

[Cite as *State v. Tomblin*, 2005-Ohio-6916.]

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

GALE E. TOMBLIN

Appellant

C. A. No. 05CA0035

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 04-CR-0177

DECISION AND JOURNAL ENTRY

Dated: December 28, 2005

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Presiding Judge.

{¶1} Defendant, Gale Edward Tomblin, appeals the decision of the Wayne County Court of Common Pleas sentencing him to two consecutive five-year prison terms. We affirm the decision of the trial court.

{¶2} On May 5, 2004, the Wayne County Grand Jury indicted Defendant on two counts of Unlawful Sexual Conduct with a Minor, in violation of R.C. 2907.04, both third degree felonies, and one count of Sexual Imposition, in violation of R.C. 2907.06, a third degree misdemeanor.

{¶3} On February 3, 2005, Defendant entered a plea of no contest. Defendant was thereafter sentenced to serve five years in prison on each count of

Unlawful Sexual Contact with a minor, for a total prison term of ten years. With respect to the Sexual Imposition charge, Defendant was ordered to pay court costs associated with the charge.

{¶4} Appellant now appeals the first two sentences, asserting three assignments of error for our review. For ease of discussion, we will consider Defendant's first and second assignments of error together.

ASSIGNMENT OF ERROR I

"The sentencing court erred by imposing maximum sentences."

ASSIGNMENT OF ERROR II

"The sentencing court erred by imposing consecutive sentences."

{¶5} In his first and second assignments of error, Defendant claims that the trial court erred by imposing maximum, consecutive sentences upon him. The State argues that Defendant waived his right to assert any error because he failed to enter an objection at the sentencing hearing. We agree with the State and hold that Defendant waived any error by failing to bring the matter to the attention of the trial court at a time when the error could have been corrected.

{¶6} "It is a basic premise that a defendant must bring an alleged error to the attention of the trial court at a time when the error can be corrected." *State v. Mills*, 9th Dist. No. 21751, 2004-Ohio-1750, at ¶4. Failure to object to sentencing errors constitutes a waiver of such errors. *State v. Riley*, 9th Dist. No. 21852, 2004-Ohio-4880, at ¶27. In the case at bar, Defendant waived any sentencing

error by his failure to bring that error to the attention of the trial court during the sentencing hearing, when it could have been corrected. *State v. Geiger*, 9th Dist. No. 22073, 2004-Ohio-7189, at ¶12.

{¶7} We find that Defendant waived any sentencing error and thus, cannot pursue it for the first time on appeal. See *Riley*, 2004-Ohio-4889, at ¶27-30. Furthermore, for reasons discussed more fully below, we do not find that any alleged error rises to the level of plain error. Accordingly, we overrule Defendant’s first and second assignments of error and affirm the decision of the Wayne County Court of Common Pleas.

ASSIGNMENT OF ERROR III

“[Defendant] suffered harm from the ineffective assistance of trial counsel.”

{¶8} In his final assignment of error, Defendant asserts that he was denied the effective assistance of trial counsel because his trial attorney failed to object to

the court’s decision to impose consecutive sentences¹ upon Defendant. We disagree.

¹ Defendant does not argue that his trial counsel was ineffective for failing to object to the imposition of maximum sentences. We note, however, that the trial court did make all of the required findings pursuant to R.C. 2929.14(C) before imposing the maximum statutorily permitted sentence. (R.C. 2929.14(C) authorizes the trial court to impose the longest statutorily permissive prison term

{¶9} This court employs a two-step process in determining whether a defendant’s right to effective assistance of counsel has been violated. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 80 L.Ed.2d 674. First, the court must determine whether there was a “substantial violation of any of defense counsel’s essential duties to his client.” (Citations omitted.) *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289. “This requires a showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” (Citations omitted.) *Id.* Second, the defendant must show that the deficient performance of counsel prejudiced the defense. *State v. Bradley* (1989) 42 Ohio St.3d 136, paragraph two of the syllabus. Prejudice exists where there is a reasonable probability that the outcome of the trial would have been different but for the alleged deficiencies of counsel. *Id.*, at paragraph three of the syllabus.

{¶10} We do not find that Defendant has shown that he was prejudiced by his counsel’s failure to object to the trial court’s decision to impose consecutive sentences. Had Defendant’s trial counsel properly objected to the sentence, and had the trial court failed to correct any alleged inefficiencies at that time, we would have reviewed Defendant’s sentence on appeal. We conducted a review of the trial court’s decision to impose consecutive sentences upon Defendant, and

for the offense “upon offenders who committed the worst forms of the offense, [and/or] upon offenders who pose the greatest likelihood of committing future

concluded that the sentence was not contrary to the law. Consequently, Defendant was not prejudiced by his trial counsel's failure to object to the imposition of consecutive sentences, and his argument that he was denied the effective assistance of counsel is without merit.

{¶11} A defendant's appeal from his sentence is reviewed to determine whether the trial court complied with the statutory mandates of R.C. Chapter 2929. *State v. Yeager*, 9th Dist. Nos. 21092 and 21107, 2003-Ohio-1809, at ¶5. We will affirm a trial court's sentencing decision unless we find by clear and convincing evidence that the sentence is not supported by the record or is contrary to the law. *State v. Harrold*, 9th Dist. No. 21797, 2004-Ohio-4450, at ¶13.

{¶12} R.C. 2929.19(B)(2) permits a court to impose consecutive sentences if it makes the proper findings in accordance with R.C. 2929.14. R.C. 2929.14(E)(4) provides as follows:

“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: ***

“(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

crimes[.]”

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.”

{¶13} In the case at hand, multiple prison terms were imposed on Defendant as a consequence of his multiple convictions for Unlawful Sexual Conduct with a Minor. More than one minor was involved, and Defendant committed the sexual offenses on more than one occasion.

{¶14} In accordance with the requirements of R.C. 2929.14(E)(4), the lower court found that consecutive prison terms were necessary “given the evidence of the multiple victims of the escalating conduct of committing an offense in 2002 and then again in 2004[.]” The trial court stated that it “[could not] think of anything worse than what [Defendant] did.” It did not know what could be worse than taking a child down to the basement of the store that Defendant worked in, and using marijuana and alcohol to engage in unlawful sexual conduct with a thirteen-year-old and a fifteen-year-old (on separate occasions).

{¶15} The court further stated that “the public does need to be protected from [Defendant].” With regard to the “question [of] whether [Defendant is] likely to engage in the future in one of more sexually oriented offences,” the trial court noted that: “[t]he evidence that we have is that he's already engaged in crimes against minors. We have multiple victims, we have multiple offenses with

the same victim. We have the use of marijuana and alcohol to entice and to impair the one victim [.]” Additionally, “we have the defendant’s denial and inability or unwillingness to face the truth of the matter.” For the above reasons, the trial court imposed consecutive sentences upon Defendant. We do not find that the trial court’s sentence was clearly unsupported by the record or contrary to the law.

Based on the above findings, we cannot say that the result of Defendant’s sentencing would have been different had his trial counsel entered an objection to the imposition of a consecutive sentence. Even if defense counsel would have objected, there would not have existed a reasonable probability that the outcome would have been different. If a defendant fails to show sufficient resulting prejudice, we may dispose of the claim of ineffective assistance of counsel. *In re J.J.*, 9th Dist. No. 21386, 2004-Ohio-1429, at ¶16. As Defendant has failed to show sufficient resulting prejudice, we overrule his third assignment of error.

{¶16} Defendant’s three assignments of error are overruled and the sentence as imposed by the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into

execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

LYNN C. SLABY
FOR THE COURT

REECE, J.
CONCURS

MOORE, J.
CONCURS IN JUDGMENT ONLY

(Reece, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

APPEARANCES:

CLARKE W. OWENS, Attorney at Law, 132 South Market Street, Suite 204, Wooster, Ohio 44691, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney and JASON B. DESIDERIO, Assistant Prosecuting Attorney, 115 West Liberty Street, Wooster, Ohio 44691, for Appellee.