

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

State of Ohio

Court of Appeals No. S-11-025

Appellee

Trial Court No. 11 CR 219

v.

Lawrence C. Buser

DECISION AND JUDGMENT

Appellant

Decided: July 20, 2012

* * * * *

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

Nathan T. Oswald, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} We consider Lawrence C. Buser's appeal of a June 2, 2011 judgment of the Sandusky County Court of Common Pleas that revoked community control and imposed

sentence of imprisonment for 12 months on a conviction for receiving stolen property.¹

The original sentencing judgment was journalized on May 19, 2011.

{¶ 2} Appellant pled guilty on May 13, 2011, to receiving stolen property, a violation of R.C. 2913.51 and a fifth degree felony. The prosecutor and appellant jointly requested the trial court to impose a sentence of community control. The trial court followed the recommendation in the May 19, 2011 judgment and sentenced appellant to serve a five-year period of community control on conditions. The judgment also provided notice that should the appellant violate the terms of community control, the court would revoke community control and sentence appellant to serve a 12-month prison term.

{¶ 3} Appellant asserts two assignments of error on appeal:

I. The trial court abused its discretion by imposing the maximum prison term when it revoked Mr. Buser's community control.

II. Mr. Buser was denied effective assistance of counsel by his trial counsel's failure to offer any mitigation argument.

¹ Appellant filed a notice of appeal on June 27, 2011, of both the June 2, 2011, and May 19, 2011 judgments. On July 25, 2011, we dismissed the appeal from the May 19, 2011 original sentencing judgment as untimely. Thereafter appellant filed a motion for a delayed appeal of the judgment. We denied the motion in a decision and judgment filed on September 14, 2011, holding that a motion for delayed appeal cannot be filed in a pending appeal, but must be filed as a new appeal. Accordingly, this appeal is limited to consideration of the June 2, 2011 judgment revoking community control and sentencing appellant to a term of 12 months in prison.

{¶ 4} The original sentencing hearing proceeded on May 16, 2011, and sentencing judgment was filed on May 19, 2011. The community control/probation department filed a notice of community control violation on May 20, 2011. The department based its determination that appellant had violated the conditions of community control on two grounds: (1) appellant tested positive for cocaine and opiates and (2) appellant was found to be in possession of drug paraphernalia.

{¶ 5} The matter proceeded to hearing on May 31, 2011. At the hearing, appellant admitted to being found in possession of drug paraphernalia. The trial court revoked community control and imposed a 12-month prison sentence.

{¶ 6} In his first assignment of error, appellant contends that the trial court abused its discretion by imposing the maximum prison term available by law without (1) giving a reason as to why the harshest prison sentence available by law was the appropriate one, (2) considering the sentencing guidelines of R.C. 2929.12, and (3) explaining why any alternative to prison was inappropriate.

{¶ 7} The Ohio Supreme Court has identified a two-step analysis in reviewing felony sentencing on appeal. First, appellate courts are required to “examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law.” *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26. If this first prong is satisfied, then an abuse of discretion standard is applied by the reviewing court. *Id.*

{¶ 8} R.C. 2929.15(B)(1) provides a trial court with a choice of sanctions where an offender violates conditions of community control:

(B)(1) If the conditions of a community control sanction are violated or if the offender violates a law or leaves the state without the permission of the court or the offender's probation officer, the sentencing court may impose upon the violator one or more of the following penalties:

(a) A longer time under the same sanction if the total time under the sanctions does not exceed the five-year limit specified in division (A) of this section;

(b) A more restrictive sanction under section 2929.16, 2929.17, or 2929.18 of the Revised Code;

(c) A prison term on the offender pursuant to section 2929.14 of the Revised Code.

Where the trial court imposes a prison term sanction for violation of community control, R.C. 2929.15(B)(2) provides:

(2) The prison term, if any, imposed upon a violator pursuant to this division shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(2) of section 2929.19 of the Revised Code. * * *.

{¶ 9} Imposition of a prison sentence upon violation of the conditions of community control is authorized under R.C. 2929.15(B)(1)(c). The 12-month prison term the court imposed upon revocation of community control is within the statutory range of sentences for a fifth degree felony. R.C. 2929.14(A)(5). The trial court provided notice at sentencing that the court would impose the 12-month prison term should appellant violate the conditions of community control. Accordingly, the prison sentence imposed by the trial court upon revocation of community control complies with the requirements of R.C. 2929.15(B)(2) and is not contrary to law.

{¶ 10} The second step of the *Kalish* analysis addresses whether the trial court abused its discretion in sentencing. The term abuse of discretion “implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Appellant contends it was an abuse of discretion for the trial court to impose a maximum sentence upon revocation of community control without giving any reason for a maximum sentence and without explaining why an alternative to prison was not appropriate. However, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus, the Ohio Supreme Court held that, “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.”

{¶ 11} Appellant also argues that the trial court abused its discretion by failing to consider both the purposes of felony sentencing under R.C. 2929.11 and factors relating

to the seriousness of the offense and risk of recidivism under R.C. 2929.12. The Ohio Supreme Court has recognized that even “where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes. Cf. *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361, paragraph three of the syllabus.” *State v. Kalish* at ¶ 18, fn. 4; *State v. Ruby*, 6th Dist. No. S-10-028, 2011-Ohio-4864, ¶ 24.

{¶ 12} Statements made by appellant and his counsel at the original sentencing and appellant’s presentence investigative report disclose the underlying circumstances of appellant’s conviction. Appellant stole jewelry from his disabled sister and sold it to obtain money to buy drugs. Appellant stole in the past to fund drug purchases.

{¶ 13} Appellant has a long history of drug addiction. His addiction began with prescription drugs taken for pain caused by a series of injuries and surgeries over a 16 to 18-year period. In time, appellant’s drug use grew to include use of illegal, nonprescription drugs. Appellant stated at the original sentencing hearing that he sought a sentence of community control to permit treatment for his addiction. Appellant also sought a sentence to community control after the court revoked community control.

{¶ 14} The court followed the joint recommendation of a sentence to community control in the original sentence largely because of appellant’s struggles with substance abuse. The sentence came with a warning:

The Court: I am going to accept the recommendation to place you upon community control. It will be for a period of five years. * * *.

And if you decide that you don't want to abide by the outline, if you are violated, the fall back is one year in prison.

{¶ 15} Appellant admitted to having violated the conditions of his community control through possession of drug paraphernalia three days after the court announced the sentence to community control. At the community control revocation hearing, the court rejected appellant's request to another sentence to community control:

The Court: Uhm, it appears to the Court that numerous opportunities have been given to you to address, uhm, your issues, yet for some reason it's not important to you that you, uhm, do so. So I think it's appropriate that you be given a time-out.

I'm going to impose the original sentence which was suspended upon your entering the community control program and, that would be 12 months in the care and custody of the Department of Rehabilitation and Corrections.

{¶ 16} Under R.C. 2929.11, the overriding purposes of felony sentencing are "to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(A). Protection of the public against future thefts to fund appellant's drug habit comes within the purposes of felony sentencing. Sentencing factors under R.C. 2929.12 include factors relating the seriousness of the crime and likelihood of recidivism. R.C. 2929.12(A).

{¶ 17} Appellant's failure to respond favorably to community control is a factor under R.C. 2929.12(D)(3) to consider in determining the likelihood appellant will commit future crimes. The parties and the trial court have recognized throughout this case that appellant's need to address his addiction is central to his rehabilitation. Appellant violated the conditions of community control through drug related conduct almost immediately after community control initiated. This, when considered with appellant's history of drug addiction and thefts to buy drugs, makes the risk of recidivism clear.

{¶ 18} Under the circumstances presented, we conclude that appellant's violation of community control was serious and directly related to rehabilitation of appellant. We conclude that the trial court gave proper consideration of the overriding purposes of felony sentencing under R.C. 2929.11 and sentencing factors under R.C. 2929.12 when imposing the 12-month prison sentence. We find no abuse of discretion by the trial court in the sentence it imposed upon revocation of community control.

{¶ 19} We find Assignment of Error No. I not well-taken.

{¶ 20} Under Assignment of Error No. II, appellant argues he received ineffective assistance of trial counsel. Appellant contends that trial counsel was deficient because counsel failed to argue in mitigation of sentence the fact that he has struggled with drug addiction for years due to the need to take prescription pain killers to treat pain caused by a series of injuries and surgeries.

{¶ 21} In order to show ineffective counsel, appellant must establish
(1) "[c]ounsel's performance is proved to have fallen below an objective standard of

reasonable representation and, in addition, prejudice arises out of counsel's performance" and (2) "[t]he defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reasonable probability is one which is sufficient to undermine confidence in the result. *Id.*

{¶ 22} "Licensed attorneys are presumed to act competently." *State v. Lott*, 52 Ohio St.3d 160, 174, 555 N.E.2d 293 (1990). As such, "judicial scrutiny of counsel's performance must be highly deferential." *Bradley* at 142; citing *Strickland* at 689. Appellant must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *State v. Creech*, 188 Ohio App.3d 513, 2010-Ohio-2553, 936 N.E.2d 79, ¶ 40 (4th Dist.), citing *Strickland* at 689.

{¶ 23} Appellant contends that his "struggles with addiction presented trial counsel with a viable mitigation argument during the community control violation hearing." The state responds by arguing that there was no reasonable probability that the outcome would have been any different even had counsel presented the mitigation argument. We agree.

{¶ 24} Trial counsel was successful at the original sentencing hearing in securing trial court approval to impose a recommended sentence to community control. At the hearing, trial counsel described appellant's substance abuse problems at length and

argued that a sentence to community control would present an opportunity to secure treatment for appellant's drug addiction. At the close of the argument counsel stated:

[Appellant] recognizes he'll probably always be on pain medication for the rest of his life * * * So we'd ask the court to allow him community control. * * * And maybe what the Court can do is give him the keys to the jailhouse and if he decides he's gonna [sic] break the law he's just opening up his own cell and putting himself in for 12 months.

{¶ 25} Despite the contentions at the original sentencing hearing that appellant would use the period of community control to secure treatment for his drug addiction, appellant violated conditions of community control only three days later by drug related conduct. In imposing a prison sanction for violation of community control, the trial court stated appellant had been given numerous opportunities to address his addiction and that for some reason it was not important to appellant.

{¶ 26} In our view, it was a reasonable strategy at the revocation hearing for trial counsel to choose not to restate arguments concerning addiction and the need for treatment in view of appellant's total failure to use community control to address his addiction. Revisiting the issues of addiction and need for treatment in that context would likely have triggered an immediate, sharp, and unfavorable response from the trial court.

{¶ 27} We find Assignment of Error No. II not well-taken.

{¶ 28} We conclude that justice has been afforded the party complaining and affirm the judgment of the Sandusky County Court of Common Pleas. We order appellant to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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.

Mark L. Pietrykowski, J.

Thomas J. Osowik, J.
CONCUR.

JUDGE

JUDGE

JUDGE

<p>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.</p>
