

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 23855

Appellee

v.

LEONARD J. DENT

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 07 01 0090

Appellant

DECISION AND JOURNAL ENTRY

Dated: September 30, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Leonard Dent, appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On March 28, 2007, a jury found Dent guilty of aggravated robbery pursuant to R.C. 2911.01(A)(1), a felony of the first degree, and guilty of felonious assault pursuant to R.C. 2903.11(A)(2), a felony of the second degree. Because Dent’s amended indictment also contained a two count repeat violent offender (“RVO”) specification pursuant to R.C. 2941.149, the trial court held a hearing on that issue on March 30, 2007. The court found Dent guilty on both counts of the RVO specification, finding that Dent had a prior conviction for felonious assault in 2002 (Common Pleas, No. CR 02-05-1427). The trial court sentenced Dent to a total of fifteen years in prison.

{¶3} Dent timely appealed from his convictions, arguing, in relevant part, that the RVO statute, R.C. 2941.149, and *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, unconstitutionally permit a trial court to make additional factual findings, which were not found by a jury, and to use those findings to enhance a sentence. On February 20, 2008, we declined to reach the merits of this issue, explaining that Dent failed to make these arguments below and that he failed to raise plain error on appeal. *State v. Dent*, 9th Dist. No. 23855, 2008-Ohio-660, at ¶7. Accordingly, we affirmed the trial court. *Id.* at ¶8.

{¶4} Dent filed an application to reopen his appeal, contending that he was denied the effective assistance of appellate counsel because his appellate counsel failed to: (1) argue that the trial court erred in enhancing his sentence through an RVO specification pursuant to R.C. 2929.14(D)(2)(a)(iv), which unconstitutionally requires judicial fact-finding; (2) argue that trial counsel was ineffective for failing to properly raise Dent’s RVO specification challenge on appeal; (3) argue that the trial court committed plain error by convicting Dent of an RVO specification; and (4) argue plain or structural error when Dent’s indictment for burglary did not include a mens rea. On July 2, 2008, we granted Dent’s application in part, affording him leave to re-open the first three issues noted above. Consequently, Dent timely filed his appellate brief, raising four assignments of error for our review. We have combined these errors for ease of review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED BY CONVICTING [] DENT OF [AN RVO] SPECIFICATION EVEN THOUGH THE JURY DID NOT FIND BEYOND A REASONABLE DOUBT THAT [] DENT HAD A PRIOR CONVICTION FOR AN OFFENSE OF VIOLENCE.”

ASSIGNMENT OF ERROR II

“TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY RAISE [] DENT’S CHALLENGE TO HIS [RVO] SPECIFICATION.”

ASSIGNMENT OF ERROR III

“THE TRIAL COURT COMMITTED PLAIN ERROR BY CONVICTING [] DENT OF [AN RVO] SPECIFICATION.”

ASSIGNMENT OF ERROR IV

“APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CORRECTLY RAISE THE ISSUES IN ASSIGNMENTS OF ERROR 1, 2, AND 3.”

{¶5} In his assignments of error, Dent contends that his appellate counsel was ineffective for failing to raise the issue of the constitutionality of his conviction of the RVO specifications. We do not agree.

{¶6} In considering a defendant’s claim of ineffective assistance of counsel, this court employs a two-step process. *Strickland v. Washington* (1984), 466 U.S. 668, 669. First, we must determine whether trial counsel engaged in a “substantial violation of any *** essential duties to his client.” *State v. Bradley* (1989), 42 Ohio St.3d 136, 141, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. Second, we must determine if the trial counsel’s ineffectiveness resulted in prejudice to the defendant. *Bradley*, 42 Ohio St.3d at 141-142, quoting *Lytle*, 48 Ohio St.2d at 396-397. We may “analyze the prejudice prong of the *Strickland* test alone if such analysis will dispose of a claim of ineffective assistance of counsel on the ground that the defendant did not suffer sufficient prejudice.” *State v. Kordeleski*, 9th Dist. No. 02CA008046, 2003-Ohio-641, at ¶37, citing *State v. Loza* (1994), 71 Ohio St.3d 61, 83 (overruled on other grounds). Prejudice exists where there is a reasonable probability that the trial result would have been different but for the alleged deficiencies of counsel. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus.

{¶7} Specifically, Dent contends that the finding of an RVO specification by a judge rather than a jury violated his right to have a jury determine every element of an offense beyond a reasonable doubt, and that the RVO specification violated Due Process and Ex Post Facto protections. He further contends that the Ohio Supreme Court in *Foster* severed R.C. 2929.14(D)(2)(b), which “contained the only authority to impose add-on sentences[,]” and therefore the trial court had no authority to impose the RVO specification. Finally, he argues that any decision to reinstate the specification should only apply prospectively.

{¶8} In *State v. Hunter*, __Ohio 3d. __, 2009-Ohio-4147, the Ohio Supreme Court held, in part, that:

“*State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 [], excised judicial factfinding from former R.C. 2929.14(D)(2) but did not eliminate the repeat violent offender specification, as defined in former R.C. 2929.01(DD).” *Id.* at paragraph one of the syllabus.

{¶9} With regard to Dent’s argument that *Foster* severed R.C. 2929.14, and therefore, the trial court did not have the authority to impose the RVO specification, the Ohio Supreme Court has stated that “none of our decisions after *Foster* indicate that this specification no longer exists.” *Id.* at ¶27. Accordingly, this portion of Dent’s argument is without merit. Further, *Foster* did not eliminate the RVO specification and the statute was in existence at the time of Dent’s sentencing. The sentencing occurred after the Court’s decision in *Foster*. Consequently, Dent’s arguments that applying the statute in his case would violate Ex Post Facto and Due Process protections, and that the specification should only apply prospectively, are moot.

{¶10} We next turn to Dent’s argument that the statute violates his right to have a jury determine every element of an offense beyond a reasonable doubt. In *Hunter*, the Court held that

“When designating an offender as a ‘repeat violent offender’ pursuant to former R.C. 2929.01(DD), a trial court does not violate the Sixth Amendment by considering relevant information about the offender’s prior conviction that is part

of the judicial record. (*Shepard v. United States* (2005), 544 U.S. 13, 125 S.Ct. 1254, [], followed.).” Id. at paragraph two of the syllabus.

{¶11} At Dent’s RVO hearing, the State introduced a certified copy of his felonious assault conviction from 2002, a second degree felony and an offense of violence. In considering this document, the trial court did not violate Dent’s constitutional rights because the document is “judicial record evidence created in connection with his prior conviction. Moreover, the findings required by former R.C. 2929.01(DD) pertain directly to the issue of recidivism, which has traditionally been within the purview of the sentencing court, not the jury.” (Citation omitted.) *Hunter*, at ¶39. Accordingly, Dent’s argument that only a jury may determine whether he had a prior conviction is without merit.

{¶12} Due to our discussion regarding Dent’s first assignment of error, Dent cannot show that he suffered any prejudice from an alleged failure on the part of his appellate or trial counsel to properly raise these issues. Accordingly, we conclude that Dent did not suffer from ineffective assistance of counsel at trial or on appeal. *Kordeleski*, supra. Dent’s assignments of error are overruled.

III.

{¶13} Dent’s assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

CARR, J.
DICKINSON, J.
CONCUR

APPEARANCES:

STEPHEN P. HARDWICK, Assistant Public Defender, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.