[Cite as *State v. Ward*, 2018-Ohio-5354.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 106912 and 107160

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DONZELL WARD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-619429-A

BEFORE: Boyle, P.J., Jones, J., and Keough, J.

RELEASED AND JOURNALIZED: December 27, 2018

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MARY J. BOYLE, P.J.:

{¶1} Defendant-appellant, Donzell Ward, appeals his plea, sentence, and sexual predator classification in two appeals.[1] He raises three assignments of error in his first appeal and one assignment of error in his second appeal, which we have combined for ease of discussion:

> 1. Defendant was denied his Sixth Amendment rights when his sentence was based upon judicial factfinding.
>
> 2. Defendant was denied due process of law when the court gave conflicting advice concerning whether the offense was non-probationable.
>
> 3. Defendant was denied effective assistance of counsel as guaranteed by the Sixth Amendment.
>
> 4. The court erred in classifying Donzell Ward a sexual predator.

{¶2} Finding no merit to his assignments of error, we affirm.

I. Procedural History and Factual Background

[1]This court has consolidated the appeals for purposes of hearing and disposition.

{¶3} On August 1, 2017, a Cuyahoga County Grand Jury indicted Ward for one count of rape with one- and three-year firearm specifications and a sexually violent predator specification, one count of gross sexual imposition with one- and three-year firearm specifications, and one count of kidnapping with one- and three-year firearm specifications, a sexual motivation specification, and a sexually violent predator specification. The charges stemmed from an incident that occurred in 2000. According to the police report, which was included as part of the presentence investigation report, the victim was waiting at a bus stop on her way to work when Ward approached her, pointed a gun at her head, and told her to get into his car. He then drove the victim to a parking lot and raped her.

{¶4} In January 2018, Ward agreed to plead guilty to rape with a one-year firearm specification and kidnapping with a sexual motivation specification. In exchange, the state dismissed the count for gross sexual imposition and deleted the remaining specifications for the rape and kidnapping counts.

{¶5} In February 2018, the trial court sentenced Ward to nine years for rape, which was to be served consecutively to a one-year sentence for the firearm specification. As to the kidnapping count, the trial court sentenced Ward to nine years, which was to be served consecutive to the sentences for rape and the firearm specification, giving Ward an aggregate sentence of 19 years and a mandatory 5 years of postrelease control.

{¶6} The trial court then held a sexual offender classification hearing pursuant to H.B. 180 and classified Ward as a sexual predator, requiring Ward to personally register every 90 days for life. The trial court explained that as part of the registration, Ward had to periodically verify his home address, employment, and education and also explained the consequences of failing to properly register or verify those details.

{¶7} It is from these judgments that Ward now appeals.

II. Law and Analysis

A. Trial Court's Plea Explanation

{¶8} In his second assigned error, Ward argues that he was denied due process of law because the trial court contradicted itself when it told him that he could possibly receive community control sanctions for rape during his plea hearing. Because Ward's remaining assignments of error could be rendered moot if his second assigned error concerning his plea is sustained, we will address his assignments of error out of order for ease of discussion.

{¶9} A defendant must enter into a plea knowingly, intelligently, and voluntarily for it to be constitutional under the United States and Ohio Constitutions. *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996), citing *Kercheval v. United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). To ensure the constitutionality of pleas, Crim.R. 11(C) sets forth specific procedures that trial courts must follow when accepting guilty pleas, covering the waiver of constitutional rights and the explanation of nonconstitutional rights. *See State v. Nero*, 56 Ohio St.3d 106, 107, 564 N.E.2d 474 (1990) ("Ohio Crim.R. 11(C) was adopted in order to facilitate a more accurate determination of the voluntariness of a defendant's plea by ensuring an adequate record for review.").

{¶10} The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he or she can make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981). "The standard for reviewing whether the trial court accepted a plea in compliance with Crim.R. 11(C) is a de novo standard of review." *State v. Cardwell*, 8th Dist. Cuyahoga No. 92796, 2009-Ohio-6827, ¶ 26, citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977). "It

requires an appellate court to review the totality of the circumstances and determine whether the plea hearing was in compliance with Crim.R. 11(C)." *Cardwell at id.*

{¶11} Crim.R. 11(C)(2) provides in pertinent part that in felony cases the court may refuse to accept and shall not accept a plea of guilty without first addressing the defendant personally and doing all of the following:

> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
>
> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶12} At the plea hearing, the trial court informed Ward that a conviction for rape is a "felony of the first degree, punishable by 3 to 10 years in prison, up to a $20,000 fine, [and] 5 years of mandatory postrelease control." It then told Ward that "Count 1 [rape] is a mandatory term of prison, so you cannot * * * receive community control on Count 1 under any possibility." Ward said he understood. The trial court then stated,

> If the court gave you what's called a split sentence, so that you went to prison on the mandatory term and then got community control on the balance, then the court could give you a community control sanction on the other count, felony of the first degree, for up to 5 years; but if you violate that sentence, you could receive a prison term.

Ward, again, said he understood.

{¶13} We do not find that the trial court gave Ward conflicting information or "advice" as

to whether his offense was "probationable." The trial court explicitly informed Ward that he was not eligible for community control sanctions, and Ward said that he understood. While the trial court touched upon the possibility of community control sanctions with a "split sentence," the trial court did not tell Ward that he was receiving a "split sentence" or contradict itself as to whether he was eligible for community control sanctions on the rape count. We therefore find that the trial court complied with Crim.R. 11.

{¶14} Accordingly, we overrule Ward's second assignment of error.

B. Judicial Fact-finding

{¶15} In his first assigned error, Ward argues that he was denied his Sixth Amendment rights when the trial court sentenced him based upon its own factual findings. Specifically, Ward argues the trial court engaged in improper judicial fact-finding when it commented on the physical and mental injuries that the victim suffered. He argues that those facts were not included in the indictment or admitted by him and that they are based solely on "the prosecutor's rendition of unrelated facts[.]"

{¶16} In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the United States Supreme Court held that a court cannot enhance a defendant's sentence based on factual findings unless those findings are made by a jury, the defendant stipulates to those facts, or the defendant consents to judicial fact-finding. *Apprendi* at 490; *Blakely* at 310.

{¶17} Based on those decisions, the Ohio Supreme Court invalidated former R.C. 2929.14(B), (C), (E)(4) and 2929.19(B)(2) in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, finding that those subsections violated a defendant's Sixth Amendment rights because they required a trial court to make particular findings before imposing a maximum,

consecutive sentence or more than the minimum sentence. *Id.* at syllabus.

{¶18} The Ohio Supreme Court, however, did not invalidate R.C. 2929.11 and 2929.12, which set forth the purposes and principles of felony sentencing. *Id.* at ¶ 36-42.[2] The court found that while trial courts must carefully consider R.C. 2929.11 and 2929.12 when sentencing defendants convicted of felonies, they "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 the minimum sentences[.]" *Id.* at ¶ 100.

{¶19} Corresponding with *Foster*, we have previously recognized that "R.C. 2929.11 and R.C. 2929.12 do not require judicial fact[-]finding; they direct trial courts to 'consider' certain enumerated factors." *State v. Ross*, 8th Dist. Cuyahoga No. 100708, 2014-Ohio-4566, ¶ 21, citing *State v. Townsend*, 8th Dist. Cuyahoga No. 99896, 2014-Ohio-924; *Foster* at ¶ 42. Specifically, R.C. 2929.11(B) states that a felony sentence "must be * * * commensurate with and not demeaning to the seriousness of the crime and its impact on the victim[,]" and R.C. 2929.12(B)(2) requires a trial court to consider whether "[t]he victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense."

{¶20} Ward argues that the trial court engaged in improper judicial fact-finding when it stated,

> And, you know, for this woman you changed her life that day. She'll never be the same. You altered her destiny that day. You altered her life. You interfered with the plan for her life. You cast a fear on her that she'll never shake. The PSI indicates that her statements are that you threatened to kill her if she told anybody. You threatened to kill her if she didn't cooperate with you. There's no question that you did this by force and by threat.

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[2] The Ohio Legislature amended R.C. 2929.11 in S.B. 66, which was passed in June 2018 and became effective on October 29, 2018. One of the amendments to that statute included adding a third purpose for felony sentencing. In addition to protecting the public from future crime by the offense and punishing the offender, the statute now provides that a sentencing court must consider the promotion of "the effective rehabilitation of the offender[.]" *See* 2018 Am.Sub.S.B. No. 66.

However, the presentence investigation report ("PSI") supports the trial court's statement. The PSI indicates that the victim received counseling for the attack and fears Ward. The PSI also contains the police report of the incident describing the threats of violence that Ward used against the victim. Therefore, we find that the trial court's comments as to the physical and mental injuries that the victim suffered did not constitute impermissible judicial fact-finding. Instead, pursuant to R.C. 2929.11(B) and 2929.12(B)(2), the trial court properly considered the victim's injuries detailed in the PSI as a factor that favored sentencing Ward to 19 years. Accordingly, we find no violation of Ward's Sixth Amendment rights and overrule Ward's first assignment of error.

C. Ineffective Assistance of Counsel

{¶21} In his third assigned error, Ward argues that he received ineffective assistance of counsel because (1) his counsel failed to thoroughly investigate his case, (2) did not object to the prosecutor's statements about the effects the crime had on the victim at sentencing, (3) agreed that the rape and kidnapping counts would not merge, and (4) failed to move for dismissal based on preindictment delay.

{¶22} The defendant carries the burden of establishing a claim of ineffective assistance of counsel on appeal. *State v. Corrothers*, 8th Dist. Cuyahoga No. 72064, 1998 Ohio App. LEXIS 491, 19 (Feb. 12, 1998), citing *State v. Smith*, 3 Ohio App.3d 115, 444 N.E.2d 85 (8th Dist.1981). To gain reversal on a claim of ineffective assistance of counsel, a defendant must show that (1) his "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The first prong of *Strickland*'s test requires the defendant to show "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688.

Strickland's second prong requires the defendant to show "a reasonable probability that but for counsel's errors, the proceeding's result would have been different." *State v. Winters*, 8th Dist. Cuyahoga No. 102871, 2016-Ohio-928, ¶ 25, citing *Strickland*.

{¶23} "A defendant who pleads guilty waives all appealable issues, including the right to assert an ineffective assistance of counsel claim, except * * * on the basis that the counsel's deficient performance caused the plea to be less than knowing, intelligent, and voluntary." *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11, citing *State v. Spates*, 64 Ohio St.3d 269, 595 N.E.2d 351 (1992).

{¶24} Here, none of Ward's underlying bases for his ineffective assistance claim allege that his plea was not knowing, intelligent, or voluntary. *See State v. Barnes*, 8th Dist. Cuyahoga No. 104910, 2018-Ohio-86, ¶ 13, citing *State v. Ramos*, 8th Dist. Cuyahoga No. 104550, 2017-Ohio-934 (defendant waived his ineffective assistance of counsel claim based on preindictment delay because he pleaded guilty and did not contest the plea's validity). Therefore, he has waived his ineffective assistance claim, and we overrule Ward's third assignment of error.

D. Sexual Predator Classification

{¶25} In his fourth assigned error, Ward argues that the trial court erred in classifying him as a sexual predator.

{¶26} Neither party disputes that because Ward committed his crimes in 2000, he was subject to the sentencing statutes in place at that time and the sexual offender classification system under former R.C. Chapter 2950.01, et seq., codified under H.B. 180 and known as "Megan's Law." *See State v. Kahn*, 8th Dist. Cuyahoga No. 104360, 2017-Ohio-4067, ¶ 25 (offenders who committed their offenses prior to January 1, 2008 are subject to the

sexual-offender classification system and hearing requirements under "Megan's Law").

{¶27} Under Megan's Law, there were three classifications for sexual offenders: sexually oriented offender, habitual sex offender, and sexual predator. The main distinctions in the classifications were the reporting requirements: a sexual predator had to register his or her address every 90 days for life; a habitual sex offender had to register his or her address annually for 20 years; and a sexually oriented offender had to register his or her address annually for 10 years. *See* former R.C. 2950.04(C)(2); former 2950.06(B)(1) and (2); and former 2950.07(B)(1) and (2).

{¶28} The "sexually oriented offender" classification is the least restrictive classification. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502, ¶ 9. While it was not defined by R.C. Chapter 2950, the Ohio Supreme Court explained that "a 'sexually oriented offender' is a person 'who has committed a "sexually oriented offense" as that term is defined in R.C. 2950.01(D) but who does not fit the description of either habitual sex offender or sexual predator.'" *Id.*, quoting *State v. Cook*, 83 Ohio St.3d 404, 700 N.E.2d 570 (1998), and *State v. Williams*, 88 Ohio St.3d 513, 728 N.E.2d 342 (2000). The next classification is "habitual sex offender," which is defined as a person who "is convicted of or pleads guilty to a sexually oriented offense and who previously has been convicted of or pleaded guilty to one or more sexually oriented offenses." Former R.C. 2950.01(B). Finally, the most restrictive classification is "sexual predator," which is defined as "a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses." Former R.C. 2950.01(E).

{¶29} Sexual predator classifications under Megan's Law are considered civil in nature. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, syllabus. As a result,

the civil manifest weight of the evidence standard of review applies on appeal. *State v. Nelson*, 8th Dist. Cuyahoga No. 101228, 2014-Ohio-5285, ¶ 8. That standard gives "great deference" to findings of fact, so judgments supported by competent, credible evidence must be affirmed. *Wilson* at ¶ 26. Moreover, the state had the burden of proving by clear and convincing evidence that Ward was a sexual predator. *State v. Hendricks*, 8th Dist. Cuyahoga No. 102365, 2015-Ohio-3035, ¶ 13. "Clear and convincing evidence" is "that measure or degree of proof" that "produce[s] in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St.3d 176, 180-181, 512 N.E.2d 979 (1987), citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954).

{¶30} Ward concedes that he "was convicted of a sexually oriented offense[,]" but argues that "there was insufficient evidence presented showing that he was likely to reoffend sexually" in the future and that he should not be classified as a sexual predator. He points specifically to his criminal history, which he claims shows that "in 18 years, he has never reoffended sexually." Ward also points to the factors listed in former R.C. 2950.09(B)(3), which he believes shows that he was not likely to reoffend. Additionally, because Ward states that this court has the power to modify the trial court's judgment, he seemingly argues that we should reclassify him as a habitual sexual offender, which is the classification he argued for at the hearing before the trial court.

{¶31} In response, the state argues that the trial court was not required to find that a requisite number of factors applied before classifying Ward as a sexual predator. It also argues that several factors, including Ward's previous sexual offense, the impact on the victim, and Ward's criminal history, support the trial court's classification, and it disputes Ward's discussion of the remaining factors.

{¶32} Former R.C. 2950.09(B)(3) set forth factors that a trial court may consider when determining whether an offender should be classified as a sexual predator. Those factors included the age of the offender and criminal record; the victim's age; whether the offense involved multiple victims; whether the offender used drugs or alcohol to impair the victim; if the offender has previously been convicted of any criminal offense; whether the offender participated in any available program for sex offenders; whether the offender demonstrated a pattern of abuse or displayed cruelty toward the victim; any mental illness or disability of the offender; and any other behavioral characteristics that contribute to the sex offender's conduct. *See* former R.C. 2950.09(B)(3)(a)-(j). Although the court must consider the factors set forth in former R.C. 2950.09(B), it is not required to make an individual assessment of those factors nor is one factor or any combination of factors dispositive. *Kahn*, 8th Dist. Cuyahoga No. 104360, 2017-Ohio-4067, at ¶ 28, citing *State v. Caraballo*, 8th Dist. Cuyahoga No. 89757, 2008-Ohio-2046.

{¶33} Ward's own analysis of the factors and argument that the trial court failed to consider the "mitigating factors for a lower classification" are not persuasive. The trial court was not required to "tally up or list the statutory factors in any particular fashion." *State v. Ford*, 8th Dist. Cuyahoga No. 83683, 2004-Ohio-3293, ¶ 7. In fact, "[t]he trial court may place as much or as little weight on any of the factors as it chooses; the test is not a balancing one. Nor does the trial court have to find the majority of the factors to be applicable to the defendant in order to conclude the defendant is a sexual predator." *State v. Butler*, 8th Dist. Cuyahoga No. 86554, 2006-Ohio-4492, ¶ 16.

{¶34} The record shows that the trial court reviewed and considered the statutory factors and the PSI, which detailed the offense, Ward's criminal history, which dated back to 1984, his

family and employment history, and his history of substance abuse. The PSI also included a recidivism risk assessment, which placed Ward at a "high risk level" of recidivism.

{¶35} The record also shows that the trial court additionally considered the STATIC-99 assessment, which "performs an actuarial assessment of an offender's chances of reoffending." *State v. Trem*, 8th Dist. Cuyahoga No. 102894, 2016-Ohio-392, ¶ 14, citing *State v. Colpetzer*, 8th Dist. Cuyahoga No. 79983, 2002-Ohio-967. According to the assessment, Ward scored a four, placing him in the "above-average risk category." The assessment stated that Ward "scored positively on the following items: stranger victim, four or more prior convictions, prior violence conviction; index non-sexual violence conviction; and unrelated victim for a subtotal of five (5)," but that Ward received "a reduction of one point (based on his age at release/current age 49)." The assessment also stated,

> "[Ward] currently presents * * * the following risk factors correlating with sexual offense recidivism.
>
> 1. Any Unrelated Victims — [Ward's] victims were not related.
>
> 2. Any Substance Use — [Ward] is a former substance user who drank regularly and used cocaine around the time of his offenses.
>
> 3. Antisocial Personality Disorder - [Ward] demonstrated traits of an Antisocial Personality Disorder. Specifically, [he] has been convicted of assault, robbery and two sexual offenses.

{¶36} After reviewing the STATIC-99, the trial court stated,

> [W]hat's troubling is that the STATIC-99 does talk about the fact that both of the sexual offenses include abduction, and this case includes certainly serious emotional and physical harm. It also includes threat of a weapon. He does have a prior. The fact that these are cold cases doesn't change the fact that they are multiple forms of the offense.

{¶37} Therefore, we find that the trial court's decision to classify Ward as a sexual predator was supported by competent, credible evidence and was not against the manifest weight

of the evidence.

{¶38} Accordingly, we overrule Ward's fourth assignment of error.

{¶39} Judgment affirmed.

It is ordered that appellee recover from appellant the 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. 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.

MARY J. BOYLE, PRESIDING JUDGE

LARRY A. JONES, SR., J., and
KATHLEEN ANN KEOUGH, J., CONCUR