[Cite as *State v. Jones*, 2013-Ohio-3562.]

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

State of Ohio — Court of Appeals No. WD-12-053

Appellee — Trial Court No. 2011CR596

v.

Vernell Jones — **DECISION AND JUDGMENT**

Appellant — Decided: August 16, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Thomas A. Matuszak, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas, following a guilty plea, in which appellant, Vernell L. Jones, pled to and was found guilty of one count of trespass in a habitation. For the following reasons, we affirm the trial court's judgment.

{¶ 2} On October 16, 2011, appellant entered the apartment of Bowling Green State University student S.G. at approximately 5:45 a.m., walked into one of the bedrooms, and laid down on the bed next to a female houseguest, who was asleep. When the guest woke up, appellant asked her if she wanted to share a bottle of alcohol that he brought with him into the home. Appellant exited the home when the guest went to wake up S.G.

{¶ 3} Upon being told of appellant's presence, S.G. contacted Bowling Green Police. After questioning S.G. and her guest, the police searched for and found appellant, who admitted that he entered S.G.'s home without permission.

{¶ 4} On November 4, 2011, the Wood County Grand Jury indicted appellant on one count of trespass in a habitation, in violation of R.C. 2911.21(A)(1), a fourth degree felony. On November 10, 2011, appellant entered a not guilty plea and was released on an own-recognizance bond. A pretrial conference was set for November 18, 2011, at which appellant was present. At that time, another pretrial was scheduled for December 2, 2011, at which appellant and his counsel were present. However, appellant did not appear for later pretrials that were scheduled for January 20, 2012, and February 10, 2012. As a result, a statewide warrant for appellant's arrest was issued on February 15, 2012.

{¶ 5} Appellant was arrested on May 24, 2012, and he appeared in court on May 25, 2012. At that time, his OR bond was revoked, a cash bond was set at $15,000, and appellant was taken into custody. The matter was set for another pretrial on June 1,

2012. After discussions were held between the prosecution, appellant and his attorney, a plea hearing was set for June 19, 2012.

{¶ 6} At the plea hearing, the trial court addressed appellant, who was present with his court-appointed attorney, concerning the nature of the offense and the possibility of a maximum prison sentence of 18 months, along with a $5,000 fine and the optional three-year period of postrelease control, after which appellant indicated that he understood. Next, the trial court inquired as to whether appellant read and understood the guilty plea form, and ascertained that appellant had a high school education, followed by several years of college, and that he was not under the influence of drugs or alcohol at the time.

{¶ 7} In addition to the foregoing, the trial court explained appellant's constitutional rights, including the presumption of his innocence, the prosecution's burden to prove appellant's guilt beyond a reasonable doubt, and the right to a speedy trial and a court-appointed attorney, as well as appellant's right to subpoena, question and cross-examine witnesses, and to testify or not testify in his own defense. The trial court also explained that, by entering a guilty plea, appellant was relinquishing the right to appeal a guilty verdict. After the foregoing explanations, the trial court asked appellant if he was still willing to enter a guilty plea, and appellant answered "No. I am okay. Yes." The following exchange then took place:

> The Court: Okay. You understand the rights we just talked about by saying "Yes, I am guilty." You are giving up those rights?
>
> Appellant: Yes, Your Honor.

{¶ 8} After appellant indicated his desire to continue with his guilty plea, the prosecution told the trial court what evidence would have been presented at trial. Specifically, the prosecutor stated that S.G. and several female friends left her residence at 5:00 a.m. on October 16, 2011, and returned at 5:45 a.m., after which they went to bed. Appellant saw the women enter the apartment, and then he went in through the back door, which was not locked. Appellant walked into one of the bedrooms and laid down on the bed where S.G.'s guest was sleeping, and woke the woman up when he touched her face. He then asked the woman if she wanted to "do shots" with him. Appellant had several liquor bottles in his possession.

{¶ 9} When the guest asked appellant if anyone knew he was in the apartment, appellant responded that he knew someone who lived there. The guest then went to get S.G, who told appellant to leave. After appellant left, the women called the police who located and interviewed appellant. Appellant told police that he had been in the apartment one other time because he was invited to a party. However, the prosecutor stated that, according to S.G., there was no party on October 16, and appellant had no other legal justification for his actions on that date.

{¶ 10} The trial court asked appellant's counsel if he agreed with the prosecutor's version of the facts, after which defense counsel stated: "First, I would state that the facts as reported by the prosecutor, if believed by a jury in my estimation, would be sufficient to support a conviction." However, defense counsel pointed out that S.G. acknowledged appellant was in her apartment at an earlier time, as a guest. Defense counsel also stated:

This case probably would have went [sic] forward to trial had not the defendant failed to appear at earlier stages of these proceedings which gave the State the authority to file an additional felony charge which made the overall defense of the case untenable.

So we are here on a negotiated plea, and this is the best that at least this particular lawyer was able to come up with. But, I would acknowledge that the facts as alleged by the prosecution, if believed by a jury, would be sufficient to justify a conviction.

{¶ 11} The prosecution then stated that, if the defense disagreed with the facts as presented, he would be willing to stop the plea proceedings, set the matter for trial, and present the failure to appear charge to the grand jury. At that point, defense counsel asked the trial court to directly address appellant regarding the plea. The following exchange took place:

Court: Mr. Jones, are the facts as set forth by the prosecutor what happened?

Appellant: Yes, Your Honor.

Court: All right. Your plea to this charge is guilty, is that correct?

Appellant: Yes, sir.

Court: All right. Now, is the plea you are entering today is what you want to do?

Appellant: It is the thing of my options that I see best right now as far as I know.

Court: Is pleading guilty today what you want to do?

Appellant: Yes, Your Honor.

* * *

Court: Do you want me to accept your plea of guilty to Trespass in a Habitation at this time?

Appellant: Yes.

{¶ 12} Thereafter, the trial court found that appellant's plea was knowingly, voluntarily and intelligently made, accepted the plea, and found appellant guilty of trespass in a habitation. The matter was referred for a presentence investigation, and sentencing was set for August 10, 2012. Appellant's request for release on his own recognizance was denied, and his $15,000 bond was continued.

{¶ 13} On August 20, 2012, a sentencing hearing was held, at which all parties were present. At the outset of the hearing appellant's defense attorney told the trial court that appellant's behavior largely was due to his problems with alcohol, and asked that appellant be placed on probation on the condition that he seek treatment and attend "AA" meetings. The prosecution also noted an ongoing theme of alcohol abuse in appellant's past, and recommended that appellant be given "an appropriate community control sanction," along with substance abuse counseling and a potential mental health evaluation and treatment. The trial court then reviewed appellant's criminal history, which included

public drunkenness and disorderly conduct both in Bowling Green, Ohio, and in Pittsburgh, Pennsylvania, and an incident of drunken disorderly conduct that occurred after the instant offense in Macedonia, Ohio, on December 24, 2011. Thereafter, the trial court told appellant "you can't drink."

{¶ 14} The trial court sentenced appellant to two years of community control on the conditions that appellant would: (1) contact an appropriate agency for chemical dependence and a mental health evaluation and follow up with all recommendations for treatment, (2) attend AA meetings or another 12-step program as recognized by the probation department, (3) obtain lawful employment or a full-time class schedule, (4) perform 200 hours of community service, (5) have no contact with any of the victims and no association with others who are on probation or community control or who are felons except during meetings, (6) submit to DNA testing, and (7) pay a one-time supervision fee of $50, plus court costs. The court also transferred supervision of appellant's probation to Cuyahoga County, where appellant resided at that time, and ordered him to submit to any additional probation requirements imposed in that jurisdiction. Appellant indicated that he understood the above conditions.

{¶ 15} On September 11, 2012, appellant filed a timely notice of appeal from the trial court's judgment. On appeal, appellant sets forth the following as his sole assignment of error:

First Assignment of Error

Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Constitution of the State of Ohio.

{¶ 16} On appeal, appellant asserts that his trial counsel was ineffective because counsel did not file a pre-plea request for intervention in lieu of conviction (ILC) pursuant to R.C. 2951.041. In support, appellant argues that he qualified for intervention because he admittedly has an alcohol problem, a fact that was acknowledged and discussed by all parties at his sentencing hearing. Appellant further argues that he was prejudiced by trial counsel's ineffectiveness because, had such a motion been granted and had he completed the required course of treatment the court could have dismissed the underlying charges against him and sealed the record of the instant offense.

{¶ 17} In order to establish a claim for ineffective assistance of trial counsel, a defendant must demonstrate that "his counsel's performance was deficient and that deficiency prejudiced his defense." *State v. Wright*, 8th Dist. Cuyahoga No. 98345, 2013-Ohio-936, ¶ 8, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 675 (1987). As to the prejudice prong of the test, the defendant is required to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different, with a reasonable probability being 'a probability sufficient to undermine confidence in the outcome.'" *State v. McGlown*, 2d Dist. Montgomery No. 25434, 2013-Ohio-2762, ¶ 14, citing *Strickland v.*

Washington, 466 U.S. at 694. This burden of proof is high given Ohio's presumption that a properly licensed attorney is competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988), *State v. Newman*, 6th Dist. Ottawa No. OT-07-051, 2008-Ohio-5139, ¶ 27.

{¶ 18} In addition to the above, it is well-established "that a guilty plea waives the defendant's right to claim he was prejudiced by the ineffective assistance of counsel, except to the extent that the defects complained of caused the plea to be less than knowing and voluntary." *State v. King*, 184 Ohio App.3d 226, 2009-Ohio-4551, 820 N.E.2d 399, ¶ 47 (8th Dist.) Accordingly, "to prove a claim of ineffective assistance of counsel with a guilty plea, appellant must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." *Wright, supra,* at ¶ 12, citing *State v. Minite*, 8th Dist. Cuyahoga No. 95699, 2011-Ohio-3585. (Other citation omitted.)

{¶ 19} R.C. 2951.041 provides, in pertinent part, that:

> (A)(1) If an offender is charged with a criminal offense, including but not limited to a violation of section 2913.02, 2913.03, 2913.11, 2913.21, 2913.31, or 2919.21 of the Revised Code, and the court has reason to believe that drug or alcohol usage by the offender was a factor leading to the criminal offense with which the offender is charged or that, at the time of committing that offense, the offender had a mental illness or was a person with intellectual disability and that the mental illness or status as a

person with intellectual disability was a factor leading to the offender's criminal behavior, the court may accept, prior to the entry of a guilty plea, the offender's request for intervention in lieu of conviction. * * * The court may reject an offender's request without a hearing. * * *

If the offender alleges that drug or alcohol usage by the offender was a factor leading to the criminal offense with which the offender is charged, the court may order that the offender be assessed by a program certified pursuant to section 3793.06 of the Revised Code or a properly credentialed professional for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan. * * *

{¶ 20} Ohio courts have held that the trial court has the discretion to accept or reject an ILC application. *State v. Stanovich*, 173 Ohio App.3d 304, 878 N.E.2d 641, 2007-Ohio-4234, ¶ 11. Further, even if the application is accepted, and the defendant meets all of the statutory requirements set forth in R.C. 2951.041(B), the trial court retains the ultimate discretion to determine whether or not to accept the offender's guilty plea and grant the request. R.C. 2591.041(C); *Stanovich* at ¶ 17.

{¶ 21} Appellant's written plea agreement states, in pertinent part, that:

C. PLEA AGREEMENT. Discussions were held between the State and my attorney and the following **Plea Agreement** has been reached and approved by me: <u>I shall plead guilty to the sole count in the indictment, to</u>

wit: Trespass in a Habitation, in violation of R.C. §2911.12(B), a felony of the fourth degree. In exchange, the State shall not prosecute a Failure-to-Appear violation arising out of my prior failure to appear for court proceedings in this case. At time of sentencing, the State and the defense shall each be free to recommend. * * * (Emphasis in original.)

{¶ 22} In order to establish that appellant's trial counsel was ineffective, the record in this case would have to show that (1) the trial court would have accepted appellant's petition for intervention in lieu of treatment and subsequently found that appellant met all of the criteria set forth in R.C. 2951.041, and (2) the state would have agreed to appellant's guilty plea on those terms. The record does not establish those facts. In addition, it is undisputed that, whether or not an ILC application was filed, appellant was required to enter a guilty plea in order to avoid being charged with failure to appear.

{¶ 23} On consideration of the entire record and the law, this court finds that appellant cannot show that that there is a reasonable probability that his appointed trial counsel's performance was deficient and that such deficiency prejudiced his defense. Appellant's sole assignment of error is not well-taken.

{¶ 24} The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered 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

Thomas J. Osowik, J. _____
CONCUR.
JUDGE