

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
WASHINGTON COUNTY

STATE OF OHIO,	:	Case Nos. 18CA11
		18CA12
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
		<u>JUDGMENT ENTRY</u>
SCOTT A. SHANKLAND,	:	
Defendant-Appellant.	:	<b>RELEASED: 01/18/2019</b>

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APPEARANCES:

Alex F. Kochanowski, Cincinnati, Ohio, for appellant.

Kevin Rings, Washington County Prosecuting Attorney, and David K.H. Silwani,  
Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for appellee.

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Harsha, J.

{¶1} After Scott A. Shankland pleaded guilty to tampering with evidence and trafficking in heroin in a school zone, the Washington County Court of Common Pleas sentenced him to an aggregate 48-month prison sentence. Now Shankland asserts that he was deprived of his right to the effective assistance of counsel, which rendered his guilty plea invalid.

{¶2} He contends that his attorney should have investigated his mental health and addiction history and presented more details about it to the state to obtain the minimum sentence. Nevertheless, Shankland has failed to meet his burden of establishing that his lawyer's performance was deficient or that he was prejudiced. Nothing in the record indicates the extent to which Shankland's trial attorney investigated – or failed to investigate – Shankland's health history, or the extent it was discussed in plea negotiations. Shankland has failed to establish that he would not have pleaded guilty and would have insisted on going to trial, that the state would have

recommended a shorter sentence, or that the court would have imposed a shorter sentence had his counsel presented a more complete health history. To the extent his ineffective-assistance claim relies on evidence outside the record on appeal, a direct appeal is not the appropriate vehicle for Shankland to raise this claim.

{¶3} Shankland contends that the trial court denied him due process and a fair trial when it failed to sentence him to the statutory minimum based on his personal factors in mitigation. The trial court considered the proper statutory factors but was under no obligation to afford them the relative weight Shankland favors. And he argues that he was denied due process when his trial counsel failed to present evidence in support of a mandatory minimum sentence. But this claim is premised on the same ineffective-assistance claim that he has failed to establish. He also argues that his sentence is excessive and unnecessarily harsh because of his drug addiction. We reject this contention because Shankland's sentence is not for being a drug addict; it is for committing criminal acts. He has failed to prove by the requisite clear and convincing evidence that his sentence was either contrary to law or not supported by the record.

{¶4} We affirm the judgment of the trial court.

## I. FACTS

{¶5} The state indicted Scott A. Shankland on one count of tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree, and filed a bill of information charging Shankland with one count of trafficking in heroin in a school zone in violation of R.C. 2925.01(A)(1) and (C)(6)(b), a felony of the fourth degree. According to Shankland the charges stemmed from him selling less than .10 grams of a

substance containing heroin and fentanyl to a confidential informant, and him attempting to wipe off methamphetamine on a spoon he pulled out of his pants pocket when he was being arrested and searched by police officers.

{¶6} Through counsel Shankland pleaded guilty to the charges without an agreed sentence. In both of the written guilty-plea forms that he signed, Shankland stated that he had no mental or health problems, that he was not under the influence of drugs or alcohol, and that he was satisfied with his attorney's advice, counsel, and competence. The court held a hearing and it found that Shankland voluntarily, knowingly, and intelligently waived his constitutional rights and pleaded guilty to the charges, and that there was a factual basis establishing his guilt. The court accepted Shankland's guilty pleas and convicted him of the offenses. The court ordered a presentence investigation report and scheduled a sentencing hearing.

{¶7} At the sentencing hearing the state noted that Shankland had a lengthy criminal record, including assault, breaking and entering, burglary, theft, and drug-related offenses. The state further noted that while he was out on bond for one crime, he was found in possession of drugs when pulled over by the highway patrol and admitted he was coming back to town to traffic those drugs. It also noted that his ORAS ("Ohio Risk Assessment System") score was high, which indicated a high likelihood that he would commit crimes in the future. The state recommended a four-year prison sentence.

{¶8} Shankland's counsel claimed the criminal charges as well as most of his past convictions arose as a result of his drug addiction and requested that he be placed in the STAR program, which provides intensive residential treatment in a community

based correctional facility, rather than lengthy incarceration in a prison. Shankland stated that he was glad that he had been kept in jail without bond pending the resolution of the criminal charges because it helped straighten him up. He also requested placement in the STAR program in order to give him the opportunity to work on his addiction problems that prison would not provide.

{¶9} The trial court noted that he had numerous prior convictions, including one committed while he was out on bond, failed to respond favorably in the past to sanctions imposed for his convictions, that Shankland had not expressed any remorse for his actions, and that he had a high risk of offending based on his high ORAS score. The court sentenced him to 36 months imprisonment on his conviction for tampering with evidence and 12 months imprisonment for his conviction for trafficking in drugs, and ordered that they be served consecutive to each other for an aggregate 48-month prison sentence. In its sentencing entries the trial court stated that it had considered the record of this case, the oral statements made, and the pre-sentence investigation report, as well as the principles and purposes of sentencing of R.C. 2929.11 through 2929.19, for the sentence to be imposed for felony crimes.

## II. ASSIGNMENTS OF ERROR

{¶10} Shankland assigns the following errors for our review:

I. MR. SHANKLAND RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER BOTH THE OHIO AND UNITED STATES CONSTITUTIONS RESULTING IN AN UNKNOWING, UNINTELLIGENT, AND INVOLUNTARY PLEA.

II. MR. SHANKLAND WAS DENIED DUE PROCESS AND FAIR TRIAL DURING SENTENCING WHEN THE TRIAL COURT FAILED TO SENTENCE MR. SHANKLAND TO THE STATUTORY MINIMUM BASED ON HIS PERSONAL FACTORS IN MITIGATION, IN VIOLATION OF HIS

FIFTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE OHIO  
AND UNITED STATES CONSTITUTIONS.

III. LAW AND ANALYSIS

A. Ineffective Assistance of Counsel

1. Standard of Review

{¶11} Shankland asserts that because he was deprived of his right to the effective assistance of counsel, his guilty plea was involuntary and unknowing. To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish: (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation; and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

2. Analysis

{¶12} Shankland's guilty plea forfeited his ineffective-assistance claim unless it precluded him from knowingly, intelligently, voluntarily entering the plea. See *State v. Betts*, 4th Dist. Vinton No. 18CA710, 2018-Ohio-2720, ¶ 26, quoting *State v. Grove*, 8th Dist. Cuyahoga No. 103042, 2016-Ohio-2721, ¶ 26 (" '[a] claim of ineffective assistance of counsel is \* \* \* waived by a guilty plea, unless the ineffective assistance of counsel precluded the defendant from knowingly, intelligently, and voluntarily entering a guilty plea' ").

{¶13} Shankland claims that his trial counsel was ineffective because counsel: (1) failed to properly investigate his personal background and psychological status; (2) failed to present his addiction history to the state during the plea process; and (3) failed

to present physical and psychological evidence concerning his addiction in mitigation during sentencing.

{¶14} In *State v. Sweet*, 4th Dist. Adams No. 18CA1063, 2018-Ohio-4505, at ¶ 11, we rejected a comparable argument:

The record does not reveal how his counsel's conduct made his plea less than knowing, intelligent, and voluntary. His counsel's efforts to investigate Sweet's psychological or addiction history are not contained in the record, nor does the record contain any discussion that occurred during the plea negotiations. We would have to speculate that counsel's performance was deficient. Moreover, Sweet has failed to show any prejudice, i.e. a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Sweet has failed to provide any evidence that the state would have agreed to recommend a two-year minimum sentence or that the court would have sentenced Sweet accordingly if counsel had presented more about Sweet's psychological health and addiction history during plea negotiations and sentencing.

{¶15} Similarly, the record does not reveal how Shankland's trial counsel's efforts to investigate his psychological or addiction history made his guilty plea less than knowing, intelligent, and voluntary. In fact, the record does not include a transcript of the plea hearing because Shankland did not request it, so we must presume the regularity and validity of the proceedings. See *State v. Crawford*, 4th Dist. Scioto No. 16CA3778, 2018-Ohio-2166, ¶ 13 (“[b]ecause Appellant has failed to provide this Court with the transcript of the change of plea hearing, we have nothing to pass upon and must, instead, presume the regularity and validity of the proceedings below”). And Shankland's written pleas, which are contained in the record, contain his affirmation that he had no mental or health problems, that he was not under the influence of drugs or alcohol, and that he was satisfied with his attorney's advice, counsel, and competence.

{¶16} At best, Shankland's ineffective-assistance claim based on trial counsel's alleged failure to investigate requires us to speculate about facts that are not contained

in the record. This we cannot do. See *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶ 120, quoting *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 65, quoting *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 M/E.2d 263, ¶ 244. His brief is largely bereft of any record citations and little of the psychological or addiction history presented in Shankland's brief is contained in the record. Insofar as he is relying on evidence that is outside the record to support his claim, postconviction relief—not direct appeal—is the appropriate method to seek relief based on a claim of ineffective assistance. See *Sweet* at ¶ 13.

{¶17} Our own de novo review of the record, which includes the trial court's detailed entries accepting Shankland's guilty pleas and finding him guilty upon his pleas, establishes that the trial court complied with the constitutional and procedural safeguards to ensure that Shankland's pleas were knowingly, intelligently, and voluntarily entered and fully complied with Crim.R. 11. He has not established either deficient performance or prejudice resulting from his trial counsel's actions. We overrule Shankland's first assignment of error.

## B. Felony Sentencing

### 1. Standard of Review

{¶18} In his second assignment of error Shankland contends that the trial court denied him due process and a fair trial when it failed to sentence him to the statutory minimum based on his personal factors in mitigation. When 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, ¶ 1, 22-23. Under R.C. 2953.08(G)(2), "[t]he appellate court's standard for review is not whether the

sentencing court abused its discretion.” Instead, R.C. 2953.08(G)(2) provides that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either:

- (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, 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.

**{¶19}** Although R.C. 2953.08(G)(2)(a) does not mention R.C. 2929.11 and 2929.12, the Supreme Court of Ohio has determined that the same standard of review applies to those statutes. *Marcum* at ¶ 23 (although “some sentences do not require the findings that R.C. 2953.08(G)[2][a] specifically addresses[,] \* \* \* it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court”); *State v. Butcher*, 4th Dist. Athens No. 15CA33, 2017-Ohio-1544, ¶ 84.

**{¶20}** The defendant bears the burden of establishing by clear and convincing evidence that the sentence is either contrary to law or not supported by the record. See, e.g., *State v. Fisher*, 4th Dist. Jackson No. 17CA5, 2018-Ohio-2718, ¶ 20, citing *State v. O’Neill*, 3d Dist. Allen No. 1-09-27, 2009-Ohio-6156, fn. 1. Clear and convincing evidence is more than a mere “preponderance of the evidence,” but allows less certainty than is required “beyond a reasonable doubt. It requires only “a firm belief or conviction as to the facts sought to be established.” *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 18.

## 2. Analysis



{¶21} Shankland claims that he was denied due process when his trial counsel failed to present evidence in support of a mandatory minimum sentence. But this claim is premised on the same ineffective-assistance claim that he has failed to establish. And the record of the sentencing hearing establishes that his trial counsel did argue that his criminal problems resulted from his longstanding drug addiction. We reject his first claim for the same reasons we overruled his first assignment of error.

{¶22} Shankland next argues that his sentence is excessive and unduly harsh because his crimes stemmed from his illness, i.e., his drug addiction. He does not contend that his sentence is contrary to law. It was not contrary to law because his sentence was within the statutory range, the trial court stated that it considered the factors in R.C. 2929.11 and 2929.12, and it was not obligated to make specific findings concerning these factors. See *State v. Douglas*, 4th Dist. Athens Nos. 17C6 and 17CA8, 2018-Ohio-732, ¶ 42, citing *State v. Mullins*, 4th Dist. Scioto No. 15CA3716, 2016-Ohio-5486, ¶ 26-27; R.C. 2929.14(A)(3)(b) (“[f]or a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months”); R.C. 2929.14(B)(4) (“For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months”). The trial court also the trial court made the requisite findings under R.C. 2929.14(C)(4) to impose consecutive sentences for the convictions.

{¶23} Therefore, Shankland must establish by clear and convincing evidence that the record does not support his sentence. But the trial court considered the presentence investigation report in its sentencing findings, and Shankland failed to

request the inclusion of this report in the record on appeal. When the contents of a presentence investigation report are necessary to review the appropriateness of a sentence, an appellant must move to supplement the record on appeal with the report to permit our review; otherwise, we must presume the regularity of the sentence and affirm it. *See, e.g., State v. McGowan*, 9th Dist. Summit No. 27092, 2014-Ohio-2630, ¶ 6-7; *State v. Daniels*, 5th Dist. Muskingum Nos. CT2016–0021 and CT2016–0022, 2017-Ohio-1045, ¶ 18.

{¶24} Moreover, at best, Shankland contests the weight the trial court accorded to certain sentencing factors and its conclusion to impose a 48-month aggregate prison sentence instead of a shorter sentence including the STAR program. We have consistently rejected similar contentions. Simply because the court did not balance the factors in the manner appellant desires does not mean that the court failed to consider them, or that clear and convincing evidence shows that the court’s findings are not supported by the record. *State v. Yost*, 4th Dist. Meigs No. 17CA10, 2018-Ohio-2719, ¶ 20, *State v. Graham*, 4th Dist. Adams No. 17CA1046, 2018-Ohio-1277, ¶ 26, *State v. Butcher*, 4th Dist. Athens No. 15CA33, 2017-Ohio-1544, ¶ 87.

{¶25} Finally, the trial court did not, as Shankland claims, punish him merely for his “illness” of being a drug addict. It instead punished him for committing the criminal acts of tampering with evidence and trafficking in heroin in a school zone. Shankland has not established by the requisite clear and convincing evidence that his 48-month aggregate prison sentence is either contrary to law or not supported by the record. We overrule his second assignment of error.

#### IV. CONCLUSION

**{¶26}** Having overruled Shankland's assignments of error, we affirm his convictions and sentence.

JUDGMENT AFFIRMED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
William H. Harsha, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**