[Cite as *State v. Ross*, 2020-Ohio-5284.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	JUDGES:
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff - Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, J.
-vs-	:	
	:	
GARY A. ROSS,	:	Case No. 20-CA-00011
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Perry County Court of Common Pleas, Case No. 19 CR 0065
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	November 12, 2020

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH A. FLAUTT Perry County Prosecuting Attorney 111 North High Street P.O. Box 569 New Lexington, Ohio 43764	K. ROBERT TOY Toy Law Office 50 1/2 S. Court St., Suite A Athens, Ohio 45701

Baldwin, J.

{¶1} Defendant-appellant Gary A. Ross appeals his conviction and sentence from the Perry County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 16, 2019, a traffic stop was initiated on appellant in Perry County, Ohio. After a drug certified dog alerted to the presence of illegal drug odors emitting from the vehicle, appellant's vehicle was searched and 33.29 grams of methamphetamines, 0.50 grams of heroin and unused jewelry baggies with blue stars on them were located. After appellant's arrest, a search warrant was executed upon his residence on May 7, 2019 and Officers located 3.064 grams of methamphetamines and jewelry baggies with the blue stars on them. Appellant was found in the residence along with his wife and two minor children.

{¶3} On August 28, 2019, the Perry County Grand Jury indicted appellant on one count of aggravated trafficking in drugs in violation of R.C. 2925.03 (A)(2) and (C)(1)(d), a felony of the second degree, one count of aggravated possession of drugs in violation of R.C 2925.11(A) and (C)(1)(c), a felony of the second degree, one count of illegal manufacture of drugs in violation of R.C. 2925.04(A) and (C)(3)(a), a felony of the second degree, one count of possession of heroin in violation of R.C. 2925.11(A) and (C)(6)(a), a felony of the fifth degree, and one count of possessing criminal tools in violation of R.C. 2923.24(A) and (C), a felony of the fifth degree. Appellant also was indicted on one count of aggravated trafficking in drugs in violation of R.C. 2925.03 (A)(2) and (C)(1)(c), a felony of the second degree, one count of count of aggravated possession of drugs in violation

of R.C. 2925.11(A) and (C)(1)(b), a felony of the third degree, one count of illegal manufacture of drugs in violation of R.C. 2925.04(A) and (C)(3)(b), a felony of the first degree, one count of endangering children in violation of R.C. 2919.22(B)(6) and (E)(3)(a), a felony of the third degree, and one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1) and (B)(1), a felony of the first degree. The indictment also contained nine forfeiture specifications. At his arraignment on September 3, 2019, appellant entered a plea of not guilty to the charges.

{¶4} Appellant, on September 4, 2019, posted a surety bond. Thereafter, on February 4, 2020, appellant appeared in court and entered pleas of guilty to one amended count of aggravated possession of drugs, a felony of the third degree, one count of aggravated possession of drugs, a felony of the third degree, both with forfeiture specifications, and one count of possession of heroin, a felony of the fifth degree, with a forfeiture specification. The Prosecutor entered a Nolle Prosequi as to the remaining counts.

{¶5} At the change of plea hearing, the State indicated that at the time of sentencing, it would recommend a sentence of thirty (30) months on each of the F3s and eleven (11) months on the F5, to be served consecutively. The State also indicated that there would be a mandatory $5,000.00 fine on each of the F3s and that the sentence was not jointly recommended "and defense counsel was reserving the right to present mitigating circumstances as far as the defendant's treatment and what he had accomplished over the last four months and he certainly is going to make a plea for a different sentence." Transcript of Plea Hearing at 4.

{¶6} A sentencing hearing was held on March 17, 2020. At the hearing, appellant was sentenced to thirty (30) months on each of the counts of aggravated possession of drugs, to be served consecutively to each other, and was fined $5,000.00 on each count and was sentenced to eleven (11) months and fined $1,000.00 on the charge of possession of heroin. The eleven (11) month sentence was to be served concurrently to the to the other sentences, for an aggregate sentence of 60 months. The trial court also ordered that the property described in the forfeiture specifications be forfeited to Perry County, Ohio.

{¶7} On March 23, 2020, appellant, through his counsel, filed a Notice of Objection to Sentencing Hearing. Appellant, in his motion, argued that his due process rights were violated. Appellant specifically alleged that his pre-sentence investigation report (PSI) was not completed until two business days before the sentencing hearing and that his counsel did not get to see the report until 30 minutes prior to the sentencing hearing and was not permitted to review the PSI with appellant. Appellant also alleged that he was not permitted to have in person character witnesses at the sentencing hearing to provide testimony in support of mitigation and "was simply not permitted by [the] Court to provide mitigation testimony at his Sentencing Hearing." The trial court, in an Order filed on March 30, 2020, found that appellant's due process rights had not been violated.

{¶8} Appellant now appeals, raising the following assignments of error on appeal:

{¶9} "I. THE TRIAL COURT ERRED BY EXCLUDING DEFENDANT'S MITIGATING WITNESSES FROM THE COURTROOM AND BY PREVENTING THE MITIGATING WITNESSES FROM TESTIFYING ON THE DEFENDANT'S BEHALF AT

THE SENTENCING HEARING AND BY FAILING TO TIMELY PREPARE A PRE-SENTENCE INVESTIGATION REPORT PRIOR TO THE SENTENCING HEARING."

{¶10} "II. THE TRIAL COURT ERRED BY SENTENCING DEFENDANT CONSECUTIVELY ON EACH COUNT OF AGGRAVATED POSSESSION OF DRUGS UNDER THE DOUBLE JEOPARDY CLAUSE BECAUSE THERE IS NO EVIDENCE IN THE RECORD THAT PROVES THAT THE DRUGS WERE NOT FROM THE SAME ORIGINAL BATCH PURCHASED BY DEFENDANT."

{¶11} "III. DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE MARCH 17, 2020 SENTENCING HEARING."

I

{¶12} Appellant, in his first assignment of error, contends that the trial court erred by excluding appellant's mitigating character witnesses from the courtroom due to Covid-19 and by preventing them from testifying on appellant's behalf at the sentencing hearing and by failing to timely prepare a PSI prior to the hearing. We disagree.

{¶13} As noted by the trial court in its March 30, 2020 Order, appellant's counsel never objected to the PSI being completed one day prior the sentencing hearing[1] and did not object to not viewing the PSI with appellant. The trial court noted that appellant's counsel had, in fact, reviewed the contents of the PSI with appellant and that at the sentencing hearing, appellant's counsel, when asked, indicted that he had a chance to review the PSI. Appellant's counsel informed the trial court that there was an error in the PSI and that while the PSI indicated that appellant was unsuccessfully terminated from

[1] The trial court, at the sentencing hearing, indicated that the Court's presentence investigator was ill and that one of the court's probation officers conducted the interview and completed the report.

ILC (Intervention in Lieu of Conviction), this was not accurate and that appellant had successfully completed ILC. Appellant's counsel informed the trial court that appellant, while out on bond, had completed the Rulon program, was actively involved in the Perry Behavioral Health and completed that outpatient program.

{¶14} The trial court, at the sentencing hearing, took a brief recess to check into the matter involving the ILC and determined that the ILC was revoked. Appellant indicated to the trial court that he had received an e-mail that said that he had completed supervision but the ILC was revoked and that he mistakenly had thought that the ILC was completed.

{¶15} Moreover, R.C. 2951.03(B)(1) states, in relevant part, as follows: "If a presentence investigation report is prepared pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2, the court, at a reasonable time before imposing sentence, shall permit the defendant or the defendant's counsel to read the report…" There is no dispute that appellant's counsel read the report. We find that there was no denial of due process.

{¶16} As is stated above, appellant also argues that the trial court erred and violated his right to due process by excluding appellant's mitigating witnesses from the courtroom due to Covid-19 and by preventing them from testifying in person on appellant's behalf at the sentencing hearing. At the sentencing hearing, appellant's counsel stated, in relevant part, as follows:

{¶17} "[H]e's performed so well at Perry Behavioral Health and he's been so actively involved that he's had a number of people at Rulon and Perry Behavioral Health that have wanted to step up and come in to the court today and speak on his behalf. And

obviously they're not able to do that because of our situation here in the United States, but they've submitted letters on behalf of Mr. Ross, and it isn't just letters that – I haven't contacted them and said, hey, can you submit letters on behalf of Mr. Ross? That didn't happen. They literally just did this on their own volition. In fact, I've had very little contact with them. They've been here at just about every court case, and they've really wanted to speak out on behalf of what Gary is doing."

{¶18} Transcript of Sentencing hearing at 7.

{¶19} There is nothing in Crim.R. 32 or R.C. 2929.19 requiring the court to allow live witnesses to testify on a defendant's behalf. Moreover, the trial court informed appellant that it had read and reviewed the sentencing memorandum which had letters from appellant's counselors, his wife and his mother as well as a letter that it had received from another counselor who was a pastor.

{¶20} We find that appellant's due process rights were not violated.

{¶21} Appellant's first assignment of error is, therefore, overruled.

II

{¶22} Appellant, in his second assignment of error, argues that the trial court erred in sentencing appellant consecutively on each count of aggravated possession of drugs. We disagree.

{¶23} Appellant argues that the two offenses are allied offenses of similar import.

{¶24} R.C. 2941.25 states:

{¶25} (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶26} (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶27} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, syllabus, the Supreme Court of Ohio held:

> 1. In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2841.25, courts must evaluate three separate factors—the conduct, the animus, and the import.
>
> 2. Two or more offenses of dissimilar import exist within the meaning of R.C. 2841.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.
>
> 3. Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus.

{¶28} In paragraph 26 of the opinion, the *Ruff* court stated:

> At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct. The evidence at trial or during a plea or sentencing hearing will reveal whether

> the offenses have similar import. When a defendant's conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts. Also, a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense. We therefore hold that two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable. *Id.*

{¶29} Appellant's trial counsel, at the sentencing hearing, withdrew his argument that the two offenses were allied offenses of similar import. In *State v. Rogers,* 143 Ohio St.3d 385, 2015–Ohio–2459, 38 N.E.3d 860, ¶ 21, the Ohio Supreme Court found that an appellant forfeits his or her allied offenses claim for appellate review by failing to seek the merger of his or her convictions as allied offenses of similar import in the trial court. An accused's failure to raise the issue of allied offenses of similar import in the trial court forfeits all but plain error, which is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice. *Id.* at paragraph 3. Moreover, unless an accused shows a reasonable probability that his or her convictions are allied offenses of similar import committed with the same conduct and without a separate animus, he or she cannot demonstrate that the trial court's failure to inquire whether the convictions merge for purposes of sentencing was plain error. *Id.*

{¶30} In the case sub judice, appellant argues that the trial court erred by sentencing him on each count of aggravated possession of drugs because there was no evidence proving that the drugs were not from the same original batch purchased by appellant. Appellant was convicted in Count Two of possessing methamphetamines on April 16 and in Count Seven of possessing methamphetamines on May 7, 2019. The methamphetamines were possessed within appellant's car on April 16, 2019 and within his home on May 7, 2019. We concur with appellee that "[t]he gap in time that the possession occurred establishes separate animus of motivation. The different locations further support the fact that they were possessed with separate animus."

{¶31} Appellant's second assignment of error is, therefore, overruled.

III

{¶32} Appellant, in his third assignment of error, maintains that he was deprived of the effective assistance of counsel. We disagree.

{¶33} Our standard of review for an ineffective assistance claim is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ohio adopted this standard in the case of *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the proceeding is suspect. This requires a showing that there is a

reasonable probability that but for counsel's unprofessional error, the outcome of the proceeding would have been different. Id. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any give case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable professional assistance. *Bradley* at 142, 538 N.E.2d 373.

{¶34} Appellant argues that his trial counsel was ineffective in failing to request a continuance of the sentencing hearing due to Covid-19 in order to allow his mitigating witnesses to testify in person on his behalf and in failing to timely object to the court's exclusion of the witnesses from the sentencing hearing due to Covid-19. However, as is stated above and noted by the trial court, appellant has no right to have live witnesses other than appellant and his counsel at the hearing. Moreover, the trial court, in its March 30, 2020 Order, stated that it had reviewed all the letters submitted on appellant's behalf. Letters had been submitted from appellant's counselors, his wife, his mother, his pastor, a treatment assistant, and a fellow outpatient treatment patient.

{¶35} Appellant further argues that trial counsel was ineffective in failing to request a continuance in order to have ample time to review the PSI and to have the opportunity to review it with appellant and in failing to object to the timing of the completion of the PSI. The PSI was completed one day prior to the sentencing hearing. At the sentencing hearing, appellant's counsel indicated that he had time to review the PSI and had submitted a sentencing memorandum with letters in support of appellant. The trial court, in its March 30, 2020 Order, found that counsel had reviewed the contents of the PSI with appellant and that appellant had pointed out to his counsel what he believed to be an error in the same. The trial court took a brief recess to clarify the matter. There is nothing

in the record establishing how long counsel had to review the PSI which was available the day before the sentencing hearing. Appellant's counsel, in his March 23, 2020 Notice, stated that he saw the report thirty (30) minutes prior to the sentencing hearing. Moreover, as is stated above, R.C. 2951.03(B)(1) states, in relevant part, as follows: "If a presentence investigation report is prepared pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2, the court, at a reasonable time before imposing sentence, shall permit the defendant or the defendant's counsel to read the report…" There is no dispute that appellant's counsel read the report. We find no ineffective assistance of counsel.

{¶36} Appellant finally argues that trial counsel was ineffective in failing to argue that the two offenses of aggravated possession of drugs were allied offense of similar import. Trial counsel raised this argument at the sentencing hearing, but then withdrew the argument. Having found that the two offenses were not allied offense of similar import, we find no ineffective assistance of counsel.

{¶37} Appellant's third assignment of error is, therefore, overruled.

{¶38} Accordingly, the judgment of the Perry County Court of Common Pleas is affirmed.

By: Baldwin, J.

Delaney, P.J. and

Wise, Earle, J. concur.