery, two counts of kidnapping, and one count of receiving stolen property. On March 24, 2010, appellee moved to relinquish jurisdiction and requested that appellant be bound over for prosecution as an adult in the trial court.

{¶4} The juvenile court held a bindover hearing on April 13, 2010. At the hearing, it was stipulated that: (1) appellant's date of birth was March 1, 1990; (2) there was probable cause for the aggravated robbery, aggravated burglary, and kidnapping charges; and (3) appellant was not amenable to rehabilitation in the juvenile court system and that society demands he be bound over to the common pleas court. Additionally, appellee moved to dismiss the count of receiving stolen property. The parties also agreed to a \$20,000 recognizance bond, and appellant waived a pre-sentence report and mental examination.

{¶5} Based upon the stipulations and after questioning appellant about the rights he was waiving and explaining the hearing process, the juvenile court found that appellant was not amenable to rehabilitation as related to the factors of R.C. 2152.12(D) and (E), and that the safety of society required that he be bound over to the adult system for prosecution. Additionally, the juvenile court ordered a \$20,000 recognizance bond and dismissed the count of receiving stolen property.

{¶6} Appellant waived indictment on these charges and a Bill of Information was filed in the trial court on April 21, 2010 charging appellant with one count of aggravated burglary and one count of robbery. This matter was assigned case No. 10CR-04-2477 and joined other pending felony charges.

{¶7} At the time case No. 10CR-04-2477 was filed, it joined pending case No. 09CR-05-3165, wherein appellant was indicted on May 28, 2009 for one count of receiving stolen property. According to the indictment, on May 5, 2009, appellant possessed credit cards belonging to another that appellant knew or had reasonable cause to believe were obtained through the commission of a theft offense.

{¶8} Also pending was case No. 09CR-08-4744, wherein appellant was indicted on August 7, 2009 for one count of breaking and entering. The indictment alleged that on June 28, 2009, appellant entered an unoccupied structure with the purpose to commit a theft offense.

{¶9} Additionally, case No. 09CR-08-4852 was pending. In that case, appellant was indicted on August 13, 2009 for one count of burglary, one count of theft, and one count of receiving stolen property. The indictment alleged that on July 29, 2009, appellant entered a residence, stole a laptop computer, and possessed a television that he knew or had reasonable cause to believe was obtained through the commission of a theft offense.

{¶10} After the Bill of Information was filed regarding the charges from juvenile court, appellant appeared in the trial court on April 21, 2010. On this date, appellant pleaded guilty to one count of receiving stolen property as contained in 09CR-05-3165, one count of breaking and entering as contained in 09CR-08-4744, one count of burglary as contained in 09CR-08-4852, and one count of aggravated burglary and one count of robbery as contained in 10CR-04-2477. A nolle prosequi was entered for the theft and receiving stolen property counts of 09CR-08-4852. After accepting appellant's guilty pleas, the trial court ordered a pre-sentence investigation ("PSI") and scheduled a

sentencing hearing for June 14, 2010. Appellant remained on bond while awaiting the sentencing hearing. The maximum possible sentence for the offenses was 28 years.

{¶11} Meanwhile, however, a crime occurred on June 6, 2010, resulting in appellant being indicted on June 15, 2010 for one count of burglary, one count of possessing criminal tools, and one count of tampering with evidence. It was alleged that on June 6, Columbus Police received a call about a burglary in progress regarding two men breaking into a home. Appellant was apprehended and while secured in the back of a police cruiser, appellant was observed trying to dispose of property taken from the home. These charges were contained in case No. 10CR-06-3523. On August 10, 2010, appellant pleaded guilty to all three counts as alleged in the indictment. These offenses carried a potential sentence of 14 years. Because the previous sentencing hearing had been continued, this matter was scheduled for sentencing with the four other pending cases.

{¶12} A sentencing hearing was held on August 24, 2010, and appellant was sentenced as follows. In 09CR-05-3165, appellant was sentenced to 12 months, concurrent to 09CR-08-4744, 09CR-08-4852, 10CR-06-3523, and 10CR-04-2477, with 78 days of jail-time credit. In 09CR-08-4744, appellant was sentenced to 12 months, concurrent to 09CR-05-3165, 09CR-08-4852, 10CR-06-3523, and 10CR-04-2477, with 74 days of jail-time credit. In 09CR-08-4852, appellant was sentenced to five years, concurrent to 09CR-08-4744 and 09CR-05-3165, but consecutive to 10CR-06-3523 and 10CR-04-2477, with 78 days of jail-time credit. In 10CR-04-2744, appellant was sentenced to seven years on each count, concurrent to each other and concurrent to 09CR-08-4744 and 09CR-05-3165, but consecutive to 10CR-06-3523 and 09CR-08-

4852, with 31 days of jail-time credit. Lastly, in 10CR-06-3523, appellant was given two five-year sentences and one 12-month sentence, concurrent to each other and concurrent to 09CR-08-4744 and 09CR-05-3165 but consecutive to 10CR-04-2477 and 09CR-08-4852. These sentences resulted in an aggregate sentence of 17 years incarceration.

{¶13} This appeal followed and appellant brings the following single assignment of error for our review:

Appellant was denied effective assistance of counsel as guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

{¶14} In his sole assignment of error, appellant contends he received ineffective assistance of trial counsel. In Ohio, a properly licensed attorney is presumed competent. *State v. Davis*, 10th Dist. No. 09AP-869, 2010-Ohio-4734, ¶12, citing *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Therefore, the burden of showing ineffective assistance of counsel is on the party asserting it. *Id.*, citing *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998-Ohio-343.

{¶15} To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; accord *State v. Bradley* (1989), 42 Ohio St.3d 136. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as

the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. Appellant's failure to satisfy one prong of the Strickland test negates a court's need to consider the other. *Id.*, 466 U.S. at 697, 104 S.Ct. at 2069.

{¶16} In analyzing the first prong under *Strickland*, there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.*, citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104.

{¶17} If appellant successfully proves that counsel's assistance was deficient, the second prong under *Strickland* requires appellant to prove prejudice in order to prevail. *Id.*, 466 U.S. at 692, 104 S.Ct. at 2067. To meet that prong, appellant must show counsel's errors were so serious as to deprive him of a fair trial, "a trial whose result is reliable." *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064. Appellant would meet this standard with a showing "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." *Id.*, 466 U.S. at 694, 104 S.Ct. at 2068.

{¶18} Appellant argues that his trial counsel was ineffective for: (1) waiving a pre-sentence report and mental examination and stipulating that he was not amenable to rehabilitation in the juvenile system; (2) failing to file discovery or pre-trial motions prior to appellant entering guilty pleas to eight felony counts; and (3) ignoring a report from appellant's mother that appellant was "hearing voices and suffering psychological problems as he sat in jail awaiting sentencing." (Appellant's brief at 9.)

{¶19} We first address appellant's contentions regarding the bindover hearing. Juvenile courts possess exclusive jurisdiction over children alleged to be delinquent for committing acts that would constitute a crime if committed by an adult. *In re M.P.*, 124 Ohio St.3d 445, 2010-Ohio-599, ¶11; R.C. 2151.23(A). Pursuant to R.C. 2152.10 and 2152.12, the juvenile court has the duty to transfer a case to the adult criminal system. Here, appellee requested a discretionary bindover, which requires the juvenile court to determine the age of the child and whether probable cause exists to believe that the juvenile committed the act charged. *In re M.P.* at ¶12. If probable cause exists and the child is eligible by age, the juvenile court must then conduct an investigation that includes a mental examination of the child and a hearing to determine whether the child is "amenable to care or rehabilitation within the juvenile system" or whether "the safety of the community may require that the child be subject to adult sanctions," and the consideration of 17 other statutory criteria to determine whether a transfer is appropriate. *Id.*

{¶20} According to appellant, his counsel was ineffective for waiving a pre-sentence report and mental examination. However, pursuant to R.C. 2152.12(C), "[t]he child may waive the examination required by this division if the court finds that the waiver

is competently and intelligently made." The transcript reflects the trial court conducted such an inquiry. The court inquired whether appellant had an adequate opportunity to discuss the agreement with his counsel. The court also explained to appellant the hearing process, including the state's requirement to put on evidence as to each and every element of the charges, the right to cross-examine witnesses, and the right to testify and present witnesses. In addition, the following colloquy occurred:

[The juvenile court]: And you – okay. And as part of that process, if I did find that the State had put on enough evidence for probable cause, I would order what we call a – a full evaluation, what we call a PSI – is a psychological evaluation – social evaluation and look at your history so that I could independently make that decision; you understand that?

[Appellant]: Yes, ma'am.

[The juvenile court]: And you understand that if I accept the stipulation today, you are waiving that right?

[Appellant]: Yes, ma'am.

[The juvenile court]: Alright. And as part of that, you are agreeing that you are not amenable to rehabilitation within our Juvenile System, and that you agree that the safety of our society requires that you be bound over to the Adult System for prosecution of these charges?

[Appellant]: Yes, ma'am.

(Apr. 13, 2010 Tr. 7-8.)

{¶21} Upon review, we find appellant's waiver of the mental examination and pre-sentence report to have been competently and intelligently made. Additionally, there is no evidence in the record to establish that there is a reasonable probability that but for the waiver of a pre-sentence report and mental examination the result of the proceedings would have been different.

{¶22} Appellant next argues his counsel was ineffective for stipulating that he was not amenable to rehabilitation in the juvenile system. In *State v. Allen*, 10th Dist. No. 10AP-487, 2011-Ohio-1757, the parties stipulated that the defendant was not amenable to rehabilitation within the juvenile system and to several factors favoring bindover to the trial court for adult prosecution. For this reason, the defendant argued on appeal that his trial counsel was ineffective. This court disagreed noting that, even without the stipulations, the record supported the trial court's decision ordering the bindover because the factors favoring bindover outweighed the mitigating factors against it. Likewise, in the matter before us, even without the stipulation of appellant's lack of amenability, the record supports the juvenile court's decision ordering bindover.

{¶23} When determining whether to transfer a child to the trial court for adult prosecution, R.C. 2152.12(D) requires that a juvenile court consider the following relevant factors in favor of transfer:

- (1) The victim of the act charged suffered physical or psychological harm, or serious economic harm, as a result of the alleged act.
- (2) The physical or psychological harm suffered by the victim due to the alleged act of the child was exacerbated because of the physical or psychological vulnerability or the age of the victim.
- (3) The child's relationship with the victim facilitated the act charged.
- (4) The child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity.
- (5) The child had a firearm on or about the child's person or under the child's control at the time of the act charged, the act charged is not a violation of section 2923.12 of the Revised Code, and the child, during the commission of the act

charged, allegedly used or displayed the firearm, brandished the firearm, or indicated that the child possessed a firearm.

(6) At the time of the act charged, the child was awaiting adjudication or disposition as a delinquent child, was under a community control sanction, or was on parole for a prior delinquent child adjudication or conviction.

(7) The results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system.

(8) The child is emotionally, physically, or psychologically mature enough for the transfer.

(9) There is not sufficient time to rehabilitate the child within the juvenile system.

{¶24} Additionally, R.C. 2152.12(E) requires that the juvenile court consider the following relevant factors against a transfer:

(1) The victim induced or facilitated the act charged.

(2) The child acted under provocation in allegedly committing the act charged.

(3) The child was not the principal actor in the act charged, or, at the time of the act charged, the child was under the negative influence or coercion of another person.

(4) The child did not cause physical harm to any person or property, or have reasonable cause to believe that harm of that nature would occur, in allegedly committing the act charged.

(5) The child previously has not been adjudicated a delinquent child.

(6) The child is not emotionally, physically, or psychologically mature enough for the transfer.

(7) The child has a mental illness or is a mentally retarded person.

(8) There is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety.

{¶25} The factors in favor of bindover are that appellant's relationship with the victims facilitated the robbery and the robbery occurred as part of organized criminal activity. Additionally, in the 14 months that this matter was pending in the juvenile court, appellant was charged in three additional indictments for crimes alleged to have occurred on May 28, July 29, and August 7, 2009, and this constitutes "any other relevant factor" favoring bindover. R.C. 2152.12(D); *Allen* (commission of another offense while the juvenile case was pending constitutes "any other relevant factor" of R.C. 2152.12(D)).

{¶26} In addition, the record demonstrates appellant's emotional, physical, and psychological maturity, which are also factors favoring a bindover. Further, appellant was six months shy of turning 18 years old when these offenses were committed and 20 years old at the time of the bindover proceedings; thus, it is reasonable to conclude there was insufficient time to rehabilitate appellant in the juvenile system before his 21st birthday. *Allen* (defendant was 17 at the time of the aggravated robbery offenses and 18 when bound over, therefore, it was reasonable to conclude there was insufficient time for rehabilitation in the juvenile system); *State v. Watson* (1989), 47 Ohio St.3d 93, 96.

{¶27} Appellant points out to this court that he was not one of the participants who entered the McClary residence and threatened the occupants at gunpoint, it was not a crime for hire, and he did not personally possess a firearm. While these are mitigating factors, they do not outweigh the number of factors supporting bindover. *Allen* at ¶42.

{¶28} Appellant also asserts there was no substantial physical or psychological harms suffered by the victims because Burgess spoke at appellant's sentencing hearing and stated she does not "think he's a bad guy." (Aug. 24, 2010 Tr. 8.) However, Burgess was only one of the victims involved in this incident and though her statement indicates she and her mother have "no bad feelings about him," her statement gives no indication of whether psychological harm was suffered by any of the other victims.

{¶29} Appellant also contends another factor against bindover is that he "was not apparently under juvenile court control" at the time of the offense. (Appellant's brief at 17.) As appellant notes, there is nothing in the record addressing appellant's prior juvenile history; however, simply because there is no discussion of a prior record does not mean that a prior juvenile record does not exist.

{¶30} Lastly, appellant contends that though a mental examination was not conducted, there is evidence of psychological dysfunction via a letter written by appellant's mother to the sentencing judge. In her letter filed on July 13, 2010, appellant's mother references his diagnosis of "ADHD" at five years old and a visit with appellant in jail in which he disclosed to her his drug use and that "he has begun to hear voices." While the letter references a diagnosis of ADHD, there is no indication appellant was alleged to have been hearing voices at any time prior to the bindover proceedings.

{¶31} Moreover, though appellant contends his trial counsel "ignored" this letter, the transcript of the sentencing hearing reveals the following statements from appellant's counsel:

And the Court will recall when [appellant] was locked up – and I believe on the last case he was locked up on June the 6th of this year, and both the family and I came to the Court to talk

about his really erratic behavior in the jail, if the Court recalls, and we were talking about whether we should have a psychological or psychiatric evaluation of [appellant] and things like that. What it turned out to be was just the effects of going cold turkey in the county jail and the withdrawal that he was going through at the time from the combination of the opiates and the heroin and things like that.

(Aug. 24, 2010 Tr. 14.) Thus, appellant's counsel did not ignore, but, rather, was aware and addressed the issues raised in the letter written by appellant's mother.

{¶32} Though the record presents mitigating factors, we conclude they do not outweigh the greater number of factors supporting bindover. Because the record supports the juvenile court's decision to bind appellant over for prosecution as an adult, his trial counsel was not ineffective for stipulating that appellant was not amenable to rehabilitation in the juvenile system.

{¶33} Appellant next asserts his trial counsel was ineffective for failing to adequately prepare for trial. According to appellant, this is demonstrated by his counsel's failure to conduct discovery and investigate the charges against appellant. According to the records, appellant's initial counsel in case Nos. 09CR-05-3165, 09CR-08-4744, and 10CR-06-3523 did file motions and receive discovery from appellee. Appellant's counsel, of which he now complains, ultimately handled and brought all of these matters to conclusion, and, as contended by appellee, the continuance entries indicate appellant's trial counsel was reviewing discovery. Appellant's counsel filed a sentencing memorandum for appellant that included mitigating factors, such as appellant's childhood and his drug use. Additionally, appellant's counsel stated at the sentencing hearing that he "was on the 2477 [case] since October of 2007," and all of the other cases currently before the court, which indicates that counsel had a long history with appellant. (Aug. 24,

2010 Tr. 13.) Further, appellant's counsel advocated for a short prison term and stated that he believed appellant would benefit from being placed on community control. Despite his counsel's assertions, the trial court was evidently bothered by appellant's continuous pattern of committing offenses as demonstrated in the trial court's comments that appellant "played the system," "thought he was smarter than everybody else," and "took advantage of the situation." (Aug. 24, 2010 Tr. 18-19.) Accordingly, we do not find that appellant's trial counsel failed to conduct discovery, investigate or advocate for his client so as to render ineffective assistance of counsel to appellant on this basis.

{¶34} For all of the foregoing reasons, we conclude appellant has failed to demonstrate that he received ineffective assistance of counsel. Consequently, we overrule appellant's single assignment of error and affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

BROWN and DORRIAN, JJ., concur.
