[Cite as *State v. Hudnall*, 2004-Ohio-5369.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 04CA3
vs.	:	
JONATHAN HUDNALL,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: David Reid Dillon, 112 South Third Street, P.O. Box 4105, Ironton, Ohio 45638

COUNSEL FOR APPELLEE: Jeffrey M. Smith, Assistant Prosecuting Attorney, Lawrence County Courthouse,#1 Veteran Square, Ironton, Ohio 45638

CRIMINAL APPEAL FROM THE LAWRENCE COUNTY COMMON PLEAS COURT
DATE JOURNALIZED: 9-23-04

ABELE, J.

{¶ 1} This is an appeal from a Lawrence County Common Pleas Court judgment of conviction and sentence. The court found Jonathan Hudnall, defendant below and appellant herein, after he entered guilty pleas, guilty of two counts of aggravated robbery in violation of R.C. 2911.01(A)(1), with firearm specifications. Appellant assigns the following errors for review:

i. FIRST ASSIGNMENT OF ERROR:

ii. "JONATHAN HUDNALL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL TO HIS PREJUDICE IN CONNECTION WITH THE PROBABLE CAUSE HEARING FOR BIND-OVER IN THE PROBATE-JUVENILE COURT."

iii. SECOND ASSIGNMENT OF ERROR:

iv. "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF DEFENDANT IN SENTENCING."

{¶ 2} Appellant and several of his friends robbed two pizza restaurants over a three day period in August, 2003.[1] Lawrence County Sheriff's Deputy Shane Hanshaw spoke with Jami Hart and Jason Ackerson who implicated appellant in both robberies. Detective Hanshaw subsequently spoke with appellant who confessed to both crimes.

{¶ 3} On November 25, 2003, the authorities filed a criminal complaint in the Lawrence County Common Pleas Court, Juvenile Division, and charged appellant with, inter alia, two counts of delinquency for having committed the aggravated robberies. The matter came on for a mandatory bind-over hearing on December 3, 2003. At the hearing, Deputy Hanshaw testified as to his investigation of the two incidents and his conversations with appellant. Evidence was also introduced to show that appellant's birthday was December 14, 1986, thus establishing that he was sixteen years of age when he committed the offenses.

{¶ 4} The court held that appellant was subject to the mandatory bind-over provisions law and ordered him transferred to the adult division of the common pleas court for trial.[2]

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[1] The record reveals that, while the other boys went along with appellant, he was the one who actually approached the two establishments carrying a firearm and asking for money.

[2] R.C. 2152.10(A)(2)(b) mandates that a juvenile be bound over for trial in adult court if (1) the juvenile is charged with a "category two offense," (2) the juvenile was at least sixteen

{¶ 5} On December 11, 2003, the Grand Jury returned an indictment charging appellant with two counts of aggravated robbery together with firearm specifications on each count. On January 7, 2004 appellant entered his guilty pleas. The trial court sentenced appellant to five years imprisonment on each count with three additional years for the firearm specifications, both sentences ordered to be served concurrently. This appeal followed.

1. I

{¶ 6} In his first assignment of error, appellant argues that he received ineffective assistance from counsel at the bind over hearing. Specifically, appellant cites the following four instances of alleged deficient representation:(1) counsel did not object to hearsay testimony offered through Deputy Hanshaw, (2) counsel did not object to an unauthenticated copy of the birth certificate being allowed into evidence, (3) counsel did not object to Deputy Hanshaw's opinion testimony and (4) counsel did nothing to explore whether appellant's Miranda rights waiver was knowingly and intelligently made. We find no merit in these arguments.[3]

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years of age when the offense was committed and (3) the juvenile displayed a firearm while committing the offense. A "category two offense" includes a violation of R.C. 2911.01 (aggravated robbery). R.C. 2152.02(CC)(1).

[3] We note that appellant is represented by the same counsel on appeal as he was at trial. The Ohio Supreme Court has held on several occasions that appellate counsel cannot realistically be expected to argue his/her own ineffectiveness at trial. See e.g. State v. Dunlap (2000), 89 Ohio St.3d 277, 730 N.E.2d 985; State v. Ballew (2000), 89 Ohio St.3d 204, 729 N.E.2d 753; State v. Lentz (1994), 70 Ohio St.3d 527, 529-530, 639 N.E.2d 784. Some appellate districts have interpreted this to mean that appellate counsel is precluded altogether from arguing his or her own ineffectiveness. See State v. Harris, Belmont App. No. 00BA26, 2002-Ohio-2411 at ¶¶20-21 (discussing the various positions taken by this state's appellate districts). This district has twice refused to take a position on that issue, see State v. Meredith (Jun. 22, 2000), Lawrence App. No. 99CA2; State v. Patrick (Sep. 8, 1994), Lawrence App. No. 94CA2, and does so again in the case sub judice because neither party has raised this issue.

{¶ 7} To obtain reversal of a conviction on grounds of ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense so as to deprive him of a fair trial. See Strickland v. Washington (1984), 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052; also see State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904; State v. Goff (1998), 82 Ohio St.3d 123, 139, 694 N.E.2d 916. In order to prove the second prong of the Strickland standard, a defendant must show that the outcome of the case would have been otherwise but for the alleged errors. State v. Johnson (Nov. 19, 1987), Cuyahoga App. Nos. 53003 & 53066. A court need not analyze both prongs of the Strickland standard if the case can be resolved under only one of them. See State v. Madrigal (2000), 87 Ohio St.3d 378, 388, 721 N.E.2d 52, 64; also see State v. Six (May 20, 1999), Washington App. No. 998CA9, unreported.

{¶ 8} In the first alleged instance of ineffective representation, appellant points to testimony by Deputy Hanshaw regarding statements from Jami Hart and Jason Ackerman concerning appellant's involvement in the robberies. Appellant claims that this testimony is hearsay and that counsel should have objected. While we do not dispute the characterization of this testimony as hearsay, we believe it was largely superfluous and offered simply to show how Deputy Hanshaw came into contact with appellant in the first place. We note that the most damaging testimony was the deputy's account of appellant's confession to the crimes. In light of appellant's admissions to these robberies, we fail to see how hearsay testimony concerning what his two friends told Deputy Hanshaw prejudiced appellant.

Nevertheless, we believe that under certain circumstances, including the specific nature or category of the alleged ineffective representation, counsel would not be automatically precluded from arguing his or her own ineffectiveness.

{¶ 9} In his second alleged instance of ineffective assistance, appellant points to the admission of an unauthenticated copy of his birth certificate to prove his age. He argues that counsel should have objected to this as well. Here again, we find no prejudice. Appellant does not claim that the birth certificate copy was inaccurate in any respect or referenced another person. Even if a timely objection had been lodged, we find nothing to suggest that the outcome of the hearing would have been different. A certified copy of a birth record is easily obtainable if necessary. It is not unusual or ill-advised for trial counsel to agree or stipulate to easily verifiable and undisputed facts. In the interest of judicial economy, and in the interest of reserving objections and argument for matters truly at controversy, counsel may employ a strategy of stipulating or withholding objections to matters involving undisputed facts.

{¶ 10} In his third alleged instance of ineffective assistance, appellant points to Deputy Hanshaw's opinion testimony that he believed that appellant committed the robberies. Appellant argues that counsel should have also objected to this testimony. We are not persuaded. The purpose of a bind-over hearing is to determine if probable cause exists to believe that an alleged offender committed the offenses. See State v. Carnes (Mar. 18, 2002), Clermont App. No. CA2001-02-018; State v. Ruggles (Sep. 11, 2000), Clinton App. No. CA99-09-027. We see no reason why Deputy Hanshaw could not testify to that issue based upon his own investigation. Appellant cites no authority to support his argument and we have found none in our own research. Moreover, even if the opinion testimony was improper, we would find no prejudice. Just as the hearsay testimony concerning appellant's friends was overshadowed by evidence of appellant's confession, Deputy Hanshaw's opinion testimony was likewise secondary to the other evidence that appellant did in fact perpetrate these crimes (i.e. his confession).

{¶ 11} In his final alleged instance of ineffective representation, appellant claims that trial counsel should have challenged the Miranda rights waiver and attempted to exclude his confession from evidence. Again, we are not persuaded. Appellant contends in his brief that the confession was "arguably inadmissible," but he gives no reason for making that contention. Appellant cites neither facts nor law to substantiate that the trial court would have concluded that his confession was inadmissible. Without some reason as to why his confession would have been deemed inadmissible, we find no prejudice. Consequently, appellant's argument is speculative.

{¶ 12} Finally, with regard to all four of the alleged instances of ineffective representation, we point out that no question exists (either below or here on appeal) that appellant was the perpetrator of these crimes, that he had a firearm on his person when he committed the crime and that he was sixteen years old at the time. Indeed, insofar as his commission of the crimes, appellant pled guilty which is a complete admission of his involvement. See Crim.R. 11(B)(1). Without some reason to believe that the result of the bind-over hearing would have been different if counsel had taken a different course of action, we cannot find that appellant was prejudiced or that he received ineffective assistance from his trial counsel.

{¶ 13} For all these reasons, we hereby overrule appellant's first assignment.[4]

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[4] Appellant cites our previous decision from State v. Lett (Sep. 11, 1996), Ross App. No. 95CA2094 for the proposition that the failure to present a "meaningful defense" during a bind-over hearing warrants a reversal on grounds of ineffective assistance of counsel. The Lett case is distinguishable from this case for two reasons. First, the accused in Lett pled no contest whereas appellant in this case pled guilty (Crim.R. 11(B)(1)-(2) states that a guilty plea is a complete admission of guilt but a no contest plea is not) thereby making it more difficult to show prejudice in the outcome of this case. Second, and more important, counsel in this case staged much more of a defense for his client. Counsel thoroughly cross-examined the prosecution's

1. II

{¶ 14} Appellant argues in his second assignment of error that the trial court erred in imposing sentence. In particular, appellant argues that the trial court erred in not finding any mitigating factors in his favor before imposing sentence. He points to his age at the time of the offense (sixteen) and his statement at the sentencing hearing that he wanted to apologize for his acts. Thus, appellant contends that the trial court's failure to consider these as mitigating circumstances when imposing sentence constitutes reversible error. We disagree.

{¶ 15} An appellate court will not disturb a sentence imposed by the trial court unless the appellate court clearly and convincingly finds either that the record does not support the trial court's findings or that the sentence is contrary to law. R.C. 2953.08(G)(2)(a)&(b). In other words, appellant must persuade us, by clear and convincing evidence, that the trial court erred when it issued the sentence. State v. Johnson, Washington App. No. 01CA5, 2002-Ohio-2576 at ¶36; Griffin & Katz, Ohio Felony Sentencing Law (2001 Ed.) 725, §T9.16. We note that clear and convincing evidence is that measure or degree of proof which will produce in the mind a firm belief or conviction as to the facts sought to be established. See State v. Eppinger (2001), 91 Ohio St.3d 158, 164, 743 N.E.2d 881; State v. Schiebel (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54. After a thorough review of the record in this case, we are not persuaded that appellant has made that showing.

{¶ 16} In the case at bar, the trial court clearly acknowledged appellant was a "young man" – only sixteen years old – when he committed these crimes. The court also acknowledged

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witness (Deputy Hanshaw), called a witness of his own (John Wesley Hudnall - appellant's father) and made a spirited argument to the court. Thus, it cannot be said here that defense counsel failed to provide a "meaningful defense" at the bind-over hearing.

that it considered the "statement of the [appellant]" when imposing sentence. We believe that the court simply afforded little weight to these factors and we find no reversible error in that decision.

{¶ 17} Though appellant was young when he committed these crimes, the court noted that he had a "lengthy background of juvenile delinquency adjudications." The history tends to negate a claim that the aggravated robberies at issue were simply a momentary indiscretion. Moreover, the trial court afforded little credibility to appellant's apologies – noting he had "shown no genuine remorse." The trial court is in a much better position than us to observe appellant, his voice inflections and demeanor and use those observations in weighing the credibility of his expressed remorse. See Myers v. Garson (1993), 66 Ohio St.3d 610, 615, 614 N.E.2d 742; Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. The trial court apparently concluded that appellant's apologies were not sincere. This is well within the trial court's prerogative.

{¶ 18} In addition, we point out that the record is replete with other factors that support the trial court's decision. For instance, Raymond Ferrell, the owner of one of the pizza establishments, testified concerning the emotional trauma that one of his employees suffered from this incident. Ferrell related that his employee is "living everyday in a jail sentence of her own having that gun [a. 380 semi-automatic pistol] put in her face." It was noted that if something had gone slightly askew during the robbery, the children of that employee "could've been without a mother."

{¶ 19} Finally, we note that the aggravated robbery offenses are first degree felonies. R.C. 2911.01(C). Prison sentences for first degree felonies range from three to ten years. R.C. 2929.14(A)(1). Appellant received five years on each count which is toward the lower end of the

available spectrum of punishment. Further, the trial court ordered the sentences to be served concurrently rather than consecutively. All things considered, we are not persuaded that the trial court clearly and convincingly erred in sentencing. For these reasons, the second assignment of error is without merit and is hereby overruled.

{¶ 20} Having reviewed all the errors assigned and argued in the briefs, and finding merit in none of them, the judgment of the trial court is hereby affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, P.J.: Concurs in Judgment & Opinion as to Assignment of Error II & Concurs in Judgment Only as to Assignment of Error I
Harsha, J.: Concurs in Judgment & Opinion

For the Court

BY:
Peter B. Abele, 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.