

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

State of Ohio

Court of Appeals No. WD-11-069

Appellee

Trial Court No. 11 CR 266

v.

Ricky Estis

DECISION AND JUDGMENT

Appellant

Decided: February 1, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Aram Ohanian, Assistant Prosecuting Attorney, for appellee.

Richard A. Schmidt, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Ricky Estis appeals the October 24, 2011 judgment of the Wood County Court of Common Pleas convicting him of the offense of improperly handling firearms in a motor vehicle, a violation of R.C. 2923.16(D)(1) and a fifth degree felony, and sentencing him for the offense. The court sentenced appellant to serve an 11-month

prison term, to pay a \$500 fine, and to pay the costs of prosecution. Appellant pled guilty to the offense.

{¶ 2} Appellant asserts three assignments of error on appeal:

1. The court's sentence was unjust and unreasonable for conviction under the circumstances.

2. Trial counsel provided ineffective assistance in violation of appellant's Sixth Amendment rights.

3. It was plain error to sentence Appellant to eleven months in prison under the factual circumstances of this case.

{¶ 3} Under Assignment of Error No. 1, appellant argues that the trial court erred as to his sentence. He asserts that his sentence is contrary to law because the trial court failed to articulate factors under R.C. 2929.13(B)(2) in determining to impose a prison sentence rather than community control. Appellant also argues that the trial court erred by failing to state the seriousness and recidivism factors under R.C. 2929.12 that it considered in imposing sentence. The state responds that appellant's felony record and history of failing to appear at court proceedings in this case, and in other prior criminal proceedings, fully supported the court's decision to impose an 11-month prison sentence.

{¶ 4} Both at the sentencing hearing and in its judgment, the trial court stated that appellant has an extensive history of criminal convictions including two prior felony convictions. The record discloses that appellant was sentenced to a two-year prison term

in 1990 on convictions of aggravated trafficking and receiving stolen property. In 1998 he was sentenced to a prison term of 15 months on a conviction for felonious assault.

{¶ 5} The Ohio Supreme Court outlined the sentencing inquiry under R.C. 2929.13(B) (2) and (3) (formerly 2929.13(B)(1) and (2)) with respect to community control in sentencing for fourth and fifth degree felonies in *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, 926 N.E.2d 1282, ¶ 8.¹ See also *State v. Tyus*, 6th Dist. No. WD-10-067, 2011-Ohio-5048, ¶ 14-15. The court discussed that the statutory scheme sets forth a list of nine factors to be considered at sentencing of fourth and fifth degree felony offenders in determining whether to sentence an offender to community control. *Massien* at ¶ 8. These provisions are now contained in R.C. 2929.13(B)(2)(a) through (i).

{¶ 6} Except in specified circumstances, the statute directs trial courts to determine whether any of the nine factors applied. R.C. 2929.13(B)(2). One of the nine factors, is that “[t]he offender at the time of the offense was serving, or the offender previously had served, a prison term. R.C. 2929.13(B)(2)(g). In this case, the court stated in the sentencing judgment that appellant’s criminal record presented a “substantial history of criminal convictions with two prior felony convictions with prison sentences.”

¹ Appellant has not claimed R.C. 2929.13(B)(1) applies under the facts.

{¶ 7} The statute directs that where a sentencing court determines that one of the nine factors exists, the court is to proceed to sentence under R.C. 2929.13(B)(3)(a).

Massien at ¶ 8.² The Ohio Supreme Court identified in *Massien* the required analysis:

After considering the seriousness and recidivism factors set forth in R.C. 2929.12, if the court finds that a prison term is consistent with the principles and purposes of felony sentencing and that an offender is not amenable to community control, then the court shall impose a prison term upon the offender. Thus, although it does not preclude the imposition of community-control sanctions, a finding of any of the factors set forth in R.C. 2929.13(B)(1)(a) through (i) [now R.C. 2929.13(B)(2)(a) through (i)] weighs against the preference for community control and may justify incarceration. *Id.*

{¶ 8} In its judgment the trial court undertook the R.C. 2929.13(B)(3)(a) analysis. First, the court stated that it had reviewed seriousness and recidivism factors and considered appellant's felony convictions in imposing sentence. The court then stated:

After a review of the foregoing factors, the court finds that a prison term is consistent with the overriding principles and purposes of sentencing set forth in R.C. 2929.11; and that the offender is not amendable to any available community control sanctions.

² At the time of *Massien*, the statutory provision was numbered R.C. 2929.13(B)(2)(a).

{¶ 9} In our view, the record demonstrates that the trial court complied with the requirements of R.C. 2929.13. The court identified a factor under R.C. 2929.13(B)(2)(a) through (i), and conducted the required analysis under R.C. 2929.13(B)(3)(a) in imposing a prison sentence. The trial court judgment is not contrary to law.

{¶ 10} A sentencing court is not required to use any specific language to demonstrate that it considered the applicable seriousness and recidivism factors under R.C. 2929.12. *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000); *State v. Warren*, 6th Dist. No. L-07-1057, 2008-Ohio-970, ¶ 9; *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶ 27.

{¶ 11} A trial court's application of the principles and purposes of felony sentencing under R.C. 2929.11 and sentencing factors under R.C. 2929.12 in selecting a sentence within the authorized statutory range of sentence is reviewed for error on appeal under an abuse of discretion standard. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 17. An abuse of discretion implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). We find no abuse of discretion in the trial court's sentencing appellant to an 11-month term of imprisonment for the conviction of violating R.C. 2923.16(D)(1).

{¶ 12} We find appellant's Assignment of Error No. 1 not well-taken.

{¶ 13} Under Assignment of Error No. 2, appellant asserts ineffective assistance of trial counsel. Appellant argues that trial counsel was deficient in his representation as

to his guilty plea. Appellant now claims that evidence is lacking to support a conviction for violating R.C. 2923.16(D)(1) and appellant should not have pled guilty to the offense. Appellant further argues that counsel was deficient in failing to object to statements by the prosecutor at sentencing concerning appellant's criminal record and his repeated failure to appear at court proceedings.

{¶ 14} To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense."

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Proof of prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id. at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

{¶ 15} In the context of convictions based upon guilty pleas, the prejudice element generally requires a showing "that there is a reasonable probability that, but for counsel's errors * * * [the defendant] * * * would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *State v. Xie*, 62 Ohio St.3d 521,524, 584 N.E.2d 715 (1992).

{¶ 16} A claim of ineffective assistance of counsel that requires consideration of evidence outside the record of trial court proceedings cannot be considered on direct appeal. *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001); *State v. Carter*, 89 Ohio St.3d 593, 606, 734 N.E.2d 345 (2000). This is such a case.

{¶ 17} Evidence is lacking in this record upon which to determine the nature of trial counsel's advice concerning the decision to plead guilty. Evidence also is lacking on whether, but for the advice of counsel, appellant would not have pled guilty to the offense. To the extent appellant's arguments under Assignment of Error No. 2 claim ineffective assistance of counsel with respect to appellant's guilty plea, we conclude they are without merit because they require consideration of facts outside of the record in this appeal.

{¶ 18} The fact that appellant failed to appear at court proceedings 128 times in 58 criminal proceedings against him was also relevant at sentencing and is relevant on the issue of recidivism. *See State v. Williams*, 7th Dist. No. 11 MA 131, 2012-Ohio-6277, ¶ 69; *State v. Endress*, 12th Dist. No. 2007-03-079, 2008-Ohio-1666, ¶ 4; *State v. Daniels*, 1st Dist. Nos. C-010070 and C-010087, 2001 WL 1635599, *5.

{¶ 19} We find appellant's Assignment of Error No. 2 not well-taken.

{¶ 20} Appellant's legal argument under Assignment of Error No. 3 is unclear. Appellant asserts that "[i]t was plain error to sentence Appellant to eleven months in prison under the factual circumstance of this case." Appellant then proceeds to challenge the sufficiency of the evidence to support a conviction, quoting his own statement at

sentencing that the gun police found in the trunk of the car was not his. Appellant then restates claimed error with respect to consideration of appellant's criminal record and appellant's repeated failures to appear at court proceedings in criminal proceedings against him.

{¶ 21} A valid guilty plea waives a defendant's right to challenge his conviction on the basis of insufficiency of the evidence. *State v. Hill*, 8th Dist. No. 90513, 2008-Ohio-4857, ¶ 6; *State v. Siders*, 78 Ohio App.3d 699, 701, 605 N.E.2d 1283 (11th Dist.1992).

{¶ 22} The state argues that Assignment of Error No. 3 is unclear and even if it is intended to challenge the validity of appellant's guilty plea, appellant's argument is predicated on evidence outside the record and cannot be considered in this appeal. We agree. Appellant pled guilty of the offense and neither moved to withdraw his plea nor submitted evidence in the trial court to demonstrate lack of possession of the firearm. Because of appellant's plea and appellant's failure to challenge the validity of his plea in the trial court, the record does not contain evidence on the issue of whether appellant in fact possessed the firearm on which his conviction is based.

{¶ 23} "A reviewing court cannot add matter to the record before it, which was not part of the trial court's proceedings, and then decide the appeal on the basis of new matter." *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus.

{¶ 24} We find appellant's Assignment of Error No. 3 not well-taken.

{¶ 25} We conclude that justice has been afforded the party complaining and affirm the judgment of the Wood County Court of Common Pleas. We also 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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>
