

[Cite as *State v. Leeper*, 2004-Ohio-5362.]

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JEREMY LEEPER

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 03 CA 35

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common  
Pleas, Case No. 03 CRI 03 084

JUDGMENT:

Affirmed in Part; Reversed in Part and  
Remanded

DATE OF JUDGMENT ENTRY:

October 5, 2004

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Wise, J.*

{¶1} Appellant Jeremy Leeper appeals the sentence rendered by the Delaware County Court of Common Pleas. Appellant also claims he received ineffective assistance of counsel. The following facts give rise to this appeal.

{¶2} On April 14, 2003, the Delaware County Grand Jury indicted appellant for two counts of grand theft and one count of failure to appear. Appellant appeared for a change of plea hearing on April 24, 2003. Pursuant to plea negotiations, appellant pled guilty to one count of theft and no contest to one count of failure to appear. Appellee agreed to dismiss the remaining count of the indictment and recommend that appellant be referred for a pre-sentence investigation. The trial court ordered a pre-sentence investigation and scheduled appellant's sentencing for June 2, 2003.

{¶3} On this date, the parties appeared for sentencing. Appellee reminded the trial court that as part of its negotiations, in another case<sup>1</sup> with appellant, it agreed that it would not ask to have the sentence in the case sub judice imposed consecutively with the sentence in the previous case. Following comments from both parties, the trial court sentenced appellant to fifteen months, on each of the two counts, to be served concurrently. The trial court imposed this prison term consecutive to the prison term rendered in the previous case.

{¶4} On August 15, 2003, we granted appellant leave to file a delayed appeal. Appellant presents the following assignments of error for our consideration:

{¶5} "1. THE TRIAL COURT ERRED WHEN IT FAILED TO ALLOW APPELLANT TO WITHDRAW HIS GUILTY PLEAS THAT WERE ENTERED INTO

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<sup>1</sup> Case No. 02CR-I-04-225

UPON COUNSEL'S PROMISE AND THE STATE OF OHIO'S PROMISE THAT THE JUDGE WOULD SENTENCE APPELLANT TO CONCURRENT SENTENCES.

{¶6} "II. DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE ERRONEOUSLY PROMISED HIS CLIENT THAT HE WOULD RECEIVE CONCURRENT SENTENCES IN EXCHANGE FOR A GUILTY PLEA AND ALSO FAILED TO WITHDRAW THAT GUILTY PLEA WHEN THE COURT IMPOSED A SENTENCE CONTRARY TO THE AGREEMENT RELIED UPON BY THE CLIENT.

{¶7} "III. THE TRIAL COURT ERRED WHEN IT FAILED TO COMPLY WITH R.C. 2929.14(E) IN IMPOSING CONSECUTIVE SENTENCES."

I

{¶8} In his First Assignment of Error, appellant maintains the trial court erred when it failed to permit him to withdraw his guilty pleas that were entered into upon counsel's promise that the trial court would sentence him to concurrent sentences. We disagree.

{¶9} Crim.R. 32.1 addresses withdrawal of guilty plea and provides as follows:

{¶10} "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶11} The record and transcript of the proceedings below indicate the defendant never made any request in the trial court to withdraw his guilty plea either prior to or following sentencing in compliance with Crim.R. 32.1. A failure to assert an alleged error in the trial court waives that error on appeal. *State v. Awan* (1986), 22 Ohio St.3d

120, 122. Thus, appellant's failure to raise this argument, in the trial court, ordinarily precludes us from reviewing these issues on appeal. *In re Nicholson* (1999), 132 Ohio App.3d 303, 307; *State v. Betances* (July 10, 1997), Cuyahoga App. No. 70786, at 2; *State v. Stokes* (Mar. 7, 1996), Cuyahoga App. No. 69032, at 2.

{¶12} However, notwithstanding appellant's failure to seek relief, in the trial court, we conclude appellant's guilty plea and plea of no contest were entered pursuant to the requirements of Crim.R. 11(C) and therefore, were entered voluntarily and knowingly. In accepting a guilty plea, a trial court must substantially comply with Crim.R. 11. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. Substantial compliance with Crim.R. 11(C) is determined upon a review of the totality of the circumstances. *State v. Carter* (1979), 60 Ohio St.2d 34, 38.

{¶13} In the case sub judice, appellant contends he entered his guilty plea because he was advised the trial court would impose a concurrent sentence with Case No. 02 CR-I-04-225. A review of the sentencing transcript establishes that appellant knew the sentences, in both cases, may not be ordered to be served concurrently. The sentencing transcript provides:

{¶14} "THE COURT: \* \* \* Apparently you have another case before Judge Krueger.

{¶15} "THE DEFENDANT: Correct.

{¶16} "THE COURT: And that the State agrees in that case that they will not seek consecutive sentencing in that case.

{¶17} "THE DEFENDANT: Correct.

{¶18} "THE COURT: Do you understand that?

{¶19} “THE DEFENDANT: Yes, I do.

{¶20} “THE COURT: You must understand, that doesn’t mean Judge Krueger has the same view.

{¶21} “THE DEFENDANT: Exactly, yes.

{¶22} “THE COURT: But you have to take your chances on that.

{¶23} “THE DEFENDANT: Correct.

{¶24} “THE COURT: Any questions then about the Rule F, 11(F), negotiation form?

{¶25} “THE DEFENDANT: No.

{¶26} “THE COURT: You understand it?

{¶27} “THE DEFENDANT: I understand it fully.

{¶28} “THE COURT: So other than the promises made in the Rule 11(F) negotiation form, have any other promises been made to you in exchange for your plea?

{¶29} “THE DEFENDANT: No, they haven’t.” Tr. Sentencing Hrng., May 20, 2003, at 9-10.

{¶30} Clearly, the record establishes that appellant understood appellee would not seek consecutive sentences in the case sub judice. Appellant also understood that the sentencing judge could impose consecutive sentences and that he would be taking a chance in receiving consecutive sentences in the case sub judice. As such, we conclude appellant entered his plea knowingly and voluntarily. Thus, the trial court did not err when it failed to permit appellant to withdraw his guilty plea.

{¶31} Appellant’s First Assignment of Error is overruled.

**II**

{¶32} Appellant contends, in his Second Assignment of Error, that defense counsel was ineffective because he erroneously promised him that he would receive concurrent sentences in exchange for a guilty plea and failed to withdraw the guilty plea when the trial court imposed a sentence contrary to the plea agreement relied upon by appellant. We disagree.

{¶33} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶34} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley* at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶35} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. "Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial

counsel.” *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104, citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370.

{¶36} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Bradley* at 143, quoting *Strickland* at 697.

{¶37} In support of his Second Assignment of Error, appellant argues defense counsel communicated an incorrect plea bargain to him and that he relied upon the misinformation to his detriment. Appellant further argues that but for the alleged promise of a concurrent sentence and counsel’s advice to take the plea deal, he would not have pled guilty. Finally, appellant argues defense counsel should have objected, at sentencing, when the trial court imposed consecutive sentences.

{¶38} We will direct our attention to the second prong of the *Strickland* test and determine whether appellant was prejudiced by defense counsel’s alleged ineffectiveness. Upon review of the record and transcripts, we conclude appellant was not prejudiced by defense counsel’s performance. As noted in appellant’s First Assignment of Error, appellant clearly understood the plea agreement and knew a possibility existed that the trial court would not order Case No. 03CR-I-03-084 to be served concurrently with Case No. 02CR-I-04-225. Thus, defense counsel did not have an obligation to object, at sentencing, when the trial court imposed a consecutive sentence. Accordingly, appellant was not prejudiced by defense counsel’s performance.

{¶39} Appellant’s Second Assignment of Error is overruled.

### III

{¶40} In his Third Assignment of Error, appellant contends the trial court erred when it sentenced him to consecutive sentences as it failed to comply with R.C. 2929.14(E)(4). We agree.

{¶41} Appellant maintains the trial court failed to find that consecutive sentences were not disproportionate to the seriousness of appellant's conduct and to the danger posed to the public. Further, the trial court did not point to any specific facts to support its conclusion that consecutive sentences were warranted.

{¶42} In *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, the Ohio Supreme Court discussed consecutive sentences and stated:

{¶43} "A court may not impose consecutive sentences for multiple offenses unless it 'finds' three statutory factors. R.C. 2929.14(E)(4). First, the court must *find* that consecutive sentences are necessary to protect the public from future crime or to punish the offender. \* \* \* Second, the court must *find* that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. \* \* \* Third, the court must *find* the existence of one of the enumerated circumstances in R.C. 2929.14(E)(4)(a) through (c)." (Emphasis sic.) Id. at ¶ 13.

{¶44} The factors contained in R.C. 2929.14(E)(4)(a) through (c) are as follows:

{¶45} "(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

{¶46} “(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender’s conduct.

{¶47} “(c) The offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.”

{¶48} Thus, the Court concluded, in *Comer*, that “[p]ursuant to R.C. 2929.14(E)(4) and 2929.19(B)(2)(c), when imposing consecutive sentences, a trial court is required to make its statutorily enumerated findings and give reasons supporting those findings at the sentencing hearing.” *Comer* at paragraph one of the syllabus.

{¶49} Appellant maintains the trial court never made a finding that the consecutive sentences were not disproportionate to the seriousness of his conduct and to the danger posed to the public. The transcript from the sentencing hearing conducted on May 20, 2003, indicates the trial court did address this factor. Specifically, the trial court stated:

{¶50} “The Court finds based upon the stipulation in the Rule 11(F) negotiations that the consecutive sentences are necessary to protect the public. The consecutive sentences are not disproportionate to the offenses and the defendant has a history of criminal conduct that demonstrates that consecutive sentences are necessary to protect the public.” Tr. Sentencing Hrng., May 20, 2003, at 28.

{¶51} Although the trial court made the requisite statutory finding, it did not point to specific and operative facts in support of its conclusion why consecutive sentences were warranted. The state recognizes, in its brief, that the trial court may not have sufficiently articulated all of the specific reasons and findings required to impose consecutive sentences. Further, the state does not indicate where, in the record, the trial court stated its reasons for imposition of consecutive sentences.

{¶52} Thus, we conclude the trial court failed to comply with R.C. 2929.14(E)(4) and *Comer*. Accordingly, appellant’s conviction is affirmed; however, his sentence is vacated. This matter is remanded to the trial court for resentencing.

{¶53} Appellant’s Third Assignment of Error is sustained.

{¶54} For the foregoing reasons, the judgment of the Court of Common Pleas, Delaware County, Ohio, is hereby affirmed in part; reversed in part and remanded for further proceedings consistent with this opinion.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

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JUDGES

