

[Cite as *State v. Peak*, 2015-Ohio-4702.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102850

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HENRY PEAK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-588205-A

BEFORE: E.T. Gallagher, J., E.A. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: November 12, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Henry Peak (“Peak”), appeals from his convictions and sentence, raising three assignments of error for review:

1. The trial court erred by sentencing appellant to multiple consecutive sentences by failing to engage in the three-step analysis required by R.C. 2929.14(C) and supporting case law.
2. The appellant received ineffective assistance of counsel during his plea negotiations.
3. The trial court erred by denying appellant’s motion to withdraw his plea.

{¶2} After careful review of the record and relevant case law, we affirm Peak’s convictions and sentence.

I. Procedural History

{¶3} In August 2014, Peak was named in a six-count indictment charging him with three counts of rape of a victim who is less than 13 years old in violation of R.C. 2907.02(A)(1)(b), and three counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A). Peak’s indictment alleged that the victim was 12 years old at the time the offenses were committed.

{¶4} In February 2015, Peak and the state reached a plea agreement wherein Peak agreed to plead guilty to two counts of rape in violation of R.C. 2907.02(A)(1)(b), as charged in Counts 1 and 2 of the indictment. After fully complying with Crim.R. 11 and advising Peak of his statutory and constitutional rights, the following exchange took place:

COURT: Are you in fact guilty? Is it true that between February 14, 2014, and May 6, 2014, in Cuyahoga County, Ohio, that you did engage in sexual conduct, to-wit: vaginal intercourse with [the victim], who was not the spouse of you, whose age at the time of the sexual conduct was less than 13 years of age * * * whether or not you knew the age of [the victim]. Is that true?

PEAK: Yes, Your Honor.

* * *

COURT: Is it also in fact true that between February 14, 2014, and May 6, 2014, another separate incident, that Count 2 is a second incident, that in Cuyahoga County, Ohio, that you did engage in sexual conduct, to-wit: vaginal intercourse with [the victim], who was not the spouse of you, whose age at the time of the sexual conduct was less than 13 years of age * * * whether or not you knew the age of [the victim]?

PEAK: Yes, Your Honor.

{¶5} Thereafter, the trial court accepted Peak's plea, finding that he "knowingly, voluntarily, with full understanding of his rights, entered these guilty pleas." Upon the state's motion, the remainder of the counts were nolle.

{¶6} Prior to sentencing, Peak filed a pro se motion to withdraw his guilty plea, arguing that he received ineffective assistance of counsel during the plea proceedings. Following a hearing, the trial court denied Peak's motion. At sentencing, the trial court ordered Peak to serve a life sentence with the possibility of parole after ten years on each count, to run consecutive to each other.

{¶7} Peak now appeals his convictions and sentence.

II. Law and Analysis

A. Consecutive Sentence

{¶8} In his first assignment of error, Peak argues the trial court failed to make the necessary findings for imposing consecutive sentences under R.C. 2929.14(C)(4).

{¶9} R.C. 2929.14(C)(4) states:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post[-]release control for a prior offense.

(b) 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 multiple offenses so committed 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.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶10} When imposing consecutive sentences, the trial court must make the R.C. 2929.14(C)(4) findings on the record at sentencing, and incorporate the statutory findings into the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29.

{¶11} “[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.* The failure to make the findings, however, is “contrary to law.” *Bonnell* at ¶ 37.

{¶12} In this case, the trial court supported its decision to impose consecutive sentences by making the following findings in open court and on the record:

Mr. Peak, the Court has considered all principles and purposes of felony sentencing, all the appropriate recidivism and seriousness factors. And you know, the acts in which you've — you have pled guilty to and accept responsibility for are some of the most harmful acts that can be done to anybody and if you were the victim yourself, you'd understand that. I know that in your mind you have a different idea about what you're doing and you didn't see the harm in it; and I'm sure that's why you were so forthcoming with the detective. And you're misguided in those thoughts and that creates a danger to the community, that creates potentially other victims.

And sending a letter to the victim here from jail reinforces that idea in my mind that the evidence is clear that you're not seeing the harmfulness in your

conduct in that you've deluded yourself into some idea that you could — you believe you can have some kind of relationship with a young girl. And that's — and that — that's why this is a serious crime, and that's why there is a need for a serious sentence. It's very difficult for a young girl who has had this experience to recover, you know. It will take a long time; it won't be easy, it will take a lot of work.

* * *

But sir, this — these acts require consecutive sentences, in my opinion; that the evidence is clear that it's necessary to protect our community and to punish you, and it's not disproportionate to what your acts were in this case. I'm finding that the harm is so great or unusual that a single term is not adequate. It just can't reflect the seriousness of your conduct or that harm. And certainly your criminal history is extensive and that's another factor, as well as all the other things that I've stated here on the record that indicate that consecutive terms are needed to protect the public[.]

{¶13} This record demonstrates that the trial court complied with the findings necessary for the imposition of consecutive sentences. First, the trial court found that consecutive sentences are necessary to protect the public and to punish the offender, whereas the court need only find one or the other. Next, the trial court found that consecutive sentences are not disproportionate to Peak's conduct and that his misguided thoughts and lack of remorse reflect the continued danger he poses to the public. Finally, the trial court found that Peak's extensive criminal history was a relevant factor for imposing consecutive terms. These findings were then incorporated into the sentencing journal entry.

{¶14} Based on the foregoing, we conclude that the trial court engaged in the required analysis pursuant to R.C. 2929.14(C)(4). Accordingly, Peak's first assignment of error is overruled.

B. Ineffective Assistance of Counsel

{¶15} In his second assignment of error, Peak argues he received ineffective assistance of counsel during his plea negotiations.

{¶16} A claim of ineffective assistance of trial counsel requires both a showing that trial counsel's representation fell below an objective standard of reasonableness, and that the

defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reviewing court “must indulge in a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. The prejudice prong requires a finding that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different, with a reasonable probability being “a probability sufficient to undermine confidence in the outcome.” *Id.* at 694; *see also State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

{¶17} A claim of ineffective assistance of counsel is waived by a guilty plea, except to the extent that the ineffective assistance of counsel caused the defendant’s plea to be less than knowing, intelligent, and voluntary. *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11, citing *State v. Spates*, 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (1992), citing *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). In such cases, a defendant can establish the prejudice necessary for an ineffective assistance of counsel claim only by demonstrating that there is a reasonable probability that, but for counsel’s deficient performance, he would not have pled guilty to the offense at issue and would have insisted on going to trial. *Williams* at ¶ 11, citing *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992), and *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

{¶18} In this case, Peak argues that he was precluded from entering a knowing and voluntary plea based on defense counsel’s (1) failure to discuss the facts and circumstances of the plea, and (2) unwillingness to discuss “comparable cases.”

{¶19} Based on the record before this court, we are unable to conclude that defense counsel’s representation fell below an objective standard of reasonableness. Contrary to the arguments raised in this assignment of error, Peak stated at the plea hearing that he understood

the nature of the charges and possible penalties, that he was not forced or threatened to enter a plea, and that he was satisfied with counsel's performance. Further, defense counsel stated on the record that he had the opportunity to explain the details of the case and plea with Peak on several occasions and that, in his opinion, Peak knowingly and intelligently entered his plea.

{¶20} Moreover, Peak's claims rely on statements made outside of the record. Such evidence is not properly considered on a direct appeal. *State v. Geraci*, 8th Dist. Cuyahoga Nos. 101946 and 101947, 2015-Ohio-2699, ¶ 7, fn. 2, citing *State v. Johnson*, 8th Dist. Cuyahoga No. 99377, 2015-Ohio-96, ¶ 53.

{¶21} Accordingly, we do not find Peak received ineffective representation throughout the plea proceedings and knowingly, intelligently, and voluntarily entered his plea. Peak's second assignment of error is overruled.

C. Presentence Motion to Withdraw Plea

{¶22} In his third assignment of error, Peak argues the trial court erred by denying his presentence motion to withdraw his guilty plea.

{¶23} Under Crim.R. 32.1, "[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."

{¶24} In general, "a presentence motion to withdraw a guilty plea should be freely and liberally granted." *Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715. It is well established, however, that "[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. A trial court must conduct a hearing to determine whether there is a reasonable legitimate basis for the withdrawal of the plea." *Id.* at paragraph one of the syllabus.

{¶25} The decision to grant or deny a presentence motion to withdraw is within the trial court's discretion. *Id.* at paragraph two of the syllabus. Absent an abuse of discretion, the trial court's decision must be affirmed. *Id.* at 527. An abuse of discretion requires a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). A trial court does not abuse its discretion in denying a motion to withdraw the plea where a defendant was (1) represented by competent counsel, (2) given a full Crim.R. 11 hearing before he entered a plea, (3) given a complete hearing on the motion to withdraw, and (4) the record reflects that the court gave full and fair consideration to the plea withdrawal request. *State v. Peterseim*, 68 Ohio App.2d 211, 428 N.E.2d 863 (8th Dist.1980), paragraph three of the syllabus.

{¶26} This court has also set forth additional factors to consider, including whether (1) the motion was made in a reasonable time, (2) the motion stated specific reasons for withdrawal, (3) the record shows that the defendant understood the nature of the charges and possible penalties, and (4) the defendant had evidence of a plausible defense. *State v. Pannell*, 8th Dist. Cuyahoga No. 89352, 2008-Ohio-956, ¶ 13, citing *State v. Benson*, 8th Dist. Cuyahoga No. 83178, 2004-Ohio-1677.

{¶27} In the instant case, we find the trial court fully complied with the *Peterseim* criteria. As discussed in the second assignment of error, Peak was represented by competent counsel. In addition, Peak concedes that he was given a full hearing in compliance with Crim.R. 11 before entering his plea. Finally, our review of the record demonstrates that the trial court provided Peak with a complete and impartial hearing and gave full and fair consideration to the arguments raised in his motion to withdraw. At the hearing, the court questioned Peak at length about the basis of his motion. Ultimately, Peak admitted that he filed the motion to withdraw

because “[he] was hoping to get a little less time.” In light of this statement, the court concluded that Peak (1) knowingly, voluntarily, and intelligently entered his plea, with a full understanding of what he was doing, and (2) failed to state a sufficient reason for the withdrawal of the plea. We agree.

{¶28} Based on these facts, we find that all four *Peterseim* factors were satisfied. Peak’s change of heart was not sufficient to warrant the withdrawal of his guilty plea where, as here, the record supports the trial court’s finding that Peak entered his plea voluntarily, knowingly, and intelligently. *State v. Creed*, 8th Dist. Cuyahoga No. 97317, 2012-Ohio-2627, ¶ 19. Accordingly, the trial court did not abuse its discretion in denying Peak’s motion to withdraw his guilty plea.

{¶29} Peak’s third assignment of error is overruled.

III. Conclusion

{¶30} The trial court made the necessary findings for imposing consecutive sentences under R.C. 2929.14(C)(4). Moreover, Peak received effective assistance of counsel during the plea proceedings and failed to establish a sufficient basis to warrant the withdrawal of his guilty plea.

{¶31} 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.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR