

[Cite as *State v. Booker*, 2015-Ohio-2515.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101886

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KENNETH BOOKER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-582017-A

BEFORE: Blackmon, J., Celebrezze, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: June 25, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Kenneth Booker (“Booker”) appeals his sentence and assigns the following four errors for our review:

I. The trial court abused its discretion and erred to the prejudice of appellant by sentencing him to a total of nineteen years imprisonment, in that the prison term is excessive for the purposes set forth in Ohio Revised Code Section 2929.11(A), and (B), and is not necessary to protect the public.

II. The trial court abused its discretion and erred to the prejudice of appellant by sentencing him to a total of nineteen years imprisonment, including consecutive sentences, in that a consecutive sentence is not necessary to protect the public, and is disproportionate to the seriousness of the offender’s conduct.

III. The appellant was denied the effective assistance of counsel, as his attorney agreed to stipulate that the charges in the case were not allied offense of similar import, thus leading to the lengthy consecutive sentences totaling nineteen years.

IV. The trial court erred to the prejudice of the appellant by not finding that involuntary manslaughter, kidnapping, and felonious assault are allied offenses of similar import, and by sentencing him to consecutive and concurrent terms for each one.

{¶2} Having reviewed the record and pertinent law, we affirm Booker’s sentence. The apposite facts follow.

{¶3} The Cuyahoga County Grand Jury indicted Booker for murder, kidnapping, felonious assault, domestic violence, and violating a protection order. The charges arose from Booker strangling his wife in a drunken, jealous rage.

{¶4} Booker agreed to plead guilty to an amended count of involuntary manslaughter, kidnapping, felonious assault, domestic violence, and violation of a protection order. As part of the plea agreement, Booker stipulated that all of the counts were non-allied offenses; therefore the charges would not merge for purposes of sentencing.

{¶5} The trial court sentenced Booker to 11 years for involuntary manslaughter, five years for felonious assault, and three years for domestic violence, all to run consecutively. Additionally, the trial court sentenced Booker to three years for kidnapping and three years for the violation of the protection order, to be served concurrently. As a result, Booker received a total sentence of 19 years in prison.

Purposes and Principles of R.C. 2929.11(A) and (B)

{¶6} In his first and second assigned errors, Booker contends that due to mitigating factors, the 19-year sentence did not comply with the purposes and principles of sentencing set forth in R.C. 2929.11(A) and (B), and that the seriousness and recidivism factors in R.C. 2929.12 also warranted a lesser sentence.

{¶7} R.C. 2953.08(G)(2) provides, in part, that when reviewing felony sentences, the appellate court's standard for review is not whether the sentencing court abused its discretion; rather, if this court "clearly and convincingly" finds that (1) "the record does not support the sentencing court's findings under R.C. 2929.14(C)(4)," or that (2) "the sentence is otherwise contrary to law," then we "may increase, reduce, or otherwise

modify a sentence * * * or [a reviewing court] may vacate the sentence and remand the matter to the sentencing court for re-sentencing.”

{¶8} A sentence is not clearly and convincingly contrary to law “where the trial court considers the purposes and principles of sentencing under R.C. 2929.11, as well as the seriousness and recidivism factors listed in R.C. 2929.12, properly applies postrelease control, and sentences a defendant within the permissible statutory range.” *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 10, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18. The trial court did all of the above.

{¶9} Although the trial court has a mandatory duty to “consider” the statutory factors, the trial court is not required to explain its analysis of those factors in a given case. *State v. Townsend*, 8th Dist. Cuyahoga No. 99896, 2014-Ohio-924, ¶ 11-12. The trial court’s statement that it considered the required statutory factors, without more, is sufficient to fulfill its obligations under the sentencing statutes. *State v. Kamleh*, 8th Dist. Cuyahoga No. 97092, 2012-Ohio-2061, ¶ 61, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 18.

{¶10} However, Booker does not claim that the trial court failed to consider R.C. 2929.11 and 2929.12, but disagrees regarding how the trial court weighed the factors. Booker argues that the fact he admitted his guilt from the beginning, was extremely remorseful, and begged forgiveness, warranted a lesser sentence than that imposed by the trial court. The trial court stated on the record that it considered those factors, but

ultimately concluded they were outweighed by the fact that the trial court, prior to the killing, had placed Booker on probation for a domestic violence conviction against the same victim, which included a no contact order. The court also noted that although Booker had taken responsibility for the murder, that after he called 911, he did not stay with the victim, but left prior to the arrival of police and EMS.

{¶11} A reviewing court cannot review the sentencing judge’s exercise of its discretion as “[t]he appellate court’s standard for review is not whether the sentencing court abused its discretion.” R.C. 2953.08(G)(2); *State v. Akins*, 8th Dist. Cuyahoga No. 99478, 2013-Ohio-5023, ¶ 18; *State v. Thompson*, 8th Dist. Cuyahoga No. 99628, 2014-Ohio-202, ¶ 22. Booker’s argument impermissibly asks us to intrude into the realm of the sentencing court’s discretion; it is the sentencing judge who has the “discretion to determine the weight to assign a particular statutory factor.” *State v. Arnett*, 88 Ohio St.3d 208, 215, 2000-Ohio-302, 724 N.E.2d 793. We, therefore, have no jurisdiction to consider whether the court abused its discretion in how it applied the purposes and principles of felony sentencing in R.C. 2929.11 and the sentencing factors in R.C. 2929.12. *See State v. Smith*, 8th Dist. Cuyahoga No. 100206, 2014-Ohio-1520, ¶ 17. Accordingly, Booker’s first and second assigned errors are overruled.

Ineffective Assistance of Counsel

{¶12} In his third assigned error, Booker argues that his counsel was ineffective for stipulating that the counts were not allied offenses and, therefore, did not merge.

{¶13} To succeed on a claim of ineffective assistance, a defendant must establish that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Counsel will only be considered deficient if his or her conduct fell below an objective standard of reasonableness. *Strickland* at 688.

{¶14} In *Strickland*, the United States Supreme Court also stated that a court's scrutiny of an attorney's work must be deferential. The court further stated that it is too tempting for an appellant to second-guess his attorney after conviction and appeal, and that it would be all too easy for a court to conclude that a specific act or omission was deficient, especially when examining the matter in hindsight. Accordingly, this court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *Id.* at 689. Further, to establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel's deficient performance. *Id.* at 694.

{¶15} We conclude counsel was not ineffective for advising Booker to accept the plea in which it was stipulated the counts would not merge. Given the evidence against Booker, the advice to accept the plea could be viewed as sound trial strategy. Moreover,

Booker was fully advised regarding the stipulation prior to accepting the plea and informed that the non-merger could result in a sentence from 15 to 30 years; Booker told the court that he understood. Booker at that point could have decided not to take the plea against his counsel's advice.

{¶16} Moreover, the trial court advised Booker after imposing the sentence that the fact he received 19 years in prison versus a longer sentence, was based in part on the fact that he “acknowledged [his] responsibility and took the plea and saved the family a trial * * *.” Tr. 43. Therefore, if he had not agreed to the plea, he could have received even more time, perhaps even the maximum of 30 years. Accordingly, Booker's third assigned error is overruled.

Allied Offenses

{¶17} In his fourth assigned error, Booker argues that the trial court erred by not concluding that the felonious assault and kidnapping counts merged.

{¶18} As we stated above, the transcript from the plea hearing shows that the prosecutor and defense counsel stipulated that as part of the plea bargain, the counts would not merge. The trial court also explained the stipulation to Booker, and he responded that he understood.

{¶19} This court has held that when the transcript demonstrates the state and defense counsel specifically agreed that the offenses were not allied, the issue of allied offenses is waived. *State v. Adams*, 8th Dist. Cuyahoga No. 100500, 2014-Ohio-3496,¶

10; *State v. Yonkings*, 8th Dist. Cuyahoga No. 98632, 2013-Ohio-890; *State v. Carman*, 8th Dist. Cuyahoga No. 99463, 2013-Ohio-4910; *State v. Ward*, 8th Dist. Cuyahoga No. 97219, 2012-Ohio-1199. Accordingly, Booker's fourth assigned error is overruled.

{¶20} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

PATRICIA ANN BLACKMON, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MELODY J. STEWART, J., CONCUR