

[Cite as *State v. Brown*, 2017-Ohio-9372.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 16 MA 0147
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
JEFFREY BROWN	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of  
Common Pleas of Mahoning County,  
Ohio  
Case No. 16 CR 476

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Paul J. Gains  
Mahoning County Prosecutor  
Atty. Ralph M. Rivera  
Assistant Prosecuting Attorney  
21 West Boardman Street, 6<sup>th</sup> Floor  
Youngstown, Ohio 44503

For Defendant-Appellant: Atty. Joseph W. Gardner  
4280 Boardman-Canfield Road  
Canfield, Ohio 44406

JUDGES:

Hon. Cheryl L. Waite  
Hon. Gene Donofrio  
Hon. Mary DeGenaro

Dated: December 22, 2017

[Cite as *State v. Brown*, 2017-Ohio-9372.]  
WAITE, J.

{¶1} Appellant Jeffrey Brown appeals a September 14, 2016 Mahoning County judgment entry finding him guilty of having weapons while under a disability. Appellant contends the trial court failed to consider his mental condition when sentencing him. Additionally, Appellant argues that his trial counsel was ineffective for failing to investigate his mental illness. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

#### Factual and Procedural History

{¶2} On April 10, 2016, Appellant was arrested for possessing a loaded firearm. On June 2, 2016, Appellant was indicted on one count of having weapons while under a disability, a felony of the third degree in violation of R.C. 2923.13(A)(2), (B), one count of improperly handling a firearm in a motor vehicle, a felony of the fourth degree in violation of R.C. 2923.16(B), (I), (2), and one count of resisting arrest, a misdemeanor of the first degree in violation of R.C. 2921(A), (D). The indictment contains a clerical error as there is no subsection (2) in R.C. 2923.16(I). However, this error does not change the nature or level of the offense.

{¶3} On August 2, 2016, Appellant pleaded guilty pursuant to a Crim.R. 11 plea agreement. Appellant entered a guilty plea to the charge of having weapons while under a disability and the state agreed to dismiss the remaining counts. The parties jointly recommended a sentence of twelve months of incarceration, however on September 14, 2016, the trial court sentenced Appellant to thirty-six months of incarceration. The court credited Appellant with thirty-five days of jail time served.

The court also imposed a nonmandatory three year term of postrelease control. This timely appeal followed.

{¶4} We note that Appellant was arrested and charged with a similar offense in case number 16 CR 1021 while awaiting sentencing in this matter. Appellant filed a motion to supplement the record in the instant case with matters pertaining to 16 CR 1021. We denied Appellant's motion.

#### ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT-APPELLANT TO THREE YEARS, THE MANDATORY MAXIMUM, WITHOUT CONSIDERING DEFENDANT-APPELLANT'S MENTAL HEALTH ISSUES. (SENTENCING T. P. 4.)

{¶5} Appellant presents two separate issues within his sole assignment of error. For ease of understanding, these issues will be separately addressed.

#### *Trial Court's Sentence*

{¶6} Appellant claims that he is mentally ill and that his illness was documented in a 2011 pre-sentence investigation report ("PSI") arising from a separate case. Appellant acknowledges that the PSI in the instant case does not contain any reference to his mental condition. However, he argues that the judge, probation officer, prosecutor, and defense attorney had access to the 2011 PSI and failed to read this document, despite having access to it. Appellant additionally complains that the trial court focused on his prior record and neglected to consider the other R.C. 2929.12 factors, specifically his mental health.

{¶7} In response, the state argues that the trial court stated on the record that all relevant sentencing statutes were considered. Additionally, the state points out that Appellant's medical records and his 2011 PSI are matters outside of this record, so the court could not have considered these documents. Appellant reported on the record in this case that he had no mental illnesses and had not received treatment for any mental illness. As such, the trial court was not properly alerted to any mental health issues.

{¶8} An appellate court is permitted to review a felony sentence to determine if it is contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23. Pursuant to *Marcum*, "an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *Id.*

{¶9} When determining a sentence, a trial court must consider the purposes and principles of sentencing in accordance with R.C. 2929.11, the seriousness and recidivism factors within R.C. 2929.12, and the proper statutory ranges set forth within R.C. 2929.14.

{¶10} Appellant contests the trial court's consideration of R.C. 2929.11 and R.C. 2929.12. At the sentencing hearing, the trial court stated "I've considered the oral statements of the defendant, the prosecutor, presentence investigation report and all of the circumstances of this case as well as the principles and purposes of sentencing under Ohio Revised Code 2929.11." (9/9/16 Sentencing Hrg. Tr., p. 4.)

The court found “that prison is the only sanction consistent with the principles and purposes of sentencing that does not place an unreasonable burden on state or local resources.” *Id.* The court opined that a maximum sentence was necessary, particularly as Appellant had committed the same offense on three separate occasions. *Id.* As such, the record demonstrates that the trial court considered R.C. 2929.11.

{¶11} As to R.C. 2929.12, the trial court stated that it “considered the seriousness and recidivism factors under 2929.12 for the offense of having weapons under disability.” *Id.* In addition to the prior offenses based on these charges, Appellant had a lengthy criminal record dating back to his juvenile years. The court noted that Appellant’s bond had been revoked due to an arrest that occurred during the pendency of the case. Further, the court emphasized the dangerousness of the offense.

{¶12} Realizing that there is no general standard in Ohio, the Eighth, Fifth, and Second Districts have considered four factors when determining whether a trial court should raise a defendant’s competency *sua sponte*. These factors include: “(1) doubts expressed by counsel as to the defendant's competence; (2) evidence of irrational behavior; (3) the defendant's demeanor at trial; and (4) prior medical opinion relating to competence to stand trial.” *State v. Cook*, 2016-Ohio-2823, 64 N.E.3d 350, ¶ 66 (5th Dist.). See also *State v. Rubenstein*, 40 Ohio App.3d 57, 531 N.E.2d 732 (8th Dist.1987); *State v. Temple*, 2d Dist. 2012–CA–65, 2013-Ohio-3843.

{¶13} There is no evidence in this record that defense counsel held any doubts as to Appellant's competency. The record does not reveal any behavior which would have alerted the court to a potential mental illness. Importantly, Appellant informed the probation officer that he had never been examined by a mental health professional and had never been a patient in a mental health facility. As such, this record provides no evidence that the trial court should have been alerted to or have investigated Appellant's mental health.

{¶14} Accordingly, the trial court's failure to consider Appellant's mental health is not erroneous. The trial court considered the relevant sentencing statutes. Appellant's arguments are without merit.

*Ineffective Assistance of Counsel*

{¶15} To successfully assert a claim of ineffective assistance of counsel, an appellant must show that counsel's performance was deficient and must also show resulting prejudice. *State v. White*, 7th Dist. No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107.

{¶16} Deficient performance occurs when counsel's performance falls below an objective standard of reasonable representation. *State v. Ludt*, 7th Dist. No. 09 MA 107, 2009-Ohio-2214, ¶ 3, citing *Strickland, supra*. In other words, there must be "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Lyons v. Schandel*, 7th Dist. No. 14 CA 898, 2015-Ohio-3960, ¶ 13, citing *Strickland, supra*.

{¶17} Appellant argues that trial counsel was ineffective for failing to raise the PSI from his 2011 case that documented his mental illness. Appellant believes that a reasonable attorney would have investigated the 2011 PSI. Appellant argues that appellate counsel was given access to the 2011 PSI, and it was readily available. The state does not provide an argument in response.

{¶18} Again, the 2011 PSI is not properly a part of this record. In the PSI on record in this matter, Appellant informed his probation officer that he had never been examined by a mental health professional and had never been a patient in a mental health facility. Additionally, there is nothing to suggest that Appellant behaved in a manner to indicate that he may have mental health issues. There is nothing within the record of this case to alert counsel that Appellant may be mentally ill, thus it cannot be said that counsel was deficient. Regardless, Appellant does not assert, and there is no evidence to demonstrate, prejudice in this matter. Appellant's assignment of error is without merit and is overruled.

#### Conclusion

{¶19} Appellant argues that the trial court failed to consider his mental condition at sentencing. Appellant also argues that his trial counsel was ineffective for failing to investigate his mental illness. The record reflects that there was no cause to suspect Appellant may have mental health issues. Accordingly, Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.