

[Cite as *State v. Robertson*, 2009-Ohio-6457.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92409

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NORMAN ROBERTSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506919

BEFORE: Gallagher, P.J., McMonagle, J., and Jones, J.

RELEASED: December 10, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Mary Elaine Hall
645 Leader Building
526 Superior Avenue, East
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Steven E. Gall
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant, Norman Robertson, appeals his conviction and sentence in the Cuyahoga County Court of Common Pleas for aggravated robbery and felonious assault. For the reasons stated herein, we affirm.

{¶ 2} Robertson was indicted on February 14, 2008, on six counts of aggravated robbery, three counts of felonious assault, and three counts of kidnapping. All counts contained one- and three-year firearm specifications. Robertson ultimately entered a plea of guilty to Count 1, as amended, for aggravated robbery (R.C. 2911.01(A)(1)) without firearm specifications, and to Count 7 for felonious assault (R.C. 2903.11(A)(1)) without firearm specifications. The remaining counts were nolle. The court indicated that the parties had agreed that if a prison sentence were imposed, there would be no judicial release.

{¶ 3} The trial court sentenced Robertson to a prison term of three years on the aggravated robbery charge and two years on the felonious assault charge. The trial court ordered the terms to run concurrent to each other, for a total prison term of three years. The court also ordered “no early release.” Robertson timely filed this appeal, raising four assignments of error for our review.

{¶ 4} Robertson argues under his first assignment of error that Count 1 of the indictment for aggravated robbery was defective for failing to include

the mens rea element. In support of his argument, Robertson relies on the Ohio Supreme Court decision of *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169.

{¶ 5} This court has declined to extend *Colon* to cases in which the defendant enters a plea of guilty to the indicted charge. *State v. Gaston*, Cuyahoga App. No. 92242, 2009-Ohio-3080; *State v. Cochran*, Cuyahoga App. Nos. 91768, 91826, and 92171, 2009-Ohio-1693; *State v. Hayden*, Cuyahoga App. No. 90474, 2008-Ohio-6279; *State v. Lawrence*, Cuyahoga App. Nos. 90977 and 90978, 2009-Ohio-33. Further, we have rejected the application of *Colon* to a charge of aggravated robbery charged under R.C. 2911.01(A)(1), involving a deadly weapon, because it is a strict liability offense.¹ *State v. Kimbrough*, Cuyahoga App. No. 91928, 2009-Ohio-3377; *State v. Ganaway*, Cuyahoga App. No. 89722, 2009-Ohio-2575; *State v. Ginley*, Cuyahoga App. No. 90724, 2009-Ohio-30; *State v. Peterson*, Cuyahoga App. No. 90263, 2008-Ohio-4239; see, also, *State v. Wharf*, 86 Ohio St.3d 375, 380, 1999-Ohio-112, 715 N.E.2d 172 (holding that “to prove a violation of R.C.

¹ Our conclusion is consistent with the Ohio Supreme Court’s recent holding in *State v. Lester*, ___ Ohio St.3d ___, 2009-Ohio-4225, ___ N.E.2d ___. In *Lester*, the court recognized that “R.C. 2911.01(A)(1), plainly indicated its purpose to impose strict liability as to the element of displaying, brandishing, indicating possession of, or using a deadly weapon.” As such, “the state is not required to charge a mens rea for this element of the crime of aggravated robbery under R.C. 2911.01(A)(1).” *Id.*

2911.02(A)(1), no specific mental state is necessary regarding the deadly weapon element of the offense of robbery”).²

{¶ 6} Accordingly, Robertson’s first assignment of error is overruled.

{¶ 7} Robertson’s second assignment of error provides as follows: “The trial court unlawfully sentenced [Robertson] in violation of the sentencing requirements contained in R.C. 2929.14, to a concurrent prison term of three years for aggravated robbery and two years for felonious assault.”

{¶ 8} Robertson concedes that aggravated robbery and felonious assault are not allied offenses and may be punishable with separate concurrent sentences. Nevertheless, he claims that the trial court should have considered that the offenses were committed as part of the same event. Robertson also argues that even though the firearm specifications were deleted from the aggravated robbery charge, the trial court sentenced him as if a mandatory three-year firearm specification was included in the prison term.

{¶ 9} A review of the record shows that the trial court issued a journal entry that corrected the plea entry to properly reflect that Count 1 for aggravated robbery was amended to delete all firearm specifications. The trial court proceeded to sentence Robertson to a three-year prison term on the

² Appellant’s reliance on *State v. Dzelajlija*, Cuyahoga App. No. 91115, 2009-Ohio-1072, is misplaced because that case did not involve a charge of robbery under R.C. 2911.01(A)(1).

amended charge. Because trial courts “are no longer required to make findings and give reasons for imposing maximum, consecutive or more than the minimum sentences,” we find that Robertson’s sentence is not contrary to law. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at paragraph three of the syllabus. Robertson’s second assignment of error is overruled.

{¶ 10} Robertson’s third assignment of error provides as follows: “The trial court committed plain error when [it] accepted the plea bargain between Assistant Cuyahoga County Prosecutor and the defense attorney waiving [Robertson’s] right to file for a hearing for judicial release pursuant to R.C. 2929.20.”

{¶ 11} Robertson argues that the trial court’s acceptance of the plea bargain condition to waive his right to file for judicial release was unconstitutional and a violation of his statutory rights pursuant to R.C. 2929.20.³ Robertson fails to cite any authority in support of his argument, and he does not argue that his guilty plea was not knowingly, intelligently, and voluntarily made. Eligibility for judicial release is often part of a plea arrangement. It even has been recognized that a trial court need not inform

³ R.C. 2929.20, the statute authorizing judicial release, confers substantial discretion on the trial court.

a defendant about judicial release unless it is part of a plea bargain. *State v. Simmons*, Hamilton App. No. C-050817, 2006-Ohio-5760 (defendant signed a written plea stating he would be ineligible for early release). Accordingly, we find no merit to Robertson's third assignment of error.

{¶ 12} Robertson argues in his fourth assignment of error that his trial counsel provided ineffective assistance of counsel. He references various procedural decisions by counsel; he alleges that his counsel was "not prepared"; and he asserts that his counsel should have filed certain motions and performed otherwise.

{¶ 13} In order to substantiate a claim of ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 122 Ohio St.3d 297, 310, 2009-Ohio-2961, 911 N.E.2d 242, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland*, 104 S.Ct. at 2065. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

{¶ 14} In this case, Robertson has not overcome the strong presumption that his counsel's actions or inactions "might be considered sound trial

strategy.” See *Strickland*, 104 S.Ct. at 2065. In addition, “[i]t is well-established that a guilty plea waives the right to claim the defendant was prejudiced by the ineffective assistance of counsel, except to the extent that the defects complained of caused the plea to be less than knowing and voluntary.” *State v. Szakacs*, Cuyahoga App. No. 92230, 2009-Ohio-5480. Robertson does not argue that his plea was less than knowing and voluntary because of counsel’s alleged errors. Without any evidence in the record that the plea was not voluntary, Robertson cannot meet his burden of proving ineffective assistance of counsel. Therefore, Robertson’s fourth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

**CHRISTINE T. MCMONAGLE, J., and
LARRY A. JONES, J., CONCUR**