

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-10-005

Appellee

Trial Court No. 08CR1325

v.

Jason F. Harper

DECISION AND JUDGMENT

Appellant

Decided: December 30, 2010

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Terice A. Warncke, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of
Common Pleas.

{¶ 2} On December 30, 2009, the Sandusky County Grand Jury indicted
appellant, Jason F. Harper, on two counts of trafficking in cocaine, both violations of
R.C. 2925.03(A)(2)(C)(4)(d) and felonies of the second degree. Both counts carried a
specification that appellant committed the offense in the vicinity of a school. In addition,

appellant was indicted on two counts of possession of cocaine in violation of R.C. 2925.11(A)(2)(c)(4)(c), both felonies of the third degree.

{¶ 3} At a hearing held on February 2, 2009, appellant withdrew his pleas of not guilty to the counts in the indictment and entered a plea of guilty to one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2)(C)(4)(d), a felony of the second degree. Harper waived his right to a presentence investigation and was immediately sentenced to a mandatory five years in prison, a mandatory \$7,500 fine and a five year period of postrelease control.

{¶ 4} Appellant raises the following assignments of error:

{¶ 5} "A. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL TO THE PREJUDICE OF DEFENDANT-APPELLANT BY MISGUIDING AND COERCING APPELLANT INTO HIS PLEA AGREEMENT, FAILING TO INCLUDE THE EVIDENTIARY LAB REPORT IN THE RECORD AND DIRECT ATTENTION TO ITS FINDINGS TO ASSURE ACCURACY IN THE CHARGES, NEGOTIATIONS, AND THE RECORD, NOT FILING THE INDIGENCY AFFIDAVIT PRIOR TO SENTENCING, FAILING TO SET FORTH AT SENTENCING THE PROPER APPLICATION OF JAIL-TIME CREDIT UNDER THE LAW, AND FAILING TO ASSURE PROPER NOTIFICATION OF POST RELEASE CONTROL.

{¶ 6} "B. APPELLANT DID NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTER HIS PLEA OF GUILTY, AND THUS, HIS PLEA

SHOULD BE WITHDRAWN AND HIS CONVICTION REVERSED AND REMANDED.

{¶ 7} "C. THE TRIAL COURT COMMITTED PLAIN, REVERSIBLE ERROR IN FAILING TO SENTENCE APPELLANT IN COMPLIANCE WITH THE LAW ON THE MATTERS OF JAIL-TIME CREDIT, MANDATORY FINES, AND POST RELEASE CONTROL."

{¶ 8} In his Assignment of Error A, appellant argues his trial counsel was ineffective because he (1) misguided and coerced appellant into entering into a plea agreement; (2) failed to include an evidentiary lab report in the record and/or review the findings in said report and their "relevance upon the accuracy of all charges in the indictment in order to establish a fair and accurate basis for bargaining with the state on behalf of his client;" (3) notified the state of appellant's acceptance of the offer of the guilty plea to one count in the indictment prior to appellant actually accepting that offer and misrepresented details of that offer to appellant; (4) failed to file appellant's affidavit of indigency before the change of plea/sentencing hearing thereby obligating Harper to pay a \$7,500 mandatory fine; (5) failed to obtain the proper jail time credit for his client; (6) failed to object to "the court's incomplete notification of post release control;" and (7) was, in general, deceitful and incompetent.

{¶ 9} Because a licensed attorney is presumed to be competent, appellant bears the burden of proving that his counsel was ineffective. *Strickland v. Washington* (1984), 466 U.S. 668, 687-689, and *State v. Lott* (1990), 51 Ohio St.3d 160, 174. To meet this

burden, Harper is required to establish that: (1) there was a substantial violation of the attorney's duty to his client, and (2) the defense was prejudiced by the attorney's actions or breach of duty. *Strickland* at 687. The failure to prove either prong of the test makes it unnecessary for a court to consider the other prong. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 389, citing *Strickland* at 697.

{¶ 10} There is no evidence in the record of this cause demonstrating that trial counsel engaged in the behavior described by appellant in allegations one, three, and seven. As to the second allegation, there is no statute or rule requiring a lab report to be included in the record and no evidence in the record indicating that trial counsel did not look at that report. Appellant's fourth allegation assumes that he will have to pay the \$7,500 mandatory fine because trial counsel failed to timely submit his affidavit of indigency. At the close of the change of plea/sentencing hearing, appellant's trial counsel noted that his client could file an affidavit of indigency and "make" the mandatory fine "go away." Thus, the record of this cause does not demonstrate that trial counsel's failure to file the affidavit of indigency during these proceedings prejudiced appellant. Consequently, appellant's fourth allegation is without merit.

{¶ 11} In his fifth allegation, appellant claims that his trial counsel was ineffective because he failed to obtain the correct jail time credit. At his sentencing hearing, it was revealed that appellant accrued 300 hours of jail time on a felony offense separate from the instant case. R.C. 2967.191 provides in pertinent part, as follows:

{¶ 12} "The department of rehabilitation and correction shall reduce the stated prison term of a prisoner * * * by the total number of days that the prisoner was confined *for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial*, confinement for examination to determine the prisoner's competence to stand trial or sanity, and confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term." (Emphasis added.)

{¶ 13} Here, it is undisputed that appellant was credited with the 28 days he spent in jail while awaiting trial on the charged offense in this cause. Thus, trial counsel did not fail in any duty to his client by not obtaining jail time credit arising from a "period of incarceration which arose from facts which are separate and apart from those on which his current sentence is based." See *State v. Smith* (1992), 71 Ohio App.3d 302, 304. See, also, *State v. Marini*, 5th Dist. No. 09-CA-6, 2009-Ohio- 4633, ¶ 15. Appellant's fifth allegation is meritless.

{¶ 14} Appellant's sixth allegation maintains that trial counsel was ineffective because he did not point out that the trial court erred in sentencing appellant to five years of postrelease control. We agree. For a second degree felony, R.C. 2967.28(B)(2) requires a mandatory term of three years of post release control—not five years. Therefore, and only in this respect, trial counsel was ineffective in failing to raise this issue at appellant's sentencing hearing.

{¶ 15} For all of the foregoing reasons, appellant's Assignment of Error A is found not well-taken, in part, and well-taken, in part.

{¶ 16} Assignment of Error B contends that his guilty plea was not knowing, voluntary or intelligent, mainly for the alleged deficiencies set forth in his first assignment of error. As we have determined that all but one of these purported deficiencies were not prejudicial to appellant, we shall not discuss them again.

{¶ 17} Crim.R. 11(C) sets forth the procedure a trial court must follow when accepting a guilty plea in felony cases. Crim.R. 11(C)(2) requires a trial judge personally to tell a defendant entering a guilty plea about his constitutional rights at trial and about certain other nonconstitutional matters. *State v. Nero* (1990), 56 Ohio St.3d 106, 107. Thus, in order to accept a guilty plea the court must first (1) determine that the defendant is making the plea voluntarily, understanding the maximum penalty involved and, if applicable, ineligibility for probation or community control sanctions; (2) inform the defendant of, and determine defendant understands, the effect of the guilty plea, including the trial court's ability on accepting the plea to proceed with sentencing; and (3) inform the defendant of, and determine defendant understands, the rights the defendant is waiving, including the right to a jury trial, the right to confront witnesses against him, the right to have compulsory process for obtaining witnesses, the right to require the state to prove the defendant's guilt beyond a reasonable doubt, and the right against self-incrimination had the case gone to trial. Crim.R. 11(C)(2)(a), (b), and (c).

A court needs only substantially comply with Crim.R. 11(C)(2)(a) and (b) regarding nonconstitutional rights. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 31-32. The court must, however, strictly comply with Crim.R. 11(C)(2)(c) regarding constitutional rights. *Id.*

{¶ 18} In the present case, the trial court fully complied with Crim.R. 11(C)(2). Furthermore, contrary to appellant's additional allegations, there is no evidence in the record of this case showing that he was "duped" or coerced into changing his plea. Moreover, even though the transcript of the change of plea/sentencing hearing contains a few, rather than a "significant" number of inaudible responses on the part of appellant, a reading of the entire transcript reveals that appellant clearly understood what was happening and voluntarily and knowingly entered a guilty plea to one second degree charge of trafficking in cocaine rather than facing a trial on the four counts in the indictment. Appellant's Assignment of Error B is found not well-taken.

{¶ 19} Finally, in his Assignment of Error C, appellant urges that the trial court committed plain error in sentencing him with regard to jail time credit, mandatory fines, and postrelease control. We have already addressed all three of these alleged errors in appellant's previous assignments of error and decided that only the imposition of a mandatory five year period of postrelease control was in error. Accordingly, Appellant's Assignment of Error C is found not well-taken in part, and well-taken in part.

{¶ 20} The judgment of the Sandusky County Court of Common Pleas is affirmed in all respects except the imposition of a mandatory five year period of postrelease

control and reversed on that issue. This cause is remanded to the trial court for further proceedings consistent with this judgment.¹ The costs of this appeal are assessed to appellant pursuant to App.R. 24(A)(4).

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

¹Nonetheless, appellant is not entitled to a de novo sentencing hearing because of this error. Pursuant to R.C. 2929.191, a trial court can correct errors regarding the imposition of postrelease control without holding such a hearing. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶ 23. Instead, after holding a hearing prescribed by R.C. 2929.191(C), a trial court is permitted to correct the journal entry and inform a defendant that postrelease control is a part of his sentence. *Id.* at ¶ 23-24.