[Cite as *State v. Messenheimer*, 2023-Ohio-2376.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TRAVIS MESSENHEIMER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0037

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 19 CR 146

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Gina DeGenova, Mahoning County Prosecutor and *Atty. Edward A. Czopur*, Assistant Prosecutor, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Robert T. McDowall, *Jr.*, Robert T. McDowall, Co., LLC., 415 Wyndclift Place Youngstown, Ohio 44515, for Defendant-Appellant

Dated: June 30, 2023

WAITE, J.

{¶1} Appellant Travis Messenheimer pleaded guilty to rape and gross sexual imposition. He has filed an appeal alleging that trial counsel was constitutionally ineffective. The record does not support Appellant's contentions in this regard. For the following reasons, Appellant's sole assignment of error is overruled and his conviction and sentence are affirmed.

Case History and Facts

{¶2} Appellant was indicted on February 21, 2019, on four counts of rape and two counts of gross sexual imposition. The crimes occurred over a three-year period. The victim was his stepdaughter, who was under the age of thirteen when some of the crimes occurred. The charges were as follows: counts one and two, felony one rape pursuant to R.C. 2907.02(A)(1); count three, felony three gross sexual imposition under R.C. 2907.05(A)(4); counts four and five, felony one charges of rape pursuant to R.C. 2907.02(A)(2); and count six, gross sexual imposition pursuant to R.C. 2907.05(A)(1), a felony four. Counts one and two carried a sentence of life imprisonment.

{¶3} On November 4, 2019, Appellant entered into a Crim.R. 11 plea agreement. Appellant agreed to plead guilty to counts three and six (gross sexual imposition), and count four (rape), with maximum potential penalties of five years, eighteen months, and eleven years in prison, respectively. The parties jointly agreed to recommend a six-year prison term. The other charges would be dismissed and Appellant would be required to register as a Tier III sexual offender.

{¶4} The change of plea hearing was held on November 4, 2019. Appellant agreed to waive the preparation of a presentence investigation report and sought to be sentenced immediately. Accordingly, Appellant was sentenced to three years in prison for count three, six years for count four, and one year for count six, to run concurrently, for a total of six years in prison. Appellant was also notified that he was subject to five years of mandatory postrelease control.

{¶5} The sentencing entry was filed on November 4, 2019. On April 20, 2022, Appellant filed a *pro se* notice of appeal, along with a motion for leave to file a delayed direct appeal. The motion to file a delayed appeal was granted on April 26, 2022. Following appointment of appellate counsel, Appellant now raises one assignment of error.

ASSIGNMENT OF ERROR

> DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER SECTION TEN, ARTICLE ONE OF THE OHIO CONSTITUTION.

{¶6} Appellant argues that his trial counsel did not provide constitutionally effective assistance when counsel allowed Appellant to plead guilty to rape and gross sexual imposition. He claims that counsel did not properly contest the evidence against him, failed to duly consider that he is learning impaired or incompetent to enter a guilty plea, and failed to prevent Appellant from agreeing to a plea that he did not fully understand. However, the record does not support these contentions.

{¶7} "[T]he Sixth Amendment right to counsel exists 'in order to protect the fundamental right to a fair trial.' " *Lockhart v. Fretwell*, 506 U.S. 364, 368, 122 L.Ed.2d 180, 113 S.Ct. 838 (1993), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Sixth Amendment's guarantee of the right to counsel "is the right to the effective assistance of counsel." *State v. Bradley*, 42 Ohio St.3d 136, 150, 538 N.E.2d 373 (1989). This right "is recognized not only for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984).

{¶8} The test for an ineffective assistance of counsel claim is two-part: whether trial counsel's performance was deficient and whether this deficiency resulted in prejudice to the defendant. *State v. White*, 7th Dist. Jefferson No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland* at 687; see also *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27.

{¶9} In order to prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Lyons*, 7th Dist. Belmont No. 14 BE 28, 2015-Ohio-3325, ¶ 11, citing *Strickland* at 694; see also *Bradley* at paragraph three of the syllabus. The appellant must affirmatively prove the alleged prejudice occurred. *Strickland* at 693. The appellant must also demonstrate more than vague speculations of prejudice to prove prejudice. *State v. Otte*, 74 Ohio St.3d 555, 566, 660 N.E.2d 711 (1996).

{¶10} If one prong of the *Strickland* test is not met, an appellate court need not address the remaining prong. *Strickland* at 697. The appellant bears the burden of proof on the issue of counsel's effectiveness. *State v. Wilkins*, 64 Ohio St.2d 382, 390, 415 N.E.2d 303 (1980). Further, in Ohio a licensed attorney is presumed competent. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999).

{¶11} Courts are very deferential to the tactical choices that attorneys make at trial and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Bradley* at 142, citing *Strickland* at 689. Counsel's tactical choices, even those that ultimately have negative consequences, normally do not constitute ineffective assistance. *State v. Carpenter*, 116 Ohio App.3d 615, 626, 688 N.E.2d 1090 (2nd Dist.1996).

{¶12} We have held that "a voluntary guilty plea waives ineffective assistance of counsel claims except to the extent that counsel's performance causes the waiver of Defendant's trial rights and the entry of his plea to be less than knowing and voluntary." *State v. Fatula*, 7th Dist. Belmont No. 07 BE 24, 2008-Ohio-1544, ¶ 9, citing *State v. Kidd*, 2d Dist. Clark No. 03CA43, 2004-Ohio-6784, ¶ 16. Because Appellant pleaded guilty in this case, he must show that his trial counsel's alleged ineffectiveness prevented him from entering a knowing and voluntary plea.

{¶13} Appellant claims that his counsel should have realized he was learning impaired or incompetent to enter a plea. "The competency standard for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial: whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual

understanding of the proceedings." *State v. Bolin*, 128 Ohio App.3d 58, 62, 713 N.E.2d 1092 (8th Dist.1998).

{¶14} Nothing in this record, however, even suggests that Appellant was incompetent to enter a plea. Appellant answered in the affirmative each time the judge asked him if he understood what was being explained. To be sure that Appellant was paying attention, the judge would change the nature of the questions at times to require negative answers. For example, the judge asked: "Is there anything [your counsel] talked about that I did not?" (11/4/19 Tr., p. 13.) Appellant answered "no" to the question. (11/4/19 Tr., p. 13.) The judge asked him if he was under the influence of drugs or alcohol, and he again responded in the negative. The judge asked him if understood the choices he was making, and he responded in the affirmative.

{¶15} Appellant had a discussion with his counsel after the judge asked him if he was pleading guilty to count three. (11/4/19 Tr., p. 17.) The judge explained for the second time the difference between pleading guilty and not guilty. The judge then asked Appellant to enter a plea to count three. (11/4/19 Tr., p. 18.) Appellant pleaded guilty to this count, then also pleaded guilty to counts four and six. The record fails to reveal any confusion or hesitation from Appellant when entering his guilty pleas.

{¶16} The main problem with all of the arguments being made by Appellant is that his allegations in this regard (that he has a learning disability which may somehow rise to the level of incompetency) require proof that does not appear anywhere in this record.

> We cannot address these contentions as they concern allegations that are de hors the record. The reviewing court cannot add matter to the record which was not part of the trial court proceedings and decide an appeal on

> the basis of such new matter. The reviewing court is limited to what transpired in the trial court as reflected in the record of the proceedings. (Citations omitted.)

State v. Moore, 7th Dist. Belmont No. 03BE22, 2003-Ohio-4888, ¶ 25.

{¶17} The same problem exists with Appellant's argument that his trial counsel did not thoroughly challenge the state's evidence in this case. The prosecutor, in explaining why a six-year prison term was being recommended, stated that this was a case of "delayed disclosure," that a trial would have been largely based on the testimony of the victim, and that there was no physical evidence. (11/4/19 Tr., p. 21.) Although the state's evidence may have been somewhat limited compared to other rape cases, it is apparent the state was still prepared to go to trial and seek a conviction. "[T]here is nothing in the law which requires that a rape victim's testimony be corroborated as a condition precedent to conviction." *State v. Nichols*, 85 Ohio App.3d 65, 76, 619 N.E.2d 80, 88 (4th Dist.1993). Far from supporting Appellant's claims of ineffectiveness, the record indicates instead that counsel's understanding of the limitations of the state's case allowed for a dramatic reduction in the potential prison term Appellant faced should he be convicted following a trial on all charges. His potential life sentence was ultimately reduced to a six-year prison term due to the plea bargain.

{¶18} Likewise, there is nothing in the record indicating that Appellant ever asked counsel to prevent the plea from going forward, or that there was some reason to intervene to stop the court from accepting his guilty plea. As Appellee points out, there is nothing in the record, or even suggested on appeal, to support the contention that Appellant would not have pleaded guilty but for the alleged deficient performance of

counsel. Without some indication that counsel's actions actually prejudiced Appellant in some way, Appellant's claims of ineffective assistance of counsel must also fail. Regardless, it appears from this record that any actions counsel undertook to obtain the results of the plea bargain, such as having three charges dropped and the potential prison term being limited to six years, can be attributed to the decisions and negotiating skills of Appellant's trial counsel. An appellant may not base an ineffective assistance claim on trial tactics of counsel.

{¶19} Appellant also contends that allegations he raised in his motion for delayed appeal would also show ineffective assistance of counsel. As the motion for delayed appeal was clearly not before the trial court when the guilty plea was entered, it cannot be used to support a determination of ineffective assistance of counsel alleged to occur during the trial court proceedings.

{¶20} As there is absolutely no indication of deficient performance of counsel, or that Appellant was in any way prejudiced by counsel's actions, Appellant's ineffective assistance of counsel argument has no merit and his assignment of error is overruled.

Conclusion

{¶21} Appellant's sole assignment of error alleging ineffective assistance of counsel is not supported by the record. There is no indication that Appellant was incompetent to enter a guilty plea to charges of rape and gross sexual imposition, and nothing in the record supports the conclusion that counsel should have prevented Appellant from pleading guilty. Neither has Appellant shown or even alleged prejudice resulting from any act or failure to act by counsel. Appellant has failed to establish either

prong of the *Strickland* test, here. Accordingly, his sole assignment of error is overruled and Appellant's conviction and sentence are hereby affirmed.

Robb, J., concurs.

Hanni, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.