

[Cite as *State v. Davis*, 2015-Ohio-4501.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102639

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DWAYNE DAVIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-574008-A

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

RELEASED AND JOURNALIZED: October 29, 2015

ATTORNEY FOR APPELLANT

Britta M. Barthol
P.O. Box 218
Northfield, Ohio 44067

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Daniel T. Van
Assistant County Prosecutor
Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY J. BOYLE, J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶2} Defendant-appellant, Dwayne Davis, pleaded guilty to an amended indictment on two counts of burglary and one count of intimidation of a crime victim or witness. He now challenges his conviction and sentence. We affirm but remand to the trial court to issue a nunc pro tunc entry to incorporate the findings made at the sentencing hearing into the journal entry.

Procedural History and Facts

{¶3} In September 2013, Davis pleaded guilty to an amended indictment on the following charges: burglary in violation of R.C. 2911.12(A)(1), a second-degree felony; burglary in violation of R.C. 2911.12(B), a fourth-degree felony; and intimidation of a crime victim or witness in violation of R.C. 2921.04(B), a third-degree felony. These charges involved different victims.

{¶4} One month later, after referring Davis for a presentence investigation report, the trial court held the sentencing hearing. At the hearing, the court first heard from defense counsel, who discussed Davis's drug addiction and his genuine remorse for his actions. Davis also addressed the court, apologizing for his actions and attributing them to his drug addiction and mental health problems.

{¶5} Next, the trial court heard from one of the victims who discussed the emotional damage that Davis's actions have inflicted upon her and her family by his "total invasion" of their home. She discussed how her four children no longer feel safe in their own home. The victim urged the court to impose the maximum sentence, noting that Davis's record "tells a story of 16 releases from prison, treatment, and asking for treatment." A neighbor of one of the homes burglarized also addressed the court, explaining the terror that Davis's actions have inflicted upon

their neighborhood. The prosecutor also addressed the court, noting the fear that Davis inflicted upon another victim by threatening him when the victim tried to get Davis out of his house.

{¶6} The trial court then addressed Davis, asking him the longest prison term that he had previously served. Davis indicated that it was four years and further stated that he did not use drugs while in prison. The trial court further discussed the danger associated with the crime of burglary, including for Davis, who could have justifiably been killed. The trial court ultimately imposed a total prison term of ten years: eight years in prison on the second-degree burglary count; 18 months in prison on the fourth-degree burglary count, to run concurrently to the other burglary count; and two years on the intimidation of a crime victim, to run consecutive to the eight-year burglary count.

{¶7} From this order, Davis requested a delayed appeal, which this court granted. He now raises the following three assignments of error:

I. The appellant received ineffective assistance of counsel at the time of his plea thereby rendering his convictions void under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 16 of the Ohio Constitution.

II. The trial court abused its decision when it denied the appellant's motion to withdraw his guilty plea in violation of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

III. The trial court failed to make all the factual findings necessary to sentence appellant to consecutive sentences under R.C. 2929.14.

Scope of the Appeal

{¶8} Initially, we note that this court granted Davis a delayed appeal to challenge the final order of conviction, dated October 3, 2013. Davis, however, raises an assignment of error related to the merits of his motion to withdraw his guilty plea, filed on December 4, 2014, over a year after the October 3, 2013 final order of conviction. The trial court has not yet ruled on this

motion. Because this matter is not properly before this court as part of the instant appeal, we summarily overrule Davis's second assignment of error.

Ineffective Assistance of Counsel

{¶9} In his first assignment of error, Davis argues that he was denied effective assistance of counsel during the proceedings below. He specifically argues that his trial counsel was ineffective in failing to file a motion to suppress, "which caused his plea to be less than voluntary, knowing and intelligent." Contrary to the state's position, this issue directly relates to Davis's underlying conviction and, therefore, is properly before this court. But we nevertheless find that Davis's argument has no merit.

{¶10} Reversal of a conviction for ineffective assistance of counsel requires a defendant to show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *State v. Smith*, 89 Ohio St.3d 323, 327, 731 N.E.2d 645 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defense counsel's performance must fall below an objective standard of reasonableness to be deficient in terms of ineffective assistance of counsel. *See State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). Moreover, the defendant must show that there exists a reasonable probability that, were it not for counsel's errors, the results of the proceeding would have been different. *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998).

{¶11} 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* at 687-688, 694; *Bradley* at paragraphs two and three of the syllabus.

{¶12} 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.

{¶13} Davis argues that, had his trial counsel filed a motion to suppress, it would have been successful and then he would not have needed to plead guilty. Aside from the fact that there is no evidence before this court to support Davis’s claim, Davis confuses the standard.¹

{¶14} “[A] guilty plea waives all non-jurisdictional defects (other than errors affecting the validity of the guilty plea) in the prior proceedings.” *State v. Moore*, 2d Dist. Montgomery No. 22365, 2008-Ohio-4322, ¶ 12, citing *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 78.

{¶15} It is well settled that when a defendant has entered a guilty plea, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pleaded guilty and would have insisted on going to trial. The mere fact that, if not for the alleged ineffective assistance of counsel, the defendant would not have entered a guilty plea is not sufficient to establish the necessary connection between ineffective assistance and the plea. Ineffective assistance will only be found to have affected the validity of plea when it precluded defendant from entering the plea knowingly and voluntarily. The relevant inquiry is not whether defendant ultimately would have prevailed at trial, but whether defendant would have pled guilty if properly advised by counsel.” *State v. Neu*, 4th Dist. Adams No. 12CA942, 2013-Ohio-616, ¶ 16, quoting 25 Ohio Jurisprudence 3d, Criminal Law: Procedure, Section 78 (2011). “[A] defendant who pleads guilty generally waives the right to make allegations of ineffective assistance of counsel * * * for failure to move

¹ In support of his motion to suppress argument, Davis relies on an affidavit attached to his motion to withdraw his guilty plea, filed after the order of conviction. The transcript of the proceedings do not provide any factual support to Davis’s claim.

for suppression unless he alleges that the error caused the plea to be less than knowing, voluntary, and intelligent.” *State v. Arnold*, 2d Dist. Clark Nos. 2014-CA-23, 2014-CA-24, 2014-CA-25, and 2014-CA-26, 2015-Ohio-1580, ¶ 10, quoting *State v. Jackson*, 7th Dist. Mahoning No. 13 MA 121, 2014-Ohio-2249, ¶ 17. *See also State v. Taylor*, 8th Dist. Cuyahoga No. 97798, 2012-Ohio-5065, ¶ 11.

{¶16} Davis’s argument as to the police’s warrantless entry and arrest is unrelated to his guilty plea and therefore provides no basis to reverse his conviction. As noted by the Second Appellate District, “even if [defendant] had filed a motion to suppress, and had it overruled by the trial court, his guilty plea would have waived any error in the disposition of his motion to suppress.” *Moore* at ¶ 12. Because Davis’s argument as to his counsel failing to file a motion to suppress does not support a claim that his guilty plea was less than knowingly, intelligently, and voluntarily made, we find his argument has no merit.

{¶17} The first assignment of error is overruled.

Consecutive Sentences

{¶18} In his final assignment of error, Davis argues that the trial court only made partial findings, failing to make the required three findings to support the imposition of consecutive sentences. We disagree.

{¶19} When reviewing the imposition of consecutive sentences, “R.C. 2953.08(G)(2)(a) directs the appellate court ‘to review the record, including the findings underlying the sentence’ and to modify or vacate the sentence ‘if it clearly and convincingly finds * * * [t]hat the record does not support the sentencing court’s findings under [R.C. 2929.14(C)(4)].” *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, quoting R.C. 2953.08(G)(2)(a).

{¶20} 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, 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.*

{¶21} A trial court is required not only to make the statutory findings required for consecutive sentences at the sentencing hearing, but also to incorporate its findings into its sentencing entry. *Bonnell* at syllabus. *Bonnell* further made clear that “a word-for-word recitation of the language of the statute is not required, and 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. Indeed, the Ohio Supreme Court expressly rejected the claim that a trial court must give a “talismanic incantation of the words of the statute” when imposing consecutive sentences. *Id.* at 37.

{¶22} Our review of the record reveals that the trial court complied with R.C. 2929.14(C)(4) before imposing consecutive sentences. The trial court specifically stated that “one sentence would not be sufficient to protect these people or our community from further harm by this defendant” and that a concurrent sentence “would demean the seriousness of the two

offenses.” The trial court made these findings after discussing both the seriousness of Davis’s conduct in this case as well as his criminal history, including his previous prison sentences. Although the trial court did not recite the exact statutory language, the trial court clearly found that “consecutive service is necessary to punish the offender” and that “the offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.” With respect to the proportionality analysis, the trial court also specifically discussed the danger associated with Davis’s actions, discussing that Davis has already been afforded a “second-chance.” Thus, because we can discern from the transcript that the trial court engaged in the correct analysis and that the record supports the findings, we find no merit to Davis’s third assignment of error. *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, at ¶ 29; *see also State v. Lunder*, 8th Dist. Cuyahoga No. 101223, 2014-Ohio-5341, ¶ 17.

{¶23} We note, however, that the sentencing entry in this case does not include the consecutive sentence findings. Therefore, in accordance with *Bonnell*, we remand for the limited purpose of incorporating nunc pro tunc the consecutive sentence findings made at the sentencing into the court’s entry.

{¶24} Judgment affirmed. However, this case is remanded to the trial court to incorporate its findings for consecutive sentences into the journal entry.

It is ordered that appellee recover from appellant 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. 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.

MARY J. BOYLE, JUDGE

MELODY J. STEWART, P.J., and
SEAN C. GALLAGHER, J., CONCUR