

[Cite as *State v. Lottie*, 2010-Ohio-2598.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93050

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BURNES A. LOTTIE, II

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-517784, CR-519449, and CR-519612

BEFORE: McMonagle, J., Rocco, P.J., and Dyke, J.

RELEASED: June 10, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief, per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Burnes A. Lottie, II, appeals from the common pleas court's judgment sentencing him to six years incarceration. Lottie contends that the trial judge improperly considered facts that were not in the record before sentencing him, and that his counsel was ineffective. Finding no merit to either argument, we affirm.

I. Background

{¶ 2} Lottie was indicted in Case No. CR-517784 on one count of importuning in violation of R.C. 2907.07(A) and one count of disseminating obscene matter to juveniles in violation of R.C. 2907.31(A)(3). He was subsequently indicted in Case No. CR-519449 on one count of importuning in violation of R.C. 2907.07(B) and in Case No. CR-519612 on two counts of disseminating matter harmful to juveniles in violation of R.C. 2907.31(A)(2).

{¶ 3} The indictments stemmed from incidents where Lottie solicited young girls. In one incident, he slowly drove by a young girl, made a lewd gesture, and then told her he was going to perform oral sex on her. In another incident, as Lottie masturbated in his car, he told an 11-year-old girl that he wanted to have sex with her. In the third incident, he followed young girls as they walked to school and, while he was masturbating, asked them to perform oral sex.

{¶ 4} Lottie pled guilty to the charges. The trial court sentenced him to four years incarceration in Case No. CR-517784 and 12 months each in Case Nos. CR-519449 and CR-519612, to run consecutive, for a total of six years incarceration. Lottie appeals from this judgment.

II. Sentencing

{¶ 5} The record of the sentencing hearing reflects that defense counsel reminded the court prior to sentencing that Lottie had cooperated with law enforcement after he was caught and confessed to the charges. Counsel argued that “while it is true in fact that some of these girls were younger, he did not target underage females * * *; he was not purposely looking for children.” Defense counsel informed the court that, for the first time in his life, Lottie had admitted that he was addicted to drugs and sex, and was seeking help for his addictions. Counsel asked that Lottie be sentenced to community control sanctions so that he could participate in Sex Addicts Anonymous to address his addiction.

{¶ 6} The prosecutor, however, asserted that Lottie did, in fact, “target young girls.” She reminded the court that Lottie admitted that the girls he solicited looked to be about 12 or 13 years of age, and that he had driven around at least three elementary schools looking for girls.

{¶ 7} After listening to statements from Lottie’s mother and an uncle of one of the victims, the trial judge stated that he had reviewed the presentence

investigation report, Lottie's statement, and the victims' statements. The judge found that Lottie's remorse appeared to be genuine, and then stated:

{¶ 8} "I think what you are missing the point with, though, is that it's not just sex addiction, it's pedophilia. That it's clear from your actions that you targeted young girls.

{¶ 9} "Your girlfriend looks pretty young in the back sitting next to your mom, as well. This is clear to the Court that that's your sickness, is pedophilia. That is what you should strive to get help for. And there is plenty of help in prison in our system. He'll be able to do whatever kind of self-help he needs."

{¶ 10} The judge then found that Lottie was not amenable to community control sanctions and that "[t]his type of crime calls for a prison sentence." The judge told Lottie that "part of helping that sickness you will find is you have to accept the consequences of what you have done. You have to make amends to the victims. And the only way to do that and to protect the community is to separate you from the community for a period of time." The judge told Lottie that he was taking his cooperation with law enforcement into consideration in imposing the sentence. The judge then sentenced him to a total term of six years incarceration.

{¶ 11} In his first assignment of error, Lottie contends that the trial court abused its discretion at sentencing by considering facts that were not

part of the record and then sentencing him based on these unproven facts. Specifically, Lottie contends that he was neither charged nor diagnosed as a pedophile, but the trial court found him to be a pedophile based upon the age of his girlfriend, and then used its conclusion about his alleged pedophilia in sentencing him.

{¶ 12} When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 (which specifies the purposes of sentencing) and 2929.12 (which provides guidance in considering factors relating to the seriousness of the offense and the recidivism of the offender), to determine whether the sentence is contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 986 N.E.2d 124, ¶4.

If the sentence is not clearly and convincingly contrary to law, we then review the trial court's decision under an abuse-of-discretion standard. *Id.*

{¶ 13} The trial court's sentencing entry indicates that it considered "all required factors of the law." As the sentences imposed were within the statutory range (see R.C. 2907.07 and 2907.31) and the court stated that it considered the applicable statute, we find that the sentences are not contrary to law.

{¶ 14} Next, we consider whether the trial court abused its discretion in imposing the sentences. A trial court has abused its discretion when it

appears from the record that the court's discretion in sentencing was influenced by a conclusion drawn from facts outside the record. *State v. Longo* (1978), 4 Ohio App.3d 136, 141, 446 N.E.2d 1145.

{¶ 15} The record does not support Lottie's argument that the trial court concluded that he was a pedophile and sentenced him accordingly simply because he had a young girlfriend. To the contrary, the record is clear that Lottie repeatedly solicited girls who were only 12 or 13 years old. Further, Lottie confessed to the charges and admitted that he had an addiction to sex.

{¶ 16} Moreover, the record indicates that the trial judge sentenced Lottie to six years incarceration to punish him, make amends to the victims, and protect the public. Further, the trial judge considered Lottie's cooperation with law enforcement as a mitigating factor and, accordingly, did not sentence him to the maximum sentence. Thus, despite Lottie's argument otherwise, there is no indication whatsoever that the judge's observation about the age of his girlfriend influenced his sentences in any way. Because the sentences were within the statutory range and the trial court indicated that it had considered the purposes and provisions of the applicable statutes, we find no abuse of discretion in sentencing.

{¶ 17} Appellant's first assignment of error is overruled.

III. Ineffective Assistance of Counsel

{¶ 18} In his second assignment of error, Lottie contends that he was denied his constitutional right to effective assistance of counsel because his trial counsel did not request that a mental health professional examine him and prepare a report for mitigation purposes at sentencing. Lottie contends that such a report would have assisted the trial court in understanding the nature of his problem.

{¶ 19} An attorney is presumed to be competent and to perform his duties ethically and competently. *State v. Lytle* (1976), 48 Ohio St.2d 391, 396, 358 N.E.2d 623. To establish ineffective assistance of counsel, Lottie must show deficient performance, i.e., performance falling below an objective standard of reasonable representation, and prejudice, i.e., a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Sanders*, 94 Ohio St.3d 150, 151, 2002-Ohio-350, 761 N.E.2d 18.

{¶ 20} Lottie has not met his burden. Assuming, without deciding, that counsel's performance was deficient by his failure to request and provide a report from a mental health professional, Lottie fails to demonstrate (or even argue) that he was prejudiced by counsel's performance. He does not allege that the court would have sentenced him to a shorter prison term or community control sanctions if counsel had provided such a report, and he

makes no argument that the court's alleged failure to understand the nature of his sex addiction due to the lack of such a report affected his sentences. Accordingly, we find no ineffective assistance of counsel.

{¶ 21} Appellant's second assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR