[Cite as *State v. Barnes*, 2010-Ohio-4674.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94025

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD BARNES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524053

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

RELEASED AND JOURNALIZED: September 30, 2010

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ANN DYKE, J.:

{¶ 1} Defendant-appellant, Richard Barnes ("appellant"), appeals his sentence arguing his counsel rendered ineffective assistance and the trial court erred in not allowing appellant to review his presentence investigation report and the state's sentencing memorandum prior to sentencing. For the reasons that follow, we affirm.

{¶ 2} On August 19, 2009, appellant pled guilty to two counts of sexual battery in violation of R.C. 2907.03(A)(1) and one count of theft in violation of R.C. 2913.02(A)(4). The court ordered a presentence investigation and, on September 14, 2009, conducted a sentencing hearing. After entertaining arguments from both the state and appellant, the court sentenced appellant to three years incarceration for each of the sexual battery convictions and one year for the theft conviction. The court ordered all sentences to be served

consecutively, for a total of seven years imprisonment. Additionally, the court classified appellant as a Tier III sex offender.

{¶ 3} Appellant now appeals and presents two assignments of error for our review. In the interests of convenience, we will first address his second assignment of error.

{¶ 4} In his second assignment of error, appellant argues that the trial court erred in denying him the opportunity to review and comment upon the presentence investigation report and the state's sentencing memorandum. A review of the transcript, however, indicates the contrary.

{¶ 5} R.C. 2951.03 mandates that a trial court allow a defendant the opportunity to review the presentence investigation report. This statute states in relevant part:

{¶ 6} "(B)(1) If a presentence investigation report is prepared pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.3, the court, at a reasonable time before imposing sentence, shall permit the defendant or the defendant's counsel to read the report, except that the court shall not permit the defendant or the defendant's counsel to read any of the following:

{¶ 7} "(a) Any recommendation as to sentence;

{¶ 8} "* * *

{¶ 9} "(d) Any other information that, if disclosed, the court believes might result in physical harm or some other type of harm to the defendant or to any other person.

{¶ 10} "(2) Prior to sentencing, the court shall permit the defendant and the defendant's counsel to comment on the presentence investigation report and, in its discretion, may permit the defendant and the defendant's counsel to introduce testimony or other information that relates to any alleged factual inaccuracy contained in the report."

{¶ 11} Additionally, Crim.R. 32.2 states that "[i]n felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation and report before imposing community control sanctions or granting probation."

{¶ 12} In the instant matter, despite appellant's assertions, a review of the record demonstrates that the trial court afforded appellant the opportunity to review and comment upon the presentence investigation report, as well as the sentencing memorandum. The court engaged in the following discussion with appellant, defense counsel and the state:

{¶ 13} "THE COURT: * * * Mr. Barnes, we are here to impose sentence in your case. As I just mentioned, the Court has received a presentence report, which your lawyer has had a chance to read. I'll give you and your lawyer and the prosecutor and the victim, if necessary, who are here, a chance to speak and then I'll decide what sentence to impose.

{¶ 14} Is there any reason not to go forward with the hearing at this time, Mr. Johnson?

{¶ 15} "[DEFENSE COUNSEL]: No, your Honor.

{¶ 16} "THE COURT: Do you wish to be heard.

{¶ 17} "[DEFENSE COUNSEL]: Sure, your Honor. I believe the State should go first. I believe they have - -

{¶ 18} "[PROSECUTOR]: No. The defense usually goes first.

{¶ 19} 'THE COURT: Traditionally the defense goes first.

{¶ 20} "[DEFENSE COUNSEL]: She wrote this elaborate - -

{¶ 21} "THE COURT: Sentencing memorandum?

{¶ 22} "[DEFENSE COUNSEL]: I just got it this morning, so I didn't have a chance to read that. I was trying to read the [presentence investigation report] but I will go forward."

{¶ 23} Following this discussion, defense counsel provided an extensive argument concerning the mitigating factors the court should consider when sentencing appellant. The court then offered appellant the opportunity to speak and the following colloquy occurred:

{¶ 24} "THE COURT: All right. Thank you.

{¶ 25} "Mr. Barnes, do you wish to say anything?

{¶ 26} "THE DEFENDANT: Your Honor, that's true, the locks had been changed and my sister had to go on her bad knee to my landlord's sister - -

{¶ 27} "THE COURT: Mr. Barnes, I really don't care about that aspect. I'm here about what you pled guilty to. Do you have anything to say about that?

{¶ 28} "THE DEFENDANT: No, your Honor.

{¶ 29} "THE COURT: You have nothing to say?

{¶ 30} "THE DEFENDANT: About the - -

{¶ 31} "THE COURT: The case. You have nothing to say?

{¶ 32} "THE DEFENDANT: All right."

{¶ 33} After appellant refrained from commenting, the court directed its attention to the state that argued its position regarding appellant's sentence. More specifically, the state summarized the substantive merits of its sentencing memorandum. Following the state's argument, defense counsel requested that appellant be permitted to speak again. The court engaged in the following exchange with appellant:

{¶ 34} "[DEFENSE COUNSEL]: Your Honor, my client would like to address the Court.

{¶ 35} "THE COURT: Now he wants to? Mr. Barnes, go right ahead.

{¶ 36} "THE DEFENDANT: I'm sorry, your Honor. I just went to my house because I just got the job down the street. I'm sorry for what happened with the case.

{¶ 37} "THE COURT: Okay.

{¶ 38} "THE DEFENDANT: I apologize to the victim, we was just friends. I throw myself on the mercy of the Court. I'm deeply sorry, your Honor.

{¶ 39} "THE COURT: Okay, Mr. Barnes, let me just tell you briefly what's troubling. I gave you a chance to speak, you had nothing to say, you want to talk about the other aspect of the case, then you have another opportunity to speak and your attorney has to mouth to you what you need to say,

as opposed to you saying something on your own. That's okay. All right?"

{¶ 40} After this engagement, the court imposed appellant's sentence after discussing its considerations on the record.

{¶ 41} In light of the foregoing, we find appellant's argument that defense counsel was not given reasonable time to review the presentence investigation report unsupported by the record. Here, appellant is attempting to convince this court that a statement by appellant's counsel that he did not read the report amounts to a request to continue the hearing so that he may review the document and further asks this court to infer that the trial court denied counsel's request. Clearly, no such request was ever made notwithstanding appellant's strained interpretation of the record. Because there is no affirmative duty upon the trial court to inquire whether defense counsel has read the presentence investigation report, we find appellant's argument unpersuasive.

{¶ 42} Appellant also claims that defense counsel did not have enough time to read the sentencing memorandum filed by the prosecution the day of the sentencing hearing. Again, as we found with the presentence investigation report, defense counsel admitted on the record to receiving the document prior to the hearing and did not request additional time to review said document. Additionally, with regard to the sentencing memorandum specifically, we note that the substance of the document consisted merely of the facts of the case as understood at the time of the plea hearing. There was no information in these documents that had not been presented prior to the hearing. Moreover, the state

reiterated the arguments presented in the memorandum during the sentencing hearing prior to appellant's second opportunity to speak with the court. Accordingly, appellant was not prejudiced in any way by the court's consideration of such information.

{¶ 43} Additionally, as established above and despite appellant's assertions to the contrary, the trial court provided him with two separate opportunities to comment upon the presentence investigation report pursuant to R.C. 2951.03(B)(2), as well as the sentencing memorandum. Therefore, this argument fails as well.

{¶ 44} Finally, had we determined that the trial court denied appellant reasonable time to review and comment on the presentence investigation report and sentencing memorandum, we would nevertheless overrule this assignment of error because appellant has failed to demonstrate and makes no argument as to how he was prejudiced if he in fact was given more time. Appellant has not identified any deficiencies in these documents that would render the outcome different. Accordingly, we find appellant's second assignment of error without merit.

{¶ 45} In his first assignment of error, appellant argues that he was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution because his counsel failed to read and address during the sentencing hearing the presentence investigation report and the state's sentencing memorandum.

{¶ 46} With regard to the claim of ineffective assistance of counsel, a defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373. Because we have not found prejudicial error in connection with appellant's second assignment of error, the claim of ineffective assistance of counsel must also fail. *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237.

Judgment 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.

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., CONCURS;
CHRISTINE T. MCMONAGLE, J., CONCURS IN JUDGMENT ONLY