

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

State of Ohio

Court of Appeals No. WD-14-022

Appellee

Trial Court No. 2012CR0439

v.

Bradley Wolfe

DECISION AND JUDGMENT

Appellant

Decided: February 13, 2015

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Thomas A. Matuszak and David T. Harold, Assistant Prosecuting Attorneys, for appellee.

Stephen D. Long, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Bradley Wolfe, appeals from the March 17, 2014 judgment of the Wood County Court of Common Pleas convicting appellant, following the acceptance of his guilty plea, of tampering with evidence, in violation of R.C. 2921.12(A)(1) and (B),

felonious assault, in violation of R.C. 2903.11(A)(1) and (D)(1)(A), and abduction, in violation of R.C. 2905.02(A)(2) and (C). For the reasons which follow, we affirm.

{¶ 2} Pursuant to the guidelines set forth in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), appellant's court-appointed counsel has filed an appellate brief and motion to withdraw as counsel. He mailed a copy of the brief and motion to appellant and informed him that he had a right to file his own brief, but he did not do so.

{¶ 3} Appellant's counsel states in his motion that he thoroughly reviewed the record in this case and concluded that the trial court did not commit any error prejudicial to appellant. However, in compliance with the requirements of *Anders*, appellant's counsel has submitted a brief setting forth the following potential assignments of error:

1. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY ACCEPTING THE APPELLANT'S GUILTY PLEA WITHOUT ENSURING THAT THE PLEA WAS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO A TERM OF IMPRISONMENT.

4. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SEVER CHARGES.

5. APPELLANT'S GUARANTEE AGAINST DOUBLE
JEOPARDY WERE [sic] VIOLATED WHERE THE JURY INDICTED
HIM ON THE CHARGE OF FELONIOUS ASSAULT AFTER NO
PROBABLE CAUSE WAS FOUND WITH REGARD TO SAID
CHARGE AT A PRELIMINARY HEARING.

{¶ 4} Appellant's appointed counsel did not include arguments which support these assignments of error, but concludes that they are unsupported by the record and/or by the law. Therefore, he concludes that an appeal would be frivolous.

{¶ 5} We have reviewed the entire lower court's proceedings and have determined that there is no merit to the errors alleged by appellant's appointed counsel and by appellant. Having entered a guilty plea, appellant has waived any errors that occurred at trial except for alleged errors related to the entry of the guilty plea. *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991), paragraph two of the syllabus.

{¶ 6} In his first proposed assignment of error, appellant's counsel considers whether appellant received ineffective assistance of counsel. Because of the guilty plea, the only argument appellant could make regarding ineffective assistance of counsel is that his counsel's ineffective assistance resulted in appellant entering an unknowingly, involuntary, or unintelligent plea. Appellant was required to show that his counsel's performance was deficient and prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Accord State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph

two of the syllabus. Any such deficiency must be related to the entry of appellant's guilty plea. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 81-90.

{¶ 7} In this case, there is no evidence in the record that counsel's representation of appellant was deficient in any manner regarding the entry of the guilty plea.

Therefore, we find appellant's first proposed assignment of error lacks merit.

{¶ 8} In his second proposed assignment of error, appellant's counsel argues that the trial court abused its discretion by accepting appellant's plea. We have examined the guilty plea hearing transcript and find that the trial court strictly complied with all of the requirements of Crim.R. 11(C)(2), thereby precluding a claim that the plea was not made knowingly, voluntarily, and intelligently. Therefore, the second proposed assignment of error is also found not well-taken.

{¶ 9} In his third proposed assignment of error, appellant's counsel argues that the trial court abused its discretion by imposing a term of imprisonment. Appellant was sentenced to nine months imprisonment for the offense of tampering with evidence, a felony of the third degree; two years of imprisonment for the offense of felonious assault, a felony of the second degree; and nine months imprisonment for the offense of abduction, a felony of the third degree. All of the terms were the minimum prison terms allowed under the applicable statutes. The sentences were ordered to be served concurrently to each other. Appellant's counsel suggests that the trial court arguably could have abused its discretion by imposing a prison term.

{¶ 10} Appellate review of a sentence is limited to issues of whether the sentence is contrary to law and whether the record clearly and convincingly supports the sentencing court’s findings required by law. R.C. 2953.08(G)(2)(a).

{¶ 11} Unless required or precluded by law from imposing a certain sentence, a trial court has the discretion to impose any sanction allowed by law with the specific sentence range dependent upon the degree of the offense and the type of felony. R.C. 2929.12(A) and 2929.13(A). Appellant was convicted of felonious assault, a felony of the second degree, for which there is a presumption of a prison term. R.C. 2929.13(D)(1). For a felony of the second degree, the court shall impose a definite prison term of “two, three, four, five, six, seven, or eight years.” R.C. 2929.14(A)(2).

{¶ 12} However, the sentence must be reasonably calculated to achieve the two overriding purposes of felony sentencing: “to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes,” R.C. 2929.11(A), and be “consistent with sentences imposed for similar crimes committed by similar offenders,” R.C. 2929.11(B). The court must also balance the seriousness and recidivism factors identified in R.C. 2929.12.

{¶ 13} In the case before us, the court stated at the sentencing hearing that appellant was a repeat violent offender for penalty purposes, had a prior prison term for an offense of violence, the victim was severely beaten, and community control would not properly protect the public. In the sentencing judgment, the court indicated that it had

considered the purposes and principles of sentencing, as well as the seriousness and recidivism factors. Therefore, we cannot find that the trial court's sentence was contrary to law. Appellant's third proposed assignment of error lacks merit.

{¶ 14} In his fourth proposed assignment of error, appellant's counsel argues that the trial court abused its discretion by denying appellant's motion to sever charges.

{¶ 15} By entering a guilty plea, appellant waived the right to challenge the denial of his Crim.R. 14 motion to sever, which had to be renewed at trial. *State v. Bennett*, 9th Dist. Lorain No. 12CA010286, 2014-Ohio-160, ¶ 9; and *State v. Kendrick*, 2d Dist. Montgomery No. 20965, 2006-Ohio-311, ¶ 17, *rev'd on other grounds, In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 411, 2006-Ohio-2394, 848 N.E.2d 809, ¶ 19. "Waiver is the intentional relinquishment or abandonment of a right, and waiver of a right 'cannot form the basis of any claimed error under Crim.R. 52(B).'" *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 23, quoting *State v. McKee*, 91 Ohio St.3d 292, 299, 744 N.E.2d 737 (2001), fn. 3 (Cook, J., dissenting).

{¶ 16} Because appellant pled guilty to the charges, he waived the right to challenge the ruling on the pretrial motion to sever the charges. Therefore, we find appellant's fourth potential assignment of error not well-taken.

{¶ 17} In his fifth proposed assignment of error, appellant's counsel argues that appellant's constitutional guarantee against double jeopardy was violated when the jury indicted him on charges of felonious assault after no probable cause was found at a

preliminary hearing. This argument fails because double jeopardy does not attach during a preliminary hearing. R.C. 2937.13; Crim.R. 5; *State v. Mills*, 12th Dist. Knox No. CA 77-CA-11, 1977 WL 200784, *2 (Dec. 9, 1977); and *United States ex rel. Rutz v. Levy*, 268 U.S. 390, 393, 45 S.Ct. 516, 69 L.Ed. 1010 (1925). Appellant's fifth proposed assignment of error is found not well-taken.

{¶ 18} Finally, this court has the obligation to fully examine the record in this case to determine whether an appeal would be frivolous. *Anders*, 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493. Our review of the record does not disclose any errors by the trial court which would justify a reversal of the judgment. Therefore, we find this appeal to be wholly frivolous. Counsel's request to withdraw as appellate counsel is found well-taken and is hereby granted. Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Wood County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is hereby ordered to pay the court costs incurred on appeal. The clerk is ordered to serve all parties with notice of this decision.

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, J.

JUDGE

Thomas J. Osowik, J.

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

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:
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