

[Cite as *State v. Hicks*, 2018-Ohio-2948.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106538

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LEON HICKS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-614028-A

BEFORE: Stewart, P.J., S. Gallagher, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: July 26, 2018

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MELODY J. STEWART, P.J.:

{¶1} Defendant-appellant Leon Hicks pleaded guilty to endangering children, a felony of the third degree, and disseminating matter harmful to juveniles, a felony of the fourth degree. The court ordered Hicks to serve maximum sentences of 3 years on the endangering children count, and 18 months on the disseminating harmful matter count, and further ordered those sentences to be served consecutively. Hicks appeals, complaining that the court wrongly stated that he had a juvenile record, that it ordered consecutive service based on facts not on the record, and that defense counsel was ineffective for agreeing that the offenses were not allied and should not merge for sentencing.

{¶2} Hicks concedes that the court considered the purposes and principles of felony sentencing set forth in R.C. 2929.11 as well as the R.C. 2929.12 factors guiding the court's discretion in sentencing. He complains, however, that the court based the sentence, in part, on Hicks's having a juvenile record ("Mr. Hicks as a juvenile was several times in the juvenile court, he was adjudicated delinquent on drug trafficking offenses on two different occasions."), but that the presentence investigation report does not contain any reference to a juvenile record. We have reviewed the presentence investigation report, and it refutes Hicks's assertion — the report indicates that Hicks was twice "adjudged delinquent" in separate cases on counts of drug trafficking and possession consistent with the court's statements at sentencing. The court correctly cited Hicks's juvenile record.

{¶3} Hicks also argues that the presentence investigation report contains nothing about his likelihood of recidivism. We reject this assertion because the presentence investigation report not only detailed Hicks’s lengthy criminal history, it specifically stated that he was at a “HIGH Risk Level” of reoffending. And we would add that the lengthy criminal history is itself evidence supporting the court’s conclusions about Hicks’s risk of recidivism. *State v. McCree*, 2017-Ohio-791, 86 N.E.3d 57, ¶ 23 (12th Dist.).

{¶4} Hicks next argues that with respect to consecutive service, the court relied on information outside the record; namely, that the court found that he assaulted the victim “under the victim’s roof in the custody of the victim’s sister who was entrusted with her care and protection.” The court accurately cited information provided in the presentence investigation report.¹ In addition, we note that at the time Hicks entered his guilty plea, the state outlined the same fact to the court, with no objection from defense counsel.

¹ It appears that appellate counsel did not review the presentence investigation report, but may have reviewed a different document that details Hicks’s adult criminal history and his institutional record. That document, which is not styled, does not list Hicks’s juvenile history or the facts underlying the conviction. Nevertheless, the presentence investigation report is a part of the appellate record. *See* R.C. 2953.08(F)(1) (the record to be reviewed on appeal shall include “[a]ny presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed”).

{¶5} Finally, Hicks argues that he was denied the effective assistance of counsel because trial counsel agreed that the offenses of child endangering and disseminating matter harmful to a juvenile were not allied offenses that should merge for sentencing. Tellingly, Hicks does not say why defense counsel wrongly conceded that the counts did not merge for sentencing — he merely states a conclusion without any rationale. We summarily overrule this assigned error. *See* App.R. 16(A)(7). In addition, we note that both the court and counsel below addressed in detail the issue of whether the offenses merged for sentencing. Those discussions indicate that the counts of endangering children and disseminating harmful matter to a juvenile were based on different conduct. The record thus gives no basis for us to conclude that defense counsel violated an essential duty owed to Hicks. *See Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶6} Judgment affirmed.

It is ordered that appellee recover of 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.

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

MELODY J. STEWART, PRESIDING JUDGE

SEAN C. GALLAGHER, J, and
ANITA LASTER MAYS, J., CONCUR

