[Cite as *State v. Johnson*, 2016-Ohio-2840.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103408

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GERMAINE JOHNSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-591449-A

BEFORE: Kilbane, J., Jones, A.J., and Blackmon, J.

RELEASED AND JOURNALIZED: May 5, 2016

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Germaine Johnson ("Johnson"), appeals from his guilty plea and sentence for gross sexual imposition and robbery. For the reasons set forth below, we affirm.

{¶2} In December 2014, Johnson was charged in a six-count indictment. Count 1 charged him with rape. Counts 2 and 5 both charged him with kidnapping and carried a sexual motivation specification. Count 3 charged him with aggravated robbery. Count 4 charged him with robbery. Count 6 charged him with petty theft. The charges arise from allegations that the victim, H.B. was walking back to her hotel on Euclid Avenue in Cleveland when Johnson ran up behind her and knocked her to the ground. He then digitally penetrated H.B., took her cell phone and purse, and ran away.

{¶3} The matter proceeded to a jury trial on June 29, 2015. On July 1, 2015, the third day of trial, Johnson advised the trial court that he wanted to withdraw his not guilty plea and enter into a plea agreement with the state. The trial court then proceeded with a guilty plea hearing. Pursuant to the plea agreement, Johnson pled guilty to gross sexual imposition ("GSI") as amended in Count 1 and robbery as amended in Count 3. The remaining counts were nolled. The trial court referred that matter for a presentence investigation report ("PSI") prior to sentencing.

{¶4} According to Johnson's version of the events in the PSI, he was driving in his car, on his way to drop off food to a friend, when he observed an extremely

intoxicated woman, later identified as H.B., walking in the area of East 77th Street. He rolled his window down and asked H.B. if she needed help because she was not wearing a coat and it was snowing. He pulled over and she got into his car. She told him she just left a concert. He continued driving to his friend's home and dropped off the food. H.B. was asleep when he got back into the car. He tapped her on the shoulder and asked what she wanted to do. She stated she wanted heroin. He told her that he did not have any heroin, but he could take her to find some. She said no and got out of the car. Johnson then proceeded to a bar when he heard a beeping noise from H.B.'s cell phone. He discovered that H.B. had left her cell phone and purse in his car. He threw her purse on the ground outside and took the phone inside the bar to ask how to turn off the beeping sound.

{¶5} The matter proceeded to sentencing on July 27, 2015. The trial court sentenced Johnson to 17 months in prison on Count 1 and 8 years in prison on Count 3. The court ordered that both counts be served concurrently for a total of 8 years of imprisonment. The trial court classified Johnson as a Tier I sex offender and ordered him to pay $1,537.99 as the stipulated amount of restitution.

{¶6} Johnson now appeals, raising the following four assignments of error for review.

Assignment of Error One

> The sentence imposed by the trial court on Counts I and III, as amended, violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, prohibiting multiple punishments for the same conduct.

Assignment of Error Two

> The sentence imposed by the trial court on Counts I and III, as amended, is clearly and convincingly contrary to law, constitutes an abuse of discretion, violates [Johnson's] rights to due process under the U.S. Constitution, Amendments V and IV, and the Ohio Constitution, and violates the prohibition against cruel and unusual punishment in the Eighth Amendment of the U.S. Constitution and Article 9, Section I of the Ohio Constitution.

Assignment of Error Three

> Mr. Johnson's guilty plea was not knowing, intelligent and voluntary and the acceptance of the plea was contrary to law and violated [Johnson's] rights to due process under the U.S. Constitution, Amendments V and IV, and the Ohio Constitution.

Assignment of Error Four

> Mr. Johnson received ineffective assistance of counsel during the trial court proceedings in violation of the Sixth Amendment and Fourteenth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, and furthermore, nullifying the informed, knowing and voluntary nature of his guilty plea.

Merger of Allied Offenses

{¶7} In the first assignment of error, Johnson argues the trial court erred when it did not merge his GSI and robbery convictions for purposes of sentencing. He contends these offenses should be allied because the "physical harm component of the robbery offense was the same conduct that constituted the [GSI]." Johnson, however, fails to reference a single case where a court has found GSI and robbery to be allied offenses that merged for purposes of sentences. The state, on the other hand, argues that the sexual conduct required for the GSI conviction was separate from the conduct required for the robbery. We find the state's argument more persuasive.

{¶8} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, the Ohio Supreme Court clarified the test courts must employ in determining whether offenses are allied offenses that merge into a single conviction, holding that:

> 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.

Id. at paragraphs one-three of the syllabus.

{¶9} We begin by reviewing whether the GSI and robbery offenses are dissimilar in import, or whether the harm that resulted from each offense is separate and identifiable. Here, Johnson was convicted of GSI, in violation of R.C. 2907.05(A)(1), which provides that "[n]o person shall have sexual contact with another * * * when * * * [t]he offender purposely compels the other person * * * to submit by force[.]" He was also convicted of robbery in violation of R.C. 2911.02(A)(2), which provides that "[n]o person, in * * * committing a theft offense or in fleeing immediately after the * * * offense, shall * * * [i]nflict * * * physical harm on another[.]"

{¶10} In reviewing Johnson's conduct throughout the incident, the record demonstrates that the offenses are of dissimilar import and H.B. suffered separate and

identifiable harms. The GSI occurred when Johnson pulled down H.B.'s pants and digitally penetrated her by force while she was on the ground. The robbery occurred when Johnson knocked H.B. to the ground and took her cell phone and purse.

{¶11} Furthermore, the record reflects that the offenses were committed with separate animus. GSI requires "sexual contact," which means "any touching of an erogenous zone of another * * * for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B). This intent of sexual gratification is separate from the intent of "depriv[ing] the owner of property or services" required for robbery. R.C. 2913.02(A). Therefore, we find that Johnson's GSI conviction and his robbery conviction are not allied offenses of similar import.

{¶12} Accordingly, the first assignment of error is overruled.

Sentence

{¶13} In the second assignment of error, Johnson argues the trial court erred when it imposed the maximum of eight years of imprisonment because the theft constituted the taking of an iPhone and $400 in cash. Johnson contends that the court sentenced him to eight years in prison as punishment for the GSI.

{¶14} Recently, in *State v. Marcum*, Slip Opinion No. 2016-Ohio-1002, the Ohio Supreme Court revisited the law applicable to an appellate court's review of felony sentences. In applying the plain language of R.C. 2953.08(G)(2), the supreme court held that

> an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not

> support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law. In other words, an appellate court need not apply the test set out by the plurality in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

Id. at ¶ 1. The *Marcum* court further held that not all felony sentences would require the findings listed in R.C. 2953.08(G)(2)(a). *Id.* at ¶ 23. In those cases, appellate courts are to

> review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court. That is, an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence.

Id. Therefore, an appellate court will only increase, reduce, modify, or vacate and remand a challenged sentence if it clearly and convincingly finds either that (1) the record does not support the trial court's findings under the specified statutory provisions, or (2) the sentence is otherwise contrary to law.

{¶15} In the instant case, Johnson essentially concedes that his sentence is not contrary to law when he acknowledges that his eight-year-robbery sentence is within the statutory range, but is the maximum for a second-degree felony. Thus, we may reverse his sentence only if we clearly and convincingly find that the record does not support the trial court's findings.

{¶16} At the sentencing hearing, the trial court stated:

> [A]t this point after 13 juvenile offenses and 21 adult offenses, the real goal of sentencing is going to be to incapacitate you from committing further crimes and, of course, to deter you and others from committing further crimes. It doesn't seem as if probation would be of any value in this case.

> * * *
> [I]n imposing the following sentence, I have taken into account everything that's been said here today on the oral record. I've considered the evidence that I heard through the beginning of the trial. I've considered the written presentence report. I've considered the letter that you sent to me. And I have taken into account all the sentencing laws of Chapter 2929 of the Ohio Revised Code.
>
> Having considered all that information, you are ordered to serve a [concurrent] prison sentence at the Lorain Correctional Institution of 17 months on Count 1 and of eight years on Count 3.

{¶17} From the foregoing, it is clear the court felt that the real goal of sentencing was to prevent Johnson from committing further crimes. Johnson was 33 years old at the time of the offense. By that time, he had committed 21 offenses in a 15-year span as an adult and 13 offenses as a juvenile. Based on these facts, we conclude the trial court sufficiently set forth its findings for the sentence it imposed in the record. Therefore, we will not vacate Johnson's sentence.

{¶18} Accordingly, the second assignment of error is overruled.

Guilty Plea

{¶19} In the third assignment of error, Johnson challenges his guilty plea. He claims his plea was not knowingly, intelligently, and voluntarily made because the trial court did not inform him that he was waiving his constitutional right to have the amended charges presented to the grand jury.

{¶20} We note that Johnson did not object to the amendment in the indictment, so he has waived all but plain error. *State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010-Ohio-3286, 934 N.E.2d 920, ¶ 6, citing Crim.R. 12(C). "To reverse a decision

based on plain error, a reviewing court must determine that a plain (or obvious) error occurred that affected the outcome of the trial." *Id.*, citing *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, 759 N.E.2d 1240; Crim.R. 52(B). In *Rohrbaugh*, the Ohio Supreme Court found that "a defendant may plead guilty to an indictment that was amended to change the name or identity of the charged crime when the defendant is represented by counsel, has bargained for the amendment, and is not prejudiced by the change." *Id.* at ¶ 1.

{¶21} Moreover, this court has found that a knowing and intelligent guilty plea to an amended indictment waives any alleged error within that indictment on appeal. *State v. Simmons*, 8th Dist. Cuyahoga No. 69238, 1997 Ohio App. LEXIS 696 (Feb. 27, 1997); *State v. Smith*, 8th Dist. Cuyahoga No. 75512, 2000 Ohio App. LEXIS 924 (Mar. 9, 2000). In *Simmons*, we concluded that an indictment may be amended without returning the matter to the grand jury where the amendment was made pursuant to a plea bargain in open court with the defendant's voluntary agreement after full disclosure. *Id.* at *6-7, citing *State v. Childress*, 91 Ohio App.3d 258, 261, 632 N.E.2d 562 (3d Dist.1993).

{¶22} In *State v. Hill*, 8th Dist. Cuyahoga Nos. 61685 and 61686, 1993 Ohio App. LEXIS 641 (Feb. 4, 1993), this court similarly stated that "[s]ince a counseled guilty plea thus waives a defendant's right to challenge his conviction on constitutional grounds, it must also operate as a waiver of any claimed errors on grounds relating to the wording of the indictments." *Id.* at *14, citing *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991).

{¶23} Here, Johnson did not decide to change his plea until H.B. testified at trial. On the third day of trial, he pled guilty to amended charges of GSI and robbery. By pleading guilty to these amended counts, we find that Johnson waived any right in questioning the validity of his indictment on appeal. The record reflects that the prosecutor set forth the terms of the plea agreement (rape amended to GSI in Count 1 and aggravated robbery amended to robbery in Count 3) and Johnson's counsel agreed to those terms. Johnson stated that he understood the consequences of entering a guilty plea to the amended indictment, and that as part of the agreement he was pleading guilty to GSI and robbery instead of rape and aggravated robbery, which are both first-degree felonies. Johnson would have been subjected to a total of 22 years in prison if he was convicted of these first-degree felonies. R.C. 2929.14(A)(1).

{¶24} Furthermore, the trial court asked Johnson if he wanted to continue with his trial or enter into the plea bargain. Johnson replied, "[p]lea bargain." The trial court explained the amended charges and the possible sentences for each count. The_ trial_ court also set forth Johnson's constitutional rights and obtained responses from which Johnson demonstrated that he understood and that he waived his rights pursuant to Crim.R. 11. Furthermore, when asked by the court, Johnson confirmed that his plea was voluntarily made. The trial court then properly accepted his plea as voluntarily, knowingly, and intelligently made.

{¶25} Based on the foregoing, we find that Johnson knowingly and voluntarily assented to the amended indictment pursuant to his plea agreement.

{¶26} Johnson also argues the trial court should have inquired into the voluntariness of his plea under *Alford v. North Carolina*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), because he protested his innocence during his PSI interview and at sentencing.

{¶27} Under *Alford*, a trial court may accept a guilty plea despite protestations of innocence when a factual basis for the guilty plea is evidenced by the record. *Id.* at 37-38. An *Alford* plea may not be accepted when the record fails to demonstrate facts upon which the trial court can resolve the apparent conflict between a defendant's claim of innocence and the defendant's desire to plead guilty to the charges. *State v. Tyner*, 8th Dist. Cuyahoga No. 97403, 2012-Ohio-2770, ¶ 6, citing *State v. Horton-Alomar*, 10th Dist. Franklin No. 04AP-744, 2005-Ohio-1537. For a valid *Alford* plea to take place, the defendant must enter a guilty plea and at the same time protest innocence. *Id*. "Implicit in any *Alford* plea is the requirement a defendant actually state his innocence on the record when entering a guilty plea." *State v. Murphy*, 8th Dist. Cuyahoga No. 68129, 1995 Ohio App. LEXIS 3924, *7 (Aug. 31, 1995).

{¶28} In the instant case, at no point during the plea colloquy did Johnson claim he was innocent of the charges. Rather, he stated that he was pleading guilty on his own choice. Furthermore, Johnson never attempted to withdraw his plea. The first time he protested his innocence was at his PSI interview. As a result, the trial court had no duty to inquire into his reasons for pleading guilty. *State v. Reeves*, 8th Dist. Cuyahoga No.

100560, 2014-Ohio-3497, ¶ 13, citing *State v. Auble*, 8th Dist. Cuyahoga No. 76709, 2000 Ohio App. LEXIS 3389 (July 27, 2000).

{¶29} Accordingly, the third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶30} In the fourth assignment of error, Johnson argues counsel was ineffective for failing to obtain DNA testing on his vehicle and for failing to adequately object to the errors raised in the first, second, and third assignments of error.

{¶31} To establish ineffective assistance of counsel, Johnson must demonstrate (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.

{¶32} 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, citing *Bradley*.

{¶33} Johnson first argues trial counsel was ineffective for failing to pursue DNA testing of his vehicle to corroborate his claim that H.B. was a passenger in his car.

However, "a claim for ineffective assistance of counsel is waived by a guilty plea, unless the ineffective assistance caused the guilty plea to be involuntary." *State v. Hicks*, 8th Dist. Cuyahoga No. 90804, 2008-Ohio-6284, ¶ 24. In the instant case, Johnson does not argue that his guilty plea was involuntary because defense counsel failed to pursue DNA testing. Therefore, Johnson has waived this claim.

{¶34} Johnson also argues defense counsel was ineffective for failing to object to his claimed errors. We note that the

> "'failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel. To prevail on such a claim, a defendant must first show that there was a substantial violation of any of defense counsel's essential duties to his client and, second, that he was materially prejudiced by counsel's ineffectiveness."'

State v. Johnson, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 139, quoting *State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831 (1988).

{¶35} Here, Johnson essentially argues that if none of his assignments of error have merit, then defense counsel was ineffective for failing to preserve the error. This alone does not rise to ineffective assistance of counsel. Johnson's assignments of error were found to be unpersuasive and he has not demonstrated that defense counsel was deficient or he suffered any prejudice. As a result, we find that defense counsel was not ineffective.

{¶36} Therefore, the fourth assignment of error is overruled.

{¶37} 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 conviction 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, JUDGE

LARRY A. JONES, SR., A.J., and
PATRICIA A. BLACKMON, J., CONCUR