

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2014-06-139
 :
 - vs - : OPINION
 : 3/16/2015
 :
 MITCHELL PAUL SIMON, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR13-12-1983

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PIPER, P.J.

{¶ 1} Defendant-appellant, Mitchell Simon, appeals his convictions and sentence in the Butler County Court of Common Pleas for attempted aggravated murder and aggravated arson.

{¶ 2} When Simon was 16 years old, he attempted to kill his parents by setting his family's home on fire while his parents were sleeping in separate bedrooms. Simon used an

accelerant to start fires in two separate areas of the upstairs near the bedrooms. Fire investigators also found rope tied around the doorknobs of the bedroom doors where Simon's parents slept so that they could not open the doors to escape. Simon's parents survived the fire, and Simon was eventually arrested.

{¶ 3} Simon originally appeared in the Butler County Juvenile Court for a probable cause hearing. The juvenile court found that probable cause existed, and then transferred the case to the common pleas court pursuant to Ohio's mandatory bindover statutes. Simon was therefore tried as an adult. Simon was indicted on two counts of attempted aggravated murder and one count of aggravated arson. He entered a plea of not guilty by reason of insanity, and also challenged his competency to stand trial. The trial court ordered psychiatric evaluations as to Simon's claims of insanity and incompetency. The evaluations determined that Simon did not suffer from a severe mental defect and that he was competent to stand trial. Simon later withdrew his not guilty by reason of insanity plea and entered a guilty plea to each charge.

{¶ 4} The trial court did not order a presentence investigation report, but later held an extensive sentencing hearing. During the hearing, Simon presented mitigation evidence and asked the trial court to sentence him to community control rather than prison so that he could continue to receive the psychiatric care that he had been receiving since his arrest. Simon's treating psychotherapist, Dr. Samuel Robertson, testified first, stating that Simon had made great progress in his mental development and understanding of why he had set the fire. Dr. Robertson opined that Simon should continue to receive psychiatric treatment rather than go to prison, and that Simon was not a threat to his parents or society. Simon's parents also spoke during the sentencing hearing and asked the trial court to sentence Simon to community control, rather than prison, so that their son could continue to seek psychiatric care.

{¶ 5} The trial court reviewed the principles and purposes of sentencing, and referred to the evaluations of Simon's mental health before ordering nine-year sentences on each of the three charges, to be served concurrently. Simon argued that the aggravated arson charge should merge with the attempted aggravated murder charges, but the trial court found that the two crimes were not allied offenses. Simon now appeals his convictions and sentence, raising the following assignments of error. Because Simon's first two assignments of error are interrelated, we will address them together.

{¶ 6} Assignment of Error No. 1:

{¶ 7} APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

{¶ 8} Assignment of Error No. 2:

{¶ 9} OHIO'S MANDATORY BINDOVER SCHEME IS UNCONSTITUTIONAL.

{¶ 10} Simon argues in his first assignment of error that he was denied effective assistance of counsel because his trial counsel did not challenge Ohio's mandatory bindover statutes, and in his second assignment of error, that such statutes are unconstitutional.

{¶ 11} The United States Supreme Court established a two-part test in regard to ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). That test requires an appellant to establish that first, "his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial." *State v. Myers*, 12th Dist. Fayette No. CA2005-12-035, 2007-Ohio-915, ¶ 33. Regarding the first prong, an appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The second prong requires the appellant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

{¶ 12} Simon argues that his counsel's performance was deficient and prejudicial for

not arguing that Ohio's mandatory bindover statutes are unconstitutional. According to R.C. 2152.12(A)(1)(a), a juvenile court must transfer the case to the common pleas court when a child has been charged with attempted aggravated murder if that child is 16 or 17 years old at the time of the act and there is probable cause to believe that the child committed the act. Simon argues that the mandatory nature of the bindover statute violates his constitutional rights to due process because the statute denies him of an individualized determination as to his amenability to the juvenile court system.

{¶ 13} As an initial matter, we note that the failure to challenge the constitutionality of a statute at the trial court level constitutes a waiver of that issue. *State v. Awan*, 22 Ohio St.3d 120 (1986), syllabus. Additionally, a defendant who voluntarily, knowingly, and intelligently enters a guilty plea with the assistance of counsel may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, ¶ 78.

{¶ 14} In this case, Simon failed to raise his constitutional challenges to the mandatory transfer in the juvenile court or the trial court. Nor does Simon challenge the validity of his plea. As such, Simon has waived his right to challenge the constitutionality of the bindover statutes, and cannot raise a claim of ineffective assistance of counsel in matters not appearing in the record on direct appeal. *State v. Rodriguez*, 12th Dist. Butler No. CA2001-04-077, 2002-Ohio-3978, ¶ 22.

{¶ 15} Even so, and assuming arguendo that Simon had properly preserved the right to challenge his trial counsel's effectiveness, Ohio courts have continually found that the mandatory bindover statute is constitutional and does not violate due process or other constitutional rights. *State v. Agee*, 133 Ohio App.3d 441(2d Dist.1999); *State v. Kelly*, 3d Dist. Union No. 14-98-26, 1998 WL 812238 (Nov. 18, 1998); *State v. Lee*, 11th Dist. Lake No. 97-L-091, 1998 WL 637583 (Sept. 11, 1998); *State v. Collins*, 9th Dist. Lorain No.

97CA006845, 1998 WL 289390 (June 3, 1998).

{¶ 16} We agree with the holdings of our sister courts that the mandatory bindover statutes do not violate due process. The statute, which removes any discretion from the juvenile court, requires the juvenile court to bind the juvenile-defendant over if three qualifications are met: the defendant must have committed a delineated crime, the defendant must be of a certain age, and there must be probable cause to support the charge. Because juvenile judges have no discretion in the matter and are required to hold a hearing to determine the defendant's age, the category of the offense charged, and whether probable cause exists, there is no deprivation of due process. *Kelly*, 3d Dist. Union No. 14-98-26.

{¶ 17} Given the constitutionality of the statute, Simon's trial counsel's performance was not deficient because any due process challenge to the statute would have been overruled based on established precedent upholding the constitutionality of the statute.¹ For this same reason, Simon's challenge to the constitutionality of the statute within his second assignment of error is also without merit.

{¶ 18} In his first assignment of error, Simon also argues that his counsel was ineffective for failing to request a presentence investigation report. According to R.C. 2951.03(A)(1), "no person who has been convicted of or pleaded guilty to a felony shall be placed under a community control sanction until a written presentence investigation report has been considered by the court."

{¶ 19} Simon argues that the trial court could not consider community control as a possible sentence because his trial counsel never requested a presentence investigation report and did not object when the trial court did not order one of its own accord. In order to

1. Simon also argues that the trial court lacked jurisdiction because the bindover statute is unconstitutional. However, given our decision that the statute is constitutional, the trial court held proper jurisdiction where the juvenile court found that Simon was 16 years old, was charged with attempted aggravated murder, and that there was probable cause to support the charge.

demonstrate prejudice, Simon argues that the presentence investigation report would have presented the trial court with mitigation evidence and relevant information indicating that community control was the proper sentence, and that the report would have permitted the trial court to at least consider a sentence of community control rather than prison.²

{¶ 20} After reviewing the record, we find that Simon received effective assistance despite the fact that counsel did not request a presentence investigation report. The record is clear that the trial court considered extensive mitigation evidence at the sentencing hearing, including full testimony from Simon's psychotherapist, Dr. Robertson, as well as statements from Simon's parents and attorney, as well as his own allocution.

{¶ 21} Dr. Robertson testified to Simon's mental condition and thoughts/actions that led Simon to set the fire. Dr. Robertson testified specifically to difficulties Simon and his parents had incurred in the past given a genetic disorder that Simon faced as a baby, and how that caused Simon to have a strained relationship with his parents. Dr. Robertson discussed the great strides Simon had made in his mental development since the time of his arrest, and that Simon was taking responsibility for his actions in a more coherent manner. Dr. Robertson also testified to the childlike way that Simon thought and reacted before setting the fire, and how his thought processes had advanced once he gained a deeper understanding of his relationship with his parents and how the genetic disorder issue shaped that relationship. Dr. Robertson also discussed a journal that Simon kept, in which he planned his parents' murder by fire and drew a picture of a burning house. Dr. Robertson tried to explain why Simon would keep the journal, and what the entries actually meant.

2. Simon presumes that a presentence investigation report would have been favorable. Not requesting a report may well have been a decision of strategy by Simon's trial counsel. Counsel was able to control the nature of information provided to the trial court when selecting what evidence to present during the sentencing hearing, as well as what questions to ask of witnesses to produce mitigation evidence. Conversely, a probation department's presentence investigation may have brought to the trial court's attention information that did not lend itself to mitigation.

{¶ 22} Moreover, the trial court heard from Simon's parents and from Dr. Robertson as to their collective belief that Simon was no longer a threat, and would benefit from therapy and community control rather than prison. Simon's mother and father told the trial court that they both wanted Simon to receive counseling and strict community control conditions, and that neither parent wanted Simon to serve any time in prison. Simon's parents also expressed their complete willingness to stand by and support Simon through his continued treatment.

{¶ 23} The trial court also had reports and evaluations from psychologists regarding Simon, which included information on the way Simon acted and thought before setting the fire, his attempt to escape criminal liability by making up mental psychosis, and his general behavior since the time of setting the fire.

{¶ 24} The trial court had ample evidence, even absent a presentence investigation report, to determine the circumstances surrounding Simon's actions and to render sentence. Although Simon places great weight on the fact that the trial court was prohibited from sentencing him to community control because there was no presentence investigation report, the trial court did not rely on that fact alone when sentencing Simon. Instead, the trial court noted that "community control is not an option for a variety of reasons. * * *. There is a presumption that a prison term is necessary. And while I have heard mitigation today, I've taken a lot of things into account. I don't believe there's been sufficient mitigation to override or to rebut the presumption of prison."

{¶ 25} The trial court also stated,

I have reviewed countless times the competency evaluation * * *. I reviewed the discovery that's been filed in this matter. I've reviewed the bill of particulars that's been filed. I am taking into account the testimony that Dr. Robertson gave this morning as well as the comments of your parents and your comments as well as that of your attorney.

In every case, whether it be this one or any other criminal case, I take into account –I must and I do take into account the principles and purposes of our sentencing statutes here in Ohio. And the overriding purpose of Ohio[’s] sentencing statute is to punish the offender and to protect the public from future crime while using the minimum sanctions necessary to accomplish that purpose. In addition, this court is obligated by law to sentence you commiserate [sic] with and not demeaning to the seriousness of your conduct.

{¶ 26} The trial court then went through several sentencing factors in more detail and addressed the mitigation evidence in regard to the principles and purposes of sentencing before sentencing Simon to prison rather than community control. There is absolutely no indication in the record that the results of the trial court’s sentencing decision would have been different had Simon’s trial counsel requested a presentence investigation report. As such, Simon has failed to demonstrate that he received ineffective assistance of counsel. Simon’s first and second assignments of error are therefore, overruled.

{¶ 27} Assignment of Error No. 3:

{¶ 28} THE TRIAL COURT ERRED IN FINDING THAT SIMON’S OFFENSES WERE NOT ALLIED OFFENSES.

{¶ 29} Simon argues in his third assignment of error that his conviction for aggravated arson should merge with his convictions for attempted aggravated murder.

{¶ 30} The Ohio Supreme Court has set forth a test to determine when merger is required. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. Pursuant to the *Johnson* test, courts must first determine "whether it is possible to commit one offense *and* commit the other with the same conduct." *Id.* at ¶ 48. (Emphasis sic.) It is not necessary that the commission of one offense will always result in the commission of the other, only that it is possible for both offenses to be committed by the same conduct. *Id.*

{¶ 31} If it is possible to commit both offenses with the same conduct, courts must next determine whether the offenses were in fact committed by the same conduct, or a single

act performed with a single state of mind. *Id.* at ¶ 49. If the answer to both prongs of the test is yes, then the offenses are allied offenses of similar import and must be merged. *Id.* at ¶ 50. Conversely, if the offenses are committed separately or with a separate animus, the offenses will not merge. *Id.* at ¶ 51.

{¶ 32} An appellate court applies a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, ¶ 28. "The defendant bears the burden of establishing his entitlement to the protection provided by R.C. 2941.25 against multiple punishments for a single criminal act." *State v. Lewis*, 12th Dist. Clinton No. CA2008-10-045, 2012-Ohio-885, ¶ 14.

{¶ 33} The decision as to whether the offenses are allied rests upon a review of the facts in this case. However, given that Simon pled guilty to the charges and that the state did not take an opportunity to provide the trial court with any facts outside the bill of particulars and indictment, we are very limited in our application of facts to the *Johnson* test.³

{¶ 34} The bill of particulars, which essentially mirrored the language of the indictment, described the charge of attempted aggravated murder against Simon's father as,

On or about October 23, 2013 * * * Mitchell Paul Simon did purposely or knowingly, when purpose or knowledge is sufficient culpability for the commission of the offense, engage in conduct which if successful would constitute or result in the offense of AGGRAVATED MURDER, O.R.C. 2903.01(B), purposely causing the death of another, to wit: Mr. Perry Simon, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, aggravated arson, arson, which constitutes the offense of ATTEMPTED AGGRAVATED MURDER, a First Degree Felony, in violation of R.C. §2923.02(A) ~ 2903.01(B).

{¶ 35} The bill of particulars used the exact same language for the second count specific to Simon's mother, expect that her name appears as the victim in the second count.

3. During the sentencing hearing, Simon challenged the trial court's decision to not merge the charges. The trial court asked the state if it wanted to elaborate on the details or facts, and the state declined the invitation.

In regard to the aggravated arson charge, the bill of particulars provides,

On or about October 23, 2013, * * * Mitchell Paul Simon did by means of fire, knowingly create a substantial risk of serious physical harm to any person other than the offender, to wit: Mr. Perry Simon and Mrs. Sharon Simon, which constitutes the offense of AGGRAVATED ARSON, a First Degree Felony, in violation of R.C. §2909.02(A)(1).

{¶ 36} Applying the *Johnson* test, we find it possible to commit both attempted aggravated murder and aggravated arson with the same conduct because Simon was trying to kill his parents by burning down the house in which they were located. In fact, the bill of particulars, and the way in which the state chose to indict the attempted aggravated murder charge under subsection (B), indicates that Simon was attempting to kill his parents *while committing aggravated arson*. Therefore, both crimes could be committed with the same conduct.

{¶ 37} We also find that the offenses were in fact committed by the same conduct, or a single act performed with a single state of mind, because Simon set fire to the house as the sole means of killing his parents. There is no indication in the record that Simon set the fire for any other reason than to kill his parents, or that he was contemplating killing his parents by any means other than the fire.

{¶ 38} This finding is supported by the very limited discussion of the facts that occurred during the sentencing hearing, as stated by the trial court when it was reviewing the sentencing factors.⁴ The court noted that Simon had planned the fire as a means of killing his parents, as evidenced by a journal that Simon kept, in which he drew a picture of the burning house, complete with flames and smoke. At the bottom of the picture, Simon wrote

4. During oral arguments, Simon indicated that some of the facts discussed by the trial court were not included in the record. However, the trial court discussed the facts in detail based upon the reports and evaluations that were used when determining Simon's competency and sanity. Moreover, Dr. Robertson made reference to some of the journal entries during his testimony at the sentencing hearing in an attempt to explain what Simon was thinking when he made the entries. As such, the facts were made part of the record.

"burn parents alive." Simon's journal also indicates that he wanted his mother to "burn in hell." Based on the journal entries, the trial court noted that Simon's statements/drawing indicated that Simon had "given some thought and some planning" to killing his parents by fire.

{¶ 39} The trial court also noted the fact that Simon tied a rope around his parents' doorknobs and that he used accelerant to set fires in two locations in the upstairs of the home near the bedrooms. While the state argues that Simon set fire to the house first, and then tied rope around his parents' doorknobs, there is no indication in the record that the events occurred in the progression suggested by the state. Instead, the limited number of facts indicates that Simon had a plan to kill his parents by burning the house, and that Simon committed one conduct of setting the fire, with one animus, to bring about the death of his parents.

{¶ 40} The state also argues that the tying of the rope proves that Simon was acting with a separate animus and conduct. However, Simon tying the doors shut was only meant to ensure that his parents could not escape by opening their bedroom doors and walking out into the hallway. Tying the rope was not enough to constitute aggravated arson, and it was not enough to establish attempted aggravated murder. The *fire* was the means Simon intended to use to kill his parents, and setting the fire constituted both aggravated arson and attempted aggravated murder by the same animus and conduct, even absent the additional step of tying the doors shut.

{¶ 41} As such, Simon has fulfilled his burden of proving that the convictions are allied offenses, and the trial court erred when it did not merge the convictions. Simon's third assignment of error is therefore sustained. On remand, the trial court shall resentence Simon after the state chooses upon which charge(s) to proceed.

{¶ 42} Judgment affirmed in part, reversed in part, and the matter is remanded for

resentencing.

RINGLAND and M. POWELL, JJ., concur.