[Cite as *State v. Wright*, 2016-Ohio-7493.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104134

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WESLEY WRIGHT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-598674-A

BEFORE: E.A. Gallagher, P.J., Stewart, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: October 27, 2016

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EILEEN A. GALLAGHER, P.J.:

{¶1} Defendant-appellant Wesley Wright appeals his conviction and sentence for sexual battery in the Cuyahoga County Court of Common Pleas. For the following reasons, we affirm.

Facts and Procedural Background

{¶2} Wright was indicted on August 26, 2015, on four counts of rape and one count of kidnapping. The case proceeded to a hearing on a motion to dismiss due to preindictment delay. Prior to issuing a ruling on that motion, the trial court was informed by the parties that they had reached a plea agreement. Pursuant to the plea bargain, Wright entered a plea of guilty to an amended count of sexual battery and all remaining counts were nolled. The trial court sentenced Wright to a prison term of three years, found him to be a sexually oriented offender[1] and imposed five years of mandatory postrelease control.

I. Ineffective Assistance of Counsel

{¶3} In his first assignment of error, Wright argues that his trial counsel failed to provide effective assistance of counsel by failing to "persist" that he proceed to trial rather than accept a plea bargain.

{¶4} 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

[1]The offense occurred on January 25, 2007, and Wright was sentenced under Megan's law, which was in effect at the time.

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.

{¶5} 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.

{¶6} Wright does not allege any violation of Crim.R. 11 in this instance. Instead, he argues that his trial counsel should have advised and insisted that he proceed to trial because, he perceives, the record contains facts that indicate he would have obtained an acquittal at trial. We disagree.

{¶7} There is no evidence in the record to satisfy either prong of the *Strickland* test or support Wright's contention that his plea was not made knowingly and intelligently. The limited facts on the record before us indicate that Wright encountered the victim at a bar where she had been voluntarily consuming alcohol on her own to the point where she was having trouble standing.[2] The presentence investigation report states that the victim fell twice exiting the bar. Wright and the victim had a prior sexual relationship but had not been together for almost a year. Wright accompanied the victim to her home along with her sister and an unidentified driver. At the victim's home, the victim recalled falling in a bathroom but nothing after that point. Wright admitted that he engaged in sexual relations with the victim but stated, "I did not know I crossed a line because she was drinking." The victim indicated that she did not consent to the sexual interaction and awoke the next morning suffering from soreness in her vaginal area. She believed

[2] The presentence investigation report states that the victim reported that Wright provided her with a drink she believed to have been "adulterated" and this led to her unsteadiness.

that something had happened during the night and she went to a hospital to have a rape kit performed. The rape kit detected a significant amount of Wright's DNA on vaginal and anal swabs.

{¶8} Wright acknowledged at the time of his plea that he had an opportunity to discuss with his attorney the evidence the state would offer against him at trial as well as evidence that might be favorable to him and defenses he might assert. Although Wright argues that "noone [sic] pleads guilty knowing the facts that came out in the transcript," the record is clear that Wright made an informed decision to avoid the risks of trial and enter a plea to a reduced charge. The record is utterly devoid of any indication that Wright's trial counsel was deficient in any way. Wright was afforded a full Crim.R. 11 hearing that demonstrated his plea was knowingly, intelligently, and voluntarily made and his trial counsel successfully negotiated a favorable plea.

{¶9} Wright's first assignment of error is overruled.

II. Appellant's Sentence

{¶10} In his second assignment of error, Wright argues that the trial court's imposition of a three-year prison term was excessive and in violation of H.B. 86.

{¶11} We are unable to review Wright's assigned error as argued. In *State v. Ongert*, 8th Dist. Cuyahoga No. 103208, 2016-Ohio-1543, this court held that R.C. 2953.08 precludes appellate review of sentences other than the maximum term allowed for an offense or a sentence otherwise specified as appealable pursuant to R.C. 2953.08(A)(1)-(5). Prior to *Ongert* and pursuant to the language found in paragraph 23 of

State v. Marcum, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231 the only potential avenue of review for Wright's sentence would have been that the sentence was "contrary to law" under R.C. 2953.08(A)(5). However, *Ongert* held that:

> A sentence within [the appropriate statutory range] cannot then be deemed contrary to law because a defendant disagrees with the trial court's discretion to individually weigh the sentencing factors. As long as a trial court considered all sentencing factors, the sentence is not contrary to law and the appellate inquiry ends.

Ongert at ¶ 12.

{¶12} Concerning *Marcum*, *Ongert* clarified that:

> The *Marcum* decision does not expand R.C. 2953.08(G)(2) to allow appellate courts to independently weigh the sentencing factors in appellate review. *Marcum* only alters the appellate sentencing review inasmuch as appellate courts must now focus on R.C. 2953.08 as the source and limits of our authority. Pursuant to R.C. 2953.08, as is pertinent to *Ongert's* assigned error, appellate courts can only review to determine whether the sentencing factors were considered; we cannot independently review the weight of each factor in the trial court's sentencing decision.

Ongert at ¶ 14.

{¶13} There is no dispute that the trial court imposed a prison term within the appropriate statutory range in this case. The record also reflects that the trial court considered the required sentencing factors. Wright's argument that the trial court's weighing of those factors resulted in what he views to be an "excessive" sentence falls directly within the province of *Ongert* and, therefore, this assignment of error is unreviewable.

{¶14} Wright's second assignment of error is overruled.

{¶15} Judgment affirmed.

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.

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

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EILEEN A. GALLAGHER, PRESIDING JUDGE

MELODY J. STEWART, J., and
ANITA LASTER MAYS, J., CONCUR