

[Cite as *State v. McKinney*, 2015-Ohio-2036.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101674

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HERBERT McKINNEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED; REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-559716-A

BEFORE: Kilbane, P.J., Boyle, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 28, 2015

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Herbert McKinney (“McKinney”), asserts that he was denied effective assistance of counsel during the resentencing in connection with his guilty plea to domestic violence following a remand from this court in *State v. McKinney*, 8th Dist. Cuyahoga No. 99270, 2013-Ohio-5730 (“*McKinney I*”). Finding no error, we affirm. However, we remand this case for correction of the sentencing journal entry.

{¶2} On February 27, 2012, McKinney was charged by information with one count of domestic violence. The charge was a third-degree felony because he had two prior domestic violence convictions. McKinney executed a jury waiver, and the case proceeded to a bench trial. On October 15, 2012, the trial court found McKinney guilty of the charge.

{¶3} On November 11, 2012, the court sentenced McKinney to 36 months in prison, to be served consecutively with a 4-year sentence issued by the Summit County Court of Common Pleas upon McKinney’s 2010 conviction for aggravated robbery. McKinney appealed this domestic violence conviction and sentence to this court. This court affirmed the conviction, but concluded that the trial court failed to make the findings required pursuant to R.C. 2929.14(C) in support of consecutive sentences, and it reversed and remanded for resentencing. *See McKinney I.*

{¶4} The trial court held a resentencing hearing on June 17, 2014. McKinney’s counsel argued that McKinney had changed during his imprisonment and now accepts responsibility for his actions. Counsel advocated for community-based incarceration,

and the prosecuting attorney argued for imposition of the original sentence. The trial court outlined the seriousness and recidivism factors and noted McKinney's criminal record, which included the following: 1997 theft conviction, 1999 drug possession, 2000 aggravated assault and misuse of a credit card, 2001 domestic violence, 2003 domestic violence, 2003 DUI, 2005 receiving stolen property, and 2010 aggravated robbery. The trial court determined that McKinney has not responded favorably to sanctions in the past.

{¶5} The trial also court considered the circumstances surrounding the incident. The offense was committed in the vicinity of their nine-year-old daughter and her young friend. The record indicates that McKinney choked the victim, who immediately shouted for the child and the child's friend to flee. The victim, their child, and the child's young friend then ran to a neighbor's home. They spent the night at a neighbor's home, and McKinney left numerous threatening messages on the victim's cell phone. When the victim and her daughter returned home the next morning, the kitchen cabinets were defaced, the bathroom medicine cabinet door was broken off, and there was broken glass on the floor. In the bedroom, the victim's mattress was glued to the box spring, and the television and other appliances were damaged. The court also read the victim's statement, which indicated that the victim and child remain terrified of McKinney and suffered psychological harm because of McKinney's actions.

{¶6} The trial court next made the findings required for imposition of consecutive sentences under R.C. 2929.14(C), and again imposed a three-year term, to be served consecutively with the Summit County conviction for aggravated robbery.

{¶7} McKinney now appeals, assigning the following error for our review:

Assignment of Error One

Trial counsel was ineffective at sentencing when counsel argued for a sentence that was less than the minimum sentence that could have been imposed by law.

{¶8} Within this assignment of error, McKinney argues that his counsel was ineffective for advocating that the trial court impose community-based incarceration and for failing to urge the trial court to order that McKinney's sentence for domestic violence be served concurrently with the Summit County sentence.¹

{¶9} In order to establish a claim of ineffective assistance of counsel, an appellant must demonstrate that (1) counsel's performance was deficient or unreasonable under the circumstances, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Ohio, a properly licensed attorney is presumed competent. *State v. Lott*, 51 Ohio St.3d 160, 174, 555 N.E.2d 293 (1990). Therefore, the defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

¹Defendant's appellate counsel also argued that trial counsel was ineffective for advocating for community control sanctions because McKinney's third-degree felony of domestic violence carries a mandatory prison term. At oral argument, counsel withdrew this argument in light of the penalty provisions of R.C. 2919.25(D).

{¶10} As to whether defendant's trial counsel committed an error in the resentencing hearing, we begin by noting that the remand issued by this court in *McKinney I* was for the correction of the court's error during the imposition of consecutive sentences on November 11, 2012. That was not a de novo sentencing hearing; rather, it was a limited remand for the purpose of determining whether consecutive sentences should be imposed and, if warranted, to make those findings. *State v. Frost*, 8th Dist. Cuyahoga No. 100498, 2014-Ohio-2645, ¶ 10, citing *State v. Nia*, 2014-Ohio-2527, 15 N.E.3d 892 (8th Dist.); *see also State v. Redd*, 8th Dist. Cuyahoga No. 98064, 2012-Ohio-5417, ¶ 20 ("Normally, when a defendant challenges the trial court's imposition of consecutive sentences and we agree with the defendant and sustain the assignment of error, we only vacate that portion of the defendant's sentence that imposed consecutive sentences.").

{¶11} As to whether defendant's trial counsel erred in advocating for imposition of community-based incarceration, rather than arguing that the sentence should be served concurrently with the Summit County matter, the record discloses that by the time of the resentencing, McKinney had already served 19 months of imprisonment. In addition, defendant's trial counsel urged the judge to consider the progress McKinney had made since the original sentence, and stated:

I read the Court of Appeals decision. I got information on what led His Honor to render consecutive sentences. And, factually speaking, you did the right thing, Your Honor. I think so, at the time.

Your Honor, it's 19 months later[.] * * *

I want you to view Mr. McKinney not as the man who saw you 19 months ago. He has had an awakening. He will tell it to you I couldn't even say it as beautifully as he says it, but somewhat illuminated to me and that's what I have to mention to you, that I am amazed. I am amazed.

* * * His Honor not only incarcerated him but gave him consecutive time and he says, what the heck did I do over here; I am a stupid man.

Your Honor, you have done the right thing when you incarcerated him and rendered it consecutive. But, Your Honor, He fesses (sic) up to his mistake that he made, he will speak and tell it to you. He really needs help. And it would be my respectful thought that * * * community-based incarceration would serve the right thing and His Honor has that discretionary power. He's not that bad. Nineteen months later, he's cleaned up * * *.

{¶12} From the foregoing record, it is obvious that the crux of defendant's trial counsel's argument is that consecutive sentences were not justified in this matter. By repeatedly referencing McKinney's changes during incarceration and urging the trial court to move beyond the original order of consecutive prison terms, defendant's trial counsel did in fact advocate for concurrent terms. As such, counsel clearly understood that the purpose of the hearing was to "determining whether consecutive sentences should be imposed and, if warranted, to make those findings." *Frost* at ¶ 10; *Redd* at ¶ 20. Therefore, we find no prejudicial error.

{¶13} With regard to whether counsel erred in advocating for community-based sanctions, it is clear from the record, that counsel framed the request as a simple appeal to the court's discretion or an appeal for a sort of clemency. In any event, by the date of the resentencing hearing, 19 months of the 36-month sentence had elapsed, a period of time that is in the middle range for the basic terms of the offense. *See R.C.*

2929.14(B)(3). Again, this argument is consistent with counsel's argument that the offense should not be punished consecutively with the Summit County matter. In consideration of all of the foregoing, we conclude that defendant's trial counsel was not ineffective for arguing, during the resentencing hearing, for imposition of community-based incarceration.

{¶14} As McKinney has failed to establish the first prong of the two-part *Strickland* showing, the claim of ineffective assistance of counsel fails as a matter of law.

{¶15} We sua sponte note, however, that the trial court failed to incorporate its R.C. 2929.14(C)(4) consecutive sentence findings into its sentencing entry as required by *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30 (trial court's inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law; rather, such a clerical mistake may be corrected by the court through a nunc pro tunc entry). Accordingly, we remand the matter for the limited purpose of issuing a nunc pro tunc journal entry to correct the sentencing journal entry.

{¶16} Judgment affirmed. We remand this case for the trial court to issue nunc pro tunc entries to correct the clerical errors in the sentencing entries and bring the entries into compliance with the requirements of *Bonnell* by incorporating its consecutive sentencing findings into the entries.

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.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

MARY JANE BOYLE, J., and
SEAN C. GALLAGHER, CONCUR