[Cite as *State v. Raphael-Hopkins*, 2019-Ohio-2689.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

SANTINO TOMAS RAPHAEL-HOPKINS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 BE 0017

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 16 CR 221

BEFORE:
Gene Donofrio, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed

Atty. Daniel P. Fry, Prosecutor, and *Atty. J. Flanagan*, Assistant Prosecutor, (NO BRIEF FILED) Courthouse Annex 1, 147-A West Main Street, St. Clairsville, Ohio 43950 for Plaintiff-Appellee, and

Atty. Rhys Cartwright-Jones, 42 North Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated:
June 25, 2019

Donofrio, J.

{¶1} Defendant-appellant, Santino Raphael-Hopkins, appeals his conviction following a guilty plea in the Belmont County Common Pleas Court for: drug trafficking of cocaine in violation of R.C. 2925.03(A)(1)(C)(4)(a), a fifth-degree felony; attempted drug possession of heroin in violation of R.C. 2925.11(A)(2)(C)(6)(d), a third-degree felony; drug possession of cocaine in violation of R.C. 2925.11(A)(C)(4)(c), a third-degree felony.

{¶2} On or about August 2, 2016, appellant was operating a motor vehicle in Belmont County, Ohio. Two deputies from the Belmont County Sheriff's Department initiated a traffic stop of appellant for failing to use a turn signal. Upon approaching appellant's vehicle, the deputies smelled what they believed was burning marijuana. The deputies requested appellant's driver's license, registration, and proof of insurance. Appellant could not produce either his license or proof of insurance. Appellant claimed that the car was a rental car but could not produce the rental agreement.

{¶3} Appellant was then removed from the car and frisked for weapons. While the frisk revealed no weapons, the deputy who frisked appellant noticed a large object in one of appellant's pockets which he believed to be a large amount of cash. The deputy also felt a hard object in another one of appellant's pockets. Appellant then confessed that the hard object was something "bad." When the deputy asked what appellant meant, appellant admitted that the hard object contained drugs. The deputies then searched the car and appellant. The searches yielded several bags of crack, cocaine, and heroin in various amounts as well as $2,445 in cash.

{¶4} A Belmont County Grand Jury indicted appellant on seven counts:

> Count one: drug trafficking in violation of R.C. 2925.03(A)(1)(C)(4)(a) a fifth-degree felony;
>
> Count two: drug trafficking in violation of R.C. 2925.03(A)(1)(C)(6)(a), a fifth-degree felony;

Count three: drug trafficking in violation of R.C. 2925.03(A)(1)(C)(1)(a), a fourth-degree felony;

Count four: drug possession in violation of R.C. 2925.11(A)(C)(6)(d), a second-degree felony;

Count five: drug trafficking in violation of R.C. 2925.03(A)(2)(C)(6)(e), a second-degree felony;

Count six: drug possession in violation of R.C. 2925.11(A)(C)(4)(c), a third-degree felony; and

Count seven: drug trafficking in violation of R.C. 2925.03(A)(2)(C)(4)(d), a third-degree felony.

{¶5} Appellant also faced a forfeiture specification pursuant to R.C. 2941.1417 in the amount of $2,445 on counts one, two, three, five and seven.

{¶6} Appellant accepted a plea agreement from the plaintiff-appellee, the State of Ohio. The terms of the plea agreement were: count four was amended to attempted possession of drugs, a third-degree felony; appellant would plead guilty to count one, amended count four, and count six; and the state would dismiss the remaining charges. After entering his guilty plea, the trial court ordered a pre-sentence investigation and scheduled a sentencing hearing.

{¶7} At the sentencing hearing, appellant's trial counsel requested that the trial court order concurrent sentences. The trial court sentenced appellant to ten months of incarceration on count one, 30 months of incarceration on amended count four, and 30 months of incarceration on count six. But the trial court ordered the sentences on all counts to be served consecutively for a total of 70 months of incarceration. The trial court also ordered appellant to be under post-release control for three years upon release from prison. Finally, the trial court ordered appellant to forfeit $2,445.

{¶8} Appellant's sentence was memorialized in a judgment entry dated January 17, 2017. Appellant filed what was construed as a motion for a delayed appeal on March 17, 2017. This court granted appellant's motion for a delayed appeal on April 4, 2017. Appellant now raises one assignment of error.

{¶9} Appellant's sole assignment of error states:

> COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE A SENTENCING RECORD IN SUPPORT OF CONCURRENT SENTENCES.

{¶10} Appellant argues that his trial counsel was ineffective by insufficiently arguing for concurrent sentences at the sentencing hearing.

{¶11} When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *State v. Sanders*, 94 Ohio St. 3d 150, 2002-Ohio-350, 761 N.E.2d 18 citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Furthermore, 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. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Strickland charges reviewing courts to apply a heavy measure of deference to counsel's judgments and to indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance. *Id.*

{¶12} Appellant claims that his trial counsel's representation fell below an objective standard of reasonableness because his counsel did not preserve the sentencing record. Appellant's trial counsel's only recommendation on sentence was that the sentences for amended count four (attempted possession of heroin) and count six (possession of cocaine) be served concurrently as they arose from the same incident. (Sent. Tr. 4). Appellant argues that this recommendation alone was a deficient preservation of the sentencing record.

{¶13} Appellant cites no case law from Ohio to support his argument that trial counsel's failure to preserve the record during sentencing constitutes deficient performance. But appellant cites a case from the Texas Supreme Court, *In re M.S.*, 115 S.W.3d 534 (Tex.2003). M.S. held that trial counsel's failure to preserve an issue for appeal "may constitute ineffective assistance." *Id*. at 550. The Texas Supreme Court held that, if there is prejudice due to counsel's failure to preserve an issue, then the failure to preserve the issue could be ineffective assistance. *Id*. at 549-550.

{¶14} In capital cases, the Ohio Supreme Court has held that the failure to present mitigating evidence at sentencing "does not itself constitute proof of ineffective assistance of counsel[.]" *State v. Keith*, 79 Ohio St.3d 514, 530, 684 N.E.2d 47 (1997). The Eighth District has also held that, absent a showing of prejudice, the failure to preserve substantive issues does not show that counsel's representation fell below an objective standard of reasonableness. See *State v. Mapes*, 8th Dist. Cuyahoga No. 86225, 2006-Ohio-294, ¶ 33.

{¶15} In order for appellant's trial counsel's failure to preserve the record at sentencing to constitute a deficient performance, such failure to preserve the record must have prejudiced appellant.

{¶16} Addressing prejudice, appellant argues that he was sentenced to consecutive sentences for allied offenses of similar import. "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." R.C. 2941.25(A). But if the conduct constitutes two or more offenses that are of dissimilar import, the conduct results in two or more offenses committed separately, or if there is separate animus as to each offense, the indictment may contain counts for all such offenses and the defendant may be convicted of all of them. R.C. 2941.25(B).

{¶17} The Ohio Supreme Court created a test to determine if offenses are of dissimilar import pursuant to R.C. 2941.25(B). "[T]he defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 26. The allied offenses analysis is dependent upon the facts of each case because R.C. 2941.25 focuses on the defendant's conduct. *Id.* at ¶ 26.

{¶18} Appellant's trial counsel did not explicitly raise the issue of allied offenses of similar import with the trial court. Appellant now argues that his trial counsel appears to have implicitly raised this issue. At sentencing, appellant's counsel requested that the sentences for amended count four and count six to run concurrent because "they were out of the same incident." (Sent. Tr. 4).

{¶19} If trial counsel does not raise an allied offenses of similar import argument, the reviewing court is limited to a plain error review. *State v. Johnson*, 7th Dist. Columbiana No. 2000-CO-1, 2000 WL 1809030. An alleged error is plain error only if the error is "obvious" and "but for the error, the outcome of the trial would have been otherwise." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 108

{¶20} We first note that the drug possession and drug trafficking statutes that appellant pled guilty to violating were both amended after appellant was sentenced. As such, we will continue our analysis using the versions of the statutes that were in effect when appellant was sentenced.

{¶21} The offenses appellant pled guilty to are: count one for drug trafficking pursuant to R.C. 2925.03(A)(1)(C)(4)(a) (cocaine in an amount of five grams or less), amended count four for attempted drug possession pursuant to R.C. 2925.11(A)(2)(C)(6)(d) (heroin in an amount of 10 grams or more but less than 50 grams), and count six for drug possession pursuant to R.C. 2925.11(A)(C)(4)(c) (cocaine in an amount of 10 grams or more but less than 20 grams).

{¶22} The cocaine related charges and the possession of heroin charge are not allied offenses of similar import because the harm in each of these offenses is separate and identifiable involving different types of drugs. In addition, appellant pled guilty to two offenses involving cocaine; one for trafficking in an amount of five grams or less and the other for possessing an amount of more than 10 grams but less than 20 grams.

{¶23} The elements of drug trafficking are to sell or offer to sell a controlled substance or controlled substance analog. R.C. 2925.03(A)(1). The elements of drug possession are to knowingly obtain, possess, or use a controlled substance. R.C. 2925.11(A). The Ohio Supreme Court has held that these two offenses are not allied offenses of similar import for two reasons: (1) the trafficking statute does not require physical possession while the possession statute does require physical possession and (2) the trafficking statute requires an intent to sell while the possession statute only requires an intent to possess. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶ 29.

{¶24} Because appellant was not sentenced to consecutive sentences for allied offenses of similar import, his trial counsel was not ineffective during sentencing.

{¶25} Accordingly, appellant's sole assignment of error lacks merit and is overruled.

{¶26} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, P. J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the sole assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.