[Cite as *State v. McCall*, 2017-Ohio-7860.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	Case No. 2017CA0002
	:	
EUGENE B. MCCALL	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Coshocton County Court of Common Pleas, Case Nos. 16 CR 0062 and 2016 CR 0097
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 25, 2017

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
JASON W. GIVEN COSHOCTON CO. PROSECUTOR BENJAMIN E. HALL 318 Chestnut St. Coshocton, OH 43812	KYLE A. DAVIS 121 West Union Ave. West Lafayette, OH 43845

Delaney, P.J.

{¶1} Appellant Eugene B. McCall appeals from the January 30, 2017 "Judgment Entry Plea of No Contest & Sentencing" of the Coshocton County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are adduced from appellee's bill of particulars filed December 19, 2016. This case arose when law enforcement made a series of controlled buys of narcotics from appellant.

{¶3} On July 11, 2016, a confidential informant (C.I.) bought $60 worth of crack cocaine from appellant while two juvenile males were present.

{¶4} On July 14, 2016, a C.I. purchased $60 worth of crack cocaine from appellant in a deli parking lot. Appellant drove to and from the transaction in a red Corvette.

{¶5} Later that day, a search warrant was executed at appellant's residence. During the search, "evidence of drug use and suspected drug trafficking" was found throughout the residence, including crack pipes, unmarked pills, crack cocaine, syringes, and suspected heroin. Law enforcement also found a Ruger .45 firearm, two loaded clips, and two boxes of ammunition. (Appellant was under disability due to multiple prior convictions of offenses involving the illegal possession, use, sale, administration, distribution, or trafficking of any drug of abuse.)

{¶6} In case number 16 CR 0062, appellant was charged by indictment with one count of having weapons while under disability, a felony of the third degree pursuant to R.C. 2923.13(A)(3) [Count I, date of offense July 14, 2016]; one count of trafficking in

cocaine, a felony of the second degree pursuant to R.C. 2925.03(A)(2) and (C)(4)(d) [Count II, date of offense July 14, 2016]; one count of trafficking in cocaine, a felony of the fourth degree pursuant to R.C. 2925.03(A)(1) and (C)(4)(b) [Count III, date of offense July 11, 2016]; and one count of trafficking in cocaine, a felony of the fourth degree pursuant to R.C. 2925.03(A)(1) and (C)(4)(b) [Count IV, date of offense July 14, 2016].

{¶7} Count II was accompanied by two forfeiture specifications, one related to $1728 in cash and the other related to the 1994 Chevrolet Corvette.

{¶8} On September 19, 2016, appellee filed a motion to forfeit appellant's bond because on September 17, 2016, appellant was discovered to be driving without an operator's license and in possession of 15 grams of cocaine. Appellee later withdrew the motion and it was overruled by the trial court.

{¶9} In case number 16 CR 0097, appellant was charged by indictment with one count of possession of cocaine, a felony of the fifth degree pursuant to R.C. 2925.11(A) and (C)(4) [date of offense March 5, 2016].[1] The single-count indictment also included a forfeiture specification relating to $4510 in cash.

{¶10} On November 18, 2016, an amended indictment was filed in case number 16 CR 0062 which added three counts to those listed supra: one count of drug possession [heroin], a felony of the fifth degree pursuant to R.C. 2925.11(A) and (C)(6)(a) [Count V, date of offense July 14, 2016]; one count of drug possession [hydrocodone], a felony of the fifth degree pursuant to R.C. 2925.11(A) and (C)(2)(a) [Count VI, date of offense July 14, 2016]; and one count of possession of drugs [buprenorphrine], a felony of the fifth

[1] Appellee's motion for joinder states the indictment arose from a traffic stop on March 5, 2016 when appellant was found to be in possession of cocaine and $4510 cash.

degree pursuant to R.C. 2925.11(A) and (C)(2)(a) [Count VII, date of offense July 14, 2016].

{¶11} On December 9, 2016, appellee moved to join both cases pursuant to Crim. R. 8 and 13. The trial court granted the motion and the cases were consolidated.

{¶12} On January 24, 2017, appellant changed his pleas to ones of no contest to Counts I through VII, and the forfeiture specifications, in case number 16 CR 0062, although Count II was amended to a felony of the fourth degree. Appellant also entered a negotiated plea of no contest to the sole count in the indictment in case number 16 CR 0097.

{¶13} In exchange for appellant's pleas of no contest, appellee agreed to recommend a prison term of six years (concurrent with a term of 11 months in 16 CR 0097); not to oppose a pre-sentence investigation (P.S.I.); not to pursue charges from the traffic stop on September 17, 2016; and to return the $2,148 seized during that stop.

{¶14} During the change-of-plea and sentencing hearing, appellant stated he is undergoing radiation treatment for pancreatic cancer. Defense trial counsel moved the trial court for a P.S.I. in part to obtain medical documentation of appellant's condition, acknowledging that he had no proof of appellant's health issues other than his own statements. The trial court overruled appellant's motion for P.S.I.

{¶15} During sentencing, the trial court noted appellant's criminal history dating from 1981 includes "close to" ten prior felony convictions and prison commitments. The trial court sentenced appellant to, e.g., an aggregate prison term of six years and advised appellant of the optional term of post-release control and penalties for any violation.

{¶16} Appellant now appeals from the judgment entries of his convictions and sentence.

{¶17} Appellant raises four assignments of error:

ASSIGNMENTS OF ERROR

{¶18} "I. CRUEL AND UNUSUAL PUNISHMENT BASED ON CONSECUTIVE SENTENCES AND DENIAL OF MEDICAL TREATMENT." (*sic*).

{¶19} "II. APPELLANT PREJUDICED BY FAILURE TO FILE A MOTION FOR SEVERANCE." (*sic*).

{¶20} "III. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL." (*sic*).

{¶21} "IV. VIOLATIONS OF DUE PROCESS AND EQUAL PROTECTION." (*sic*).

ANALYSIS

I.

{¶22} In his first assignment of error, appellant argues his sentence constitutes cruel and unusual punishment due to consecutive sentences and "denial of medical treatment." We disagree.

{¶23} We first note the trial court properly imposed consecutive sentences.[2] In Ohio, concurrent sentences are statutorily favored for most felony offenses. R.C. 2929.41(A). The trial court may overcome this presumption by making the enumerated findings set forth in R.C. 2929.14(C)(4). *State v. Bonnell,* 140 Ohio St.3d 209, 2014–

[2] Appellee argues appellant has not preserved his right to appeal the consecutive sentence. In *State v. Bell*, 5th Dist. Muskingum No. CT2016–0050, 2017-Ohio-2621, at ¶ 8, we granted leave to appeal consecutive prison terms within the decision because the sentence imposed exceeded the maximum term for a felony of the third degree, in accord with R.C. 2953.08(C)(1). Appellant in the instant case, therefore, is also granted leave to appeal the aggregate sentence of six years which exceeds the maximum term for a felony of the third degree.

Ohio–3177, 16 N.E.3d 659, ¶ 23. The statute requires the trial court to undertake a three-part analysis. *State v. Alexander,* 1st Dist. Hamilton Nos. C–110828 and C–110829, 2012–Ohio–3349, 2012 WL 3055158, ¶ 15.

{¶24} R.C. 2929.14(C)(4) provides:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of 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 so 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 offender's conduct.

> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶25} In *Bonnell*, supra, 140 Ohio St.3d 209 at the syllabus, the Supreme Court of Ohio found that to impose consecutive terms of imprisonment, the trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings.

{¶26} In the instant case, on the record at the hearing and in the judgment entry, the trial court found appellant's history of criminal conduct demonstrates consecutive sentences are necessary to protect the public from future crime by the offender. (T. 42; Judgment Entry, 5). R.C. 2929.14(C)(4)(c). The record therefore supports the conclusion that the trial court made the findings required by R.C. 2929.14(C)(4) at the time it imposed consecutive sentences.

{¶27} Appellant further argues, though, that consecutive sentences constitute cruel and unusual punishment. The Eighth Amendment to the United States Constitution prohibits excessive sanctions and provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Section 9, Article I of the Ohio Constitution likewise sets forth the same restriction: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." The Ohio Supreme Court has noted, "Central to the Constitution's prohibition against cruel and unusual punishment is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *In re C.P.,* 131 Ohio St.3d 513, 2012–Ohio–

1446, 967 N.E.2d 729, ¶ 25, quoting *Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910).

{¶28} Appellant asserts his sentence is cruel and unusual because of the consecutive sentences, despite his acknowledgment that the sentences are within the appropriate statutory ranges, and generally "* * * a sentence within the statutory limitations is not excessive and does not violate the constitutional prohibition against cruel and unusual punishment." *State v. Medezmapalomo*, 5th Dist. Richland No. 10CA15, 2010-Ohio-4845, ¶ 21.

{¶29} Appellant argues, though, that in the instant case the trial court made "improper use" of consecutive sentences because the aggregate sentence of six years is double the maximum penalty for the most severe crime charged (having weapons while under disability, a felony of the third degree). Appellant therefore infers his six-year sentence is disproportionate to his crime. "'The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.'" *State v. Weitbrecht,* 86 Ohio St.3d 368, 373, 715 N.E.2d 167 (1999), quoting *Harmelin v. Michigan,* 501 U.S. 957, 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), (Kennedy, J., concurring in part and in judgment).

{¶30} Appellant's 6-year sentence is not grossly disproportionate. Our proportionality analysis under the Eighth Amendment should be guided by objective criteria, "including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *State v. Morin,* 5th Dist. Fairfield No. 2008–CA–10, 2008–Ohio–6707, ¶ 70, citing *Solem v. Helm,* 463 U.S. 277,

290–292, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). "It is well-established that sentences do not violate these constitutional provisions against cruel and unusual punishment unless the sentences are so grossly disproportionate to the offenses as to shock the sense of justice in the community." *State v. Chaffin,* 30 Ohio St .2d 13, 282 N.E.2d 46 (1972); *State v. Jarrells,* 72 Ohio App.3d 730, 596 N.E.2d 477 (2nd Dist.1991); *State v. Hamann,* 90 Ohio App.3d 654, 672, 630 N.E.2d 384 (8th Dist.1993).

{¶31} Appellant argues the prison term is grossly disproportionate for a 64-year-old man suffering from pancreatic cancer. Assuming arguendo the state of appellant's health was an appropriate consideration in sentencing, the record is devoid of evidence of appellant's alleged health condition, absent appellant's self-serving statements.

{¶32} We find appellant's sentence is not shocking to the sense of justice in the community in light of appellant's status as a repeat drug offender. The terms of this sentence are within the statutory range. "As a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment." *McDougle v. Maxwell,* 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964). "[P]unishments which are prohibited by the Eighth Amendment are limited to torture or other barbarous punishments, degrading punishments unknown at common law, and punishments which are so disproportionate to the offense as to shock the moral sense of the community." *Id.* "Cruel and unusual punishments are 'rare' and are limited to sanctions that under the circumstances would be shocking to any reasonable person." *State v. Koch*, 5th Dist. Knox No. 16-CA-16, 2016-Ohio-7926, ¶ 24, citing *State v. Blankenship,* 145 Ohio St.3d 221, 2015–Ohio–4624, 48 N.E.3d 526, ¶ 32. Six years under these circumstances, in light of appellant's admissions to repeated instances of narcotics trafficking, and his

extensive criminal history of similar offenses, is lawful, reasonable, and appropriate, based upon our review of the record.

{¶33} Finally, appellant argues his sentence is cruel and unusual because "he was denied medical treatment for severe chest pains while being held at the Coshocton County Sheriff's Office" (Appellant's Brief, 9). Appellant's claim is not cognizable under this assignment of error because his allegations are outside the record and are irrelevant to the trial court's sentencing considerations.

{¶34} The prison sentence imposed is not grossly disproportionate to the offense and does not constitute cruel and unusual punishment.

{¶35} Appellant's first assignment of error is overruled.

II., III., IV

{¶36} Appellant's second, third, and fourth assignments of error are related and will be considered together. Appellant argues he received ineffective assistance of defense trial counsel, in part because counsel did not file a motion to sever. He further argues that he was treated differently than others because of the alleged ineffective assistance, resulting in due process and equal protection violations. We disagree.

{¶37} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *See*, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, "a court must indulge 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.'" *Id.* at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶38} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690.

{¶39} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

{¶40} Appellant first argues he received ineffective assistance because defense trial counsel failed to file a motion to sever the two cases which appellee moved to join on December 9, 2016 and the trial court granted on December 20, 2016. Appellant points out that defense trial counsel did not respond to appellee's motion for joinder. Appellant has failed to establish the cases were not properly joined. If cases are properly joined and appellant is not prejudiced thereby, defense trial counsel's failure to sever the cases is not ineffective assistance. See, *State v. Hamblin*, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶41} The evidence of each of appellant's crimes is simple and distinct, and the offenses all relate to appellant's repeat drug trafficking. "The law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged 'are of the same or similar character.'" *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990) (citation

omitted). A defendant may move for severance of the offenses under Crim.R. 14 upon a showing of prejudice. Id. A jury is presumed capable of segregating the proof on multiple charges when the evidence as to each is uncomplicated. Id. at 343, citing *State v. Roberts*, 62 Ohio St.2d 170, 175, 405 N.E.2d 247 (1980).

{¶42} In the instant case, the evidence underlying each of appellant's narcotics offenses is simple and distinct: he was found with narcotics in his possession on March 5, and he sold narcotics to an informant on July 11 and July 14, 2016. The firearm was found in his house upon execution of the search warrant. Appellant cannot demonstrate that his rights were prejudiced by having the two criminal cases consolidated, thus he likewise is unable to demonstrate ineffective assistance of trial counsel for not filing a motion to sever. *State v. Pietrangelo*, 11th Dist. Lake No. 2003–L–125, 2005-Ohio-1686, ¶ 31.

{¶43} Defense trial counsel may have determined, in light of the appellee's offer to refrain from charging the September 17, 2016 offenses in exchange for appellant's plea to the consolidated cases, that a motion to sever would not be in appellant's best interest. Tactical or strategic trial decisions do not generally constitute ineffective assistance. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Trial counsel's decisions regarding timing of Crim.R. 14 motion to sever "involves a tactical choice that was reasonably within the attorney's discretion in the presentation of appellant's defense." *State v. Walker*, 6th Dist. Sandusky No. S-96-037, unreported, 1997 WL 799875, *2 (Dec. 31, 1997), citing *State v. Hester*, 45 Ohio St.2d 71, 341 N.E.2d 304 (1976) and *State v. Hunt*, 20 Ohio App.3d 310, 486 N.E.2d 108 (9th Dist.1984).

{¶44} Appellant also summarily argues he received ineffective assistance because trial counsel "had a duty to inform [him] of all the potential harms of agreeing to sentencing proceedings." (Brief, 11). Appellant essentially argues counsel was ineffective in failing to go to trial. We fail to discern, and appellant does not point out, any prejudice arising from the no-contest pleas. Appellant obtained a shorter prison sentence than he would have been exposed to if he had gone to trial, particularly in light of the overwhelming evidence against him.

{¶45} In his final assignment of error, appellant argues his rights to due process and equal protection were violated because he "was treated differently than others in similar circumstances based on his ineffective trial counsel." In light of our conclusion that appellant did not receive ineffective assistance of counsel, he cannot establish any due process or equal protection violation on that basis.

{¶46} Appellant's three remaining assignments of error are overruled.

CONCLUSION

{¶47} Appellant's four assignments of error are overruled and the judgment of the Coshocton County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Hoffman, J. and

Wise, Earle, J., concur.