[Cite as *State v. Tinsley*, 2018-Ohio-278.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105551

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

IVOREE TINSLEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-16-608545-A

BEFORE: Celebrezze, J., E.A. Gallagher, A.J., and McCormack, J.

RELEASED AND JOURNALIZED: January 25, 2018

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Ivoree Tinsley, asserts that his sentences for drug trafficking and having a weapon while under disability should be modified or vacated because defense counsel was ineffective during the sentencing phase of this case. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} Appellant was charged with drug trafficking, a first-degree felony violation of R.C. 2925.03(A)(2); drug possession, a first-degree felony violation of R.C. 2925.11(A); having a weapon while under disability, a third-degree felony violation of R.C. 2923.13(A)(2); and possession of criminal tools, a fifth-degree felony violation of R.C. 2923.24(A). After the exchange of discovery and various pretrials, appellant accepted a plea deal offered by the state. At a change of plea hearing, the state agreed to amend the drug trafficking charge to a second-degree felony and dismiss the drug possession and possession of criminal tools charges. After a Crim.R. 11 plea colloquy, appellant pled guilty to drug trafficking and having a weapon while under disability.

{¶3} Because appellant was subject to mandatory prison time, the trial court immediately proceeded to sentencing. The state set forth that appellant had a history of trafficking offenses, and the court was aware that appellant was on postrelease control at the time of the change of plea hearing. The state asked for a sentence of not less than three years. Appellant's attorney also asked for a three-year sentence and asked the court

to waive costs.

{¶4} The trial court imposed a three-year sentence for drug trafficking and a concurrent 24-month prison sentence for having a weapon while under disability. Appellant was also informed of a three-year period of postrelease control, and the court suspended appellant's driver's license for five years. The court ordered the license suspension to start immediately, rather than on his release. Therefore, it would remain suspended for two years on his release from prison. Finally, costs and fines were waived by the court.

{¶5} Appellant, with leave of this court, then filed a delayed appeal raising one error for review:

> I. Counsel was constitutionally ineffective when he failed to advocate for the minimum prison sentence and less than the maximum driver's license suspension.

II. Law and Analysis

{¶6} Appellant, relying on standards established by the American Bar Association, argues that counsel failed to vigorously advocate for him at sentencing, and was thus constitutionally ineffective.

{¶7} A claim of ineffective assistance of counsel originates from the Sixth Amendment guarantee of representation found in the United States Constitution. This right requires representation that meets a minimum standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Falling below such a standard is not reversible error, however, where that failing does

not result in prejudice to the defendant. *Id*. at 691. Appellant must demonstrate that counsel's performance was deficient and that there is a reasonable probability that the trial court's sentence would have been different but for counsel's errors. *Id*. at 688; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Where one prong of this test is not satisfied, a reviewing court need not address the other. *Bradley* at 143, citing *Strickland* at 697.

{¶8} A properly licensed attorney enjoys a presumption of competence, and the person alleging ineffective assistance of counsel has the burden of establishing the deficiency. *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988).

{¶9} Appellant claims that counsel was ineffective during the sentencing phase. For support, appellant cites to the following American Bar Association ("ABA") standards:

> (a) Early in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might affect sentencing. Defense counsel should become familiar with the client's background, applicable sentencing laws and rules, and what options might be available as well as what consequences might arise if the client is convicted. Defense counsel should be fully informed regarding available sentencing alternatives and with community and other resources which may be of assistance in formulating a plan for meeting the client's needs. Defense counsel should also consider whether consultation with an expert specializing in sentencing options or other sentencing issues is appropriate.
>
> (b) Defense counsel's preparation before sentencing should include learning the court's practices in exercising sentencing discretion; the collateral consequences of different sentences; and the normal pattern of sentences for the offense involved, including any guidelines applicable for either sentencing and, where applicable, parole. The consequences (including reasonably foreseeable collateral consequences) of potential dispositions should be explained fully by defense counsel to the client.

(c) Defense counsel should present all arguments or evidence which will assist the court or its agents in reaching a sentencing disposition favorable to the accused. Defense counsel should ensure that the accused understands the nature of the presentence investigation process, and in particular the significance of statements made by the accused to probation officers and related personnel. Defense counsel should cooperate with court presentence officers unless, after consideration and consultation, it appears not to be in the best interests of the client. Unless prohibited, defense counsel should attend the probation officer's presentence interview with the accused and meet in person with the probation officer to discuss the case.

(d) Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible; and in an appropriate case, with the consent of the accused, counsel should suggest alternative programs of service or rehabilitation or other non-imprisonment options, based on defense counsel's exploration of employment, educational, and other opportunities made available by community services.

(e) If a presentence report is made available to defense counsel, counsel should seek to verify the information contained in it, and should supplement or challenge it if necessary. Defense counsel should either provide the client with a copy or (if copying is not allowed) discuss counsel's knowledge of its contents with the client. In many cases, defense counsel should independently investigate the facts relevant to sentencing, rather than relying on the court's presentence report, and should seek discovery or relevant information from governmental agencies or other third-parties if necessary.

(f) Defense counsel should alert the accused to the right of allocution. Counsel should consider with the client the potential benefits of the judge hearing a personal statement from the defendants as contrasted with the possible dangers of making a statement that could adversely impact the sentencing judge's decision or the merits of an appeal.

(g) If a sentence of imprisonment is imposed, defense counsel should seek the court's assistance, including an on-the-record statement by the court if possible, recommending the appropriate place of confinement and types of treatment, programming and counseling that should be provided for the defendant in confinement.

> (h) Once the sentence has been announced, defense counsel should make any objections necessary for the record, seek clarification of any unclear terms, and advise the client of the meaning and effects of the judgment, including any known collateral consequences. Counsel should also note on the record the intention to appeal, if that decision has already been made with the client.
>
> (i) If the client has received an imprisonment sentence and an appeal will be taken, defense counsel should determine whether bail pending appeal is appropriate and, if so, request it.

ABA Model Standards for Defense Function, Standard 4-8.3, Fourth Ed. (2015).

{¶10} However, Standard 4-1.1 provides,

> (b) These Standards are intended to provide guidance for the professional conduct and performance of defense counsel. *They are not intended to modify a defense attorney's obligations under applicable rules, statutes or the constitution. They are aspirational or describe "best practices," and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for clients, or to create a standard of care for civil liability. They may be relevant in judicial evaluation of constitutional claims regarding the right to counsel.* For purposes of consistency, these Standards sometimes include language taken from the Model Rules of Professional Conduct; but the Standards often address conduct or provide details beyond that governed by the Model Rules of Professional Conduct. No inconsistency is ever intended; and in any case a lawyer should always read and comply with the rules of professional conduct and other authorities that are binding in the specific jurisdiction or matter, including choice of law principles that may regulate the lawyer's ethical conduct.

(Emphasis added.)

{¶11} In the death penalty context, the Ohio Supreme Court has indicated that ABA guidelines are not "'inexorable demands [sic],"' which counsel must follow. *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 225, quoting *Bobby v. Van Hook*, 558 U.S. 4, 9, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) ("inexorable

commands"). *See also State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 183; *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 88, 2002-Ohio-3605, 771 N.E.2d 853, ¶ 23; *Grossman v. Mathless & Mathless*, 85 Ohio App.3d 525, 528, 620 N.E.2d 160 (10th Dist.1993). The Supreme Court has stated that, "*Strickland* stressed, however, that 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition." *Van Hook* at 8, quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674. In that case, one justice wrote separately to emphasize that ABA standards are not relevant to determining whether counsel is constitutionally ineffective. *Id*. at 13-14 (Alito, J., concurring).

{¶12} Here, the court was not aware of the extent of appellant's criminal history, but was aware that appellant was on postrelease control. Appellant faced a mandatory prison sentence. Therefore, there was no community control alternative, and counsel could not have been ineffective for failing to champion community-based alternatives. Appellant's attorney advocated for a sentence near the minimum and the least amount advanced by the state.

{¶13} The Seventh District found no violation of a defendant's right to counsel when defense counsel failed to request probation or community control, a term of the plea agreement. *State v. Dickinson*, 7th Dist. Columbiana No. 03 CO 52, 2004-Ohio-6373, ¶ 16. There, a part of the plea agreement was that defense counsel would request community control at the sentencing hearing. At the hearing, the state requested a maximum prison sentence, and defense counsel did not request community control. *Id*.

at ¶ 8. On appeal, Dickinson argued that counsel's silence misled the trial court into believing there was an agreed recommended sentence. *Id*. at ¶ 9. The *Dickinson* court found a lack of prejudice. *Id*. at ¶ 16.

{¶14} In another case, the Seventh District went further and indicated,

> While counsel may advocate for any sentence or diversion, there is no objective requirement that defense counsel request a particular sanction or present arguments in a specific manner. At sentencing, the trial court has "full discretion to impose a prison sentence within the statutory range." *State v. Foster*, 109 Ohio St.3d 1, 30, 2006-Ohio-856, ¶ 100, 845 N.E.2d 470 [superseded by statute on other ground as recognized by *State v. Sergent*, 148 Ohio St.3d 94, 2016-Ohio-2696, 69 N.E.3d 627, ¶ 34.] The trial court's broad discretion means that any connection between the actions or inactions of counsel at sentencing or probation violation hearings and the specific sentence imposed or reinstated is tenuous at best.

State v. Cascarelli, 7th Dist. Mahoning No. 13 MA 145, 2014-Ohio-5403, ¶ 7. This court does not need to go that far to determine whether trial counsel was ineffective.

{¶15} The ABA guidelines do not indicate that an attorney should always argue for a minimum sentence. Such a rule would not take into consideration the attorney's knowledge of the particular practices of a trial judge in light of the criminal history of a defendant, the best outcome achievable given the various parameters of a case, and the

attorney's experience. Appellant's counsel made a tactical decision to request a sanction one increment above the minimum sentence. Here, appellant's counsel was not constitutionally ineffective for failing to argue for a minimum sentence.

{¶16} Appellant also claims that counsel was ineffective by failing to submit mitigating evidence or arguments, and by failing to object to more than the minimum sentence.

{¶17} The extent to which counsel presents mitigation evidence at a sentencing hearing is generally a matter of trial strategy. *State v. Cossack*, 7th Dist. Mahoning No. 08 MA 161, 2009-Ohio-3327, ¶ 36, citing *State v. Stiles*, 3d Dist. Allen No. 1-08-12, 2009-Ohio-89, citing *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 241, citing *State v. Keith*, 79 Ohio St.3d 514, 530, 684 N.E.2d 47 (1997). The *Cossack* court went on to note that "[t]actical or strategic trial decisions, even if unsuccessful, do not generally constitute ineffective assistance." *Id*., citing *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Trial counsel could reasonably presume that the presentation of additional mitigation could prompt the state to put forth appellant's criminal history, something defense counsel may have wished to avoid. This is why this type of decision is generally attributed to trial strategy, and not second-guessed by a reviewing court.

{¶18} Given trial counsel's success in keeping appellant's criminal history from being spread on the record,[1] and the tactical nature of the presentation of mitigating

[1] The record in this case contains several instances we can rely on to glean

evidence, this court cannot say trial counsel's advocacy fell below a minimum standard. The fact that counsel did not vociferously present mitigating evidence does not amount to reversible error here.

{¶19} Counsel also had no basis to object to a sentence greater than the minimum in Ohio. Appellant refers to the ABA guidelines, which, as quoted above, do include a direction to object. But in Ohio, a trial court is free to exercise its discretion in sentencing appellant within the statutory range using the least sanction that will accomplish the goals of felony sentencing. *See State v. Moore*, 2014-Ohio-5135, 24 N.E.3d 1197, ¶ 7 (8th Dist.) (discussing the tension between minimum sanctions that will accomplish the goals of felony sentences with the discretion of a sentencing court to sentence within the statutory range). The lack of an objection does not waive sentencing review through the lens of R.C. 2953.08.

{¶20} Appellant has no basis under R.C. 2953.08 to appeal a sentence simply because it is more than the minimum. A failure to object does not change the standard of review as appellant suggests because the only basis to appeal such a sentence is that it is contrary to law. *See* R.C. 2953.08. *See also State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23. To challenge his sentence, appellant must

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that this was a trial strategy. The transcript of appellant's arraignment hearing demonstrated that he was returned for the proceedings from the correctional institution where he was serving a prison sentence. Further, appellant stated that he was on postrelease control at the time he entered his guilty pleas. Finally, at the sentencing hearing, the state indicated that appellant had a significant history of drug trafficking.

shoehorn an argument into the "contrary to law" category, and such an argument does not depend on whether an objection was made below. Therefore, a failure to object to more than a minimum sentence does not result in prejudice as appellant indicates.

{¶21} Appellant also claims counsel should have advocated for less than a five-year driver's license suspension. The court imposed, in essence, a two-year license suspension. That is, after appellant is released from prison, his license will be suspended for two years. Further, R.C. 2925.03(G)(1) provides that appellant may request the court to lift the suspension upon his release from prison.

> If the sentencing court suspends the offender's driver's * * * the court shall suspend the license, by order, for not more than five years. If an offender's driver's or commercial driver's license or permit is suspended pursuant to this division, the offender, at any time after the expiration of two years from the day on which the offender's sentence was imposed or from the day on which the offender finally was released from a prison term under the sentence, whichever is later, may file a motion with the sentencing court requesting termination of the suspension; upon the filing of such a motion and the court's finding of good cause for the termination, the court may terminate the suspension.

{¶22} Appellant was not prejudiced by counsel's failure to argue for a lesser suspension of his driver's license where the court only imposed, in essence, a two-year suspension, and appellant may move the court to lift the suspension upon his release from prison. If appellant's counsel had reasons to request a shorter suspension at the time of sentencing that would have impacted the court's decision, then those reasons would presumably provide the basis for a motion to end the suspension on release. Therefore, appellant has not demonstrated ineffective assistance of counsel.

III. Conclusion

{¶23} Appellant failed to demonstrate that trial counsel was ineffective during the sentencing phase of appellant's case. Counsel secured a favorable plea agreement, and appellant received a near-minimum sentence through trial counsel's tactical decisions.

{¶24} 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.

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

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN A. GALLAGHER, A.J., and
TIM McCORMACK, J., CONCUR