[Cite as *State v. Smith*, 2016-Ohio-7153.]

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. 2015-T-0079**
- vs -	:	
LARRY SMITH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2014 CR 00387.

Judgment: Affirmed.

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

Richard E. Hackerd, 231 South Chestnut Street, Ravenna, OH 44266 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Larry Smith, appeals from the May 19, 2015 judgment of the Trumbull County Court of Common Pleas, sentencing him to 36 months in prison for attempted felonious assault following a guilty plea. On appeal, appellant alleges his trial counsel was ineffective because she did not review and argue the PSI, thereby undermining confidence in the sentence imposed. For the reasons stated, we affirm.

{¶2} On June 23, 2014, appellant was indicted by the Trumbull County Grand Jury on one count of felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(1) and (D)(1)(a). Appellant pleaded not guilty at his arraignment.[1]

{¶3} On November 20, 2014, appellant appeared in court with his counsel. Appellant withdrew his former not guilty plea and entered an oral and written plea of guilty to a lesser count as charged in the indictment, to wit: one count of attempted felonious assault, a felony of the third degree, in violation of R.C. 2923.02(A) and (E) and 2903.11(A)(1) and (D)(1)(a). The plea agreement did not contain a recommendation regarding sentence. Rather, it stated that appellant was to undergo a PSI, was eligible for probation, and faced a penalty of up to 36 months in prison. Appellant stated he reviewed the plea agreement with his attorney and was satisfied with her representation.

{¶4} A sentencing hearing was scheduled for February 5, 2015. However, appellant failed to appear and the trial court issued a capias for his arrest.

{¶5} Thereafter, appellant appeared with his counsel for the re-scheduled sentencing hearing on May 14, 2015. Appellant did not reference the victim nor apologize for his behavior. Rather, appellant indicated he had completed various sessions at Community Solutions, was enrolled at Trumbull Business College, and desired to get on with his life and take care of his children.

1. Appellant was represented by a total of three attorneys during different periods of time throughout the trial proceedings.

{¶6} The following exchange occurred among the trial judge, defense counsel, and the prosecutor at the sentencing hearing regarding the PSI prepared by the Adult Probation Department.[2]

{¶7} "THE COURT: Court has reviewed the presentence investigation prepared by the Adult Probation Department. Counsel, have you had an opportunity to review that?

{¶8} "[DEFENSE COUNSEL]: No, Your Honor. I don't believe it's necessary.

{¶9} "THE COURT: Either side have anything else to present?

{¶10} "[THE PROSECUTOR]: No.

{¶11} "[DEFENSE COUNSEL]: No, Your Honor."

{¶12} The trial court went on to state the following in open court:

{¶13} "The Court makes the following specific findings pursuant to the recommendation by the Adult Probation Department: The defendant has a prior felony conviction, five prior misdemeanor Domestic Violence convictions, has not responded favorably to sanctions previously imposed, has shown no genuine remorse, committed this offense while on probation in the Warren Municipal Court for Domestic Violence in Case No. 13-CRB-622, has caused serious physical harm to the victim, has failed to appear for a NEOCAP assessment intake interview and also failed to appear for sentencing until he was arrested and given a capias to be in court."

{¶14} Neither party alleged that any corrections to the PSI were necessary nor objected to the trial court's foregoing recitation from the PSI.

2. The PSI reveals the assessment that appellant is a high risk to reoffend and was not amenable to any known community control sanctions.

{¶15} On May 19, 2015, the trial court sentenced appellant to 36 months in prison and notified him that post-release control is mandatory for three years. On appeal, appellant raises the following assignment of error:

{¶16} "Defendant's trial counsel was ineffective when she failed to read and argue the presentence investigation which undermines confidence in the sentence imposed."

{¶17} The Sixth and Fourteenth Amendments to the United States Constitution guarantee that criminal defendants must be afforded the right to the assistance of counsel before they can be validly convicted and punished by imprisonment. *State v. Victor*, 11th Dist. Geauga Nos. 2014-G-3220 and 2014-G-3241, 2015-Ohio-5520, ¶18, quoting *Village of Highland Hills v. Nicholson*, 8th Dist. Cuyahoga No. 100577, 2014-Ohio-4671, ¶11, citing *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Implicit in the right to counsel is the right to competent counsel. "An attorney has a duty to zealously represent a criminal defendant." *State v. Henry*, 11th Dist. Lake No. 2007-L-142, 2009-Ohio-1138, at ¶59.

{¶18} "'In order to prevail on an ineffective assistance of counsel claim, a petitioner must satisfy the two-prong test set forth in *Strickland v. Washington* (1984), 466 U.S. 668 * * * (* * *). * * * Thus, appellant must show that counsel's performance was deficient and "must also show prejudice resulting from the deficient performance."'" (Citations omitted.) *State v. Kirschenmann*, 11th Dist. Portage Nos. 2014-P-0031 and 2014-P-0032, 2015-Ohio-3544, ¶16. *See Henry*, *supra*, at ¶50-59; *State v. Peoples*, 11th Dist. Lake No. 2005-L-158, 2010-Ohio-2523, ¶17-30.

{¶19} In this case, appellant alleges his trial counsel provided ineffective assistance. He asserts that if his counsel would had reviewed and argued the PSI, she would have found two "errors": (1) that he had only four, not five, prior misdemeanor domestic violence convictions; and (2) that he was unable, not unwilling, to keep a NEOCAP assessment appointment because he had been arrested for failure to pay child support and could not attend. Appellant asserts these "errors" are not in the record.

{¶20} The PSI and the facts contained therein are a part of the record in this case. A review of the PSI lists, inter alia, one prior felony domestic violence conviction, three prior misdemeanor domestic violence convictions, one prior unspecified domestic violence conviction, and one prior misdemeanor domestic violence offense which was dismissed.[3] Also, the PSI reveals that the probation officer's recommendation included the fact that appellant "failed to appear" for the NEOCAP intake interview based upon a letter from the Community Services Administrator that appellant "did not appear" for a NEOCAP intake interview. If appellant believed there were any factual inaccuracies in the PSI, R.C. 2951.03(B) provided a mechanism for him to raise that issue.

{¶21} R.C. 2951.03(B)(2), "Presentence investigation report in felony case," states: "Prior to sentencing, the court shall permit the defendant and the defendant's

3. Specifically, the PSI lists the following: "8-10-08 (Age 25) Domestic Violence (M1) Warren P.D. War.Muni.Ct. #08-CRB-1871: On 6-23-09, P/G. Fine & cost; 180 days jail, 157 susp.; 2 years NR probation"; "4-14-10 (Age 26) Domestic Violence (F3) Warren P.D. T.C.C.C.P. #10-CR-341: On 3-21-11, P/G to amend indictment, Dom. Viol. (M1). On 6-6-11, sent. to T.C.J. 6 months, susp. all but 90 days; 2 years probation; no contact with victim. On 9-24-12, P.V. 6 months T.C.J."; "1-1-10 (Age 26) Domestic Violence (M1) Warren P.D. War.Muni.Ct. #10-CRB-03: On 2-4-10, P/G. 180 days jail, 160 susp., 20 days credit; 5 years probation; fine & cost."; "3-30-10 (Age 26) Domestic Violence (M1) Warren P.D. War.Muni.Ct. #10-CRB-580: On 5-18-10, dismissed."; "7-19-10 (Age 27) Domestic Violence (M1) Warren P.D. War.Muni.Ct. #10-CRB-1397: On 9-7-10, P/G. Fine & cost; 30 days jail, susp.; 2 years NR probation."; "4-5-13 (Age 29) Domestic Violence Warren P.D. War.Muni.Ct. #13-CRB-622: On 10-31-13, P/G. 180 days jail, susp.; 5 years probation; fine & costs."

counsel to comment on the presentence investigation report and, in its discretion, may permit the defendant and the defendant's counsel to introduce testimony or other information that relates to any alleged factual inaccuracy contained in the report."

{¶22} "'The burden of proof regarding any inaccuracy in the PSI is on the defendant who alleges the report is inaccurate.' *State v. Deeb*, 6th Dist. Erie No. E-14-117, 2015-Ohio-2442, ¶14, quoting *State v. Cisco*, 5th Dist. Delaware No. 13 CAA 04 0026, 2013-Ohio-5412, ¶28." *State v. Mavrakis*, 9th Dist. Summit No. 27457, 2015-Ohio-4902, ¶33.

{¶23} Appellant did not challenge any facts contained in the PSI. Appellant's trial attorney should have, but failed to even review the PSI. Nevertheless, there is no credible evidence in the record to suggest that if appellant's counsel had reviewed the PSI before sentencing, a different result was reasonably probable. *See, e.g., State v. Brewer*, 4th Dist. Meigs No. 14CA1, 2014-Ohio-1903, ¶19-24.

{¶24} Based on the facts presented, appellant inflicted serious harm upon his victim**,** with whom he was cohabitating; was on probation at the time of the offense; was unfazed by prior non-prison sanctions; the trial court had to issue a capias for his arrest in order to effectuate his sentence; and appellant showed no remorse. Appellant was assessed as a high risk to reoffend and was found to be not amenable to any known community control sanctions.

{¶25} Notwithstanding these facts, appellant's trial counsel negotiated a favorable plea agreement which included a plea to a lesser charge. As such, the count at issue was reduced from a second degree felony to a third degree felony. As a result,

appellant's potential jail time was also reduced from eight years to three years. R.C. 2929.14(A)(2) and (3).

{¶26} Appellant's trial counsel had an independent obligation to review the record. She should have reviewed the PSI or asked for a short continuance if time was a factor. Instead, however, appellant's counsel relied on the trial judge, who properly reviewed and recited from the PSI before imposing sentence.

{¶27} As stated, during the plea proceedings, appellant indicated he was satisfied with his trial counsel's representation. Appellant failed to appear for the scheduled sentencing hearing but later appeared with his counsel for the re-scheduled sentencing hearing. Although appellant's counsel did not "believe it's necessary" to review the PSI, the trial court stated at that hearing that it reviewed the PSI. In open court, the trial court indicated its specific findings, as mentioned above, pursuant to the recommendation by the Adult Probation Department. Therefore, any error by counsel was cured or corrected by the trial court as it read on the record and in appellant's presence why it viewed the PSI as unfavorable to him. Neither party alleged that any corrections to the PSI were necessary nor objected to the trial court's recitation from the PSI. However, we cannot conclude that an objection to the PSI would have altered the outcome of appellant's sentencing. *See State v. Richardson*, 2d Dist. Montgomery No. 23879, 2013-Ohio-1374, ¶28.

{¶28} Although appellant's trial counsel should have reviewed the PSI and found any alleged "errors," appellant cannot show prejudice as a result from such deficient performance as he cannot show that the outcome of his sentence would have been different. Thus, appellant fails to satisfy the second prong under *Strickland*.

{¶29} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, J.,

THOMAS R. WRIGHT, J.,

concur.