[Cite as *State v. Turner*, 2019-Ohio-934.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JAMAL TURNER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0155

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16 CR 1293

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, Atty. *Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Donald Gallick, The Law Office of Donald Gallick LLC, 190 North Union Street #102, Akron, Ohio 44304, for Defendant-Appellant.

Dated: March 7, 2019

Robb, J.

{¶1} Defendant-Appellant Jamal Turner appeals after pleading guilty in the Mahoning County Common Pleas Court. He protests the trial court's failure to impose an agreed sentence after he failed to appear at the original sentencing hearing, arguing the court was unreasonable and vindictive. He claims the prosecution breached the plea agreement by asking the court to disregard the agreed sentence. He also claims plain error where one judge presided at sentencing while another presided at the plea hearing and ineffective assistance of counsel for failing to object to this procedure. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On December 8, 2016, Appellant was indicted for: aggravated robbery occurring on July 28, 2016 at a Dunkin' Donuts; a firearm specification; having a weapon under disability; and three counts of kidnapping corresponding to the three store employees. At a pretrial before the original common pleas court judge assigned to the case, Appellant's bond (initially set in the municipal court) was continued and amended to specifically include a condition that he "is to be personally aware of, appear timely, and be appropriately dressed for all future court proceedings * * *." (1/30/17 J.E.).

{¶3} A signed plea agreement was filed on February 24, 2017. In return for Appellant's guilty plea to aggravated robbery, having a weapon under disability, and the firearm specification, the state agreed to dismiss the three kidnapping counts. The state "agreed to recommend an agreed to term" of 3 years for aggravated robbery and 12 months for having a weapon under disability to run concurrent but consecutive to the mandatory term of 3 years for the firearm specification, for a total of 6 years. The agreement emphasized the court was not bound by the recommendation, warned the recommendation was contingent on Appellant not violating the law or the conditions of his bond, and set forth the maximum penalties. It separately and expressly explained the court could, upon acceptance of the plea, sentence him to prison for: 3 to 11 years for

aggravated robbery; 9, 12, 18, 24, 30, or 36 months for having a weapon under disability; and a mandatory term of 3 years for the firearm specification.

{¶4} The February 23, 2017 plea hearing was held before a visiting judge. The court made various advisements, including the prison terms available for the charges. The court outlined the jointly recommended sentence, noted the court was ordering a presentence investigation (PSI), and explained the court was not bound by the state's recommendation. (Plea Tr. 7, 16-17). The court accepted the plea and continued the bond pending sentencing. A February 24, 2017 judgment entry memorializing the plea noted the judge was sitting by assignment of the Ohio Supreme Court and set sentencing for April 20, 2017 at 11:00 a.m. In continuing the bond, the court again warned that Appellant shall "be personally aware of and appear timely and appropriately dressed for all future court proceedings * * *." This condition was restated in all capital letters in a second judgment filed the same day.

{¶5} On April 20, 2017, the originally assigned judge filed an entry stating the case was called for sentencing and a bench warrant was issued due to Appellant's failure to appear. The sentencing hearing subsequently proceeded before this judge on July 12, 2017. The assistant prosecutor, who was different than the one originally involved in the plea, recited the agreed sentencing recommendation contained in the plea agreement (3 years concurrent to 1 year plus 3 years for the gun specification, for a total of 6 years). (Sent.Tr. at 4). The prosecution then expressed the state was not bound by the recommendation in the plea agreement because Appellant failed to appear for sentencing and opined Appellant should be sentenced to more than 6 years. (Sent.Tr. 5).

{¶6} It was claimed Appellant failed to appear at the original sentencing hearing "because he wanted to be there for his son's first birthday." (Sent.Tr. 7). Defense counsel asked the court to impose the agreed sentence and use contempt to sentence Appellant to 60 or 90 days for failing to appear. (Sent.Tr. 8). It was noted that when Appellant was originally apprehended and interviewed by police, he confessed, expressed remorse, and revealed his family was in a poor financial situation. (Sent.Tr. 6-7). Defense counsel also emphasized that the store video of the robbery showed Appellant pointed the firearm at the ground while using his other hand to direct the employees. (Sent.Tr. 6).

{¶7} The court sentenced Appellant to 8 years for aggravated robbery, 12 months for having a weapon under disability, and three years for the firearm specification, to run consecutively for a total of 12 years. The court made consecutive sentence findings, concluding all three of the options in R.C. 2929.14(C)(4)(a)-(c) applied: the crimes were committed while Appellant was under sanctions to another court; the harm was so great or unusual that a single term would not adequately reflect the seriousness of his conduct; and his criminal history showed consecutive terms were needed to protect the public. (Sent.Tr. 15). The July 14, 2017 sentencing entry recited the required consecutive sentence findings.[1]

ASSIGNMENT OF ERROR ONE: AGREED SENTENCE NOT IMPOSED

{¶8} Appellant sets forth three assignments of error, the first alleges:

"THE TRIAL COURT ABUSED ITS DISCRETION BY DECLARING THE AGREED SENTENCE VOID AND IMPOSING A NINE-YEAR SENTENCE FOR AGGRAVATED ROBBERY AND WEAPONS UNDER DISABILITY INSTEAD OF THE AGREED CONCURRENT THREE-YEAR SENTENCE."

{¶9} Appellant complains he was sentenced to 8 years for aggravated robbery and 12 months for having a weapon under disability to run consecutive for a total of 9 years (plus a 3-year firearm specification), instead of the recommended 3 years for aggravated robbery and 12 months for having a weapon under disability to run concurrent for a total of 3 years (plus a 3-year firearm specification). He notes the court tripled the agreed upon time for the two counts.

{¶10} In discussing whether an agreed sentence should be binding on the sentencing court, Appellant cites a federal case stating the trial court cannot keep the plea and discard the sentence as the acceptance of the plea binds the court to the recommended sentenced. *See United States v. Cieslowski*, 410 F.3d 353, 363 (7th Cir.2005). However, a federal criminal rule provides the prosecution can "agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor

[1] A motion to reconsider the sentence was filed on July 17, 2017 and denied on September 1, 2017. Appellant did not appeal from the July 14, 2017 sentencing entry until November 2, 2017, but this court granted leave to file a delayed appeal.

does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement)." Fed.Crim.R. 11(c)(1)(C) (as opposed to the prosecution's mere recommendation or expression of non-opposition in (c)(1)(B), which will not bind the federal court). There is no similar provision in Ohio's Criminal Rules.

{¶11} Appellant then points to the remedy in a case remanding with instructions for the trial court to either impose the agreed sentence or allow the defendant to withdraw his plea. *State v. Lumbus*, 8th Dist. No. 99301, 2013-Ohio-4592, ¶ 52.[2] However, the Eighth District found the defendant had a reasonable expectation he would be given a three-year sentence as part of his plea as the trial court allowed the defendant to plead without explaining it could deviate from the plea agreement and sentence him to more than the agreed sentence. *Id.* at ¶ 50.

{¶12} The Eighth District case retained the precedent (which is also the precedent of this court) that a trial court does not err by imposing a sentence greater than an agreed sentence when the court forewarned the defendant of the applicable penalties and the possibility the court may impose a greater sentence than the agreed sentence. *Id.* at ¶ 38-39, 43; *State v. Martinez*, 7th Dist. No. 03-MA-196, 2004-Ohio-6806, ¶ 8. *See also State v. Henry*, 7th Dist. No. 14 BE 40, 2015-Ohio-4145, ¶ 29 ("the well-established principle that a trial court is not bound by the parties' joint recommendation"), citing *State v. Kelly*, 7th Dist. No. 08CO17, 2009-Ohio-1035, ¶ 29 ("Courts are not bound by the state's recommendation in sentencing, even when the recommended sentence induces the defendant to plead guilty to an offense.").

> Because the trial court generally is not a party to the plea negotiations and the contract itself, it is free to impose a sentence greater than that forming the inducement for the defendant to plead guilty so long as the court forewarns the defendant of the applicable penalties, including the possibility of imposing a greater sentence than that recommended by the prosecutor.

[2] He cites another Eighth District case which found the trial court should have enforced the plea or vacated the plea and ordered a trial. *State v. Weakley*, 8th Dist. No. 105293, 2017-Ohio-8404. However, this ruling was based on ineffective assistance of counsel who engaged in an erroneous legal analysis while encouraging the defendant to reject a plea offer. *Id.* at ¶ 33-41, 61 (remanding to reoffer the original plea agreement and requiring a new trial if the defendant rejected the reoffered plea due to the finding of reversible errors at trial).

State v. Vari, 7th Dist. No. 07-MA-142, 2010-Ohio-1300, ¶ 24 (but if the court makes a promise and thus becomes a party to the agreement, it is bound thereby).

{¶13} Here, the plea agreement signed by Appellant clearly stated the court was not bound by the agreed recommendation and the court could choose to impose any sentence up to the listed maximums. Besides generally stating the court may impose a sentence from the range listed up to the maximum for each offense upon the acceptance of the plea, the agreement provided: "I FURTHER ACKNOWLEGE THAT MY DECISION TO PLEAD GUILTY PLACES ME COMPLETELY AND WITHOUT RESERVATION OF ANY KIND, UPON THE MERCY OF THE COURT WITH RESPECT TO PUNISHMENT." Furthermore, directly under the joint recommendation of sentence, the agreement declared: "THE COURT IS NOT BOUND BY THIS RECOMMENDATION." (Emphasis original.)

{¶14} At the plea hearing, the court recited the maximum applicable sentences and clearly explained:

> [T]he recommendation by the state is just that, a recommendation. The court is not bound by that recommendation. So if the court in evaluating your circumstances and the circumstances of these offenses as a consequence of the pre-sentencing investigation done in this case and the report of that investigation decides to impose a greater sentence, even arguably a much greater sentence, you don't have any recourse. You will be stuck with that because only the court decides on the penalty. Is that clear?

(Plea Tr. 16-17). Appellant answered in the affirmative.

{¶15} Consequently, the court forewarned the defendant of the applicable penalties and clearly disclosed the possibility the court could choose to impose a greater sentence than the agreed recommendation. The court did not inject itself into the plea agreement as a party and/or promise to accept the agreed sentence. As such, the court was not bound by the joint recommendation in the plea agreement.

{¶16} Appellant asks for a review of the trial court's deviation from the agreed sentence set forth in the plea agreement and imposition of a sentence of 8 years for aggravated robbery (where the maximum sentence was 11 years) consecutive to 12

months for having a weapon under disability (where the maximum sentence was 36 months). According to the Ohio Supreme Court's *Marcum* case, the plain language of R.C. 2953.08(G)(2) prohibits the application of the abuse of discretion standard to felony sentencing. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 10, 16. "[A]n appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.* at ¶ 1, applying R.C. 2953.08(G)(2).

{¶17} *Marcum* indicates this is not only the standard of review applied to the findings required by certain statutory sections identified in R.C. 2953.08 (such as consecutive sentencing); it is also the standard of review regarding the trial court's consideration of the sentencing factors in R.C. 2929.11 and R.C. 2929.12. *Marcum*, 146 Ohio St.3d 516 at ¶ 23. We therefore review these statutes under the principle that "an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *Id.*

{¶18} Pursuant to R.C. 2929.11, a court sentencing a felony defendant shall be guided by the overriding sentencing purposes of: (1) protecting the public from future crime by the offender and others; and (2) punishing the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. R.C. 2929.11(A). The court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both. *Id.* A felony sentence shall be reasonably calculated to achieve the two overriding purposes in a manner commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim and consistent with sentences imposed for similar crimes committed by similar offenders. R.C. 2929.11(B). Pursuant to R.C. 2929.12(A), the sentencing court has discretion to determine the most effective way to comply with the purposes and principles of sentencing. In exercising that discretion, the court shall consider the statutory

seriousness and recidivism factors in R.C. 2929.12(B), (C), (D), and (E) and may consider any other relevant factor. *Id.*[3]

{¶19} The trial court is not required to set forth its findings regarding the purposes or principles of sentencing in R.C. 2929.11 or the seriousness and recidivism factors in R.C. 2929.12; nor is the court required to voice its consideration of these items. *See State v. Henry*, 7th Dist. No. 14 BE 40, 2015-Ohio-4145, ¶ 22-24 (where the defendant appealed his sentence on the grounds that it was contrary to the recommendation of the state, defense counsel, and the victim). In any event, the trial court referred on the record to its consideration of the purposes and principles of sentencing and the seriousness and recidivism factors. (Sent.Tr. 10). The sentencing entry also stated the court considered the record, the statements and recommendation of counsel, the PSI, the purposes and principles of sentencing under R.C. 2929.11, and the seriousness and recidivism factors under R.C. 2929.12.

{¶20} A trial court is required to make the statutory findings on consecutive sentencing pursuant to R.C. 2929.14(C)(4). The court need not provide reasons in support of its consecutive sentence findings and need not quote the statute verbatim in making its findings. *State v. Bonnell*, 140 Ohio St.3d 209, 16 N.E.3d 659, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 27, 29 (a reviewing court reviews the entire hearing transcript to ascertain if it can discern from the record that the trial court engaged in the statutory analysis). The court must find consecutive sentences are necessary to protect the public from future crime or to punish the offender, consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and one of the three alternative findings in subdivisions (a), (b), or (c). R.C. 2929.14(C)(4). In setting forth consecutive sentence findings at the sentencing hearing and in the sentencing entry, the court found all three of the alternative options in R.C. 2929.14(C)(4)(a)-(c) were applicable: the crimes were committed while

[3] Contrary to a suggestion in Appellant's brief, a statement that a trial court has discretion does not mean the standard of review is abuse of discretion where a statute expressly provides a different standard of review. *See State v. Rahab*, 150 Ohio St.3d 152, 2017-Ohio-1401, 80 N.E.3d 431, ¶ 10 ("appellate courts defer to trial courts' broad discretion in making sentencing decisions"), citing R.C. 2953.08(G) and *Marcum*, 146 Ohio St.3d 516. In response to Appellant's citation to *Allen*, the failure to impose a jointly recommended sentence (and the exercise of discretion to choose a sentence) is not akin to a court's rejection of a plea. *See State v. Allen*, 8th Dist No. 98394, 2013-Ohio-1656, ¶ 12-13 (abuse of discretion to maintain a blanket policy of rejecting pleas after court's deadline).

Appellant was under sanctions to another court; the harm was so great or unusual that a single term would not adequately reflect the seriousness of his conduct; and his criminal history showed consecutive terms were needed to protect the public.

{¶21} Notably, a finding on any one of the options in subdivisions (a)-(c) would have been sufficient, and Appellant does not contest the facts supporting these findings (such as the finding that he was under certain sanctions at the time of the offense for the first option or the existence of an extensive criminal history for the third option). And, there is no challenge to the thoroughness of the trial court's recitation of its consecutive sentence findings. Appellant suggests that, notwithstanding the court's findings, the imposition of consecutive sentences was arbitrary because the court made a comment that a person "needs to have their head examined" if they do not understand why consecutive sentences were imposed. However, the quoted portion of the comment omits the modifier used by the court, "in this case." (Sent.Tr. 14-15).

{¶22} Appellant suggests the record does not support the trial court's total sentence of 9 years for aggravated robbery and having a weapon under disability because the agreed total was 3 years and the court made various statements he considers inappropriate. For instance, in responding to Appellant's apology and referring to his failure to appear, the sentencing court characterized the agreed sentence as "the deal of a lifetime" and said he "probably would have had trouble going with this six-year deal." Appellant believes this shows the sentencing court failed to properly respect the position of the visiting judge at the plea hearing.

{¶23} First, we note this comment was immediately followed by: "I might have gone along with it" (at which point the court mentioned the failure to appear at sentencing). In any event, as set forth supra, the visiting judge specifically advised Appellant that the agreed sentence may not be the sentence imposed by the court as the court is not bound by the joint recommendation. The visiting judge made no promises at the plea hearing, disclosed that a PSI would assist the court in determining an appropriate sentence, and ordered Appellant to appear timely at all court proceedings. In sum, the visiting judge did not take any position on the agreed sentence. The sentencing court was referring to its decision whether to accept the jointly recommended sentence (not whether to accept a {non-existent} promise of the visiting judge).

{¶24} Appellant also claims the sentencing court indicated it had an arbitrary or blanket policy that a failure to appear at sentencing will cause the court to refuse to impose an agreed sentence regardless of the reason. He cites to a portion of the court's pronouncement: "I probably would have had trouble going with this six-year deal. I might have gone along with it. There's no way I can go along with it when you don't show." However, the latter observation must be read in context. After this particular statement, the court added: "* * * But this kind of conduct has to stop. This kind of conduct is what makes us scared in our community * * *." (Sent Tr. 11).

{¶25} At this point, a disturbance interrupted the court. We pause to note Appellant informed the court his brother caused the interruption and apologized for his brother's outburst. The court assured Appellant the occurrence would have nothing to do with the sentence. (Sent.Tr. 12). Contrary to a suggestion in Appellant's brief, we cannot presume otherwise.

{¶26} Returning to our reading of the court's cited pronouncement in context, it must further be recognized the court had already been informed that Appellant purposely failed to appear for his 11:00 a.m. sentencing hearing because he wanted "to be there for his son's first birthday" and he "turned himself in * * * two days after his son's birthday." (Sent.Tr. 7). (The date of the birthday was not specified; that is, it was not clear the birthday was the day of sentencing as opposed to some day after the scheduled sentencing hearing.) The court's statement about being unable to go along with the recommended sentence due to the failure to appear at sentencing was made with knowledge and consideration of Appellant's reason for his failure to appear. His reason for failing to appear for sentencing did not involve some involuntary, emergency occurrence, and the trial court could rationally find his reason was not compelling.

{¶27} The contested statement must be read in the context of the court's other statements at sentencing as well. The court pointed out the violated condition of bond: that Appellant was to be personally aware of and timely appearing at court proceedings. (Sent.Tr. 9). *See* R.C. 2929.12(D)-(E) (and any other factor relevant to recidivism). The court concluded recidivism was likely as Appellant was on probation in Pennsylvania and in Ohio at the time of the offense. *See* R.C. 2929.12(D)(1). The court found Appellant failed to respond to previous community control sanctions. *See* R.C. 2929.12(D)(3). In

addition, the court found recidivism was likely due to Appellant's extensive criminal record. *See* R.C. 2929.12(D)(2). *Compare* R.C. 2929.12(E)(2)-(3) (recidivism less likely if prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense or the offender led a law-abiding life for a significant number of years). The court expressed that nothing indicated recidivism was less likely. Besides the relevance of the criminal history, the court could rationally doubt whether "[t]he offense was committed under circumstances not likely to recur" or whether there was "genuine remorse." *See* R.C. 2929.12(E)(4)-(5). On the latter factor, the court viewed Appellant's demeanor and heard him speak and also found it hard to accept the remorse was genuine where he purposely missed his scheduled sentencing.

{¶28} In downplaying Appellant's claim that he kept the gun pointed down during the robbery, the court observed the victims were still aware of the gun in his hand while he ordered them around. (Sent.Tr. 11). This still created a dangerous situation, one in which there was no inducement by the victim or provocation. *See* R.C. 2929.12(C)(1)-(3). In discussing the seriousness of the offense, the court made observations on the fear in the community after such events and took into account how this conduct changes the lives of victims. (Sent.Tr. 12, 14). *See* R.C. 2929.12(C) (any other seriousness factor found relevant). On this topic, Appellant believes it was unreasonable for the court to disclose, "it means very little, if nothing, to me" that the gun was pointed down. However, it is the abuse of discretion standard of review which is defined as an attitude that is unreasonable, arbitrary, or unconscionable. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 67 ("unreasonable, arbitrary, or unconscionable use of discretion, or as a view or action that no conscientious judge could honestly have taken"). As aforementioned, the standard of review for a felony sentence is not abuse of discretion. *Marcum*, 146 Ohio St.3d 516 at ¶ 10, 16; R.C. 2953.08(G)(2).

{¶29} Besides describing the sentencing judge's attitude as unreasonable and insulting, Appellant contends the trial court imposed a "vindictive" sentence. He believes the court failed to properly consider defense counsel's suggestion to impose a jail sentence of 60 or 90 days for contempt instead of considering the failure to appear as a sentencing factor. Appellant relies on vindictiveness rules applicable when a defendant successfully challenges his conviction on appeal and is convicted again on retrial after

which a more severe sentence is imposed or where a defendant chooses to go to trial rather than accept a plea offer. *See, e.g., North Carolina v. Pearce*, 395 U.S. 711, 724-725, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *State v. Rahab*, 150 Ohio St.3d 152, 2017-Ohio-1401, 80 N.E.3d 431, ¶ 8. The vindictive sentencing precedent deals with the situation where a defendant is essentially punished for exercising a constitutional right. *Id.* This is not the situation here.

{¶30} Failing to appear at sentencing in order to attend a birthday party is not a constitutional right. As the state points, Appellant's failure to appear for his sentencing hearing was an appropriate factor for the court to consider in determining the appropriate sentence. *State v. Williams*, 7th Dist. No. 11 MA 131, 2012-Ohio-6277, ¶ 69 (failure to appear for sentencing is relevant to recidivism especially where the reason was not unavoidable consideration and where bond was violated). As aforementioned, the court believed Appellant's intentional failure to appear made his apology less sincere. *See* R.C. 2929.12(D)(5) (remorse as recidivism factor).

{¶31} In addition, Appellant contends the court infringed upon his right to allocution. Crim.R. 32(A)(1) provides: "At the time of imposing sentence, the court shall * * * Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment." This inquiry "is much more than an empty ritual: it represents a defendant's last opportunity to plead his case or express remorse." *State v. Green*, 90 Ohio St.3d 352, 359-360, 738 N.E.2d 1208 (2000). The court is not required to utilize the exact language employed by the rule when inviting a defendant to exercise his allocution right. *State v. Masson*, 7th Dist. No. 16 MA 0066, 2017-Ohio-7705, 96 N.E.3d 1225, ¶ 13.

{¶32} Appellant does not contend the court failed to offer him the right to allocution. Rather, he complains the court interrupted him. He also states the court mocked his apology. After counsel spoke on Appellant's behalf, he said Appellant would like to make a statement, and the court replied, "Very well. Thank you. Yes, sir." Appellant responded: "Yes, sir. I'd like this court to accept my sincerest apologies." The court explained: "If you're apologizing you need to say it so somebody can hear you. The court reporter needs to take a proper record. And really, if you want me to consider what

it is you have to say, you have to make sure I hear you. Otherwise I can't consider what you have to say." (Sent.Tr. 8). The sentencing transcript describes the subsequent colloquy as follows:

> THE DEFENDANT: Yes, sir, I want to express my sincerest apologies--
>
> THE COURT: Wow, that speech didn't do much good, did it?
>
> THE DEFENDANT: -- to the victims for any trauma that I may have caused them. Like my lawyer said, it doesn't make what I did right by not coming that day but I want to apologize. I'm here today to take full responsibility for everything I did. That's all, Your Honor."

(Sent.Tr. 8-9).

{¶33} Even if it appears a court interrupted a defendant, the right to allocution is not necessarily violated. *Masson*, 7th Dist. No. 16 MA 0066 at ¶ 10 (especially if he is permitted to speak after the interruption and there is no indication he had additional information to impart); *State v. Roach*, 7th Dist. No. 15 BE 0031, 2016-Ohio-4656, ¶ 16 (where it appeared the defendant's allocution trailed off at the point the court spoke). Moreover, an allocution issue can be considered harmless error. *State v. Campbell*, 90 Ohio St.3d 320, 324-325, 738 N.E.2d 1178 (2000); *State v. Reynolds*, 80 Ohio St.3d 670, 684, 687 N.E.2d 1358 (1998).

{¶34} Appellant has not demonstrated prejudice from the interruption. Defense counsel spoke to the court on Appellant's behalf. Appellant was offered his allocution right; the court's first interruption was specifically done to ensure Appellant spoke loud enough to make a record and so the court could properly consider his apology. Appellant was invited to continue speaking. Although the second interruption was unfortunate, Appellant may have been trailing off or somehow giving the impression he was finished. *Roach*, 7th Dist. No. 15 BE 0031 at ¶ 16. A trial transcript is not like a script for a play and does not contain indicators of demeanor or measures of time between pauses. *See id.* Finally, it appears Appellant completed his allocution after the interruption as he continued to speak and thereafter concluded by confirming, "That's all, Your Honor." For these reasons, the allocution argument is without merit.

{¶35} In conclusion, the sentence was not contrary to law, and we cannot find by clear and convincing evidence that the sentence was unsupported by the record. *See*

Marcum, 146 Ohio St.3d 516 at ¶ 23. For all of the foregoing reasons, Appellant first assignment of error is overruled.

ASSIGNMENT OF ERROR TWO: BREACH OF PLEA

{¶36} Appellant's second assignment of error provides:

"TURNER SUFFERED PLAIN ERROR AS THE PROSECUTOR'S OFFICE BREACHED THE PLEA AGREEMENT BY ASKING THE SENTENCING COURT TO DISREGARD THE AGREED SIX YEAR SENTENCE."

{¶37} As part of the plea agreement, the state dismissed the three kidnapping counts and promised to recommend an "agreed to" sentence of 3 years for aggravated robbery and 12 months for having a weapon under disability to run concurrent plus the mandatory consecutive term of 3 years for the firearm specification, for a total of 6 years. Appellant was fully advised the court was not bound by this joint recommendation and a PSI was ordered.

{¶38} At sentencing, the prosecutor recited the agreed sentencing recommendation in the plea agreement but proceeded to state: "However, on April 20th of this year the defendant failed to appear for sentencing. Therefore, I don't think - - or I believe that we are not bound by that agreement. However, we would just ask that the court sentence the defendant to the Ohio Department of Corrections for whatever term the court deems appropriate." (Sent.Tr. 4-5). The prosecutor then added: "we believe he should serve more than six years. Whatever the court deems appropriate." The defense did not object or seek to withdraw or obtain specific performance of the plea.

{¶39} Initially, we respond to Appellant's claim that the trial court "seemed stunned" the prosecutor was not maintaining its recommendation, quoting the court's comment: "You're going to leave it up to me, huh?" (Sent.Tr. 5). Yet, there is no indication the court believed the prosecutor was breaching the agreement. Rather, it seems the court was making a general observation or employing sarcasm (to make the point that the court was not bound by the joint recommendation and the parties would have "to leave it up to" the court regardless of any agreement).

{¶40} In any event, Appellant's argument is without merit. Appellant argues the prosecution's failure to adhere to the joint recommendation constituted a breach of the plea agreement and requires a remand for specific performance of the agreement by the

prosecution at a new sentencing hearing. Where the state breaches a significant term in a plea agreement, the defendant can seek vacation of the plea or specific performance of the agreement (require the state to recommend the agreed sentence at resentencing). *State v. Masson*, 7th Dist. No. 16 MA 0066, 2017-Ohio-7705, 96 N.E.3d 1225, ¶ 21, citing *State v. Hansen*, 7th Dist. No. 11 MA 63, 2012-Ohio-4574, ¶ 14, citing *Santobello v. New York*, 404 U.S. 257, 263, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). However, if a defendant fails to object to the state's failure to abide by its agreement as to sentencing recommendations, he forfeits the alleged error. *Masson*, 7th Dist. No. 16 MA 0066 at ¶ 21, citing *Hansen*, 7th Dist. No. 11 MA 63 at ¶ 15, citing *Puckett v. United States*, 556 U.S. 129, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009).

{¶41} Upon the defendant's failure to object to this issue at sentencing, the reviewing court can conduct only a plain error review. *Masson*, 7th Dist. No. 16 MA 0066 at ¶ 22. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). An appellate court's invocation of plain error requires the existence of an obvious error which affected the outcome of the proceedings. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22. In this context, we would ask whether the sentence would have been different absent the alleged breach. *Masson*, 7th Dist. No. 16 MA 0066 at ¶ 22. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Murphy*, 91 Ohio St.3d 516, 532, 747 N.E.2d 765 (2001). Furthermore, recognition of plain error is discretionary with the reviewing court; it is not mandatory. *Rogers*, 143 Ohio St.3d 385, 38 N.E.3d 860 at ¶ 22–23.

{¶42} Appellant notes a plea is governed by contract principles. *See State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 50 (which includes giving effect to every provision). Although Appellant acknowledges his timely appearance at court proceedings was a condition of bond that he violated, he states it was not a term in the plea agreement. He therefore contends the state was not permitted to use his failure to appear as a reason for refraining from recommending the agreed sentence or the state would essentially be adding a new contract term at sentencing.

{¶43} The state cites law on implied covenants in a plea agreement, concluding: the failure to appear for a scheduled sentencing hearing violates an implied term of the plea agreement and allows the prosecution to recommend a higher sentence than the agreed recommendation. *See, e.g., State v. Grier*, 3d Dist. No. 3-10-09, 2011-Ohio-902, ¶ 18-19; *State v. Adkins*, 161 Ohio App.3d 114, 2005-Ohio-2577, 829 N.E.2d 729, ¶ 8-9 (4th Dist.). Nevertheless, there is no need to address the law applicable to the situation where the agreement does not expressly state the recommendation was contingent on certain conditions which include appearance at sentencing.

{¶44} Here, in addition to informing Appellant the court was not bound by the recommendation and after setting forth the jointly recommended sentence, the signed plea agreement provided: "THIS RECOMMENDATION IS STRICTLY CONTINGENT UPON THE DEFENDANT NOT VIOLATING LAWS OR OTHER CONDITIONS OF BOND WHILE AWAITING SENTENCING." Appellant's appearance at scheduled court proceedings, especially sentencing, was a condition of his bond. Not only is the defendant's appearance at court proceedings the very purpose of bond, this particular condition was memorialized and repeated in multiple judgment entries. As set forth supra in the Statement of the Case, at least three judgment entries explained that a condition of bond required Appellant to "be personally aware of and appear timely and appropriately dressed for all future court proceedings * * *." Sentencing was a future court proceeding.

{¶45} Consequently, Appellant's appearance at sentencing was an express contractual term, and the plea agreement explicitly declared the state was not bound by the agreement to recommend the agreed sentence if Appellant violated this term. Accordingly, the state did not breach the plea agreement by generally opining Appellant should be sentenced to longer than the original recommendation. This assignment of error is therefore without merit.

ASSIGNMENT OF ERROR THREE: DIFFERENT JUDGE AT SENTENCING

{¶46} Appellant's third assignment of error contends:

"APPELLANT SUFFERED FROM PLAIN ERROR AND INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS LAWYER FAILED TO OBJECT TO A NEW JUDGE OVERSEEING THE SENTENCING HEARING."

{¶47} Appellant is not contesting the visiting judge's assignment and handling of the plea at a pretrial scheduled by the originally assigned judge. It is unknown why a visiting judge presided at the plea hearing. Nevertheless, there is no indicated issue with his appointment, and an entry memorializing the plea noted his appointment by the Ohio Supreme Court was pursuant to Article IV, Section 6 of the Ohio Constitution. Rather, Appellant is contesting the fact that a different judge presided over his sentencing than the one who presided over the plea hearing. Notably, the judge who sentenced Appellant was the judge to whom Appellant's case was originally assigned, and there was no objection to his presence at sentencing.

{¶48} Although he is not protesting the appointment of the visiting judge who presided at the plea hearing, Appellant quotes: "procedural irregularities in the transfer of a case to a visiting judge affect the court's jurisdiction over the particular case and render the judgment voidable, not void." *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, paragraph one of syllabus. "A party may timely object to the authority of a visiting judge on the basis of an improper case transfer or assignment, but failure to timely enter such an objection waives the procedural error." *Id.* at ¶ 17.

{¶49} Due to the latter holding, Appellant raises plain error and ineffective assistance of counsel.[4] The test for exercising discretion to recognize plain error under Crim.R. 52(B) was set forth supra. To recognize plain error, the appellate court must find an obvious error which prejudiced the appellant by affecting his substantial rights; this involves a "reasonable probability that the error resulted in prejudice." *Rogers*, 143 Ohio St.3d 385 at ¶ 22 (equating this prejudice analysis to the prejudice prong for an ineffective assistance of counsel analysis).

{¶50} We review a claim of ineffective assistance of counsel under a two-part test, which requires the defendant to demonstrate: (1) trial counsel's performance fell below an objective standard of reasonable representation; and (2) prejudice arose from the deficient performance. *State v. Bradley*, 42 Ohio St.3d 136, 141-143, 538 N.E.2d 373

[4] The state responds that the failure to object at sentencing was not ineffective assistance or plain error because only the Ohio Supreme Court's Chief Justice (or her designee) can disqualify a judge under R.C. 2701.03, and the matter is not subject to review by the appellate court. *See Yeager v. Moody*, 7th Dist. No. 11 CA 874, 2012-Ohio-1691, ¶ 4, citing *Beer v. Griffith*, 54 Ohio St.2d 440, 441-442, 377 N.E.2d 775 (1978). We note, however, Appellant is not arguing counsel should have sought disqualification due to interest, bias, or prejudice or that he was "otherwise disqualified" to preside per R.C. 2701.03.

(1989), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A claim of ineffective assistance of counsel in a direct appeal must be established by the evidence in the record. *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001).

{¶51} In evaluating an alleged deficiency in performance, our review is highly deferential to counsel's decision as there is a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance. *Bradley*, 42 Ohio St.3d at 142-143 (there are countless ways to provide effective assistance in any given case). We are to refrain from second-guessing the strategic decisions of trial counsel. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). A defendant must prove his lawyer's errors were so serious that there is a reasonable probability the result of the proceedings would have been different. *Id.* at 558. Lesser tests of prejudice have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d 136 at fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice from defective representation justifies reversal only where the results were unreliable or the proceeding fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶52} As for deficient performance, Appellant complains there was no attempt by defense counsel to protect him "from the risk that the visiting judge's acceptance of the agreed sentence might be uniformly rejected by the sentencing judge." This argument mischaracterizes the plea proceedings. As explained above, the visiting judge did not interject himself into the plea agreement at the plea hearing and did not bind itself to the agreed sentence. Therefore, there was no "acceptance of the agreed sentence" by the court at the plea hearing.

{¶53} In evaluating the reasonableness of counsel's performance, the failure to object to a different judge's presence at sentencing can be a strategic decision, which reviewing courts generally refrain from second-guessing. There is no claim or indication the plea agreement was executed by the parties in reliance on information that a visiting judge would be presiding over the plea. The sentencing judge was the judge to whom the case was originally assigned. Appellant appeared before this judge on January 19,

2017 for a pretrial where he waived his speedy trial rights. A jury trial was set to proceed before this original judge on January 23 and continued until February 27, 2017, which never proceeded due to the February 23, 2017 plea. The plea agreement was captioned with the original judge's name.

{¶54} We conclude there is no deficiency in performance on the record by the mere failure to object to the sentencing judge. As such, ineffective assistance of counsel has not been demonstrated. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (both prongs must be established; there is no need to review for prejudice if the performance has not been demonstrated to be deficient, and vice versa).

{¶55} Although there is no need to discuss this prong, we note in arguing prejudice, Appellant states the sentencing judge "declared his lack of interest of following the agreed sentence" (even if Appellant had not failed to appear at the original sentencing hearing). Appellant cites to the court's statement, "I probably would have had trouble going with this six-year deal." Yet, the court immediately added, "I might have gone along with it" (and then spoke of Appellant's failure to appear at sentencing). Regardless, as discussed in various places supra, a sentencing court is not bound by a joint recommendation where the judge presiding at the plea hearing did not interject himself into the plea agreement or otherwise become a party. There is no indication what sentence the visiting judge would have imposed under the same circumstances. A reasonable probability of a lesser sentence has not been shown. Some conceivable effect is not the test for prejudice. *Bradley*, 42 Ohio St.3d 136 at fn. 1, quoting *Strickland*, 466 U.S. at 693.

{¶56} Finally, the record does not indicate why the visiting judge did not preside at sentencing and thus nothing in the record shows he was able to preside over the sentencing hearing (which occurred nearly five months after the plea hearing and nearly three months after the original sentencing date Appellant intentionally missed). There is no requirement to certify in the record the reason for replacing a judge who presided at a plea hearing. *Compare* Crim.R. 25(A) (which requires the reason to be certified in the record where a judge must be substituted during a jury trial). We additionally note Crim.R. 25(B) provides: "If for any reason the judge before whom the defendant has been tried is unable to perform the duties of the court after a verdict or finding of guilt, another judge

designated by the administrative judge, or, in the case of a single-judge division, by the Chief Justice of the Supreme Court of Ohio, may perform those duties." Although not cited here, a Supreme Court case applying this rule involved the situation where a different judge presided over sentencing other than the one who presided over *a jury trial*, even though the original judge was available. *Beatty v. Alston*, 43 Ohio St.2d 126, 330 N.E.2d 921 (1975). "[U]nder the plain language of the rule, Crim.R. 25(B) only applies to cases where the defendant went to trial. That is, 'has been tried' means that a trial was held, and this phrase would not encompass those who waived trial and instead pled guilty." *State v. Carosella*, 7th Dist. No. 07 MA, 2008-Ohio-6370, ¶ 15.

{¶57} In conclusion, any issue with the original judge presiding over sentencing where he did not preside at the plea hearing was procedural and was waived by the failure to object. *See In re J.J.*, 111 Ohio St.3d 205 at ¶ 17; *State v. Guild*, 8th Dist. No. 63407 (Jan. 13, 1994). Based on the record before this court, we conclude the failure to object did not rise to the level of ineffective assistance of counsel or plain error. This assignment of error is overruled.

{¶58} For the foregoing reasons, the trial court's judgment is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.