[Cite as *State v. Tucker*, 2019-Ohio-652.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 27694
	:	
v.	:	Trial Court Case No. 2017-CR-782/1
	:	
ISAIAH M. TUCKER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 22nd day of February, 2019.

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DONOVAN, J.

{¶ 1} Defendant-appellant Isaiah M. Tucker appeals his conviction and sentence for one count of abduction, in violation of R.C. 2905.02(A)(1), a felony of the third degree. Tucker filed a timely notice of appeal with this Court on August 16, 2017.

{¶ 2} The incident which forms the basis for the instant appeal occurred on December 3, 2016, after Tucker called his ex-girlfriend, Ronnika Parson, demanding to know who was driving her motor vehicle. Parson informed Tucker that it was none of his business because they were no longer in a relationship and had not been together since their daughter was born approximately two years prior. At the time of the conversation with Tucker, Parson was riding in her motor vehicle, which was being driven by her current boyfriend, Michael Oldums, while her daughter was sitting in the backseat.

{¶ 3} Shortly thereafter, Tucker began following Parson's vehicle in his own vehicle. When Oldums stopped the vehicle at the intersection of State Route 49 and Hoover, Tucker pulled up very close to Parson's vehicle and began yelling at Oldums. Parson asked Tucker to stop following them because their daughter was in the vehicle. Ignoring Parson's pleas to stop, Tucker continued to follow Oldums after he turned onto Hoover Avenue. Oldums attempted to evade Tucker by driving through the yard of a residence, through a pile of firewood, and then into an alleyway. The alleyway, however, was a dead-end, and Oldums was forced to stop the vehicle.

{¶ 4} At this point, Tucker and four other men exited the vehicle. All of the men were armed with handguns. The men pulled Oldums out of the vehicle, and one of them pistol-whipped Oldums in the face. Parson testified that one the men then shot Oldums in the leg. After the shooting occurred, Tucker removed his daughter from Parson's

vehicle, placed her in his own vehicle, and drove away. A short time later, Parson's family members located her daughter and took her to Miami Valley Hospital for any necessary treatment.

{¶ 5} On April 6, 2017, Tucker was indicted for one count of abduction. On July 5, 2017, Tucker pled no contest to the abduction count. The trial court found Tucker guilty and ordered the Adult Probation Department to prepare a presentence investigation report (PSI). On August 2, 2017, Tucker appeared for sentencing with respect to his conviction in the instant case, as well as his convictions following a jury trial in Case No. 2016-CR-3714.[1] The trial court sentenced Tucker to two years in prison for abduction in the instant case and to 13 years in prison for his convictions in Case No. 2016-CR-3714. The trial court ordered the sentences in each case to be served consecutively for an aggregate sentence of 15 years in prison.

{¶ 6} The trial court filed a judgment entry in the instant case on August 3, 2017. As previously stated, Tucker filed a timely notice of appeal on August 16, 2017. The record establishes that, on August 23, 2017, we issued an order consolidating the instant case with Tucker's simultaneous appeal in Montgomery App. No. 27693 (appeal from his convictions in Case No. 2016-CR-3714).

{¶ 7} On July 3, 2018, we issued an order severing the appeal in the instant case from Tucker's appeal in Montgomery App. No. 27693. On July 12, 2018, we appointed

[1] In Montgomery C.P. No. 2016-CR-3714, Tucker was convicted of one count of felonious assault with a deadly weapon (Count I), one count of improperly discharging a firearm at or into a habitation (Count II), and one count of discharge of a firearm on or near prohibited premises (Count III). Each count was accompanied by a firearm specification. The case involved a drive-by shooting committed by Tucker approximately eight days before he committed the offense in the instant case.

new counsel to represent Tucker in the instant appeal. We note that in an opinion issued on July 20, 2018, we affirmed Tucker's convictions and sentence in the other case. *See State v. Tucker*, 2d Dist. Montgomery No. 27693, 2018-Ohio-2859.

{¶ 8} Tucker's appeal in the instant case is now properly before this Court. His first assignment of error states:

> THE TRIAL COURT UNLAWFULLY ORDERED TUCKER TO SERVE CONSECUTIVE SENTENCES, IN VIOLATION OF HIS RIGHTS TO DUE PROCESS, GUARANTEED BY SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶ 9} In his first assignment, Tucker contends that the trial court erred when it ordered him to serve his sentence in the instant case consecutively to his sentence in Case No. 2016-CR-3714. Specifically, Tucker argues that the record fails to support the imposition of consecutive sentences.

{¶ 10} In reviewing felony sentences, appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 9. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce, or modify a sentence, or it may vacate the sentence and remand for resentencing, only if it "clearly and convincingly" finds either (1) that the record does not support certain specified findings or (2) that the sentence imposed is contrary to law.

{¶ 11} As this Court has previously noted:

> "The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any

> findings or give its reasons for imposing maximum or more than minimum sentences." *State v. King*, 2013-Ohio-2021, 992 N.E.2d 491, ¶ 45 (2d Dist.). However, in exercising its discretion, a trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and R.C. 2929.12. *State v. Leopard*, 194 Ohio App.3d 500, 2011-Ohio-3864, 957 N.E.2d 55, ¶ 11 (2d Dist.), citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶ 38.

State v. Armstrong, 2d Dist. Champaign No. 2015-CA-31, 2016-Ohio-5263, ¶ 12.

{¶ 12} In general, it is presumed that prison terms will be served concurrently. R.C. 2929.41(A); *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 23 ("judicial fact-finding is once again required to overcome the statutory presumption in favor of concurrent sentences"). However, R.C. 2929.14(C)(4) permits a trial court to impose consecutive sentences if it finds that (1) consecutive sentencing is necessary to protect the public from future crime or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) any of the following applies:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single

prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 13} At Tucker's sentencing hearing on August 2 , 2017, the trial court stated the following:

> The Court: * * * In regards to Case Number 17-CR-782, the charge of abduction, the Court does sentence you to a term of two years in the correction and reception center, *with that sentence to run consecutive with the case of 16-CR-3714. The Court finds that consecutive sentences in this case are necessary to protect the public from future crime. The Court finds that consecutive sentences are necessary to punish the offender. That they are not disproportionate to the seriousness of the offender's conduct and to the danger [the] offender poses to the public.*
>
> *The Court further finds at least two of the multiple offenses were committed as part of one or more course* [sic] *of conduct. And the harm caused by two or more of the multiple offenses was so great and unusual that no single prison term can adequately reflect the seriousness of the offender's conduct. Also, the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime of the Defendant.*

Sentencing Tr. 15-16.

{¶ 14} As is evident from the above excerpt, the trial court made the requisite findings to support the imposition of consecutive sentences. The trial court found that Tucker's "history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime of the Defendant" pursuant to R.C. 2929.14(C)(4)(c). The trial court additionally found that, pursuant to R.C. 2929.14(C)(4)(b), "that these two offenses were committed as a part of a course of conduct and the harm caused was so great or unusual that no single term adequately reflects the seriousness of his conduct."

{¶ 15} Initially, we note that the Supreme Court of Ohio has held that a course of conduct may be established by factual links including time, location, weapon, cause of death or similar motivation. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 144; *see also State v. Ramey*, 2d Dist. Clark No. 2014-CA-127, 2015-Ohio-5389, ¶ 87. Upon review, we find that Tucker's conviction for abduction in the instant case is not linked in any way to the drive-by shooting in Case No. 2016-CR-3714. The offenses in each case were committed on separate dates and in different locations. Additionally, the offenses involved different victims and different motivations. The trial transcript in Case No. 2016-CR-3714 and our opinion in *Tucker*, 2d Dist. Montgomery No. 27693, 2018-Ohio-2859, indicate that Tucker was avenging a friend's shooting, which was unrelated to the facts herein. Simply put, the offenses in Case No. 2017-CR-782 and Case No. 2016-CR-3714 were not committed as a course of conduct pursuant to R.C. 2929.14(C)(4)(b). Therefore, the trial court erred when it imposed consecutive sentences on the basis that the case constituted a course of conduct.

{¶ 16} However, we find that the record supports the trial court's imposition of

consecutive sentences with respect to R.C. 2929.14(C)(4)(c), namely that Tucker's "history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime of the defendant." In Case No. 2016-CR-3714, Tucker fired several gunshots at an individual while sitting in the backseat of car, and at least one of the shots Tucker fired struck a nearby residence. Approximately eight days later, Tucker committed the instant offense, wherein Oldums was pistol-whipped and shot in the leg by Tucker or one of his associates. Tucker then removed his daughter from Parson's vehicle, placed the infant in his vehicle, and drove away.

{¶ 17} Additionally, the record establishes that on two occasions, Tucker had been adjudicated delinquent for receiving stolen property, which would have constituted fourth degree felony convictions if committed by an adult. Tucker also was adjudicated delinquent for disorderly conduct and unauthorized use of property. After reaching adulthood, Tucker was convicted of resisting arrest. Accordingly, we find that the trial court did not err when it imposed consecutive sentences.

{¶ 18} Tucker's first assignment of error is overruled.

{¶ 19} Tucker's second assignment of error is as follows:

> TUCKER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION.

{¶ 20} In his second assignment, Tucker argues that his trial counsel was ineffective for failing to request that the trial court waive court costs.

{¶ 21} In order to establish ineffective assistance of counsel, a defendant must

demonstrate both that trial counsel's conduct fell below an objective standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, the outcome of the case would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland* at 688. A defendant is entitled to "reasonable competence" from his or her attorney, not "perfect advocacy." *See Maryland v. Kulbicki*, ___ U.S. ___, 136 S.Ct. 2, 5, ___ L.Ed.2d ___ (2015), citing *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003).

{¶ 22} "*Strickland* and its progeny establish that when a court is presented with an ineffective-assistance-of-counsel claim, it should look to the full record presented by the defendant to determine whether the defendant satisfied his [or her] burden to prove deficient performance." *Reeves v. Alabama*, ___ U.S. ___, 138 S.Ct. 22, 26, 199 L.Ed.2d 341 (2017). Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel. *State v. Cook*, 65 Ohio St.3d 516, 524-525, 605 N.E.2d 70 (1992); *State v. Fields*, 2017-Ohio-400, 84 N.E.3d 193, ¶ 38 (2d Dist.).

{¶ 23} Under R.C. 2947.23, a trial court is required to impose court costs against all convicted defendants, even those who are indigent. *See State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. The trial court, however, has the discretion to waive court costs if the defendant makes a motion to waive costs. *State v. Hawley*, 2d

Dist. Montgomery No. 25897, 2014-Ohio-731, ¶ 13; *State v. Mihalis*, 8th Dist. Cuyahoga No. 104308, 2016-Ohio-8056, ¶ 30. Although Tucker's trial counsel could have requested a waiver of the payment of those costs at sentencing, counsel's failure to do so does not prevent Tucker from seeking a waiver of those costs in the future. R.C. 2947.23(C). Additionally, Tucker has not demonstrated a reasonable probability that he was prejudiced by counsel's actions.

{¶ 24} In *State v. West*, 2d Dist. Greene No. 2015-CA-72, 2017-Ohio-7521, we recently stated the following:

> Under R.C. 2947.23(C), as amended by Am.Sub.H.B. 247, effective March 22, 2013, the trial court "retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution * * *, at the time of sentencing or at any time thereafter." *Thus, there is no limit on when a defendant can move for a waiver of costs. This makes it almost impossible to find that counsel was ineffective for failing to raise the issue at sentencing*. " 'The statutory provision in R.C. 2947.23(C) adds another facet to our ineffective assistance of counsel analysis because a defendant is no longer required to move for a waiver of court costs at the sentencing hearing or waive it—strategic timing may now play a role in trial counsel's decision—and prejudice resulting from a failure to move at the sentencing hearing is harder, if not impossible, to discern. Trial counsel may have decided as a matter of strategy not to seek a waiver or modification of court costs until some later time when the trial court had time to either reflect upon its sanctions or the vividness of the impact of [the defendant's] conduct had

faded.' " *Mihalis* at ¶ 33, quoting *State v. Farnese*, 4th Dist. Washington No. 15CA11, 2015-Ohio-3533, ¶ 15, 16.

(Emphasis added.) *Id*. at ¶ 31.

{¶ 25} In *West,* we found that trial counsel was not ineffective for failing to seek a waiver of costs at sentencing. Specifically, we found that although the defendant was indigent at the time of trial, he was only 55 years old and in apparent good health. *Id.* at ¶ 32. Additionally, there was nothing in the record to indicate that he was incapable of working or paying costs in the future. *Id.* We found that based upon these facts, it was "at best, speculative, to find that the trial court would have granted a waiver." *Id*. Therefore, we held that the defendant was unable to demonstrate that he was prejudiced by trial counsel's failure to request a waiver of court costs at sentencing.

{¶ 26} Upon review, we conclude that the instant case is analogous to the facts we encountered in *West*. Although Tucker claimed indigency at the time of his plea and sentencing, he was only 20 years old and in good health. Furthermore, Tucker informed the author of the PSI that he suffered from no mental health issues. At the time Tucker was arrested for the instant offense, he was employed at Lowe's in Trotwood, Ohio. Tucker stated that he had also worked for Proctor and Gamble for a period of time. There is nothing in the record before us which indicates that Tucker is incapable of working or paying costs. Therefore, we find that the record establishes that it is "at best, speculative, to find that the trial court would have granted a waiver," and Tucker is unable to demonstrate that he was prejudiced by his trial counsel's failure to seek a waiver of costs at sentencing. *Id.* at ¶ 32.

{¶ 27} Tucker's second assignment of error is overruled.

{¶ 28} Both of Tucker's assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

FROELICH, J., concurs.

TUCKER, J., concurring:

{¶ 29} I agree, on this record, that the trial court, because it found only one course of conduct, erred in its R.C. 2929.14(C)(4)(b) conclusion. I write separately to express my opinion that if the trial court had found and articulated that the R.C. 2929.14(C)(4)(b) finding was based upon two courses of conduct, the imposition of consecutive service upon this basis would have been proper.

{¶ 30} I do not disagree that a course of conduct is established by an analysis of factual links, such as time, location, and motivation, between two or more crimes. *Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 144. I also do not disagree that the events leading to Tucker's abduction conviction in the pending case and the events resulting in his conviction on multiple counts in Montgomery C.P. No. 2016-CR-3714 constitute separate, distinct courses of conduct. These conclusions, however, would not have precluded consecutive service based upon a correct R.C. 2929.14(C)(4)(b) finding.

{¶ 31} The relevant discussion in *Short* concerns R.C. 2929.04(A) as it relates to the imposition of the death penalty. R.C. 2929.04(A) states that "imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count of the indictment pursuant to [R.C. 2941.14] and

proved beyond a reasonable doubt[.]" One of the criterion allowing the death penalty is R.C. 2929.04(A)(5), which states in relevant part that the death penalty may be imposed when "* * * the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender." The Supreme Court, in this context, stated as follows:

> "In order to find that two offenses constitute a single course of conduct under R.C. 2929.04(A)(5), the trier of fact 'must * * * discern some connection, common scheme, or some pattern or psychological thread that ties [the offenses] together.' "

Id. at ¶ 144, quoting *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239, syllabus, quoting *State v. Cummings*, 332 N.C. 487, 510, 422 S.E.2d 692 (1992). The *Short* decision then stated that "specific examples of 'factual links' that may establish a course of conduct include 'time, location, murder weapon, or cause of death' and 'a similar motivation on the killer's part for his crimes.' " *Id.*, quoting *Sapp* at ¶ 52. The *Short* decision ended this discussion by concluding that Short, when killing two individuals, had engaged in a single course of conduct because the "victims were killed within minutes of each other, at the same address, with the same weapon, and for the same reason." *Id.* at ¶ 145.

{¶ 32} In contrast to R.C. 2929.04(A)(5)'s use of course of conduct in the singular form, R.C. 2929.14 (C)(4)(b) states that a consecutive sentence is permissible when "at least two of the multiple offenses were committed as part of *one or more courses of conduct* * * * " (Emphasis added.) This language, I think, compels the conclusion that

a consecutive sentence may be ordered for multiple offenses committed as part of a single course of conduct or for multiple offenses committed during multiple courses of conduct. Therefore, if the trial court, in the pending case, had concluded that the convictions in each case were two courses of conduct, this finding would have allowed the imposition of consecutive service.

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