

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2009-L-168
JAMES C. ROBINSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 03 CR 000117.

Judgment: Affirmed in part, reversed in part, and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

James C. Robinson, pro se, PID: 574-665, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, James C. Robinson, appeals his conviction and sentence in the Lake County Court of Common Pleas of complicity to trafficking in cocaine, a felony of the fourth degree. Appellant argues that he was denied the effective assistance of counsel and that the trial court abused its discretion in sentencing him. For the reasons that follow, we affirm in part, reverse in part, and remand this case to the trial court for further proceedings.

{¶2} Between November 2001 and January 2002, appellant trafficked in cocaine or aided and abetted another in trafficking in cocaine by making sales of this controlled substance to a confidential informant working with the Lake County Narcotics Agency. With respect to the instant offense to which appellant pled guilty, on November 15, 2001, appellant, while acting with a female accomplice, sold 1.18 grams of cocaine to said informant for \$200.

{¶3} On March 3, 2003, appellant was indicted in a three-count indictment in which he was charged with trafficking in cocaine in an amount less than one gram in the vicinity of a school, a felony of the fourth degree, in violation of R.C. 2925.03(A)(1) (Count 1); complicity to trafficking in cocaine in an amount more than one gram but less than five grams, a felony of the fourth degree, in violation of R.C. 2923.03(A)(2) and R.C. 2925.03 (Count 2); and trafficking in cocaine in an amount more than one gram but less than five grams, a felony of the fourth degree, in violation of R.C. 2925.03(A)(1) (Count 3). The indictment recited that upon conviction of Counts 2 and 3, there is a presumption in favor of a prison term. Appellant pled not guilty.

{¶4} On May 5, 2005, appellant pled guilty to Count 2, complicity to trafficking in cocaine, and the remaining counts were dismissed. The court referred the matter to the probation department for a pre-sentence investigation report, and sentencing was scheduled for June 2, 2005. However, appellant failed to appear for his sentencing. The trial court revoked his bond and ordered that a warrant be issued for his arrest. Subsequently, appellant failed to appear for a bond forfeiture hearing and his bond was forfeited. Appellant remained a fugitive for more than four years.

{¶5} After appellant was arrested on the bench warrant, the court held a sentencing hearing on November 12, 2009. Appellant's counsel asked that the court

impose a sentence of six months in prison. The prosecutor advised the court that, based on appellant's absence from the court for four years and various outstanding warrants against him, there was nothing to overcome the presumption of imprisonment, and recommended a sentence of 12 months in prison.

{¶6} The trial court noted that the Cuyahoga County Common Pleas Court has an outstanding warrant for appellant due to his failure to appear in court for possession of drugs in 2002 and another outstanding warrant for theft in 2003. The Lyndhurst Municipal Court has an outstanding warrant for appellant for his failure to appear on theft charges in 2002. The Bedford Municipal Court has an outstanding warrant for appellant for his failure to appear on falsification charges in 2003. The Lakewood Municipal Court has an outstanding warrant for appellant for falsification and possession of marijuana in 2005.

{¶7} The court also noted that appellant had previously been convicted of carrying a concealed weapon and attempted possession of drugs in the Cuyahoga County Common Pleas Court in August 1999. He was also convicted of theft and burglary in that court in a separate case in December 1999. Also, in 2001, he was convicted of theft in the Lyndhurst Municipal Court.

{¶8} The trial court sentenced appellant to 17 months in prison and suspended his driver's license for five years. Appellant appeals his conviction and sentence, asserting seven assignments of error. For his first assigned error, he alleges:

{¶9} "Because Defendant-Appellant failed to cooperate with Lake County Narcotics Agency as confidential informant, it is prosecutorial misconduct for State of Ohio to subsequently indict Defendant-Appellant."

{¶10} Appellant argues that he was indicted because he chose not to act as a confidential police informant, and that his indictment constituted prosecutorial misconduct and a violation of his due process rights, entitling him to a reversal of his conviction. In support of his argument, appellant references a colloquy between the trial judge and the prosecutor at the sentencing hearing during which the judge asked the prosecutor to explain why it took two years for the case to be indicted. The prosecutor stated:

{¶11} “*** The case came to our office, looks like July 12th of 2002. But according to the Lake County Narcotics notes[,] they had given the Defendant an opportunity to work with them for a positive recommendation. So I think that’s probably what delayed it coming over for awhile. But they said that nothing ever happened from the opportunity they gave him to work off the case. I think that was the initial delay in getting it over ***.”

{¶12} Appellant argues that he was indicted in retaliation for his refusal to become an informant. However, the referenced transcript does not support this argument. The prosecutor merely explained his understanding of the reason for the apparent delay in the referral of the case to his office for prosecution. An appellate court in determining the existence of error is limited to a review of the record. *State v. Sheldon* (Dec. 31, 1986), 11th Dist. No. 3695, 1986 Ohio App. LEXIS 9608, *2; *Schick v. Cincinnati* (1927), 116 Ohio St. 16, paragraph three of the syllabus. On appeal it is the appellant’s responsibility to support his argument by evidence in the record that supports his assigned errors. *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. Because appellant presented no evidence in support of his retaliation argument, it is not well taken.

{¶13} Appellant's first assignment of error is overruled.

{¶14} For his second assignment of error, appellant contends:

{¶15} "Defendant-Appellant was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution where counsel (1) permits Defendant-Appellant to enter guilty plea to complicity to trafficking cocaine without full understanding of the nature of the charge; (2) fails to file an Affidavit of Indigency with respect to Defendant-Appellant's ability to pay costs and fines; and (3) failed to file a motion to dismissed [sic] the indictment with respect to both pre-indictment and post-indictment delays."

{¶16} Appellant argues his trial counsel was ineffective for three reasons. First, he argues his counsel was ineffective because she allowed him to plead guilty without explaining to him the nature of the charge. He argues that, due to his attorney's deficient performance, his guilty plea was not voluntarily entered and should be vacated. Second, appellant argues his trial counsel was ineffective because she failed to request a waiver of court costs for him. Third, he argues his counsel was deficient because she failed to file a motion to dismiss the indictment for lack of speedy trial. With respect to the third alleged failing, appellant does *not* argue that it affected the voluntary nature of his guilty plea.

{¶17} A properly licensed attorney is presumed to have rendered effective assistance to a defendant. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In the context of a guilty plea, the standard of review for ineffective assistance of counsel is whether: (1) counsel's performance was deficient; and (2) the defendant was prejudiced by the deficient performance in that there is a reasonable probability that, but for counsel's

error, the defendant would not have pled guilty. *State v. Madeline*, 11th Dist. No. 2000-T-0156, 2002-Ohio-1332, 2002 Ohio App. LEXIS 1348, *9-*10, citing *Hill v. Lockhart* (1985), 474 U.S. 52. The burden of proving ineffective assistance of counsel falls on the defendant. *Madeline* at *10.

{¶18} “The mere fact that, if not for the alleged ineffective assistance of counsel, the defendant would not have entered a guilty plea is *not* sufficient to establish the requisite connection between the guilty plea and the ineffective assistance.” (Emphasis sic.) *Id.*, citing *State v. Sopjack* (Dec. 15, 1995), 11th Dist. No. 93-G-1826, 1995 Ohio App. LEXIS 5572, *11, citing *State v. Haynes* (Mar. 3, 1995), 11th Dist. No. 93-T-4911, 1995 Ohio App. LEXIS 780, *4-*5. “Rather, ineffective assistance of trial counsel is found to have affected the validity of a guilty plea when it precluded a defendant from entering his plea knowingly and voluntarily.” *Madeline*, *supra*.

{¶19} A guilty plea represents a break in the chain of events that preceded it in the criminal process. Thus, a defendant who admits his guilt waives the right to challenge the propriety of any action taken by the court or counsel prior to that point in the proceedings unless it affected the knowing and voluntary nature of the plea. *Id.* at *10-*11; *Haynes*, *supra*, at *3-*4. This waiver applies to a claim of ineffective assistance of counsel, unless the alleged conduct of counsel caused the plea not to be knowing and voluntary. *Madeline*, *supra*, at *11.

{¶20} Generally, a guilty plea is deemed voluntary if the record demonstrates the trial court advised the defendant (1) of the nature of the charge and the maximum penalty involved, (2) of the effect of entering a guilty plea, and (3) that the defendant will waive his constitutional rights by entering the plea. *Id.*, citing *Sopjack*, *supra*, at *27-*28.

{¶21} Based on our review of the transcript of the guilty plea hearing, the trial court scrupulously complied with Crim.R. 11. First, the court explained to appellant the nature of the charge by explaining to him the elements of Count 2 as set forth in the indictment, and appellant said he understood the charge. Further, the court advised appellant concerning, and appellant said he understood, the maximum sentence and the presumption of prison time associated with Count 2. Second, the court also explained to appellant the consequences of his guilty plea by advising him that if he entered such a plea, he would be admitting he committed the crime charged and that the court could immediately proceed to sentencing. After this explanation, appellant said he understood. Third, the court explained to appellant each of the rights he would be waiving by pleading guilty and he waived each such right.

{¶22} For the foregoing reasons, the transcript of the guilty plea hearing shows that appellant's guilty plea was made knowingly, intelligently, and voluntarily.

{¶23} A claim that a guilty plea was induced by ineffective assistance of counsel must be supported by evidence where the record of the guilty plea shows it was voluntarily made. *State v. Malesky* (Aug. 27, 1992), 8th Dist. No. 61290, 1992 Ohio App. LEXIS 4378, *5; see, also, *State v. Kapper* (1983), 5 Ohio St.3d 36. In *Malesky*, supra, the court held:

{¶24} "A naked allegation by a defendant of a guilty plea inducement, is insufficient to support a claim of ineffective assistance of counsel, and would not be upheld on appeal unless it is supported by affidavits or other supporting materials, substantial enough to rebut the record which shows that his plea was voluntary."

{¶25} In *Kapper*, the Supreme Court adopted the following rationale:

{¶26} “*** [A]n allegation of a coerced guilty plea involves actions over which the State has no control. Therefore, the defendant must bear the initial burden of submitting affidavits or other supporting materials to indicate that he is entitled to relief. Defendant’s own self-serving declarations or affidavits alleging a coerced guilty plea are insufficient to rebut the record on review which shows that his plea was voluntary. A letter or affidavit from the court, prosecutors or defense counsel alleging a defect in the plea process may be sufficient to rebut the record on review and require an evidentiary hearing.” Id. at 38.

{¶27} First, with respect to appellant’s claim that his counsel failed to explain to him the nature of the charge, appellant argues that the state had originally recommended that he plead guilty to Count 1. He argues that Count 1 carried with it a presumption of community control sanctions, while a plea under Count 2 gave rise to a presumption of prison time. He argues that if his counsel had explained this difference to him, there is a reasonable probability he would not have pled guilty to Count 2. However, a reading of *the count in the indictment to which the defendant is pleading guilty* is adequate to advise him of the nature of the charge. *State v. Gore* (Feb. 17, 1981), 10th Dist Nos. 80AP-348, 80AP-349, 80AP-350, 1981 Ohio App. LEXIS 10164, *5, *7-*8. Therefore, appellant’s trial counsel was not obligated to compare and contrast the offense to which appellant was pleading guilty to the other offenses charged in the indictment for him to understand the nature of the charge.

{¶28} Moreover, based on our review of the record, there are no affidavits or other supporting materials in the record showing: (1) that trial counsel failed to correctly advise appellant concerning the nature of the charge; (2) that appellant did not fully understand the nature of the charge; or (3) that his attorney induced him to enter his

guilty plea. As a result, there is inadequate evidence to rebut the record below that demonstrates appellant's guilty plea was voluntarily entered.

{¶29} Second, with respect to appellant's claim that his counsel failed to file a motion to waive costs, based on our disposition of appellant's seventh assignment of error, appellant cannot claim prejudice as a result of his counsel's failure to file such motion since appellant will be permitted to make such request on remand.

{¶30} Third, with respect to appellant's argument that his counsel was ineffective because she failed to file a motion to dismiss for lack of a speedy trial, this argument fails for several reasons. First, appellant does not reference any evidence in the record in support of a speedy trial violation. His reference to the prosecutor's comments to the trial court regarding the *possible* reasons for the alleged pre-indictment delay (that officers gave appellant an opportunity to act as an informant) and alleged post-indictment delay (that a bench warrant had to be issued on the indictment) is unavailing since these comments do not support a speedy trial violation. Trial counsel is not required to file groundless motions. *State v. Bittner* (Dec. 11, 1985), 9th Dist. No. 3906, 1985 Ohio App. LEXIS 9613, *6. Appellant's trial counsel was therefore not ineffective for failing to file a motion to dismiss. Further, there is no evidence that, but for such alleged deficiency, appellant would not have pled guilty. For this additional reason, his argument lacks merit. *Sheldon*, *supra*; *Schick*, *supra*. In addition, because appellant does not argue that this deficiency affected the voluntary nature of his plea, this argument is barred by appellant's guilty plea. *Madeline*, *supra*.

{¶31} For the foregoing reasons, we cannot conclude that counsel's performance fell below an objective standard of reasonableness or that appellant was prejudiced by any failings of his trial counsel.

{¶32} Appellant's second assignment of error is overruled.

{¶33} Appellant alleges for his third assigned error:

{¶34} "Defendant-Appellant's guilty plea was enter [sic] under extreme duress and trial court erred in accepting plea where there was sufficient indication that his plea was not entered knowingly, intelligently and voluntarily."

{¶35} The state argues this assignment of error is not ripe because appellant's motion to withdraw his guilty plea is still pending in the trial court. In his reply brief, appellant agrees and therefore withdraws this assigned error. A claim is not ripe if it depends on "future events that may not occur as anticipated, or may not occur at all." *Texas v. United States* (1998), 523 U.S. 296, 299. (Citations omitted.) Accordingly, we hold that the issue raised by this assignment of error is not ripe for our review.

{¶36} Appellant's fourth and fifth assignments of error are interrelated and shall therefore be considered together. They allege:

{¶37} "[4.] Trial court erred by (1) imposing prison rather than community control; (2) not sentencing Defendant-Appellant to the minimum prison sentence; (3) not making statutory findings on record; and (4) imposing a sentence that puts an unnecessary burden on state government resources.

{¶38} "[5.] Trial court abuse [sic] its discretion when it impose [sic] a prison sentence of 17 months prison sentence and a five year driver's license suspension."

{¶39} Appellant argues the trial court erred by sentencing him to prison, by imposing more than the minimum sentence, by not making findings of fact pursuant to R.C. 2929.11, R.C. 2929.13, and R.C. 2929.14, and by imposing a sentence that put an unnecessary burden on state governmental resources.

{¶40} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio held that because R.C. 2929.14(E)(4) and R.C. 2929.41(A) require judicial fact-finding before a court can impose consecutive sentences, they are unconstitutional and ordered them to be severed. *Id.*, paragraph three of the syllabus. In striking down these and other parts of Ohio's sentencing scheme, the court held that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.*, paragraph seven of the syllabus. Further, contrary to appellant's argument, the court in *Foster* stated that its holding applies to all cases pending on direct review. *Id.* at 31. Therefore, *Foster* applies to the instant case.

{¶41} The court in *Foster* also held that R.C. 2929.11 and R.C. 2929.12 still "apply as a general guide for every sentencing." *Id.* at 12-13. In sentencing an offender for a felony conviction, pursuant to R.C. 2929.11(A), a trial court must be guided by the overriding purposes of felony sentencing, which are "to protect the public from future crime by the offender and others and to punish the offender." *Id.* R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the two purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed on similarly-situated offenders. The court must also consider the seriousness and recidivism factors under R.C. 2929.12.

{¶42} The court in *Foster* held that R.C. 2929.11 and R.C. 2929.12 do not mandate judicial fact-finding. Rather, "[t]he court is merely to 'consider' the statutory factors." *Id.* at 14. Thus, "in exercising its discretion, a court is merely required to

‘consider’ the purposes and principles of sentencing in R.C. 2929.11 and the statutory *** factors set forth in R.C. 2929.12.” *State v. Lloyd*, 11th Dist. No. 2006-L-185, 2007-Ohio-3013, at ¶44.

{¶43} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, the Supreme Court of Ohio established a two-step analysis for an appellate court reviewing a felony sentence. In the first step, we consider whether the trial court “adhered to all applicable rules and statutes in imposing the sentence.” *Id.* at 25. “As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G).” *Id.*

{¶44} Next, if the first step is satisfied, we consider whether the trial court abused its discretion in selecting the defendant’s sentence. *Id.* at 27. This court has stated that the term “abuse of discretion” is one of art, connoting judgment exercised by a court that does not comport with reason or the record. *State v. DelManzo*, 11th Dist. No. 2009-L-167, 2010-Ohio-3555, at ¶23, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶45} Addressing the first step of the *Kalish* test, appellant pled guilty to complicity to trafficking in cocaine, a felony of the fourth degree. He was therefore subject to a prison term for this offense of six, seven, eight, nine, ten, 11, 12, 13, 14, 15, 16, 17, or 18 months. R.C. 2929.14(A). The maximum sentence that the court could have imposed was 18 months. Appellant’s sentence of 17 months was therefore within the statutory range for this offense.

{¶46} Further, the trial court stated on the record during appellant’s sentencing hearing that it considered the overriding purposes of felony sentencing pursuant to R.C. 2929.11, which, it noted, are to protect the public from future crime by this offender and

others similarly minded, and to punish this offender. The court stated it considered the need for incapacitation, deterrence, rehabilitation, and restitution, along with the public burden on governmental resources. The court said it reasonably calculated appellant's sentence to achieve the two overriding purposes of felony sentencing, and to be commensurate with and not demeaning to the seriousness of appellant's conduct and its impact on society, and to be consistent with sentences imposed for similar crimes committed by similar offenders. The court stated it considered all relevant factors, including the seriousness and recidivism factors in R.C. 2929.12. The court therefore expressly considered the purposes and principles of felony sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12.

{¶47} Because the sentence imposed was within the statutory range of sentences for appellant's crime and the court considered the purposes and factors of felony sentencing, appellant's sentence complied with all applicable statutes and therefore was not clearly and convincingly contrary to law. His sentence therefore complied with the first step of the *Kalish* test.

{¶48} We next address the second step of the *Kalish* test, which is to determine whether the trial court abused its discretion in selecting appellant's sentence. He presents two arguments in support of his abuse-of-discretion argument. First, he argues the trial court's sentence will put an unnecessary burden on state governmental resources. However, appellant's argument is not supported by *Foster*, supra, or other pertinent authority. Moreover, appellant fails to reference the record in support of his argument that his sentence will put an unnecessary burden on governmental resources, in violation of App.R. 16(A)(7).

{¶49} Second, appellant argues that his sentence was excessive because the trial court should have placed more emphasis on his volunteer work in the community, his lengthy period of sobriety, and his stated genuine remorse. Appellant does not dispute that the court considered these factors; rather, he argues the court should have given them greater weight in imposing his sentence. However, this court has stated: “A trial court is not required to give any particular weight or emphasis to a given set of circumstances; it is merely required to consider the statutory factors in exercising its discretion.” *State v. Delmanzo*, 11th Dist. No. 2007-L-218, 2008-Ohio-5856, at ¶23. Since the record demonstrates the trial court considered the purposes and principles of felony sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12, we cannot say the court abused its discretion in selecting appellant’s sentence.

{¶50} Appellant’s fourth and fifth assignments of error are overruled.

{¶51} For his sixth assigned error, appellant alleges:

{¶52} “Trial court lacked the statutory authority to impose a driver’s license suspension when the Ohio General Assembly has not made into law such a sanction, for which Defendant plead guilty to [sic].”

{¶53} Appellant argues the trial court erred in suspending his driver’s license for five years because, he claims, the version of R.C. 2925.03(G) in effect in 2001, when he committed the instant offense, only authorized a driver’s license suspension for first-degree drug law violations. However, the 2001 version of the statute also provided that a trial court “shall suspend for not less than six months or more than five years the driver’s *** license *** of any person who is convicted of or pleads guilty *to any other violation of this section.* ***” (Emphasis added.)

{¶54} As a result, pursuant to the version of R.C. 2925.03(G) in effect as of the date of appellant's crime, the court was authorized to suspend appellant's driver's license.

{¶55} Appellant's sixth assignment of error is overruled.

{¶56} For his seventh assigned error, appellant contends:

{¶57} "The trial court erred by failing to inform Defendant-Appellant at the sentencing hearing that it would be imposing fines and costs, and thereby violated his constitutional right to due process of law as guaranteed by the Ohio and United States Constitutions."

{¶58} Appellant argues that, pursuant to *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, the trial court erred in assessing costs against him in the court's judgment entry without imposing costs at the sentencing hearing and giving him an opportunity to move for a waiver of costs. In *Joseph*, the court held that while the failure of the court to orally notify the defendant that it was imposing court costs on him does not void his sentence, it was prejudicial error. *Id.* at 80. The court therefore affirmed the conviction, but remanded the case to the trial court for the limited purpose of allowing Joseph to move the court for a waiver of the payment of court costs. *Id.*

{¶59} The state agrees that the trial court erred in ordering appellant to pay costs in its judgment entry without informing him that it would be doing so at the sentencing hearing. The state therefore indicates that the case should be remanded to the trial court for the limited purpose of allowing appellant to move the court for the waiver of costs. Pursuant to *Joseph*, we hold that while the trial court's failure to orally notify appellant that it was imposing court costs on him did not void his sentence, it was

error. We therefore remand the case to the trial court for the limited purpose of allowing appellant to move the court for a waiver of court costs.

{¶60} Appellant's seventh assignment of error is sustained.

{¶61} For the reasons stated in this opinion, it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed in part and reversed in part; and this case is remanded for further proceedings consistent with this opinion.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.