[Cite as *State v. Hudson*, 2015-Ohio-5424.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102767

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MONTANA L. HUDSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-588838-A

BEFORE: Kilbane, P.J., Blackmon, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: December 24, 2015

ATTORNEY FOR APPELLANT

Christopher R. Fortunato
13363 Madison Avenue
Lakewood, Ohio 44107

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
Andrew J. Santoli
Assistant County Prosecutor
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Montana Hudson ("Hudson"), appeals from his conviction for rape and other offenses. Having reviewed the record and the controlling case law, we affirm.

{¶2} On September 25, 2014, Hudson was charged in a nine-count indictment in connection with a rape and robbery that occurred in August 2014 in Bedford, Ohio. Hudson was charged with three counts of rape (Counts 1-3), in violation of R.C. 2907.02(A)(2); one count of aggravated robbery (Count 4), in violation of R.C. 2911.01(A)(1); one count of kidnapping, in violation of R.C. 2905.01(A)(4) (Count 5); tampering with evidence, in violation of R.C. 2921.12(A)(1) (Count 6); having a weapon while under disability, in violation of R.C. 2923.13(A)(2) (Count 7); one count of disrupting public service, in violation of R.C. 2909.04(A)(3) (Count 8); theft, in violation of R.C. 2913.02(A)(l) (Count 9). All of the counts contained forfeiture of a weapon and forfeiture of property specifications. Counts 1-7 each included one- and three-year firearm specifications, and Counts 1-5 each contained a notice of prior conviction specification and a repeat violent offender specification.

{¶3} On October 9, 2014, the trial court issued the following order:

> At the request of Defendant. Defendant is referred to Court Psychiatric Clinic. Director, Psychiatric Clinic: In accordance with provisions of the Ohio Revised Code 2945.371 competence to stand trial; etc. 2945.371 sanity at the time of the act 2947.06(B) reports for the purpose of determining the disposition of a case: eligibility for transfer to Mental Health Court.

{¶4} Thereafter, at a hearing on November 13, 2014, Hudson's counsel and the prosecuting attorney stipulated that the court psychiatric clinic found Hudson to be both sane at the time of the alleged offenses and competent to stand trial.

{¶5} On January 27, 2015, Hudson entered into a plea agreement with the state. He pled guilty to one count of rape (Count 3), aggravated robbery (Count 4), and kidnapping (Count 5), all with one- and three-year firearm specifications, forfeiture specifications, notice of prior conviction, and repeat violent offender specification. Hudson also pled guilty to having a weapon while under disability (Count 7), with one- and three-year firearm specifications and forfeiture specifications. The remaining counts were dismissed.

{¶6} The trial court held a sentencing hearing on February 24, 2015. The trial court determined that the rape and kidnapping offenses were allied offenses of similar import. The state elected to proceed to sentencing on the offense of rape. The trial court acknowledged that Hudson has an I.Q. of 79. The court also noted that in Hudson's previous criminal record, he had served four years in prison from 2010 until January 2014, and he was on postrelease control at the time of the instant offenses. The court concluded that Hudson's criminal history shows that consecutive terms are necessary to protect the public, a single term of imprisonment would not be adequate to protect the community or punish him, and a single term would not adequately reflect the seriousness of his conduct. The court sentenced Hudson to a total of 25 years in prison, which included ten years for rape with a three-year firearm specification, nine years for

aggravated robbery with a three-year firearm specification, and a concurrent term of 36 months for having a weapon while under disability. The court also ordered Hudson to serve five years of postrelease control and register as a Tier III sex offender.

{¶7} Hudson now appeals, assigning the following three errors for our review:

Assignment of Error One

> The appellant's trial counsel did not provide him effective assistance of counsel when he failed to seek transferring this case to the trial court's mental health docket as well as not prosecuting the appellant's motion regarding competency.

Assignment of Error Two

> The trial court erred when it ran two of the appellant's sentences consecutively in violation of R.C. 2929.14.

Assignment of Error Three

> The trial court erred when it failed to merge the firearm specifications.

Ineffective Assistance of Counsel Claim

{¶8} Within this assignment of error, Hudson argues that his trial counsel was ineffective for failing to pursue the claims that Hudson's low I.Q. rendered him insane, and/or incompetent to stand trial. He additionally argues that counsel erred in failing to seek a referral to the mental health docket, which would have resulted in a less severe punishment than imposed herein.

{¶9} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: (1) the performance of defense counsel was

seriously flawed and deficient, and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Brooks*, 25 Ohio St.3d 144, 495 N.E.2d 407 (1986). "Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104, 651 N.E.2d 965. Further, "trial counsel is entitled to a strong presumption that all decisions fell within the wide range of reasonable, professional assistance." *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998-Ohio-343, 693 N.E.2d 267, citing *State v. Thompson*, 33 Ohio St.3d 1, 10, 514 N.E.2d 407 (1987). Moreover, counsel is not required to file futile motions. *See State v. Martin*, 20 Ohio App.3d 172, 174, 485 N.E.2d 717 (1st Dist. 1983); *State v. Parra*, 8th Dist. Cuyahoga No. 95619, 2011-Ohio-3977, ¶ 78.

{¶10} With regard to the issue of competency, we note that a defendant is presumed competent to stand trial, and the defendant carries the burden to establish incompetency by preponderance of the evidence. R.C. 2945.37(G); *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 31, citing *State v. Hunter*, 8th Dist. Cuyahoga No. 89456, 2008-Ohio-794, ¶ 15-16. An attorney will not be deemed ineffective for failing to pursue a claim of incompetency where the record contains professional evaluations that indicate the defendant is competent to stand trial. *See State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 34.

{¶11} In this matter, the record demonstrates that in Hudson's competency evaluation, he exhibited coherent, relevant speech and thought processes. He also stated that he understood the nature of the charges against him and the evidence that could be offered against him. He also had an appreciation for the adversarial process against him, understood the roles of the various courtroom personnel, and understood the charges against him. The court psychologist opined that Hudson was competent to assist in his defense. Though not determinative here, it is noteworthy that Hudson had also been deemed competent in the 2010 proceedings against him. Therefore, we decline to find that trial counsel was ineffective in failing to continue to assert that Hudson was not competent to stand trial.

{¶12} With regard to the issue of sanity, we note that in Ohio, the defendant in a criminal case is presumed at law to be sane, and the burden of proof rests upon the defendant to prove, by a preponderance of the evidence, that he was insane within the meaning of the law at the time the act was committed. *State v. Johnson*, 31 Ohio St.2d 106, 117, 285 N.E.2d 751 (1972); R.C. 2945.04. Where the facts and circumstances of the record indicate that a plea of not guilty by reason of insanity would not have had a reasonable probability of success, it is not ineffective assistance of counsel to fail to enter such plea. *State v. Allen*, 8th Dist. Cuyahoga No. 91750, 2009-Ohio-2036. That is, where "the facts indicate that counsel was pursuing a reasonable strategy in failing to so plead, or where the likelihood of success for the plea is low, counsel's actions cannot be

called unreasonable." *Id*., citing *State v. Mangus*, 7th Dist. Columbiana No. 07 CO 36, 2008-Ohio-6210; *State v. Garcia*, 6th Dist. Lucas No. L-07-1104, 2008-Ohio-2095.

{¶13} In this matter, the sanity evaluation conducted herein demonstrated that Hudson has an I.Q. of 79. He is within the eighth percentile for intelligence or "mild mental retardation range" and "borderline range of intelligence." The report also indicates that Hudson could adequately define the nature of the offenses of rape and kidnapping, as well as the nature of evidence that might be offered against him. He also understood the "wrongfulness of his actions in relation to the alleged offenses." Although he claimed that he could not remember the events because he was drugged, the court psychologist determined that Hudson was sane at the time of the alleged act. Defense counsel was therefore not ineffective for failing to pursue the defense of insanity in this matter.

{¶14} As to the issue of counsel's failure to obtain a transfer to the court's mental health docket, Loc.R. 30.1 of the Court of Common Pleas of Cuyahoga County, General Division, provides the following:

> Rule 30.1. Assignment of criminal cases to mental health dockets
>
> (A) Definitions. Mental health dockets shall include cases where the defendant has a confirmed serious mental illness or is developmentally disabled as defined below:
>
> * * *
>
> (2) For purposes of this section, a defendant is deemed to be developmentally disabled if there is a clinical diagnosis that the defendant meets current Developmentally Disabled Offender eligibility of an IQ of 75 or less and/or an adaptive skills deficit based on either a diagnostic report or

> on the defendant previously having been found eligible or assigned to a MHCD.
>
> * * *
>
> (C) Assignment of cases to mental health dockets.
>
> (2) In cases where it is determined after arraignment that a defendant has a confirmed serious mental illness or is developmentally disabled as defined in A(1) or A(2) above, the Administrative Judge may reassign the case to a mental health docket through random assignment.
>
> * * *
>
> (D) Cases will not be assigned to mental health dockets when:
>
> (1) A single defendant commits a new offense while on probation or community control. The case shall then be assigned to the docket of the judge with such prior case.

{¶15} Through the use of the word "may," this rule authorizes, but does not mandate, a transfer of a defendant to the common pleas court's mental health docket under certain circumstances. *State v. Ellis*, 8th Dist. Cuyahoga No. 98538, 2013-Ohio-1184, ¶ 30. On appeal, the reviewing court considers whether the trial court abused its discretion by not transferring the case to the mental health docket. *State v. Jones*, 8th Dist. Cuyahoga No. 99703, 2014-Ohio-1634, ¶ 6.

{¶16} In this matter, the court psychologist specifically opined that Hudson was not eligible for transfer to the mental health court. The psychologist also concluded, based upon her examination, that Hudson was competent to stand trial and sane at the time of the alleged acts. Therefore, the record provides no basis for the transfer of this

case to the mental health docket. As a result, counsel was not ineffective for failing to urge the court to transfer the matter.

{¶17} The first assignment of error is without merit.

Consecutive Sentences

{¶18} Hudson next asserts that the trial court erred in ordering that his sentences for rape and aggravated robbery be served consecutively.

{¶19} Pursuant to R.C. 2953.08(G)(2), in reviewing felony sentences, the reviewing court must determine whether it "clearly and convincingly" finds that (1) the record does not support the sentencing court's findings under R.C. 2929.14(C), or that (2) the sentence is otherwise contrary to law. The reviewing court may then "increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for re-sentencing." R.C. 2953.08(G)(2). *See State v. Hammond*, 8th Dist. Cuyahoga No. 100656, 2014-Ohio-4673; *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 11 (8th Dist.).

{¶20} Pursuant to R.C. 2929.14, a trial court may impose consecutive sentences if the court finds that (1) a consecutive sentence is necessary to protect the public from future crime or to punish the offender and (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. In addition to these two factors, the court must find 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.

Id.

{¶21} In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus. The trial court is not required to use "talismanic words," but, it must be clear from the record that it actually made the findings required by statute. *Id.* at ¶ 37; *Venes* at ¶ 14. The Supreme Court of Ohio 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." *Bonnell* at ¶ 26, 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

{¶22} In this matter, the record establishes that the trial court made all the required findings. The court found that Hudson had been imprisoned from 2010 until January 2014, and that he was on postrelease control at the time of the instant offenses. The court determined that he has a "terrible history" of criminal conduct, violent criminal conduct with firearms, and victimizing people. The court found that consecutive terms are necessary to protect the public from future crime by the offender, and that a single term of imprisonment would not be adequate to protect the community or punish Hudson. The court also found that consecutive terms were not disproportionate to the seriousness of Hudson's conduct and the danger he poses to the public. The court found that the harm was so great that a single term of imprisonment would not reflect the seriousness of defendant's conduct. In the record, and again in the sentencing journal entry, the trial court made all of the findings required to support the imposition of consecutive sentences.

{¶23} Therefore, the second assignment of error is not well taken.

Firearm Specifications

{¶24} In his third assignment of error, Hudson argues that the trial court erred in failing to merge the sentences for two firearm specifications that accompanied the rape and aggravated robbery convictions because they were part of a single transaction.

{¶25} As an initial matter, we note that the defense did not raise this issue at the time of sentencing. In addition, pursuant to R.C. 2929.14(B)(1)(b) states in part: "a

court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction."

{¶26} R.C. 2929.14(B)(1)(g), however, provides:

> If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

{¶27} By operation of this provision, the trial court was within its discretion to impose separate firearm specifications, without considering whether the conduct was part of the same act or transaction because Hudson pled guilty to rape and aggravated robbery. *State v. Cassano,* 8th Dist. Cuyahoga No. 97228, 2012-Ohio-4047, ¶ 34.

{¶28} Therefore, the third assignment of error is without merit.

{¶29} Judgment is 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 issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated.

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

PATRICIA A. BLACKMON, J., and
ANITA LASTER MAYS, J., CONCUR