[Cite as *State v. Price*, 2015-Ohio-944.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2013-T-0088**
- vs -	:	
ANTONIO MAURICE PRICE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2012 CR 612.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Antonio Maurice Price, pro se, PID: #A643-347, Lake Erie Correctional Institution, P.O. Box 8000, 501 Thompson Road, Conneaut, OH 44030 (Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the Trumbull County Court of Common Pleas. Appellant Antonio Maurice Price was indicted on one count of aggravated robbery, a first degree felony in violation of R.C. 2911.01(A)(2) & (C); two counts of improperly discharging a firearm at or into a habitation, a second degree felony, in violation of R.C. 2923.161(A)(1) & (C) and one count of felonious assault, a second degree felony, in violation of R.C. 2903.11(A)(2) & (D)(1)(a). All counts carried a firearm specification.

Price entered into a plea agreement with the state and pled guilty to all of the charges. The trial court accepted the terms of the plea deal, including the agreed sentencing, and sentenced Price to 11 years for aggravated robbery and 8 years for the remaining counts, which are to be served concurrently with one another and the aggravated robbery. The trial court merged the firearm specifications into a single specification and sentenced Price for a mandatory three years to be served prior to and consecutively with the aggravated robbery. Thus, Price's total sentence is 14 years. For the reasons that follow, we affirm Price's conviction.

{¶2} Within this appeal, Price's appellate counsel filed a motion to withdraw and a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) indicating that he believed there were not any meritorious issues to argue on appeal. In *Anders*, the United States Supreme Court held that if appellate counsel, after a conscientious examination of the case, finds an appeal to be wholly frivolous, he or she should advise the court and request permission to withdraw. *Id.* at 744. This request to withdraw must be accompanied by a brief citing anything in the record that could arguably support an appeal. *Id.* Further, counsel must furnish his client with a copy of the brief and request to withdraw and give the client an opportunity to raise any additional items. *Id.* Once these requirements have been met, the appellate court must review the entire record to determine whether the appeal is wholly frivolous. *Id.* If the court finds the appeal is wholly frivolous, the court may grant counsel's motion to withdraw and proceed to a decision on the merits. *Id.* If, however, the court concludes the appeal is not frivolous, it must appoint new counsel for the client. *Id.*; *see also Penson v. Ohio*, 488 U.S. 75, 83 (1988).

{¶3} Price’s appellate counsel raised a possible issue of whether Price’s trial counsel was ineffective for allowing Price to enter into a plea deal where Price pled guilty to the indicted charges, as opposed to pleading guilty to a lesser-included offense, and that Price agreed to serve the maximums on each of his counts. Ultimately, Price’s appellate counsel concluded, based upon the limited record, any information there were no errors in entering the plea or any indication that had counsel acted differently the outcome would have differed.

{¶4} In evaluating ineffective assistance of counsel claims, Ohio appellate courts apply the two-part test enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). First, it must be determined that counsel's performance fell below an objective standard of reasonableness. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. Trial counsel’s decisions on strategy and trial tactics are granted wide latitude in professional judgment, and therefore debatable trial tactics and strategies do not constitute ineffective assistance of counsel. *State v. Gau*, 11th Dist. Ashtabula No. 2005-A-0082, 2006-Ohio-6531, ¶35, citing *Strickland* at 689; *State v. Phillips*, 74 Ohio St.3d 72, 85 (1995), citing *State v. Clayton*, 62 Ohio St.2d 45, 49 (1980). Second, it must be shown that prejudice resulted. *Bradley*, 42 Ohio St.3d 136. To demonstrate prejudice, a defendant must establish there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at paragraph three of the syllabus. *See also State v. Woodard*, 11th Dist. Ashtabula No. 2009-A-0047, 2010-Ohio-2949, ¶11.

{¶5} The record does not support a claim for ineffective assistance of counsel for failure to request a lighter sentence for Price. As to the alleged deficiency of trial counsel, there is no evidence indicating one way or the other whether Price's trial counsel requested a lighter sentence or not. A silent record on this matter does not mean no efforts were made as it is possible that Price's trial counsel did try to get a plea deal, but the prosecution refused to offer anything less. If anything, Price's plea deal could be the result of leniency. Price's agreed sentence resulted in him serving time for aggravated robbery and the remaining second degree felonies *concurrently* with one another and to the aggravated robbery. Had Price gone to trial and been found guilty, he might have faced a higher sentence if the evidence convinced the trial court to sentence him consecutively on any of the counts Price was sentenced to concurrently.

{¶6} Even if trial counsel had not requested a lighter sentence and such failure constituted deficient performance, the record does not indicate Price was prejudiced. The prosecution was under no obligation to agree to giving Price a better deal or a lower sentence and there is no way of knowing what Price's sentence would have been had he gone to trial. Therefore, this argument has no merit.

{¶7} Price also submitted a pro se briefing raising two issues for review. As his first assignment of error, Price asserts:

{¶8} "The trial court abused its discretion when it violated appellant's right to due process and equal protection of the law under the VI and XIV amendments to the United States Constitution and under Article I Sections 10 and16 of the Ohio Constitution."

{¶9} Within this assignment, Price claims that: (1) the trial court did not make the requisite findings pursuant to R.C. 2929.14(B) that sentencing him to the shortest prison term would demean the seriousness of the offense, (2) the trial court failed to consider the recidivism and mitigating factors in R.C. 2929.12, (3) the trial court failed to consider sentencing provisions, specifically R.C. 2925.02, 2929.11, 2929.12, 2929.13, 2929.14, 2929.15 and 2929.19, at his sentencing hearing and instead only "incorporated that notice into its journal entry," (4) the trial court denied him equal protection of the law because a co-defendant received a lighter sentence than him.

{¶10} In reviewing felony sentences, this court no longer uses the standard of review in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912 and instead uses R.C. 2953.08(G)(2). *State v. Long*, 11th Dist. Lake No. 2013-L-102, 2014-Ohio-4416, ¶71. R.C. 2953.08(G)(2) states:

{¶11} "The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

{¶12} "The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

{¶13} "(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

{¶14} "(b) That the sentence is otherwise contrary to law."

{¶15} Furthermore, because the trial court sentenced Price in accordance with the jointly recommended sentence, our review is further limited by R.C. 2953.08(D)(1) which states in pertinent part that "[a] sentence imposed upon a defendant is not subject to review * * * if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." Thus, as a threshold matter, our review is limited to determining whether Price's sentence was "authorized by law." If we determine that Price's sentence was not authorized by law, then R.C. 2953.08(D)(1) does not limit our review and we can consider the full range of possible sentencing errors. We conclude, however, that Price's sentence was authorized by law.

{¶16} For a sentence to be authorized by law, it is not enough that the sentence fell within the statutory range; rather, the trial court must have complied with "all mandatory sentencing provisions." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶20. As to what constitutes a mandatory sentencing provision, the Ohio Supreme Court held that requirements concerning post-release control (former R.C. 2929.19(B)(3)(c)) or required findings for imposing consecutive sentences (former R.C. 2929.14(D) and (E)) were mandatory sentencing provisions. *Id.* However, the Ohio Supreme Court also stated: "Our holding does not prevent R.C. 2953.08(D)(1) from barring appeals that would otherwise challenge the court's discretion in imposing a

sentence, such as whether the trial court complied with statutory provisions like R.C. 2929.11 (the overriding purposes of felony sentencing), 2929.12 (the seriousness and recidivism factors), and/or 2929.13(A) through (D) (the sanctions relevant to the felony degree) or whether consecutive or maximum sentences were appropriate under certain circumstances." *Id.*, ¶22.

{¶17} In regard to Price's first argument that the trial court did not make the requisite findings pursuant to R.C. 2929.14(B), this argument is without merit. The current version of R.C. 2929.14(B) does not require the trial court to make any findings. Rather, that subsection provides a complex list of sentences that a trial court must impose if a defendant pleads guilty or is convicted of a felony and pleads guilty to or is convicted of certain specifications. R.C. 2929.14(B). Therefore, the trial court did not err.

{¶18} Price further argues that the trial court did not consider various mitigating circumstances in accordance with R.C. 2929.12. Per *Underwood* and R.C. 2953.08(D)(1) we are barred from reviewing this claim. *Underwood*, ¶22.

{¶19} Price also argues that although the trial court considered R.C. 2925.02, 2929.11, 2929.12, 2929.13, 2929.14, 2929.15 and 2929.19 in its sentencing entry, it erred by not considering those sentencing provisions at his sentencing hearing. As to R.C. 2929.11, 2929.12, and 2929.13 we cannot review the trial court's consideration of these sentencing provisions. *Id.* As for R.C. 2929.14 and 2929.15, there is nothing in those provisions that requires the trial court to take a certain action at the sentencing hearing. As for the last provision, we refuse to consider Price's argument. App.R. 16(A)(7) requires an appellant's brief to provide "[a]n argument containing the

contentions of the appellant with respect to each assignment of error presented for review and *the reasons in support of the contentions*, with citations to the authorities, statutes, and parts of the record on which appellant relies." (Emphasis added.) It is not an appellate court's duty to guess the arguments of an appellant. *Kuper v. Halbach*, 10th Dist. Franklin No. 09AP-899, 2010-Ohio-3020, ¶86. Here, Price has asserted without explanation that the trial court did not comply with R.C. 2929.19, which contains all of the requirements that a trial court must perform at a sentencing hearing. It is not a simple statute; rather, it is moderately complex. Although we are aware that as an incarcerated individual, Price does not have the opportunity for oral argument, we emphasize that the burden was on Price to identify the specific parts of R.C. 2929.19 the trial court failed to comply with.

{¶20} Finally, Price's argument that his sentence violates the Equal Protection Clause because a co-defendant received a lighter sentence is without merit. *State v. Beaver*, 11th Dist. Trumbull No. 2011-T-0037, 2012-Ohio-871, ¶74.

{¶21} The first assignment is without merit.

{¶22} As his second assignment, Price asserts:

{¶23} "Appellant Antonio Price received ineffective assistance of trial counsel under the VI and XIV Amendments to the United States Constitution and under Article I Section 10 and 16 of the Ohio Constitution when counsel failed to investigate the facts surrounding the case; withheld evidence; waived the PSI; and negotiated a plea agreement without first discussing it with the appellant."

{¶24} Within this assignment, Price argues that (1) his trial counsel should have tried to get a lighter sentence for him, (2) his trial counsel should have not waived the

PSI because he was a first time offender, (3) his trial counsel should have investigated his claims that his felonious assault was an accident and consequently, he lacked the mens rea to commit felonious assault, (4) his trial counsel withheld photos, statements, hospital records, audio recordings and video recordings, (5) that his trial counsel was racially biased against him and coerced him into entering the plea deal, (6) that trial counsel incorrectly assured him that he would only serve 7 years, when his plea agreement was 14 years.

{¶25} As to the first argument, Price argues that his trial counsel "[w]ith all of her years of special training" as a criminal defense attorney, she should have "handled this matter in a more professional manner with her client's best interest at heart [and] should have requested the court for a lighter sentence * * *." Assuming, without deciding, that trial counsel's alleged actions were deficient, there is no indication that requesting a lighter sentence would have resulted in a lighter sentence as the requests may have been denied by the prosecutor or trial court. Therefore, Price has not demonstrated the necessary prejudice under *Strickland*.

{¶26} As to the second argument concerning the waiving of the PSI, Price undermines his claim of deficient performance by disclosing that his attorney wanted to waive the PSI in order to hide gun specifications from the trial court that if disclosed would have resulted in a higher prison sentence. Accordingly, Price admits there was a strategic reason to waive the PSI making this argument meritless.

{¶27} As to the third argument, concerning whether trial counsel properly investigated defenses to some of the charges, Price has waived these arguments by pleading guilty. As the U.S. and Ohio Supreme Courts have explained "'a guilty plea

represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [*v. Richardson* (1970), 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763].'" *See State v. Spates*, 64 Ohio St.3d 269, 272 (1992), quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Here, Price has not argued that trial counsel's alleged improper investigation demonstrated his plea was not voluntary or intelligent; rather, he claims further investigation would have enabled trial counsel to negotiate a better deal. Even assuming that were true, by pleading guilty Price has waived any argument concerning his lack of guilt for his convictions.

{¶28} As to the fourth argument regarding Price's trial counsel allegedly withholding evidence from him, Price does not elaborate on what evidence his trial counsel allegedly withheld. Therefore, we do not evaluate this argument pursuant to App.R. 16(A)(7). Moreover, Price does not point to anywhere in the record where his trial counsel allegedly took these actions. Because the evidence of such misconduct lies outside the record, we would also not evaluate the claim on direct appeal. *State v. Ishmail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus. For Price to succeed on this claim, he would have to introduce evidence on the matter through a petition for post-conviction relief.

{¶29} As to the fifth and sixth arguments, Price argues his trial counsel was racially biased against him and that his trial counsel coerced him into the plea. Specifically Price argues that his trial counsel told him that "you [Price] have no chance in the court being a black man and if you want to go to trial, I'm done with it." According to Price, this alleged statement meant that his trial counsel would withdraw from the case if Price exercised his right to a jury trial. Furthermore, Price argues that his counsel misinformed him about the length of time he would serve in prison. Price claims that he was sentenced to 12 years but that his trial counsel told him that he will only "do" 7 years. Although these allegations are concerning and, if true, might demonstrate ineffective assistance of counsel, none of these allegations were part of the record. Thus, we cannot evaluate this claim on direct appeal. *Id.* For Price to argue his plea was not made knowingly, intelligently or voluntarily on these facts, he needs to raise those arguments in a petition for post-conviction relief.

{¶30} Because trial counsel was not deficient, considering Price's remaining arguments on the prejudice prong of *Strickland* is moot.

{¶31} The second assignment of error is without merit.

{¶32} Upon our own review, we find there are no non-frivolous issues an attorney could raise on appeal.

{¶33} The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.