

[Cite as *State v. Wright*, 2016-Ohio-5248.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103823

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHNNY W. WRIGHT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-569856-A

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

RELEASED AND JOURNALIZED: August 4, 2016

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EILEEN A. GALLAGHER, P.J.:

{¶1} Defendant-appellant Johnny Wright appeals his convictions in the Cuyahoga County Court of Common Pleas. We affirm the decision of the trial court.

Facts and Procedural Background

{¶2} On December 21, 2012 Wright was indicted on three counts of aggravated murder, two counts of murder, aggravated burglary, two counts of kidnapping, attempted murder, escape and three counts of felonious assault. Wright entered guilty pleas to amended charges of involuntary manslaughter, aggravated burglary, two counts of kidnapping, attempted murder and two counts of felonious assault. The remaining counts were nolle. As part of the plea bargain, Wright stipulated that the offenses to which he entered guilty pleas would not merge as allied offenses of similar import.

{¶3} The trial court imposed prison terms of nine years for involuntary manslaughter with a consecutive term of three years for a firearm specification, three years for each count of aggravated burglary, kidnapping and attempted murder and two years for each count of felonious assault. The trial court ordered the prison terms to be served consecutively for a cumulative prison sentence of 28 years.

Law and Analysis

I. Allied Offenses

{¶4} In his first assignment of error, Wright argues that his sentence was contrary to law because the trial court failed to merge his various offenses as allied offenses of similar import despite his stipulation to non-merger.

{¶5} We review felony sentences under the standard set forth in R.C. 2953.08(G)(2). *State v. Marcum*, Slip Opinion No. 2016-Ohio-1002, ¶ 16. Under R.C. 2953.08(G)(2), an appellate court may increase, reduce or modify a challenged felony sentence or may vacate the sentence and remand the matter to the sentencing court for resentencing if it “clearly and convincingly finds” that the sentence is “contrary to law.” R.C. 2953.08(G)(2).

{¶6} The fact that the offenses would not merge was one of the conditions of Wright’s plea. When the transcript demonstrates that the state and defense counsel agreed that the offenses were not allied, the issue of allied offense is waived on appeal. *State v. McClain*, 8th Dist. Cuyahoga No. 103089, 2016-Ohio-705, ¶ 32; *State v. Adams*, 8th Dist. Cuyahoga No. 100500, 2014-Ohio-3496, ¶ 10; *State v. Carman*, 8th Dist. Cuyahoga No. 99463, 2013-Ohio-4910; *State v. Ward*, 8th Dist. Cuyahoga No. 97219, 2012-Ohio-1199.

Wright waived the argument presented in this assignment of error by stipulating to non-merger pursuant to his plea agreement.

{¶7} Wright’s first assignment of error is overruled.

II. Ineffective Assistance of Counsel

{¶8} In his second assignment of error, Wright argues that his trial counsel failed to provide effective assistance of counsel by participating in and recommending that Wright accept the plea agreement that required him to stipulate that the offenses to which he would plead guilty would not merge as allied offenses of similar import.

{¶9} To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) deficient performance by counsel, i.e., that counsel’s performance fell below an objective standard of reasonable representation, and (2) that counsel’s errors prejudiced the defendant, i.e., a reasonable probability that but for counsel’s errors, the result of the proceeding 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. “Reasonable probability” is “probability sufficient to undermine confidence in the outcome.” *Strickland* at 694.

{¶10} 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, 1992-Ohio-130, 595 N.E.2d 351, citing *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). Where a defendant has entered a guilty plea, the defendant can prevail on 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 offenses 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). The prejudice inquiry in the context of a guilty plea requires a “nuanced analysis of all of the factors

surrounding the plea decision,” including the benefits associated with a plea, the possible punishments involved, the weight of the evidence against the defendant and any other special circumstances that might support or rebut a defendant’s claim that he would have taken his chances at trial. *State v. Ayesta*, 8th Dist. Cuyahoga No. 101383, 2015-Ohio-600, ¶ 16.

{¶11} This court has previously rejected ineffective assistance of counsel arguments based on counsel’s advice in entering into a stipulation of non-merger of allied offenses as part of a plea agreement because defendants are unable to demonstrate prejudice where they secure reduced charges and potential sentences. *See, e.g., State v. Yonkings*, 8th Dist. Cuyahoga No. 98632, 2013-Ohio-1890, ¶ 8-11 (holding that a defendant had failed to demonstrate prejudice in agreeing to a non-merger stipulation where he faced the potential of life in prison from an aggravated murder charge and his counsel secured a plea agreement with an agreed sentence of 30 years in prison); *State v. Booker*, 8th Dist. Cuyahoga No. 101886, 2015-Ohio-2515, ¶ 12-16 (finding no prejudice where the defendant’s plea and stipulation resulted in a reduced sentence). The facts of this case are nearly identical to those presented in *Yonkings*: Wright was charged with aggravated murder and his counsel was able to obtain, conditioned upon the non-merger stipulation, a reduction in charges and an agreement that Wright serve between 20 and 30 years in prison. For the same reasons set forth in *Yonkings*, Wright is unable to demonstrate prejudice.

{¶12} Wright’s second assignment of error is overruled.

{¶13} The judgment of the trial court is affirmed.

It is ordered that appellee recover of 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.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
MELODY J. STEWART, J., CONCUR