[Cite as *State v. Henderson*, 2009-Ohio-5207.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-G-2867**
- vs -	:	
JEFFREY O. HENDERSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 07 C 000095.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Jeffrey O. Henderson appeals from the judgment of the Geauga County Court of Common Pleas, sentencing him to a total term of imprisonment of thirty years to life, following his entry of pleas of no contest to three counts of rape. We affirm.

{¶2} Mr. Henderson was born March 5, 1990. The record indicates a childhood full of instability and unhappiness. Mr. Henderson served a period of commitment with the Department of Youth Services for sexually molesting a young boy. On or about April 18, 2007, the Geauga County Prosecutor filed a complaint containing nine counts

with the Geauga County Court of Common Pleas, Juvenile Division. Counts I through VI alleged that Mr. Henderson had committed what would be six rapes, R.C. 2907.02(A)(1)(b), first degree felonies, if done by an adult, upon three children, aged nine, eleven, and twelve. Counts VII and VIII alleged he had committed two acts of what would be gross sexual imposition, R.C. 2907.05(A)(4), third degree felonies, if done by an adult, upon the nine year old. Count IX alleged he had committed one act of public indecency, R.C. 2907.09(A)(1), a fourth degree misdemeanor, if done by an adult, in the presence of a five year old.

{¶3} On or about June 26, 2007, the Geauga County Court of Common Pleas, Juvenile Division, relinquished jurisdiction of Mr. Henderson's case, ordering it transferred to the General Division.

{¶4} July 19, 2007, the Geauga County Grand Jury returned an indictment in three counts against Mr. Henderson. Each count was for rape, in violation of R.C. 2907.02(A)(1)(b). The first count was for rape of a victim less than ten years of age; the others, for rapes of victims less than thirteen years of age. Each is a first degree felony.

{¶5} July 24, 2007, Mr. Henderson made his initial appearance. August 23, 2007, he entered a written plea deal with the state, which agreed to amend the first count of the indictment to rape of a victim less than thirteen years of age, instead of a victim less than ten years of age. That same day, Mr. Henderson appeared before the trial court for what had been scheduled as his arraignment. Instead, the trial court accepted his pleas of no contest; found him guilty; and sentenced him to three consecutive terms of ten years to life in prison. It further informed him that he would

automatically be classified as a sexual predator if and when he was released from prison.

{¶6} November 20, 2008, Mr. Henderson noticed delayed appeal to this court, pursuant to App.R. 5(A). This court accepted jurisdiction of the appeal by a judgment entry filed January 7, 2009. Mr. Henderson assigns one error:

{¶7} "APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO[.]"

{¶8} "Both the Ohio Supreme Court and this court have adopted the *** two-pronged test articulated in *Strickland v. Washington* (1984), 466 U.S. 668, ***, to determine whether an accused has received ineffective assistance of counsel:

{¶9} "'First, a defendant must be able to show that his trial counsel was deficient in some aspect of his representation. (***) This requires a showing that trial counsel made errors so serious that, in effect, the attorney was not functioning as the "counsel" guaranteed by both the United States and Ohio Constitutions. (***)

{¶10} "'Second, a defendant must show that the deficient performance prejudiced his defense. (***) This requires a showing that there is "a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." (***) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (***)' (Citations omitted.) *State v. Swick* (Dec. 21, 2001), 11th Dist. No. 97-L-254, 2001-Ohio-8831, 2001 Ohio App. LEXIS 5857, at 4-5." *State v. Tripi*, 11th Dist. Nos. 2005-L-030 and 2005-L-031, 2006-Ohio-1687, at ¶37-39.

{¶11} In applying the *Strickland* test, courts must always recall that properly-licensed counsel is presumed competent, and that trial counsel must be afforded deference regarding trial strategy. *In re Roque*, 11th Dist. No. 2005-T-0138, 2006-Ohio-7007, at ¶11.

{¶12} In support of his assignment of error, Mr. Henderson advances two arguments. First, he asserts that trial counsel should have challenged any reliance by the trial court upon his prior juvenile record in arriving at sentence.

{¶13} We respectfully disagree. The trial court took notice of the fact that Mr. Henderson was on parole for a sex crime at the times he committed those subject of this appeal. It did so when balancing the seriousness and recidivism factors, R.C. 2929.12. This is proper. The trial court further relied upon the report prepared by the psychologist who interviewed Mr. Henderson while in juvenile detention after his commission of these particular crimes. Obviously, this (very thorough) report contains a great deal of information regarding Mr. Henderson's youth, including his prior sex crime. But such reports are commonly and correctly relied upon by our trial courts in formulating sentences; and, Mr. Henderson's counsel specifically asserted her client's youth, and the difficulties of his childhood, in mitigation.

{¶14} This issue is without merit.

{¶15} R.C. 2907.02(B) provides that rapists found guilty pursuant to R.C. 2907.02(A)(1)(b) – such as Mr. Henderson – "shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code." Mr. Henderson cites to an exception for offenders less than sixteen years of age at the time they committed their offense. As the state correctly points out, this exception is

inapplicable to him, since he was sixteen or seventeen at the time he committed the rapes for which he was sentenced. Pursuant to R.C. 2971.03(B)(1)(a), the trial court imposed the minimum sentences possible on Mr. Henderson: ten years to life imprisonment.[1] Pursuant to R.C. 2971.03(E) it made the sentences consecutive, since that section requires all minimum sentences under R.C. 2971.03(B) to be consecutive.

{¶16} Finally, as the state points out, R.C. 2971.03(B)(1)(b) makes the minimum term of imprisonment for those found guilty of raping children under ten years of age fifteen years imprisonment. Further, R.C. 2907.02(B) gives trial courts authority to impose life imprisonment without parole upon such offenders. Mr. Henderson was indicted for raping a nine year old; his trial counsel persuaded the state to amend the indictment, so he could not face these heavier penalties. We must agree with the state that these facts hardly support a charge of ineffective assistance of counsel.

{¶17} The assignment of error is without merit. The judgment of the Geauga County Court of Common Pleas is affirmed.

{¶18} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.

1. The state asserts that Mr. Henderson was sentenced pursuant to R.C. 2971.03(A)(3)(d)(ii). We respectfully note that this division does not apply to rapes committed pursuant to R.C. 2907.02(A)(1)(b) after January 2, 2007, such as these.