**[Cite as *State v. Harder*, 2015-Ohio-795.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

| | |
|---|---|
| State of Ohio | Court of Appeals No. OT-14-005 |
| Appellee | Trial Court No. 12-CR-213 |
| v. | |
| Frederick B. Harder | **DECISION AND JUDGMENT** |
| Appellant | Decided: March 6, 2015 |

* * * * *

Mark Mulligan, Ottawa County Prosecuting Attorney, and
Joseph H. Gerber, Assistant Prosecuting Attorney, for appellee.

Amanda A. Krzystan, for appellant.

* * * * *

**PIETRYKOWSKI, J.**

**{¶ 1}** Frederick B. Harder, appellant, appeals a February 12, 2014 judgment of the Ottawa County Court of Common Pleas of conviction and sentence on four counts of rape, violations of R.C. 2907.02(A)(2) and first degree felonies. Appellant pled guilty to the offenses pursuant to a plea agreement.

**{¶ 2}** The charges against appellant were brought by indictment. The Ottawa County Grand Jury returned a 73 count indictment against appellant on December 10, 2012. The indictment included 37 counts of rape and 36 counts of sexual battery. Later, in a 2013 criminal case (case No. 13-CR-086), more charges were added against appellant, including four charges of rape, two of pandering obscenities, and two of pandering sexually oriented material.

**{¶ 3}** Under a plea agreement, appellant pled guilty to four counts of rape (Counts one, two, four, and six of the indictment). The state agreed to dismiss counts three, five, and seven through seventy-three of the indictment as well as the 2013 criminal case charges at sentencing and to recommend a sentence of no more than 30 years on the four rape convictions. The trial court did not follow the state's recommendation as to sentence. The court sentenced appellant to serve ten year prison terms on each rape count, and also ordered that the sentences be served consecutively to each other, for an aggregate total period of incarceration of 40 years.

**Assignments of Error**

**{¶ 4}** Appellant asserts three assignments of error on appeal:

A. Assignment of Error I: The appellant was not afforded effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

B. Assignment of Error II: The appellant did not voluntarily and knowingly enter guilty pleas relative to Counts I, II, IV and VI given the

plea negotiations agreed upon between the states [sic] and appellant ensured appellant a thirty-year prison sentence rather than the forty-year term imposed by the sentencing court.

C. Assignment of Error III: The appellant's sentence should be vacated based upon the trial court's failure to comply with R.C. 2929.11 and R.C. 2929.12.

**{¶ 5}** We consider appellant's challenge to his guilty pleas under assignment of error No. 2 first. Appellant contends that his guilty pleas were not voluntarily and knowingly made, because the trial court imposed an aggregate term of imprisonment on the four rape convictions of 40 years, rather than a sentence of no more than 30 years, as recommended by the state in the plea bargain. Appellant contends that the trial court erred because it "represented to the Appellant that it would sentence the defendant consistent with the agreement between the Appellant and the State," failed to inform appellant of its changed intent, and did not afford appellant an opportunity to withdraw his plea.

**{¶ 6}** The state argues that the record demonstrates that appellant understood that under the plea agreement the trial court could impose an aggregate sentence of up to 40 years on the rape convictions and that the court had not agreed to impose a lesser sentence.

**{¶ 7}** A trial court is not bound to accept the state's recommended sentence in a plea agreement. *Akron v. Ragsdale*, 61 Ohio App.2d 107, 109, 399 N.E.2d 119 (9th

Dist.1978). The better practice, not followed here, is for the trial court to specifically forewarn the defendant that "it was not bound by the sentencing agreement." *State v. Walker*, 6th Dist. Lucas No. L-98-1210, 1999 WL 278120, *4 (May 7, 1999); *see State v. Darmour*, 38 Ohio App.3d 160, 529 N.E.2d 208 (8th Dist.1987), syllabus. A trial court does not err in imposing a sentence greater than that recommended by the state under a negotiated plea agreement where "the trial court forewarns the defendant of the applicable penalties, including the possibility of imposing a greater sentence than that recommended by the prosecutor." *State ex rel. Duran v. Kelsey*, 106 Ohio St.3d 58, 2005-Ohio-3674, 831 N.E.2d 430, ¶ 6, quoting *State v. Buchanan*, 154 Ohio App.3d 250, 2003-Ohio-4772, 796 N.E.2d 1003, ¶ 13 (5th Dist.). This standard can be met without the court specifically telling the defendant that it was not bound by the state's recommendation as to sentence. *Walker* at * 4; *State v. Martinez*, 7th Dist. Mahoning No. 03 MA 196, 2004-Ohio-6806, ¶ 8-9; *State v. Dixon*, 2d Dist. Clark No. 03CA0045, 2994-Ohio-4262, ¶ 11-12.

**{¶ 8}** The record discloses that in the Crim.R. 11 colloquy the trial court gave appellant notice that he could be sentenced to ten year terms of imprisonment on each of the four rape counts, to be served consecutively, for an aggregate total term of imprisonment of 40 years:

> Court: All right. Do you understand, Mr. Harder, what the state would need to prove in order to find you guilty of the offense of rape"
>
> Defendant: Yes.

Q. What do you understand the maximum penalty to be for these offenses?

A. Ten years maximum per charge.

Q. All right.

A. And bail, a bond, darn it, that isn't the right wording, a fine of $25,000 per offense.

Q. A maximum basic prison terms of ten years none of which is mandatory, and you are eligible for Judicial Release during that time period, a maximum possible fine of $25,000, none of that is mandatory. Do you understand that?

A. Yes, I do.

Q. *Now do you understand that those sentences can be given consecutively, meaning end to end, for a total of 40 years in prison?*

A. *Yes, I do.* (Emphasis added.)

**{¶ 9}** The written plea agreement, signed by appellant and filed with the court on the date of the plea hearing also provided notice that appellant faced a potential aggregate sentence of 40 years under the plea agreement. The written agreement provides for appellant withdraw his pleas of not guilty to rape charges under Counts one, two, four and six of the indictment and entered a plea of guilty separately on each count. As to each rape charge to which appellant changed his plea to guilty, the plea agreement stated:

I understand the **MAXIMUM** sentence **COULD** be: a maximum basic prison term of **ten (10) years** of which **none** is mandatory, during which I am eligible for judicial release. The maximum fine possible is **$25,000**, of which none is mandatory. Restitution, other financial costs are possible in my case. (Emphasis sic.)

**{¶ 10}** The document, the plea agreement signed by appellant also stated: "I understand that the Court may impose said sentences consecutively."

**{¶ 11}** The document sets forth what the state promised to do under the plea agreement:

No threats have been made to me. No promises have been made except as part of this plea agreement: The state will dismiss Counts #Three, #Five, #Seven through #Seventy-three of the indictment and Case No. 13-CR-086 at the time of sentencing. Further, the State will recommend a prison sentence of not more than thirty (30) years.

**{¶ 12}** In our view, the totality of the circumstances including the plea colloquy and the signed plea agreement demonstrate appellant knew at the time he changed his pleas that (1) the court was not required to follow the state's recommendation as to sentence and (2) appellant faced a potential maximum sentence of consecutive ten year terms on each count for an aggregate period of incarceration of 40 years (the sentence imposed by the trial court).

**{¶ 13}** We find assignment of error no. 2 not well-taken.

**{¶ 14}** Under assignment of error No. 1, appellant asserts that he was denied effective assistance of counsel. Appellant contends that his guilty pleas were based upon advice of counsel that was deficient and led him to believe that the maximum sentence he faced under the plea agreement was an aggregate term of imprisonment of no more than 30 years. Appellant asserts that he would not have entered guilty pleas on the four counts of rape, but would have proceeded to trial, had he known that he faced a potential 40 year prison term. The state argues that evidence is lacking in the record to support appellant's claim of ineffective assistance of counsel.

**{¶ 15}** To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

**{¶ 16}** In the context of convictions based upon guilty pleas, the prejudice element generally requires a showing "that there is a reasonable probability that, but for counsel's errors * * * [the defendant] * * * would not have pleaded guilty and would have insisted

on going to trial." *Hill v. Lockhart* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *State v. Xie*, 62 Ohio St.3d 521,524, 584 N.E.2d 715 (1992).

**{¶ 17}** Where proof of a claim of ineffective assistance of counsel requires consideration evidence outside of the record, the claim "is not appropriately considered on direct appeal." *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 162, quoting *State v. Madrigal*, 87 Ohio St.3d 378, 391, 721 N.E.2d 52 (2000); *State v. Estis*, 6th Dist. Wood No. WD-11-069, 2013-Ohio-318, ¶ 16.

**{¶ 18}** We conclude that consideration of evidence outside the record is necessary in this case to prove appellant's claim of ineffective assistance of counsel. Evidence is lacking in the record upon which to determine the nature of trial counsel's advice concerning appellant's decision to plead guilty to the rape charges. Specifically evidence is lacking to demonstrate that counsel advised appellant that he faced a maximum term of 30 years imprisonment under the plea agreement. Evidence is also lacking to establish that there is a reasonable probability that appellant would not have pled guilty to the rape charges but would have insisted on going to trial but for counsel's errors.

**{¶ 19}** We find assignment of error No. 1 not well-taken on that basis.

**{¶ 20}** Under assignment of error No. 3, appellant argues that his sentences should be vacated because the trial court abused its discretion in that it failed to consider the overriding purposes and principles of felony sentencing under R.C. 2929.11 and sentencing factors listed in R.C. 2929.12, when it imposed sentence.

**{¶ 21}** Our review of felony sentencing is governed by R.C. 2953.08(G)(2). *State v. Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 11. In *Tammerine* we outlined appellate review of felony sentencing under R.C. 2953.08(G)(2):

> R.C. 2953.08(G)(2) establishes that an appellate court may increase, reduce, modify, or vacate and remand a disputed sentence if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13(B) or (D), division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law. *Tammerine* at ¶ 11, quoting R.C. 2953.08(G)(2).

**{¶ 22}** Although the abuse of discretion standard set forth in *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, is no longer controlling in appellate review of felony sentencing, we recognized in *Tammerine* that *Kalish* still can provide guidance for determining whether a sentence is clearly and convincingly contrary to law:

> Significantly, *Kalish* determined that a sentence was not clearly and convincingly contrary to law in a scenario in which it found that the trial court had considered the R.C. 2929.11 purposes and principles of sentencing, had considered the R.C. 2929.12 seriousness and recidivism factors, had properly applied post release control, and had imposed a

sentence within the statutory range. *Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124 at ¶ 18. *Tammerine* at ¶ 15.

**{¶ 23}** At the sentencing hearing the trial court discussed R.C. 2929.11 and 2929.12. The court read R.C. 2929.11 into the record. It also stated that it had considered the sentencing factors in 2929.12.

**{¶ 24}** R.C. 2929.11(A) states that a sentencing court "shall be guided by the overriding purposes of felony sentencing * * * [which] * * * are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." The statute outlines matters to be considered to achieve those purposes. Under R.C. 2929.11(B) the statute also provides that the felony sentence is to be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentence imposed for similar crimes committed by similar offenders."

**{¶ 25}** R.C. 2929.12 sets forth factors relating to the seriousness of the conduct, likelihood of recidivism, and pertaining to the offender's service in the armed forces. R.C. 2929.12(A).

**{¶ 26}** The court stated that it had reviewed the presentence investigative report, appellant's criminal history, psychiatric evaluations, employment history and appellant's background. The court stated that the original charges included 37 counts of rape and 36

counts of sexual battery. Subsequently, an additional four more rape, two pandering obscenities, and two pandering sexually oriented material charges were also filed. Appellant pled guilty to four counts of rape.

**{¶ 27}** The court noted that the rapes began on the victim's 12th birthday and there are photographs depicting appellant having sexual conduct with the victim as early as when the victim was age six. The court concluded that appellant failed to show remorse.

**{¶ 28}** The court noted that Dr. Charlene Cassel, who conducted the psychiatric evaluation of appellant, stated in her report that appellant attempted to fake his psychiatric evaluation. The court also considered Dr. Cassel's findings that "[t]here is nothing in this man's history that suggests that he has ever had a serious mental illness. No mental illness or mental defect which may have prevented the Defendant from knowing the wrongfulness of his behavior."

**{¶ 29}** The court stated that "I cannot in good conscience sentence you to 30 years."

**{¶ 30}** In our view, the record demonstrates that the trial court considered the overriding purposes of felony sentencing under R.C. 2929.11 as well as the seriousness and recidivism factors under R.C. 2929.12 when imposing sentence. The court also imposed sentences within the statutory range of sentences for first degree felonies under the version of R.C. 2929.14(A)(1) in effect in 2009 and 2010, when the offenses

occurred.[1] Appellant has not claimed error as to the imposition of postrelease control. Accordingly, we conclude that appellant's sentences are not clearly and convincingly contrary to law.

**{¶ 31}** We find assignment of error No. 3 not well-taken.

**{¶ 32}** Justice having been afforded the party complaining, we affirm the judgment of the Ottawa County Court of Common Pleas. We order appellant to pay the cost of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE



[1] At that time, the maximum sentence for a first degree felony was ten years. It was increased to eleven years by 2011 H 130, effective September 11, 2011.