

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2010-01-008 |
| - vs - | : | <u>OPINION</u> 8/30/2010 |
| MARY HELEN WOODREY, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 09-CR-00617

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 43103-3033, for plaintiff-appellee

Michaela M. Stagnaro, 810 Sycamore Street, 2nd Floor, Cincinnati, Ohio 45202, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, Mary Woodrey, appeals her sentence from the Clermont County Court of Common Pleas after pleading guilty to two counts of conspiracy to commit aggravated murder. We affirm the decision of the trial court.

{¶2} According to facts entered into the record during Woodrey's plea hearing, Woodrey was in a relationship with Michael Gray, who had been indicted for raping a seven-year-old girl. Gray, who was incarcerated, approached a fellow inmate who was also serving time in the Clermont County Jail. Gray asked the unnamed inmate to kill

the child-victim and the victim's mother so that they could not appear as witnesses in his upcoming rape trial.

{¶3} Gray discussed the fee, method of killing, and the time frame for the murders with the inmate, and further requested that the inmate provide photographic evidence of the killings. The inmate alerted authorities of Gray's request, and agreed to wear a recording device to help the police during a sting operation. The inmate was then able to record Gray discussing the details of the murder-for-hire plot.

{¶4} On August 26, 2009, Woodrey and another co-conspirator, Belinda Gray, met with Gray and the inmate during jail visitation to discuss the details of the killings. Law enforcement also tracked telephonic and mail correspondence that contained details of the "hit." Soon thereafter, the Clermont County Sheriff's Office arranged for the inmate to be released from jail. Per Gray's instructions, the inmate contacted Belinda, who arranged a meeting place and time where the inmate would be shown the victim's residence. Woodrey then met the inmate, drove him to the victim's residence, and pointed out where the child and her mother lived. Woodrey also discussed payment details and reminded the inmate that Gray required photographic evidence of the killings.

{¶5} Once the sting operation was complete, Gray, Woodrey, and Belinda Gray were arrested, and Woodrey was charged with two counts of conspiracy to commit aggravated murder. Woodrey initially pled not guilty, but changed her plea when the state offered a plea bargain including a jointly recommended ten-year prison sentence.

{¶6} After the plea hearing, the trial court withheld sentencing and ordered a pre-sentence investigation. The trial court did not accept the recommended sentence, and instead, sentenced Woodrey to six years on the first count and seven years on the second count to be served consecutively. Woodrey now appeals the trial court's

sentence, raising the following assignments of error.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY IMPROPERLY SENTENCING APPELLANT."

{¶9} In her first assignment of error, Woodrey asserts that the trial court should have accepted the ten-year joint sentencing recommendation, and that the trial court's ultimate 13-year sentence was unlawful. These arguments lack merit.

{¶10} Regarding the joint sentencing recommendation, Ohio law is clear that a plea bargain is a contract between the state and the defendant. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶50. However, where a defendant is forewarned that the trial court is not bound by the terms of the agreement, a trial court's sentence contrary to the plea bargain does not constitute a breach of that contract. *State v. Pettiford*, Fayette App. No. CA2001-08-014, 2002-Ohio-1914.

{¶11} Woodrey asks this court on appeal to revisit our decision in *Pettiford*, and find that that the trial court breached the plea agreement by not sentencing her to the ten-year jointly recommended sentence. We decline to revisit *Pettiford*, or to stray from the long-held precedent that a trial court is not bound by a prosecutor's recommendation when the trial court advises the defendant that it is not bound by a jointly recommended sentence. *State ex rel Duran v. Kelsey*, 106 Ohio St.3d 58, 2005-Ohio-3674, ¶6.

{¶12} The record is clear that the trial court expressly told Woodrey that it was not bound by the recommendation, and instead, would sentence her of its own accord. During the plea hearing, and before Woodrey changed her plea to guilty, the following exchange occurred.

{¶13} "[Trial Court] Now, it's up to the Court as to what your sentence is going to be. The prosecutor and the State is recommending a sentence to the Court, and are

going to say that that's what they believe that the Court is going to do. But you understand I'm not bound by that?

{¶14} "[Woodrey] Yes, Sir.

{¶15} "[Trial Court] It's up to me how long your sentence is?

{¶16} "[Woodrey] Yes, Sir.

{¶17} "[Trial Court] It could be from – it could be for a short period of time. It could be for a longer period of time. You could get it – you could get up to 20 years. Do you understand that?

{¶18} "[Woodrey] Yes, Sir. Yes, Sir."

{¶19} The trial court clearly advised Woodrey that she could received a much longer sentence than that agreed to in the plea bargain. However, Woodrey voluntarily changed her plea to guilty after being advised by the trial court that it was not bound by the recommended sentence, and cannot now claim that the trial court breached the agreement by sentencing her to 13 years.

{¶20} Specific to the legality of the trial court's sentence, Woodrey claims that the sentence was unlawful because the trial court failed to consider pertinent factors regarding the seriousness of the conduct and factors relating to the likelihood of the offender's recidivism according to R.C. 2929.11 and R.C. 2929.12.

{¶21} Initially, we note that Woodrey did not object when the trial court sentenced her. If a "party forfeits an objection in the trial court, reviewing courts may notice only 'plain errors or defects affecting substantial rights.'" *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶15, citing Crim.R. 52(B). The plain error standard requires that the burden of demonstrating plain error is on the party asserting it and "reversal is warranted if the party can prove that the outcome 'would have been different absent the error.'" *Id.* at ¶17, citing *State v. Hill*, 92 Ohio St.3d 191, 203, 2001-Ohio-

141.

{¶22} While Woodrey asserts that the trial court failed to mention any specific factors or take into consideration her relatively crime-free history, the record indicates otherwise. During the sentencing hearing, the trial court specifically stated, "I recognize that you have a minimal record, so I don't think it calls for the absolute maximum. And the sentence I'm handing I'm taking into consideration the recommendations that were made, everything in the pre-sentence report, and everything that I'm required to take into consideration under the purposes and principles of sentencing." The record is therefore clear that the trial court did not fail to consider pertinent statutory factors or Woodrey's lack of a criminal history.

{¶23} We also note that the trial court's sentence comports with sentencing principles set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4, that require an appellate court to review a sentence to "determine whether the sentence is clearly and convincingly contrary to law." Should the sentence satisfy the first prong, "the trial court's decision shall be reviewed under an abuse-of-discretion standard." *Id.* An abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶181.

{¶24} "A sentence is not clearly and convincingly contrary to law, where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible range." *State v. Elliott*, Clermont App. No. CA2009-03-020, 2009-Ohio-5926, ¶10, citing *Kalish* at ¶18.

{¶25} The record clearly demonstrates that the trial court's sentence is not contrary to law. The trial court indicated that its decision was based on what it learned

from the pre-sentencing investigation, the joint recommendation, and "everything that I'm required to take into consideration under the purposes and principles of sentencing."

Further, the sentencing entry expressly states that the trial court considered "the principles and purposes of sentencing under Ohio Revised Code section 2929.11, and has balanced the seriousness and recidivism factors pursuant to Ohio Revised Code section 2929.12." See *Elliot* at ¶11 (finding trial court's sentence in compliance where "in its judgment entry, the trial court expressly stated that it 'considered * * * the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code Section 2929.12'").

{¶26} The trial court also informed Woodrey that she would be subject to postrelease control, and then sentenced her to six years on the first count, and seven years on the second. These sentences are within the permissible range for the first-degree felony offenses of conspiracy to commit aggravated murder. See R.C. 2929.14.

{¶27} We also find that the trial court did not abuse its discretion in ordering Woodrey to serve 13 years. In deviating from the recommended sentence, the trial court stated that "sometimes I think things are so serious and so harmful that the Court cannot in good conscious go along with those kinds of recommendations. There are two potential victims here, not one. And the only way this could have gotten worse is if they'd actually been killed."

{¶28} The record demonstrates that the trial court gave careful and substantial deliberation to the circumstances and factors of the case. The trial court withheld sentencing until after a pre-sentencing investigation could be completed and considered all of the information gathered as a result of the investigation. The trial court also considered that Woodrey conspired to kill a seven-year-old rape victim and the child's

mother so that the two could not appear as witnesses in her boyfriend's rape trial. The trial court also specifically noted that its decision was based, in part, on the fact that there were two victims targeted in the crime so that separate sentences were warranted.

After reviewing the record, we find that the trial court's decision to sentence Woodrey to 13 years was not unreasonable, arbitrary or unconscionable.

{¶29} We also note that the imposition of consecutive sentences was in compliance with sentencing guidelines. As noted above, the trial court complied with R.C. 2929.11 and 2929.12 in reaching its decision, and the decision to run the sentences together was not an abuse of discretion. See *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, ¶19 (holding that "the trial court now has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently ****").

{¶30} Woodrey's final argument invites us to abandon the Ohio Supreme Court's holding in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, in light of the United States Supreme Court's decision in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711. *Foster* severed Ohio's statutory sentencing scheme requiring certain judicial findings before imposing maximum, consecutive, or non-minimum sentences. In *Ice*, the Court upheld an Oregon statute that permitted judicial fact finding when imposing consecutive sentences. However, this court has held that we are bound by *Foster* unless or until the Ohio Supreme Court reconsiders *Foster* in light of *Ice*. See *State v. Lewis*, Warren App. NO. CA2009-02-012, 2009-Ohio-4684.

{¶31} Having found that the trial court did not abuse its discretion in sentencing Woodrey to 13 years and that the sentence was otherwise lawful, no plain error has occurred. Woodrey's first assignment of error is overruled.

{¶32} Assignment of Error No. 2:

{¶33} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HER CONSTITUTIONAL RIGHTS THUS PREJUDICING HIS [SIC] RIGHT TO A FAIR HEARING."

{¶34} In her second assignment of error, Woodrey argues that she received ineffective assistance of counsel. There is no merit to this argument.

{¶35} The Sixth Amendment pronounces an accused's right to effective assistance of counsel. However, and warning against the temptation to view counsel's actions in hindsight, the United States Supreme Court stated that judicial scrutiny of an ineffective assistance claim must be "highly deferential***." *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052.

{¶36} Also within *Strickland*, the Supreme Court established a two-part test that requires an appellant to establish that first, "his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial." *State v. Myers*, Fayette App. No. CA2005-12-035, 2007-Ohio-915, ¶33, citing *Strickland*.

{¶37} Regarding the first prong, an appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Strickland* at 688. The second prong requires the appellant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

{¶38} Woodrey argues that her counsel was ineffective because counsel failed to advise her that she could withdraw her guilty plea in light of the trial court's decision to not accept the recommended sentence. However, and as discussed under the first assignment of error, Woodrey did not change her plea to guilty until after the trial court expressly advised her that it was not bound by the joint recommendation.

{¶39} The record demonstrates that the trial court specifically explained that it had the right to sentence Woodrey to a term that exceeded the recommendation. Woodrey acknowledged the trial court's sentencing discretion before she changed her plea, and also confirmed that her attorney had given her sufficient legal advice and stated that she was confident in that advice. After receiving full disclosure from the trial court regarding sentencing, Woodrey then changed her plea to guilty and we cannot say that her counsel's performance was deficient.

{¶40} We also note that Woodrey has failed to demonstrate how her counsel's performance prejudiced her. She does not claim that she would not have pled guilty had her counsel performed in a different manner. Instead, Woodrey stated that "although appellant may not have chosen to withdraw her guilty plea, she should have been advised that she had that choice to make." However, the record is clear that Woodrey was given all pertinent information before she voluntarily agreed to change her plea. Woodrey has therefore failed to demonstrate that, but for her counsel's unprofessional errors, the result of the proceeding would have been different.

{¶41} Having found that Woodrey received effective assistance of counsel, her second assignment of error is overruled.

{¶42} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.