

[Cite as *State v. English*, 2015-Ohio-1665.]

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

STATE OF OHIO

Plaintiff-Appellee

V.

DIONTE ENGLISH

Defendant-Appellant

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Appellate Case No. 26337

Trial Court Case No. 2014-CR-1291

(Criminal Appeal from
Common Pleas Court)

OPINION

Rendered on the 1st day of May, 2015.

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WELBAUM, J.

{¶ 1} Defendant-appellant, Dionte English, appeals from his conviction and sentence in the Montgomery County Court of Common Pleas after pleading guilty to one count of aggravated robbery and one count of felonious assault. Specifically, English contends that he received ineffective assistance of trial counsel and that the trial court imposed a prison sentence that was contrary to law and in violation of his Eighth Amendment right against cruel and unusual punishment. For the reasons outlined below, the judgment of the trial court will be affirmed.

Facts and Course of Proceedings

{¶ 2} On April 14, 2014, English was indicted by the Montgomery County Grand Jury for one count of aggravated robbery in violation of R.C. 2911.01(A)(3), a felony of the first degree, and one count of felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree. The charges arose from English severely beating a woman in the parking lot of a Butler Township Wal-Mart after she refused to give him her purse that he was attempting to steal.

{¶ 3} Following his indictment, on April 17, 2014, English filed a pro se motion for change of venue. In the motion, English argued that he would be unable to receive a fair trial and impartial jury due to an April 10, 2014 article in the Dayton Daily News reporting on the incident, the victim's injuries, and how English allegedly admitted to police that he had attacked the woman while high on drugs. English was appointed trial counsel the same day this motion was filed.

{¶ 4} After the appointment of counsel, on April 22, 2014, English filed a pro se

motion to set aside his indictment on grounds that certain races were excluded from the grand jury. Thereafter, on April 30, 2014, English's trial counsel filed a motion to suppress certain statements English made during his arrest. Then, on May 6, 2014, English filed another pro se motion to set aside his indictment, again challenging the racial composition of the grand jury.

{¶ 5} A hearing on the motion to suppress was held on May 14, 2014. At the suppression hearing, English withdrew his motion to suppress and the trial court thereafter explained that it would not consider his pro se motions due to the fact that English had been appointed counsel. However, the trial court advised English's counsel to perform research on the issue of whether the grand jury was properly selected and whether its racial composition was in accord with constitutional standards. The trial court indicated that if counsel found merit to English's concerns, counsel could then file a new motion for the court's review. English indicated that he understood.

{¶ 6} The trial court scheduled a jury trial to commence on July 7, 2014. English then appeared in court on June 27, 2014, to plead guilty, but instead asked the judge for more time to talk it over with his attorney and family. The judge granted English's request. Thereafter, on July 7, 2014, English entered a guilty plea to both aggravated robbery and felonious assault. The parties then reconvened for sentencing on July 23, 2014. At that time, the trial court merged English's aggravated robbery and felonious assault offenses and sentenced English to eight years in prison for aggravated robbery. In addition, the trial court ordered English to pay \$3,359.04 in restitution.

{¶ 7} English now appeals from his conviction and sentence, raising two assignments of error for our review.

First Assignment of Error

{¶ 8} English's First Assignment of Error is as follows:

APPELLANT'S CONVICTION SHOULD BE REVERSED BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶ 9} Under his First Assignment of Error, English contends that his trial counsel was ineffective in failing to file a motion to change venue due to the Dayton Daily News article, and a motion to set aside the indictment due to the alleged exclusion of certain races from the grand jury.

{¶ 10} In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), paragraph two of the syllabus; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. Therefore, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness and that counsel's errors were serious enough to create a reasonable probability that, but for the errors, the outcome of the proceeding would have been different. *Id.* In conducting this analysis, "we will not second-guess trial strategy decisions, and 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *State v. Mason*, 82 Ohio St.3d 144, 157-158, 694 N.E.2d 932 (1998), quoting *Strickland* at 689. (Other citation omitted.)

{¶ 11} “A guilty plea waives the right to allege ineffective assistance of counsel, except to the extent that the errors caused the plea to be less than knowing and voluntary.” *State v. Webb*, 2d Dist. Montgomery No. 26198, 2015-Ohio-553, ¶ 15, citing *State v. Spates*, 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (1992). (Other citation omitted.) “Only if there is a reasonable probability that, but for counsel’s errors, the defendant would not have pleaded guilty but would have insisted on going to trial will the judgment be reversed.” (Citations omitted.) *State v. Huddleson*, 2d Dist. Montgomery No. 20653, 2005-Ohio-4029, ¶ 9.

{¶ 12} In the present case, English pled guilty to aggravated robbery and felonious assault and has not raised any arguments suggesting that his trial counsel’s actions rendered his plea less than knowing, intelligent, and voluntary. It is well-established that “[i]n order for a plea to be given knowingly and voluntarily, the trial court must follow the mandates of Crim.R. 11(C).” *State v. Brown*, 2d Dist. Montgomery Nos. 24520, 24705, 2012-Ohio-199, ¶ 13. In reviewing the plea colloquy between the trial court and English, we find that the trial court complied with all aspects of Crim.R. 11(C) before it accepted English’s guilty plea. Because English has not alleged that his trial counsel engaged in any conduct affecting the knowing, intelligent, and voluntary character of his plea, and because the record indicates that his guilty plea was in fact knowingly, intelligently, and voluntarily made, English has waived his right to raise an ineffective assistance claim.

{¶ 13} English’s ineffective assistance claim also fails under the *Strickland* test because he has not demonstrated that his counsel rendered deficient performance that prejudiced him. With regards to a motion to change venue, we note that “[t]rial counsel’s failure to request a change of venue is not tantamount to ineffective assistance of

counsel.” *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 49. The decision whether to request a change of venue due to pretrial publicity is a matter of trial strategy, which is not to be second guessed by the reviewing court. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶ 234; *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 156. “Moreover, a change of venue is not automatically granted when there is extensive pretrial publicity. Any decision to change venue rests largely within the discretion of the trial court.” *Bryan* at ¶ 157, citing *State v. Maurer*, 15 Ohio St.3d 239, 251, 473 N.E.2d 768 (1984).

{¶ 14} In this case, English has failed to establish that his trial counsel’s decision not to file a motion to change venue was anything other than sound trial strategy. In addition, English has not argued or presented any evidence indicating that the trial court would have granted a motion to change venue based on the Dayton Daily News article. As a result, English has not satisfied either prong of the *Strickland* test.

{¶ 15} As for trial counsel’s failure to file a motion to set aside the indictment, the trial court specifically instructed counsel to research English’s concern about certain races allegedly being excluded from the Montgomery County Grand Jury and to file such a motion if there was any merit to the claim. The trial court specifically stated that:

COURT: So—now—[defense counsel], as I understand it is going to do some research on that issue, is going to do some investigation regarding how it’s—how grand juries are conducted or selected here in Montgomery County Ohio, and simply because you have that concern, that doesn’t mean that [defense counsel] will come to the conclusion that there is a

legitimate basis for filing such a motion. * * * [Defense counsel] understands your concern, he's sensitive to your concern, he will review and investigate your concern. That doesn't mean at the end of the day he's going to conclude that there's merit to your concern, and that there is a need then to file a motion. If he does, great, we'll hear it and cite it. But simply because you have this idea, doesn't mean any validity [sic]. Do you understand that?

ENGLISH: Understood.

Transcript (May 14, 2014), p. 5-6.

{¶ 16} English has failed to demonstrate that his counsel's failure to file a motion to set aside the indictment on the above referenced claim was due to anything other than counsel finding that the claim lacked merit. As previously noted, we indulge in a strong presumption that counsel rendered effective assistance in choosing not to file the motion. Furthermore, English failed to demonstrate any resulting prejudice from counsel's failure to file a motion to set aside the indictment, as English did not argue or present any evidence indicating that such a motion had a reasonable probability of success. See *State v. Johns*, 10th Dist. Franklin No. 11AP-203, 2011-Ohio-6823, ¶ 25 (finding that "[w]hen a claim of ineffective assistance of counsel is based on counsel's failure to file a motion or make an objection, the appellant must show that the motion had a reasonable probability of success").

{¶ 17} For the foregoing reasons, English's First Assignment of Error is overruled.

Second Assignment of Error

{¶ 18} English's Second Assignment of Error is as follows:

APPELLANT SHOULD BE REMANDED TO THE TRIAL COURT FOR SENTENCING AS THE SENTENCE HE RECEIVED IS CONTRARY TO LAW, AND IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶ 19} Under his Second Assignment of Error, English contends that his eight-year prison sentence is contrary to law because he had no prior felony record or history of violence. English also contends that his sentence was grossly disproportionate, excessive, and amounts to cruel and unusual punishment in violation of his Eighth Amendment rights.

{¶ 20} This court now applies R.C. 2953.08(G)(2) as the appellate standard of review for all felony sentences. *State v. Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069, ¶ 29 (2d Dist.). The statute states, in pertinent part, that:

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division 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, 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.

R.C. 2953.08(G)(2).

{¶ 21} The trial court in this case did not make, and was not required to make, any of the findings under the statutory provisions listed in division (a) of R.C. 2953.08(G)(2). Therefore, the threshold issue is whether English's sentence is clearly and convincingly contrary to law. " '[C]ontrary to law' means that a sentencing decision manifestly ignores an issue or factor which a statute requires a court to consider." (Citation omitted.) *State v. Lofton*, 2d Dist. Montgomery No. 19852, 2004-Ohio-169, ¶ 11. "[A] sentence is not contrary to law when the trial court imposes a sentence within the statutory range, after expressly stating that it had considered the purposes and principles of sentencing set forth in R.C. 2929.11, as well as the factors in R.C. 2929.12." *Rodeffer* at ¶ 32, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18.

{¶ 22} In making this determination, we emphasize that "[t]he court is not required to make specific findings or to use the exact wording of the statute[s]." (Citation omitted.) *State v. Wilson*, 2d Dist. Montgomery No. 24978, 2012-Ohio-4756, ¶ 8. "Furthermore, even if there is no specific mention of those statutes in the record, 'it is presumed that the trial court gave proper consideration to those statutes.' " *State v. Cave*, 2d Dist. Clark No. 09-CA-6, 2010-Ohio-1237, ¶ 10, quoting *Kalish* at fn. 4.

{¶ 23} In this case, English's eight-year prison sentence falls within the prescribed statutory-sentencing range for aggravated robbery, a felony of the first degree. See R.C. 2929.14(A)(1); R.C. 2911.01(C). In addition, the trial court expressly stated at the sentencing hearing that it "reviewed the statutory factors [it was] required to review before

reaching a sentencing decision.” Trans. (July 23, 2014), p. 25. The trial court also indicated that it had carefully reviewed the presentence investigation report, the parties’ sentencing memoranda, the victim impact statement, and letters written by both English and the victim.

{¶ 24} In reaching a sentencing decision, the trial court considered the fact that English’s only prior offense was a misdemeanor offense of resisting arrest. The trial court also noted that English’s record was not indicative of his conduct in this case. However, the court weighed this fact against the severity of the offense against the victim, who English severely beat in front of the victim’s three-year-old granddaughter. The trial court read a letter written by the victim at the sentencing hearing in which the victim stated that she had to have facial surgery as a result of the attack and now has metal plates in her face. The victim indicated that one side of her face is numb due to nerve damage and that she has painful headaches, trouble walking, and is always hurting. In her victim impact statement, the victim indicated that the nerve damage to her face is irreparable, and that she will need more surgeries in the future. In addition to her physical trauma, the record reveals that the attack has left the victim emotionally distraught as well. In her letter to the court, the victim stated that her life is miserable, she is scared to leave her house, cries all the time, and has nightmares.

{¶ 25} Because the trial court indicated that it had considered all the required statutory factors—being the principles and purposes of sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12—and given that an eight-year prison term is within the prescribed statutory range for first-degree felonies, we do not find that English’s prison sentence is contrary to law.

{¶ 26} We reiterate that we have reviewed English's sentence under the standard of review set forth in *Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069, in which we held that we would no longer use an abuse-of-discretion standard of review for felony sentences, but rather apply the standard of review set forth in R.C. 2953.08(G)(2). Since then, opinions from this court have expressed reservations as to whether our decision in *Rodeffer* is correct. See, e.g., *State v. Garcia*, 2d Dist. Greene No. 2013-CA-51, 2014-Ohio-1538, ¶ 9, fn. 1; *State v. Johnson*, 2d Dist. Clark No. 2013-CA-85, 2014-Ohio-2308, ¶ 9, fn. 1. However, in the case before us, we find no error in the sentence imposed under either standard of review.

{¶ 27} With respect to English's Eighth Amendment challenge, we note that "Eighth Amendment violations are rare, and instances of cruel and unusual punishment are limited to those punishments, which, under the circumstances, would be considered shocking to any reasonable person." (Citations omitted.) *State v. Harding*, 2d Dist. Montgomery No. 20801, 2006-Ohio-481, ¶ 77. "[W]e are bound to give substantial deference to the General Assembly, which has established a specific range of punishment for every offense[.]" (Citation omitted.) *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 24. Therefore, " 'as a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.' " *Id.* at ¶ 21, quoting *McDougle v. Maxwell*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964). (Other citations omitted.) Accordingly, given that English's eight-year prison term falls within the specific range of punishment for his offenses, we do not find that it constitutes cruel and unusual punishment under the Eighth Amendment.

{¶ 28} English's Second Assignment of Error is overruled.

Conclusion

{¶ 29} Having overruled both assignments of error raised by English, the judgment of the trial court is affirmed.

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FROELICH, P.J. and HALL, J., concur.

Copies mailed to:

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