[Cite as *State v. Marneros*, 2015-Ohio-2156.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 101872 and 101873

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL LOUIS MARNEROS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeals from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-14-583992-A and CR-14-584351-A

BEFORE: Boyle, J., E.A. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: June 4, 2015

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Michael Marneros, appeals his convictions and sentence. He raises five assignments of error for our review:

> 1. The trial court erred when it refused to allow Marneros to withdraw his guilty plea.
>
> 2. Marneros was denied the effective assistance of counsel at sentencing and with respect to the motion to withdraw the plea.
>
> 3. The trial court denied Marneros the opportunity to allocute at sentencing.
>
> 4. The trial court erred by imposing consecutive sentences when it failed to make findings required by R.C. 2929.14(C)(4).
>
> 5. In CR-584351, Counts 1 and 3 are allied offenses and a sentence can only be imposed on one of the two counts.

{¶2} Finding merit to his fourth and fifth assignments of error, we reverse and remand.

Procedural History and Factual Background

{¶3} In Case No. CR-14-583992, Marneros was indicted on two counts: receiving stolen property and failure to comply with an order or signal of police officer. In Case No. CR-14-584351, Marneros was indicted on ten counts: two counts of theft, one count of receiving stolen property, and seven counts of forgery.

{¶4} Marneros entered into a plea agreement with the state. In Case No. CR-14-583992, Marneros pleaded guilty to receiving stolen property in violation of R.C. 2913.51(A) and attempted failure to comply with an order or signal of a police officer in violation of R.C. 2921.331(B) and 2923.02. In Case No. CR-14-584351, Marneros

pleaded guilty to theft in violation of R.C. 2913.02(A)(3) and forgery in violation of R.C. 2913.31(A)(3) (which was amended to include all seven checks).

{¶5} At the plea hearing, the state reviewed the plea deal, as well as the maximum penalties, for both cases on the record. The state indicated that the plea deal in Case No. CR-14-584351 was contingent upon Marneros paying restitution to Charter One Bank in the amount of $7,685. The plea deal in Case No. CR-14-583992 was contingent upon Marneros paying the victim $728.39.

{¶6} Marneros's counsel told the court that the case had been fully pretried and that he had gone over all discovery with Marneros.

{¶7} The trial court asked Marneros if he understood everything that had been stated. Marneros indicated that he had. The trial court further asked Marneros if anyone had made any promises to him to get him to enter into the plea other than what was stated on the record that day; Marneros responded, "no." In response to other questions posed by the court, Marneros stated that he was satisfied with his counsel's representation, that he was a United States citizen, that he had obtained a GED, and that he had not taken any medication or any substances such as alcohol or drugs that day.

{¶8} The trial court reviewed Marneros's constitutional rights with him, ensuring that he was aware of each right and that he understood that he was giving up that right. The trial court then reviewed the maximum penalties that Marneros could face if he entered into the plea. Marneros indicated that he understood all of the penalties.

{¶9} Marneros then pleaded guilty to the charges as outlined by the state. The trial court found that Marneros entered into the plea knowingly, voluntarily, and intelligently.

{¶10} The trial court ordered that a presentence investigation report be conducted. Defense counsel then requested that Marneros be sent for a TASC assessment because he felt that drugs had contributed to the charges. The trial court stated, "I don't think it's going to make any difference to me at sentencing, but that's fine."

{¶11} At the sentencing hearing, defense counsel indicated that he just had something brief to say because Marneros "asked [him] not to address the court, because [Marneros] has something prepared that he wants to read to the court." Defense counsel then stated that he did not believe that a TASC assessment had ever been completed, as requested.

{¶12} Marneros spoke to the court after defense counsel. He told the court that he had been reading from Am.Sub.H.B. No. 86 ("H.B. 86"). Marneros stated that it was his understanding that "the court allows and accepts for a guilty plea of defendant's request for program participation." Marneros told the court that he had a very serious alcohol and drug problem, as well as mental health issues, and that his attorney did not inform the court of either of these problems. According to Marneros, he should have received intervention in lieu of conviction due to his substance abuse and mental health issues. Marneros stated that his attorney told him that he was not eligible for intervention in lieu of conviction, but then filed a motion for "an assessment." But

Marneros stated that he had his file in front of him and his attorney never moved for "an assessment." Marneros then argued to the court that his indictment was defective and that he wished to withdraw his plea.

{¶13} The court asked him why he wished to withdraw his plea. Marneros told the court that he had PTSD and manic depression and that he should have been on the mental health docket. The court stated that he did not qualify for the mental health docket, and then asked him if there was any other reason. Marneros responded that he should have been given treatment in lieu of conviction. The court responded: "with your prior criminal history, no judge in America would put you on treatment in lieu of conviction." Marneros stated that for all the times that he had gone to prison, he had never been given treatment because he never qualified for treatment. Marneros asserted that under H.B. 86, he believed that he now qualified for treatment.

{¶14} The court reminded Marneros that as part of the presentence investigation report, Marneros admitted that he took checks from the victim and that he felt really bad about it. In fact, the court stated that the presentence investigation report indicated that Marneros said that he had prayed about it and wanted to do something for the victim. The court told Marneros that he had not given any reason that qualified for a plea withdrawal. The court further told Marneros that he was "under the delusion" that he should be placed on the mental health docket for conditions that do not qualify for the mental health docket. At that point, the court stated:

> You have a criminal history dating back to 1991 in Melbourne, Florida. You have countless felony convictions in this county. Let's try

to count; one, two, three, four, five, six, seven — seven was another receiving stolen property motor vehicle case, I should note. These are at least your eighth and ninth convictions in this county of felony offenses.

You have more than that number in misdemeanors. You have crimes of violence in your past. In case 437062, you were sentenced to Lorain Correctional Institute to run consecutive to case 424947, and three years on case 437062, and that was for — you pled guilty to attempted felonious assault.

In the 424947 case was a drug possession case. You were originally placed on probation on that case and then you come back with the attempted felonious assault.

So Mr. Marneros, you are no stranger to the criminal justice system. You have a history of violence. You have a history of drug possession.

I will take you at your word that you have a drug problem. There is AA basically on every corner in this county. The criminal justice system is under no obligation to treat you for a supposed drug dependency at this time.

You continue to take advantage of people. And that's why the law has created such a thing as consecutive time. It's necessary to protect the public and punish the offender, and I intend to impose it on these two cases. I'm denying your motion to withdraw. I just find it to be as you are trying to avoid the inevitable.

You pled guilty to these cases. You admitted in the PSI you regret taking the elderly woman's checks, and you presented the Court with a rambling view this morning as to why you want to withdraw your plea.

{¶15} In justifying consecutive sentences, the trial court stated:

Given your prior criminal history and the harm in this case done to a 71 year old woman, I find the harm was so great or unusual that a single term does not adequately reflect the seriousness of your conduct, and clearly your criminal history shows that consecutive terms are needed to protect the public.

It's not a question of, if you commit another crime. It's only a question of when. And that is why we are imposing consecutive time.

{¶16} The trial court sentenced Marneros to an aggregate of five and one-half years in prison. In Case No. CR-14-583992, the trial court sentenced Marneros to 18 months for receiving stolen property and 12 months for attempted failure to comply, to be served consecutive to each other and consecutive to the sentence imposed in Case No. CR-14-584351. In Case No. CR-14-584351, the trial court sentenced Marneros to 36 months for theft, and 12 months for forgery, to be served concurrent to each other. The trial court further sentenced Marneros to costs and restitution as outlined in the plea agreement. It is from this judgment that Marneros appeals.

Presentence Motion to Withdraw Plea

{¶17} In his first assignment of error, Marneros contends that the trial court erred when it denied his oral motion to withdraw his plea prior to sentencing. A motion to withdraw a guilty plea is governed by the standards set forth in Crim.R. 32.1, which provides that "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶18} Generally, a presentence motion to withdraw a guilty plea should be freely and liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). A defendant, however, does not have an absolute right to withdraw a plea prior to sentencing, and it is within the sound discretion of the trial court to determine what circumstances justify granting such a motion. *Id.* In ruling on a presentence motion to

withdraw a plea, the court must conduct a hearing and decide whether there is a reasonable and legitimate basis for withdrawal of the plea. *Id*. at 527. This court has held that a trial court does not abuse its discretion in overruling a motion to withdraw a plea:

> (1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim.R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request.

State v. Tucker, 8th Dist. Cuyahoga No. 97981, 2012-Ohio-5067, ¶ 7, quoting *State v. Peterseim*, 68 Ohio App.2d 211, 214, 428 N.E.2d 863 (8th Dist.1980), paragraph three of the syllabus.

{¶19} Here, we find no abuse of discretion in the trial court's denial of Marneros's plea withdrawal request as the parameters set forth in *Peterseim* are met here: (1) Marneros was represented by highly competent counsel (Marneros claims that his counsel was not effective in his second assignment of error, but we disagree), (2) he was afforded a full Crim.R. 11 hearing before he entered into the plea, (3) he was given a full and impartial hearing on his motion to withdraw his plea, and (4) the record reveals that the court gave full and fair consideration to his plea withdrawal request.

{¶20} Further, Marneros did not assert at the hearing that he was innocent of the crimes. And as the court noted, as part of the presentence investigation report, Marneros admitted that he stole checks from the victim (although he did not admit to stealing the victim's vehicle). Thus, it is clear that Marneros simply had a change of heart.

{¶21} Accordingly, Marneros's first assignment of error lacks merit and is overruled.

Ineffective Assistance of Counsel

{¶22} In his second assignment of error, Marneros contends that his trial counsel was ineffective for failing to assist him with his oral motion to withdraw his plea and for failing to say anything at his sentencing hearing "other than the TASC referral."

{¶23} To establish ineffective assistance of counsel, a defendant must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus.

{¶24} In evaluating a claim of ineffective assistance of counsel, a court must give great deference to counsel's performance. *Strickland* at 689. "A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175, ¶ 69; *Bradley* at 141.

{¶25} Marneros has not met his burden of showing that his trial counsel was deficient or that he was prejudiced by such performance. As for not assisting Marneros with his motion to withdraw his plea, it was clear that Marneros wished to speak to the

court himself about the motion — as counsel informed the court. Indeed, Marneros asked his counsel not to talk.

{¶26} As for not saying anything else on Marneros's behalf (besides the fact that the TASC assessment was not completed), it does not rise to the level of deficient performance. In determining a claim of ineffective assistance of counsel, our review is limited to the record before this court. Based on the record, it is just as possible that there was nothing else to say on Marneros's behalf. Thus, Marneros did not meet his burden in rebutting the presumption that his counsel adequately represented him.

{¶27} Marneros's second assignment of error is overruled.

Right of Allocution

{¶28} In his third assignment of error, Marneros argues that the trial court erred by not permitting him to speak at sentencing.

{¶29} Crim.R. 32(A) provides that before sentencing a defendant, the trial court shall "[a]fford 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." A defendant has an absolute right to allocution, which is not subject to waiver due to the defendant's failure to object. *State v. Campbell*, 90 Ohio St.3d 320, 325-326, 738 N.E.2d 1178 (2000). "In a case in which the trial court has imposed sentence without first asking the defendant whether he or she wishes to exercise the right of allocution created by Crim.R. 32(A), resentencing is required unless the error is invited error or harmless error." *Id.* at 326.

{¶30} In this case, at the beginning of the sentencing hearing, the trial court permitted Marneros to speak extensively. Although Marneros chose to use that time to request to withdraw his plea, Marneros spoke of his supposed mental heath issues and substance abuse issues. These issues are relevant at sentencing as well. Thus, we find no error on the part of the trial court as it permitted Marneros to speak. Further, in addition to Marneros's comments at the sentencing hearing, the trial court had the benefit of a presentence investigation report, which set forth Marneros's mental health history (which indicated that Marneros reported he had been diagnosed with PTSD, but concluded that Marneros had no mental health issues), substance abuse history (which set forth Marneros's own account of his drug use), and indicated that Marneros was remorseful about stealing from the victim.

{¶31} Accordingly, Marneros's third assignment of error is overruled.

Consecutive Sentences

{¶32} In his fourth assignment of error, Marneros contends that the trial court failed to make the required findings under R.C. 2929.14(C)(4) before imposing consecutive sentences.

{¶33} R.C. 2953.08(G)(2) provides that our review of felony sentences is not an abuse of discretion. An appellate court must "review the record, including the findings underlying the sentence or modification given by the sentencing court." *Id*. If an appellate court clearly and convincingly finds either that (1) "the record does not support the sentencing court's findings under [R.C. 2929.14(C)(4)]" or (2) "the sentence is

otherwise contrary to law," then "the appellate court may increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for resentencing." *Id.*

{¶34} R.C. 2929.14(C)(4) requires trial courts to engage in a three-step analysis when imposing consecutive sentences. First, the trial court must find that "consecutive service is necessary to protect the public from future crime or to punish the offender." *Id.* Next, the trial court must find that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* Finally, the trial court must find that at least one of the following applies: (1) the offender committed one or more of the multiple offenses while awaiting trial or sentencing, while under a sanction imposed under R.C. 2929.16, 2929.17, or 2929.18, or while under postrelease control for a prior offense; (2) at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the offenses was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct; or (3) the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. *Id.*

{¶35} Compliance with R.C. 2929.14(C)(4) requires the trial court to make the statutory findings as part of the sentencing hearing. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. But "a word-for-word recitation of the

language of the statute is not required. As long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Id.* at ¶ 29. The Ohio Supreme Court further explained that the word "finding" in this context means that the trial court "must note that it engaged in the analysis" and that it "considered the statutory criteria and specifie[d] which of the given bases warrants its decision." *Id.*, citing *State v. Edmonson*, 86 Ohio St.3d 324, 326, 715 N.E.2d 131 (1999). The court emphasized that the trial court is not required to give a "talismanic incantation" of the words of the statute, provided the necessary findings can be found in the record. *Id.* at ¶ 37.

{¶36} Here, the trial court made several findings relating to the need to protect the public from future crime and to punish Marneros. It also discussed Marneros's extensive criminal history, finding that because of it, consecutive sentences were necessary to protect the public from future crime. But the trial court never addressed the proportionality of consecutive sentences to the seriousness of Marneros's conduct and the danger he posed to the public.

{¶37} Consequently, we vacate Marneros's consecutive sentences and remand this matter to the trial court for resentencing. *See Bonnell* at ¶ 30, 37. On remand, the trial court shall consider whether consecutive sentences are appropriate under R.C. 2929.14(C)(4), and if so, shall make the required statutory findings on the record at resentencing, and incorporate its findings into the subsequent sentencing entry.

{¶38} Marneros's fourth assignment of error is sustained.

Allied Offenses of Similar Import

{¶39} In his fifth assignment of error, Marneros contends that in Case No. CR-14-584351, that his theft and forgery convictions should have merged. The state conceded this error at oral argument, and we agree.

{¶40} An appellate court should apply a de novo standard of review in reviewing whether two offenses are allied offenses of similar import. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28. But here, Marneros failed to object to the imposition of multiple punishments. Nonetheless, the Ohio Supreme Court has held that the imposition of multiple sentences for allied offenses of similar import is plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31, citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96-102.

{¶41} Recently, the Ohio Supreme Court set forth the standard for determining whether two or more offenses are allied offenses of similar import. In *State v. Ruff*, Slip Opinion No. 2015-Ohio-995, the Ohio Supreme Court held at paragraphs one through three of the syllabus:

> 1. In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors — the conduct, the animus, and the import.
>
> 2. Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

> 3. Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus.

{¶42} Neither the state nor Marneros placed any facts on the record. But the PSI contained a police summary from Case No. CR-14-584351. It states that police were called to Charter One Bank. When they arrived, the bank manager was with the victim, Lenora Glenn. After getting a call from Glenn, the bank manager checked Marneros's account and noticed that multiple checks had been deposited into his account within the previous six weeks. All of the checks were for $400 or more and appeared to be written by Glenn to Marneros. There was a total of seven checks, amounting to $7,685. Glenn, however, told the bank manager that she did not write the checks to Marneros.

{¶43} Theft under R.C. 2913.02(A)(3) provides that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * by deception." Forgery under R.C. 2913.31(A)(3) provides that "[n]o person, with purpose to defraud, or knowing that the person is facilitating a fraud, shall * * * [u]tter, or possess with purpose to utter, any writing that the person knows to have been forged."

{¶44} In conducting the three-step *Ruff* test and looking at Marneros's conduct, we agree with Marneros that his theft offense and forgery offense should have merged. The offenses of theft and forgery are allied offenses of similar import under the facts of this case because the harm that resulted from each offense was the same, the offenses

occurred simultaneously, as a result of the same conduct, and arose from the same animus. Marneros committed the crime when he presented the checks to the bank and received, in return, the victim's money deposited into his account. The passing (or "uttering") of the checks was the forgery offense, and his receipt of money into his account was the theft offense.

{¶45} Accordingly, Marneros's fifth assignment of error is sustained.

{¶46} Judgment reversed and cause remanded for resentencing. On remand, the state must elect the allied offense on which to proceed for purposes of sentencing in Case No. CR-14-584351. Also on remand, the trial court shall consider whether consecutive sentences are appropriate under R.C. 2929.14(C)(4), and if so, shall make the required statutory findings on the record at resentencing and incorporate its findings into the subsequent sentencing entry.

It is ordered that appellant recover from appellee the 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 J. BOYLE, JUDGE

EILEEN A. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR