

[Cite as *State v. Barker*, 2010-Ohio-2191.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-564
 : (C.P.C. No. 08CR-08-5874)
 Stephan C. Barker, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on May 18, 2010

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Clark Law Office, and *Toki Michelle Clark*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Stephan C. Barker ("appellant"), appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas following appellant's pleas of guilty to one count of burglary and one count of domestic violence. For the reasons that follow, we affirm that judgment.

{¶2} Appellant's convictions arise out of an incident that occurred on July 27, 2008, on Rockcastle Drive involving Jane Lawson. Appellant and Ms. Lawson have a child together but were not residing together. Ms. Lawson alleged that she and a friend were approached at her residence by appellant, who started an argument. Ms. Lawson

attempted to retreat into her residence, but appellant followed her, pushing his way inside. A physical altercation ensued. Appellant eventually left the residence, but then attempted to strike Ms. Lawson and her friend with his vehicle. As a result, appellant was indicted for one count of aggravated burglary, one count of felony domestic violence, and two counts of felonious assault.

{¶3} On March 19, 2009, appellant and the State of Ohio entered into a plea agreement. Appellant signed a two-page entry of guilty plea form acknowledging that he was pleading guilty to one count of domestic violence, a fourth degree felony, and to one count of the stipulated lesser included offense of burglary, a felony of the third degree. A nolle prosequi was entered for the remaining counts. The entry of guilty plea form set forth the maximum prison terms for each offense, with those being 18 months for the domestic violence count and five years for the burglary count. The provision on the plea form which provided for a jointly recommended sentence had a large "X" drawn through it.

{¶4} During the plea hearing, the trial court discussed the plea form with appellant and addressed his rights pursuant to Crim.R. 11. Among other things, the court informed appellant that, by entering pleas of guilty, he was waiving his right to: (1) a trial by jury or by the court; (2) confront or cross-examine witnesses against him; (3) compel witnesses who would testify in his favor to appear; (4) remain silent and require the State of Ohio to prove his guilt beyond a reasonable doubt; and (5) appeal to a higher court if mistakes were made during trial. The trial court also addressed the charges to which appellant was pleading guilty, along with the maximum fine and penalties, and the implications of a community control sanction or a prison sentence, which would also include a period of post-release control.

{¶5} After addressing these issues with appellant, the trial court found that appellant had made a knowing, intelligent, and voluntary waiver of his rights and that he understood the nature of the charges, the effect of the plea, and the maximum penalties which could be imposed.

{¶6} Additionally, during the plea hearing, the State of Ohio emphasized that the parties were not making a joint recommendation, that appellant's counsel was requesting a Community Based Correctional Facility ("CBCF") evaluation, and that the State of Ohio intended to request a prison sentence at the sentencing hearing. The trial court then ordered a pre-sentence investigation as well as a CBCF evaluation and scheduled the matter for sentencing.

{¶7} A sentencing hearing was held on April 17, 2009. The State of Ohio, Ms. Lawson, appellant's counsel, and appellant were all given an opportunity to speak. Next, the trial court read various portions of the pre-sentence investigation report regarding appellant's prior convictions and the facts of the instant case into the record. The trial court then sentenced appellant to an 18-month sentence on the domestic violence offense, to be run consecutively to a five-year sentence on the burglary offense, for a total sentence of six and one-half years. Appellant was also informed he would be supervised on post-release control for three years following his release from prison.

{¶8} Upon hearing the sentence, appellant informed the trial court that his counsel had told him to lie at the plea hearing in order to get a deal. Appellant also informed the court that he now wanted to have a trial, but the trial court refused his demand.

{¶9} Appellant filed a timely appeal and raises the following four assignments of error:

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE AND VIOLATED HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION WHEN IT ERRED PURSUANT TO OHIO CRIMINAL RULE 11 AND ACCEPTED AN UNKNOWING, UNINTELLIGENT AND INVOLUNTARY GUILTY PLEAS.

ASSIGNMENT OF ERROR NO. 2:

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR NO. 3:

THE TRIAL COURT LACKED THE STATUTORY AUTHORITY TO IMPOSE CONSECUTIVE SENTENCES UNDER THE POST-FOSTER STATUTE, AND UNDER THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR NO. 4:

A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHT TO A JURY TRIAL IS VIOLATED WHERE THE TRIAL COURT FAILS TO HOLD A HEARING TO ASSESS WHETHER THERE WAS A WAIVER OF A JURY TRIAL.

{¶10} In his first assignment of error, appellant submits that the trial court failed to comply with the requirements of Crim.R. 11 and thus accepted a guilty plea that was not entered knowingly, intelligently, and voluntarily. We disagree.

{¶11} The waiver of a defendant's constitutional right to a trial must be knowing, intelligent, and voluntary. *State v. Turner*, 10th Dist. No. 08AP-978, 2009-Ohio-2403. See also *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179 (A plea in a criminal

case must be made knowingly, intelligently, and voluntarily. Failure to meet all three renders the plea unconstitutional under both the United States and Ohio Constitutions).

{¶12} Crim.R. 11 governs the process of accepting a plea. Crim.R. 11(C)(2) provides as follows:

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶13} Appellant submits that throughout the plea hearing, the trial court failed to engage in a colloquy with him and instead merely spoke "at" him. Appellant contends he was not properly advised of the possible effect and ramifications of his plea. Appellant asserts the trial court never informed him that he could be subject to a maximum sentence, even though he had negotiated a purported deal with the State of Ohio. As a result, appellant argues he was left with the mistaken impression that his plea would result in a negotiated sentence for community control, with the added condition of

attendance at CBCF. Had he known the trial court could still sentence him to the maximum period of incarceration, or to any type of incarceration, he would not have entered the guilty pleas.

{¶14} Appellant's assignment of error is based solely upon his assertion that he made some type of an agreement with the State of Ohio to receive only a community control sanction. However, this assertion is not supported by the record. In fact, the record refutes this claim.

{¶15} At the plea hearing, the State of Ohio recited the maximum penalties which could be imposed for appellant's crimes. This information was also contained in the signed entry of guilty plea form. The trial court went over this information as well:

THE COURT: The law requires that you understand the maximum penalties that could be imposed. The domestic violence is a felony four. That could be 18 months in prison and a fine of up to \$5,000.

Burglary is a felony three. That could be five years in prison and a fine of up to \$10,000. Under certain circumstances these could run back to back, so that would be six and a half years and \$15,000. Do you understand these maximum penalties?

THE DEFENDANT: Yes, sir.

(Plea Tr. 5.)

{¶16} The trial court went on to explain that it was ordering a pre-sentence investigation and that when appellant returned for sentencing, the court would have to decide whether it was going to place appellant on a period of community control or send him to prison.

THE COURT: I'm going to order a pre-sentence investigation. You will come back here in a number of weeks for sentencing. At that point in time, I'll need to make a decision, and I have

two choices. I could send you to prison, or I could put you on a period of community control. * * *

(Plea Tr. 5-6.)

{¶17} The trial court explained the implications of a prison sentence, including the lack of time off for good behavior, and post-release control. The trial court also explained the implications of community control. When asked if he had any questions, appellant inquired about "good time" credit. The trial court explained there was no time off for good behavior.

{¶18} This exchange, among others, demonstrates that a colloquy between appellant and the trial court did in fact take place. From this exchange, one can infer that appellant was in fact listening to the information provided by the court and questioning anything that he did not understand. This refutes appellant's claim that the trial court merely talked "at" him and that his plea was not knowingly, voluntarily, and intelligently entered.

{¶19} Furthermore, the transcript of the plea hearing reveals the State of Ohio made it quite clear that there was no joint recommendation in this matter and that it intended to request a prison sentence:

[PROSECUTOR]: So we are clear on the record, Judge, there is no joint recommendation in this case, and I'm aware Mr. Beal [appellant's trial counsel] is asking for a CBCF evaluation. However, based upon his prior record and conduct in this case, the State of Ohio at the time of sentencing will be asking for prison time.

(Plea Tr. 14.)

{¶20} Neither appellant nor his counsel objected to these remarks by the State of Ohio. Based upon the record, there is absolutely no evidence to support appellant's

contention that the State of Ohio and appellant and/or appellant's counsel negotiated a deal that would definitively result in a sentence that did not involve incarceration. Furthermore, the trial court clearly informed appellant that when he returned for sentencing, the court would have to decide whether he would sentence appellant to a period of incarceration or to a period of community control.

{¶21} In addition, the trial court properly informed appellant that he was giving up various constitutional rights by changing his plea to guilty:

THE COURT: When you change your pleas to guilty you give up rights that are guaranteed by our Constitution. I need to make certain that you understand each one of these rights and that you're willing to waive or give up these rights, so I'll explain them one at a time. I'm going to ask if you understand my explanation. Then at the end I'm going to ask you if you're willing to waive or give up these rights.

(Plea Tr. 8-9.)

{¶22} Throughout that exchange and in response to the trial court's questions as to whether or not appellant understood each of those rights he was waiving, appellant responded "Yes, sir." (Plea Tr. 9-12.)

{¶23} Accordingly, we find the trial court complied with Crim.R. 11 and properly accepted a plea that was knowingly, intelligently, and voluntarily entered. Appellant's first assignment of error is overruled.

{¶24} In his second assignment of error, appellant submits he was denied the effective assistance of counsel as guaranteed by the United States and Ohio Constitutions.

{¶25} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Therefore, the burden of showing ineffective

assistance of counsel is on the party asserting it. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675. Additionally, in fairly assessing counsel's performance, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101.

{¶26} "[T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." *Strickland v. Washington*, (1984) 466 U.S. 686, 686, 104 S.Ct. 2052, 2064. In order to succeed on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, he must demonstrate that his trial counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. This requires a showing that his counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.*

{¶27} If he can show deficient performance, he must next demonstrate that he was prejudiced by the deficient performance. *Id.* To show prejudice, he must establish there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to erode confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

{¶28} To prevail here, appellant must meet the test for ineffective assistance of counsel as established in *Strickland* and as applied to the plea process in *Hill v. Lockhart*

(1985), 474 U.S. 52, 106 S.Ct. 366. See *State v. Bird*, 81 Ohio St.3d 582, 585, 1998-Ohio-606; *State v. Xie* (1992), 62 Ohio St.3d 521, 524; and *State v. Ransom* (Aug. 12, 1999), 10th Dist. No. 98AP-1613 (in order to obtain relief, the defendant must show that he would not have pled guilty to the reduced charges if his counsel's advice had been correct).

{¶29} Citing to *State v. Bradley* (1989), 42 Ohio St.3d 136, and *State v. White*, 12th Dist. No. CA2008-02-046, 2009-Ohio-2965, appellant argues that we, as the reviewing court, need not determine whether his counsel's performance was deficient before examining the prejudice he suffered as a result of his counsel's deficiencies. Based upon this statement and his corresponding argument, appellant seems to infer that we need not examine and determine whether counsel's performance was deficient at all, and that we can solely look to the prejudice element. We do not agree.

{¶30} Appellant contends he was prejudiced as a result of his counsel's shortcomings and submits that if his counsel had adequately advised him of the ramifications of the plea, including his exposure to incarceration, appellant would not have entered pleas of guilty and would have been more likely to opt for a jury trial.

{¶31} Appellant has failed to provide legitimate authority to support his position, which contravenes the long-standing rule that he must meet both prongs of the two-pronged test set forth under *Strickland* in order to establish ineffective assistance of counsel. While *Strickland* established that it is unnecessary for a court to approach the inquiry in the same order or to address both components of the inquiry if the defendant makes an insufficient showing on one of the components, neither *Strickland* nor *Bradley*

nor *White* stand for the idea that a defendant need not establish both sufficient prejudice and deficient performance in order to prevail on his claim.

{¶32} Here, appellant claims that if his counsel had adequately advised him of the ramifications of the plea, he would not have pled guilty, and thus, but for counsel's errors, he would not have entered these pleas. Yet appellant has failed to demonstrate how counsel's advice to him was inadequate and/or how his representation of him was deficient. There is nothing in the record to indicate that counsel's advice was incorrect or incomplete as to the possibility that appellant would be sentenced to a period of incarceration. In fact, we don't know what was discussed between appellant and counsel on this particular issue, as there is nothing specifically in the record regarding the details of any discussions between appellant and his counsel, presumably because such discussions are privileged and/or confidential and/or are not typically held on the record or in open court. Appellant has not met his burden of proving error by referencing matters in the appellate record. See *Knapp v. Edward Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶33} Moreover, the record supports the State of Ohio's argument that there was no joint sentencing recommendation supporting the imposition of community control, thereby further diminishing support for appellant's claim that his counsel's performance was deficient, since the record demonstrates that the purported "deal" never existed.

{¶34} Because there is no evidence in the record to demonstrate that appellant's trial counsel erred in this regard, appellant has not demonstrated that his counsel's performance was deficient, and thus, it follows that appellant cannot demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty. Accordingly, we overrule appellant's second assignment of error.

{¶35} In his third assignment of error, appellant argues the trial court lacked the statutory authority to impose consecutive sentences under the United States Constitution and under the post-*Foster* sentencing statutes. Appellant argues that although *Foster* now allows trial courts to impose consecutive sentences without judicial factfinding, the United States Constitution does not permit the imposition of maximum consecutive sentences as were imposed in the instant case. Appellant directs the court's attention to Article XIV of the United States Constitution to support his position, but offers no further explanation or authority.

{¶36} The premise of appellant's argument is unclear, and we are at a loss as to exactly what appellant is attempting to argue. As the United States Constitution does not contain an Article XIV, we presume appellant intended to direct us to the Fourteenth Amendment of the United States Constitution, specifically the due process clause. However, even in examining the Fourteenth Amendment and applicable caselaw, we find no merit in appellant's argument.

{¶37} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio severed certain statutory sentence-finding requirements, based upon a determination by the United States Supreme Court that such judicial factfinding was unconstitutional. Prior to *Foster*, and as a result of Am.Sub.S.B. No. 2, prison sentences were to be served concurrently unless consecutive sentences were determined to be appropriate, based upon compliance with other statutory directives as determined by a judge. *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, ¶5. However, this statutory presumption in favor of concurrent sentences was excised in *Foster* and the previously existing common law presumptions were reinstated. *Id.* at ¶18. In *Foster*, the Supreme

Court of Ohio determined trial courts were still permitted to impose consecutive sentences. See *Foster* at paragraphs three, four, and seven of the syllabus. Trial courts now have the discretion and inherent authority to determine whether a prison sentence imposed within the statutory range shall run consecutively or concurrently. *Bates* at ¶19.

{¶38} A long-standing principle of constitutional law is that a trial court's authority for imposing sentence is derived from the statutes enacted by the General Assembly. *Bates* at ¶12. But, "in the absence of statute, it is a matter solely within the discretion of the sentencing court as to whether sentences shall run consecutively or concurrently." *Stewart v. Maxwell* (1963), 174 Ohio St. 180, 181. See *Bates* at ¶13. See also *State v. Worrell*, 10th Dist. No. 06AP-706, 2007-Ohio-2216, ¶9, 11 (pursuant to *Foster*, trial courts have discretionary power to impose consecutive sentences; to the extent *Foster* did not expressly discuss this authority, previous Ohio Supreme Court decisions have endorsed the concept that a court's authority to impose consecutive sentences derives from common law).

{¶39} Thus, post-*Foster*, and in the absence of statutory authority, trial courts are still permitted to impose consecutive sentences. To the extent appellant has argued that some statutory authority is necessary to impose consecutive sentences post-*Foster*, and that appellant's due process rights have been violated as a result of the absence of such authority, we reject that argument. Appellant's third assignment of error is overruled.

{¶40} In his fourth assignment of error, appellant argues the trial court erred in failing to hold a hearing after the imposition of appellant's sentence in order to determine whether or not appellant had properly waived his right to a trial by jury. Appellant cites to *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104, to support his position that

the failure to hold a hearing in this matter was a clear violation of appellant's constitutional right to a jury trial. However, we find *Gilfillan* is not applicable to the instant case.

{¶41} In *Gilfillan*, the defendant was convicted of one count of rape following a bench trial. After the conviction, defendant, through new counsel, filed several motions requesting a new trial and arguing that his former counsel had been ineffective. The trial court held a hearing based on the Crim.R. 33 motions for new trial, which were based upon the alleged ineffective assistance of counsel. The trial court ultimately denied the defendant's request for a new trial. Because the trial court conducted a hearing in *Gilfillan*, appellant submits the trial court should have conducted a hearing in this case.

{¶42} While appellant attempts to draw a comparison between the circumstances in *Gilfillan* and the case before us, we find the two situations are not comparable and that *Gilfillan* is distinguishable.

{¶43} The instant case involves a guilty plea, not a bench trial as in *Gilfillan*. Furthermore, in *Gilfillan*, the defendant filed a motion for a new trial prior to sentencing on the grounds that he had received ineffective assistance of counsel because his counsel had given him erroneous information, causing him to choose a bench trial, rather than a jury trial.

{¶44} Here, we have already determined appellant was properly informed of all of the rights he was waiving, including his right to a jury trial, at his plea hearing. Additionally, we have determined appellant's counsel was not ineffective in advising appellant. Nevertheless, appellant argues that he should be granted a second hearing to assess whether there was a proper jury trial waiver, despite the fact that his sentence had already been imposed, because he claimed he lied during the plea hearing and because

he believed he would receive community control, rather than a prison sanction. However, we fail to see how this warrants a second hearing or denies appellant his constitutional right to a jury trial, simply because he was unhappy with the sentence imposed by the trial court. We further note that appellant did not file a motion to withdraw his guilty pleas pursuant to Crim.R. 32.1.

{¶45} Accordingly, we overrule appellant's fourth assignment of error.

{¶46} Having overruled appellant's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.
