[Cite as *State v. Clark*, 2013-Ohio-832.]

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

State of Ohio — Court of Appeals No. L-10-1092

Appellee — Trial Court No. CR0200902937

v.

William Clark — **DECISION AND JUDGMENT**

Appellant — Decided: March 8, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

John P. Millon, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} This matter is before the court pursuant to our February 28, 2012 decision which granted appellant's application for reopening, pursuant to App.R. 26(B), based upon a claim of ineffective assistance of appellate counsel on direct appeal. For the reasons which follow, the judgment of the trial court is affirmed.

{¶ 2} Appellant was found guilty of attempted kidnapping and attempted felonious assault on a no contest plea entered in the Lucas County Court of Common Pleas in 2010. The court sentenced appellant to seven and five-year terms of incarceration on these counts respectively and ordered that the terms be served consecutively. On appeal, appellant's counsel argued only that appellant's sentence was contrary to law and that the trial court unreasonably sentenced appellant to near maximum sentences. We rejected both of these propositions and affirmed appellant's conviction. *State v. Clark*, 6th Dist. No. L-10-1092, 2011-Ohio-4681.

{¶ 3} On December 8, 2011, appellant filed an application for reopening of his appeal pursuant to App.R. 26(B). App.R. 26(B)(5) provides that an application for reopening shall be granted if there is a genuine issue as to whether appellant was deprived of effective appellate counsel. Appellant's application for reopening was granted by this court on February 28, 2012. Specifically, this court found that there was a genuine issue as to whether or not appellant's appellate counsel was ineffective for failing to raise the issue of the trial court's failure to conduct a competency hearing. Appellant raises this issue in his first two assignments of error.

{¶ 4} R.C. 2945.37(B) provides:

> In a criminal action in a court of common pleas, a county court, or a municipal court, the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in

this section. If the issue is raised after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court's own motion.

{¶ 5} In this case, it is undisputed that the defense raised the issue of appellant's competence before trial. The trial court then referred appellant to the Court Diagnostic and Treatment Center for an evaluation of his competency to stand trial. On December 3, 2009, clinical psychologist Charlene A. Cassel submitted a report to the court concluding that appellant was competent to stand trial. At defense counsel's request and without objection from the state, the report was admitted into evidence.

{¶ 6} "[T]he competency issue is one that can be waived by the parties. A hearing is not required in all situations, only those where the competency issue is raised and maintained." *State v. Smith*, 8th Dist. No. 95505, 2011-Ohio-2400, ¶ 5. In *Smith*, the court held that where a defendant stipulates to competency, a trial court need not hold a hearing pursuant to R.C. 2945.37(B) because a hearing is only needed to introduce evidence rebutting the presumption of competency established in R.C. 2945.37(G). *State v. Asadi-Ousley*, 8th Dist. No. 96668, 2012-Ohio-106.

{¶ 7} While defense counsel in this case did not officially "stipulate" to appellant's competency, her action in asking that the report be admitted into evidence can be interpreted as a failure to maintain the competency issue, as discussed in *Smith*.

{¶ 8} Moreover, the Ohio Supreme Court has held that "there is no question that where the issue of the defendant's competency to stand trial is raised prior to the trial, a

competency hearing is mandatory." However, the court also held that "the failure to hold a mandatory competency hearing is harmless error where the record fails to reveal sufficient indicia of incompetency." *State v. Bock*, 28 Ohio St.3d 108, 110, 502 N.E.2d 1016 (1986).

{¶ 9} Here, the record reveals no adequate indication of any behavior on the part of the defendant which might indicate incompetency. Dr. Cassel's conclusion was that he was competent to stand trial. At his plea colloquy, he stated that he understood the charges against him and the possible sentences he faced. He stated he understood the rights he was waiving and that he was satisfied with appointed counsel's advice and counsel. As there is no evidence in the record before us that appellant was incompetent, we find that the failure to hold a hearing in this regard was harmless. Accordingly, appellant's first two assignments of error are found not well-taken.

{¶ 10} In his third assignment of error, appellant contends that the court erred in sentencing him consecutively as the offenses of attempted kidnapping and attempted felonious assault are allied offenses of similar import. Thus, he argues, the two sentences should be merged.

{¶ 11} Appellant's argument is without merit. If multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50

(Lanzinger, J., dissenting). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Id.* at ¶ 50.

{¶ 12} The events leading up to appellant's convictions took place over a four-day period wherein appellant assaulted the victim multiple times while separately preventing her from getting away from him. Accordingly, the offenses at issue were committed separately and with a separate animus. Appellant's third assignment of error is found not well-taken.

{¶ 13} On consideration whereof, the judgment of the Lucas 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.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE