[Cite as *State v. Franklin*, 2020-Ohio-1597.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 107454
v.	:	
NICHOLAS FRANKLIN,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: APPLICATION DENIED
RELEASED AND JOURNALIZED: April 22, 2020

Cuyahoga County Court of Common Pleas
Case No. CR-17-622587-C
Application for Reopening
Motion No. 534300

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony T. Miranda, Assistant Prosecuting Attorney, *for appellee*.

Nicholas Franklin, *pro se*.

EILEEN T. GALLAGHER, A.J.:

{¶ 1} Nicholas Franklin has filed a timely App.R. 26(B) application for reopening. Franklin is attempting to reopen the appellate judgment, rendered in *State v. Franklin*, 8th Dist. Cuyahoga No. 107454, 2019-Ohio-3759, that affirmed

his plea of guilty to the offenses of involuntary manslaughter (R.C. 2903.04(A)), aggravated burglary (R.C. 2911.11(A)(1)), and also affirmed the consecutive sentences imposed by the trial court. We decline to reopen Franklin's appeal for the following reasons.

I. Standard of Review Applicable to App.R. 26(B) Application for Reopening

{¶ 2} In order to establish a claim of ineffective assistance of appellate counsel, Franklin is required to establish that the performance of his appellate counsel was deficient and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), *cert. denied*, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 767 (1990).

{¶ 3} In *Strickland*, the United States Supreme Court held that a court's scrutiny of an attorney's work must be highly deferential. The court further stated that it is all too tempting for a defendant to second-guess his attorney after conviction and that it would be too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Thus, a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*.

{¶ 4} Moreover, even if Franklin establishes that an error by his appellate counsel was professionally unreasonable, he must further establish that he was prejudiced; but for the unreasonable error there exists a reasonable probability that the results of his appeal would have been different. Reasonable probability, with regard to an application for reopening, is defined as a probability sufficient to undermine confidence in the outcome of the appeal. *State v. May*, 8th Dist. Cuyahoga No. 97354, 2012-Ohio-5504.

II. First Proposed Assignment of Error

{¶ 5} Franklin's first proposed assignment of error is that:

> Franklin should be provided specific performance of the terms of his plea agreement.

{¶ 6} Franklin, through his first proposed assignment of error, argues that appellate counsel failed to argue on appeal the claim that the state of Ohio breached the plea agreement offered in exchange for a plea of guilty to the offenses of involuntary manslaughter and aggravated robbery.

{¶ 7} A review of the transcript demonstrates that the state of Ohio delineated with specificity the offer that would be extended to Franklin upon entering a plea of guilty to the offenses of voluntary manslaughter and aggravated burglary.

> THE COURT: Court's understanding there would be a change of plea. Assistant Prosecutor, can you outline the plea for the record?
>
> ASSISTANT PROSECUTOR: Yes, your Honor. He's been provided two options. After full pre-trial discussions and full discovery, it's the State's understanding defendant will withdraw his formerly entered

plea of not guilty and enter a plea of guilt in option 1, State would be amending Count 1 to involuntary manslaughter, a felony of the first degree, in violation of 2903.04(A). Count 4, aggravated burglary, a felony of the first degree as indicted -- actually we are going to incorporate the victims in Count 5 and 6 into Count 4. So that would be victims C.F., R.K., and T.L. In this case we are not going to provide an agreed recommended range, that was for option 1.

Option 2, it was the same charges of involuntary manslaughter, felony of the first degree for Count 1. Count 4, aggravated burglary, incorporated victims, felony of the first degree with the recommended agreed range of 8 to 17 years.

It's the State's understanding that defendant can opt for no range agreement, so exposure is anywhere from 3 to 22 years, with 6 years being stacked time, it would be 6 to 22 years. Felony of the first degrees are punishable by 3 to 11 years and they do not merge.

This has the approval of our supervisor-in-chief. Thank you.

THE COURT: Count 1, 2903.04 involuntary manslaughter, and Count 4, aggravated burglary adding the victim?

ASSISTANT PROSECUTOR: Yes, both are felonies of the first degree. Thank you, Your Honor.

THE COURT: Defense Counsel, is that your understanding of the plea?

DEFENSE COUNSEL: Yes, it is, Your Honor.

THE COURT: Mr. Franklin, have you understood what the assistant prosecutor said, what the defense counsel has agreed with, is that also your understanding of the plea?

THE DEFENDANT: Yes, your Honor.

Tr.4-5

{¶ 8} Clearly, the record reflects that no unfulfilled promises were made by the state of Ohio with regard to the plea offer made to Franklin. In exchange for Franklin's guilty plea, Count 1 was amended from aggravated murder to involuntary

manslaughter. In addition, the counts of aggravated murder, murder, aggravated burglary, felonious assault, and kidnapping were nolled in exchange for Franklin's plea of guilty. Finally, the state of Ohio did not recommend any sentencing range, which was agreed upon by Franklin. Franklin has failed to establish that he was prejudiced through his first proposed assignment of error.

III. Second Proposed Assignment of Error

{¶ 9} Franklin's second proposed assignment of error is that:

> Count's [sic] 1 and 4 should be merged as allied offenses.

{¶ 10} Franklin, through his second proposed assignment of error, argues that the offenses of involuntary manslaughter and aggravated burglary are allied offenses of similar import and should have merged for the purpose of sentencing. In *State v. Malicke Franklin*, 8th Dist. Cuyahoga No. 107482, 2019-Ohio-3760, this court addressed the issue of whether the offenses of involuntary manslaughter and aggravated burglary were allied offenses of similar import, under identical facts, and held that:

> In the second assignment of error, Malicke argues the trial court erred by failing to merge his convictions as allied offenses. In the third assignment of error, Malicke claims that he was afforded ineffective assistance of counsel because his attorney conceded that his convictions should not merge. R.C. 2941.25(A) provides that "where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import * * * the defendant may be convicted of only one." However, "[w]here the defendant's conduct constitutes two or more offenses of dissimilar import, or where his [or her] conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each * * * the defendant may be convicted of all of them."

R.C. 2941.25(B).

> Malicke argues that he committed Count 1 (attempted murder) and Count 4 (aggravated burglary) by the same conduct. Malicke concedes that he did not object to the trial court's failure to merge offenses. Therefore, he bears the burden of proof to demonstrate plain error on the record. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22. "[E]ven if an accused shows that the trial court committed plain error affecting the outcome of the proceeding, an appellate court is not required to correct it." *Id*. at ¶ 23. In *Rogers*, the Ohio Supreme Court "admonished courts to notice plain error with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Rogers* at *id*.
>
> It is well-established that where counts contain separate victims, the counts do not merge. *See State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 23 ("[T]wo or more offenses of dissimilar import exist * * * when the defendant's conduct constitutes offenses involving separate victims."); *State v. Crawley*, 8th Dist. Cuyahoga No. 99636, 2014-Ohio-921, ¶ 41 ("[S]eparate victims alone established a separate animus for each offense"). Here, Count 1 named victim C.F. Count 4 named three victims — C.F., R.K., and T.L. thus, because the counts name different victims, the offenses are not allied.
>
> Malicke next argues that his counsel was ineffective for failing to argue that Count 1 and Count 4 were allied offenses. In order to establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonable representation and that he or she was prejudiced by that performance. *State v. Hill*, 8th Dist. Cuyahoga No. 106542, 2018-Ohio-4327, ¶ 21, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This court has recognized that where the offenses do not merge, a defendant cannot establish prejudice from his or her trial counsel's failure to request merger. *Hill* at ¶ 22. Having determined Counts 1 and 4 were not allied offenses of similar import, Malicke cannot show that he was prejudiced by his counsel's actions.

State v. Malicke Franklin, supra, ¶ 19.

{¶ 11} Based upon this court's decision in *Malicke Franklin*, we once again find that the offenses of involuntary manslaughter and aggravated burglary are not

allied offenses of similar import. We find no prejudice befell Franklin through his second proposed assignment of error.

IV. Third Proposed Assignment of Error

{¶ 12} Franklin's third proposed assignment of error is that:

> Failure to challenge on appeal the near-maximum sentences imposed by the trial court.

{¶ 13} Franklin, through his third proposed assignment of error, argues that his appellate counsel was defective by failing to argue on appeal that the sentences imposed by the trial court were contrary to law. The doctrine of res judicata prevents further review of the issue of improper sentencing by the trial court because the issue has already been addressed by this court on direct appeal and found to be without merit. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967). Claims of ineffective assistance of appellate counsel in an application for reopening may be barred from further review by the doctrine of res judicata unless circumstances render the application of the doctrine unjust. *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992); *State v. Logan*, 8th Dist. Cuyahoga No. 88472, 2008-Ohio-1934; *State v. Tate*, 8th Dist. Cuyahoga No. 81682, 2004-Ohio-973.

{¶ 14} This court previously held that:

> On appeal, Franklin does not argue that the trial court failed to make the requisite consecutive sentencing findings under R.C. 2929.14(C)(4). Rather, Franklin contends that the record does not support the trial court's findings. According to Franklin, "there was nothing put on the record, no facts at all, that would make this case deserving of a maximum consecutive sentence of 18 years in prison." He further asserts that his lack of a criminal history, his sincere

remorse, and his "minimal" role in the victim's death are factors that support the imposition of concurrent sentences.

Contrary to Franklin's position on appeal, the trial court was not required to place facts on the record or state reasons in support of its consecutive sentence findings. *State v. Johnson*, 8th Dist. Cuyahoga No. 106450, 2018-Ohio-3670, ¶ 49, 119 N.E.3d 914, citing *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659 at ¶ 37. Where the trial court made the requisite consecutive sentencing findings, R.C. 2953.08(G)(2) requires this court to affirm an order of consecutive service unless we "clearly and convincingly" find that the record does not support the court's findings in support of consecutive sentences. *State v. Simmons*, 8th Dist. Cuyahoga No. 107144, 2019-Ohio-459, ¶ 11. "This is an extremely deferential standard of review." *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 21 (8th Dist.).

After careful review of the record in its entirety, we find no basis to conclude that the record does not support the court's findings under R.C. 2929.14(C)(4). In this case, the trial court carefully considered Franklin's familial relationship with the victims, discussed the great harm caused by the multiple offenses, weighed the need to protect the public, and evaluated the proportionality of the punishment to Franklin's conduct. The trial court described the crimes committed by Franklin as "extremely violent" and discussed the ongoing trauma caused to C.F.'s family. The court further rejected defense counsel's characterization of Franklin's involvement in the crimes as being "minimal," stating: "A man [was] beaten to death by three people in front of his fiancée and the other occupants of the home. * * * [The] three of you did it together, you're all equally responsible and that's the way the Court sees it."

On this record, Franklin has not demonstrated that the trial court's findings relied on facts that were demonstrably wrong. *See State v. Perkins*, 8th Dist. Cuyahoga Nos. 106877 and 107155, 2019-Ohio-88, ¶ 18; *State v. Williams*, 8th Dist. Cuyahoga No. 100488, 2014-Ohio-3138, ¶ 13. Instead, Nicholas merely reiterates the mitigation arguments that were previously raised before the court during the sentencing hearing. Thus, Nicholas's position seems to suggest that the trial court abused its discretion by not giving enough weight to the relevant factors he believes weigh heavily in favor of concurrent sentences. However, R.C. 2953.08(G)(2) makes clear that our standard of review is not whether the sentencing court abused its discretion. *See Perkins* at ¶ 17.

> We note that Franklin's lack of a criminal history did not render the imposition of consecutive sentences to be inappropriate in this case. As this court has previously explained, even where a defendant has no criminal history, consecutive sentences may be imposed if the court makes one of the alternative findings under R.C. 2929.14(C)(4)(a) or (b). *State v. Nave*, 8th Dist. Cuyahoga No. 107032, 2019-Ohio-348, ¶ 7. Here, the court found R.C. 2929.14(C)(4)(b) applied, stating that Franklin's commission of the involuntary manslaughter and aggravated burglary offenses caused harm that "is so great or unusual that a single term is not adequate to reflect the seriousness of the conduct." As stated, it cannot be concluded that the record clearly and convincingly does not support this finding given the circumstances of C.F.'s death.
>
> The record further reflects that the trial court considered Franklin's claims of remorse under R.C. 2929.12 when imposing a term of imprisonment on each first-degree felony offense. At the sentencing hearing and again in the final entry of conviction, the trial court expressly stated that it considered all sentencing factors as required by law, including the recidivism factors that were offered by defense counsel for consideration. Thus, while Franklin disagrees with the trial court's decision to exercise its discretion to impose consecutive sentences, we find the trial court fulfilled each of its obligations under the applicable sentencing statutes.
>
> Based on the foregoing, we cannot clearly and convincingly find that the record fails to support the trial court's findings under R.C. 2929.14(C)(4). In addition, the record reflects that the trial court's findings were properly incorporated into the sentencing journal entries as required under *Bonnell*.

State v. Franklin, supra, ¶ 14.

{¶ 15} Res judicata bars further review of the issue of improper sentencing by the trial court. *State v. Williams*, 8th Dist. Cuyahoga No. 107748, 2020-Ohio-378; *State v. Lewis*, 8th Dist. Cuyahoga No. 107552, 2019-Ohio-4974; *State v. Tate*, 8th Dist. Cuyahoga No. 81682, 2004-Ohio-973. We further find that circumstances do not render the application of the doctrine of res judicata unjust.

{¶ 16} Notwithstanding the application of the doctrine of res judicata, we once again find no error associated with the sentences imposed by the trial court. The sentences imposed by the trial court fell within the applicable statutory range, the trial court considered the factors enumerated within R.C. 2929.11 (purposes and principles of felony sentencing) and R.C. 2929.12 (sentencing factors), and the trial court did not rely upon false or inaccurate information. Herein, the record clearly demonstrates that the trial court imposed individual prison terms for the offenses of involuntary manslaughter and aggravated burglary within the prescribed statutory ranges.

{¶ 17} In addition, the trial court also discussed the relevant seriousness factors, the extremely violent nature of the charged offenses, and the serious physical harm caused to the victims pursuant to R.C. 2929.11 and 2929.12. Finally, the record fails to disclose that the trial court relied upon inaccurate or false information. *State v. Tidmore*, 8th Dist. Cuyahoga No. 107369, 2019-Ohio-1529. Franklin was properly sentenced by the trial court and we find no prejudice under the third proposed assignment of error.

{¶ 18} Application denied.

EILEEN T. GALLAGHER, ADMINISTRATIVE JUDGE

EILEEN A. GALLAGHER, J., CONCURS;
LARRY A. JONES, SR., J., DISSENTS

LARRY A. JONES, SR., J., DISSENTING:

{¶ 19} Respectfully, I dissent. The record in this case does not support the imposition of consecutive sentences.

{¶ 20} As the majority mentions, pursuant to R.C. 2929.14(C)(4), the trial court found that consecutive sentences were not disproportionate to the seriousness of Franklin's conduct and to the danger he posed to the public and the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the Franklin's conduct.

{¶ 21} The reasons the trial court gave with regard to the finding that "consecutive sentences are not disproportionate to the seriousness" of Franklin's conduct and to the danger he poses to the public do not support this finding. The court noted that all three defendants' actions resulted in Foster's death and if there had been fewer participants, someone who was present in the home could have stopped the beating. This fact alone, however, has nothing to do with the relative seriousness of Franklin's individual conduct in this case. The court noted that Franklin was present only at the behest of his mother. Consequently, the fact that Franklin participated in the crime tells this court nothing about the proportionality between the consecutive nine-year sentences and the seriousness of the criminal activity underlying those sentences. *See State v. Simons*, 2d Dist. Champaign No.

2003-CA-29, 2004-Ohio-6061, ¶ 35. Moreover, Franklin had no felony prior record.[1]

{¶ 22} The record also does not support the finding that "the harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the offender's conduct."

{¶ 23} Although the parties stipulated at sentencing that the two offenses were not allied offenses of similar import, the fact remains that the criminal conduct in which Franklin engaged to help commit these two offenses occurred within a single episode. Moreover, both the state and the trial court acknowledged that Franklin was present at the scene because of his mother and that, if not for her, the crime probably would have not occurred.

{¶ 24} In addition, while each offense Franklin committed — involuntary manslaughter and aggravated burglary — is serious, neither is made materially more serious by the particular conduct the other offense involves.

{¶ 25} Therefore, I clearly and convincingly find that imposition of consecutive sentences is disproportionate to the seriousness of the conduct in which

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[1]Additionally, courts should consider that lengthy prison sentences do not make the public safer, in part, because "long-term sentences produce diminishing returns for public safety as individuals 'age out' of the high-crime years." Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87:1 UMKC.L.Rev. 121 (2018). In other words, the risk an individual may pose to public safety declines with age and each successive year of incarceration is likely to produce diminishing returns for public safety. *Id*. at 122.

Franklin engaged when he committed these two offenses. Because the record does not support the trial court's finding on this issue, Franklin's two nine-year sentences should be ordered to be served concurrently.