[Cite as *State v. Morrison*, 2015-Ohio-2018.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
CHAD M. MORRISON	:	Case No. CT2014-0042
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleals, Case No. CR2014-0085
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	May 22, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
RON WELCH 27 North Fifth Street Suite 201 Zanesville, OH 43701	WILLIAM T. CRAMER 470 Olde Worthington Road Suite 20 Westerville, OH 43082

Farmer, P.J.

{¶1} On March 19, 2014, the Muskingum County Grand Jury indicted appellant, Chad Morrison, on one count of trafficking in cocaine in violation of R.C. 2925.03, one count of possessing cocaine in violation of R.C. 2925.11, and one count of possession of marijuana in violation of R.C. 2925.11.

{¶2} On October 22, 2014, appellant pled guilty to the charges pursuant to a plea agreement. The cocaine possession count was reduced from a second degree felony to a third degree felony. By entry filed October 24, 2014, the trial court sentenced appellant to twelve months on the trafficking count and thirty-six months on the cocaine possession count, to be served consecutively, and thirty days on the marijuana possession count, to be served concurrently, for a total aggregate term of forty-eight months in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE PROSECUTOR BREACHED THE PLEA AGREEMENT BY RECOMMENDING MAXIMUM CONSECUTIVE SENTENCES."

II

{¶5} "APPELLANT WAS DEPRIVED OF HIS RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION, ARTICLE I, SECTION 10, WHEN COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S VIOLATION OF THE PLEA AGREEMENT."

I, II

{¶6} Appellant claims the prosecutor breached the plea agreement in recommending maximum consecutive sentences, and his trial counsel was ineffective in failing to object to the recommendation. We disagree.

{¶7} To demonstrate ineffective assistance of counsel, appellant must establish the following as set forth in *State v. Bradley,* 42 Ohio St.3d 136 (1989), paragraphs two and three of the syllabus:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)
>
> 3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

{¶8} The written plea agreement filed October 22, 2014 specifically states: "***the State agrees to make no recommendation and defer sentencing to the discretion of the Court. Both parties reserve the right to present arguments regarding sentencing at the sentencing hearing." During the plea hearing, the trial court

reiterated this language to appellant and appellant stated he understood. T. at 9. Following the guilty pleas, the trial court proceeded to sentencing, and specifically asked the prosecutor if the state had a recommendation, to which the prosecutor recommended maximum consecutive sentences, "that being one year on the trafficking in drugs, and three years be imposed on the felony 3, for a total of four years." T. at 16.

{¶9} No objection was made to the recommendation. An error not raised in the trial court must be plain error for an appellate court to reverse. *State v. Long,* 53 Ohio St.2d 91 (1978); Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *Long*. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id*. at paragraph three of the syllabus.

{¶10} Although appellant argues the prosecutor breached the plea agreement, we find no error. The plea agreement specifically states that while the prosecutor would not recommend a sentence, both parties reserved the right to present arguments regarding sentencing at the hearing. It is unclear as to what the arguments would be. It could very well include the appropriateness of the sentence.

{¶11} Under the sentencing statutes, it is the trial judge who is required to make the final determination as to sentence, its length, and its consecutive/concurrent nature. "[N]othing binds the court to the recommendations or statements given by the prosecutors at sentencing." *State v. Namack,* 7th Dist. Belmont No. 01 BA 46, 2002-Ohio-5187, ¶ 36.

{¶12} The case had been at trial for a day; therefore, the trial court had personal knowledge of the state's claims and appellant's defenses via opening statements and some witnesses.

{¶13} We cannot find that the error complained of negates a voluntary guilty plea that is not contrary to law. We also do not find any suggestion that the trial court's sentence would have been any different. In his appellate brief at 4, appellant argues the trial court "would not have imposed maximum consecutive terms absent the prosecutor's recommendation." There is no evidence in the record to support this argument. Appellant had a lengthy criminal record: "1998, assault and ag menacing; 2001, felony RSP; 2002, OVI; 2005, trafficking in cocaine and possession of cocaine; an RSP that resulted in a five-year sentence; ***a 2012 domestic violence, and a 2000 - - another RSP in 2007." T. at 16.

{¶14} We find the cited case of *State v. Adams,* to be distinguishable from the case sub judice. In *Adams,* the prosecutor agreed in writing to "stand silent" during the sentencing hearing, and then volunteered a sentencing recommendation during the hearing. In this case, there is no agreement in writing to "stand silent," and the prosecutor made a recommendation only after the trial court inquired.

{¶15} Upon review, we find the prosecutor did not breach the plea agreement, there is no evidence to suggest the sentence would have been any different, and do not find any prejudice to appellant.

{¶16} Assignments of Error I and II are denied.

{¶17} The judgment of the Court of Common Pleas of Muskingum County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Baldwin, J. concur.

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