[Cite as *State v. Anders,* 2012-Ohio-4762.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0034**
- vs -	:	
TIMOTHY J. ANDERS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2009 CR 0358.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Richard E. Hackerd, 231 South Chestnut Street, Ravenna, OH 44266 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Timothy J. Anders, appeals the Judgments of the Portage County Court of Common Pleas, denying his Motion to Suppress and sentencing him to an aggregate prison term of fifteen years for thirty counts of Theft and/or Breaking and Entering. The issues before this court are: whether Miranda warnings given on the first day of police questioning become “stale” when questioning resumes on the second day; whether a trial court abuses its discretion by ordering multiple low-level felony sentences to be served consecutively to create an aggregate

prison sentence of fifteen years; and whether trial counsel is ineffective when he fails to expressly raise the issue of consistency and proportionality prior to the actual imposition of sentence. For the following reasons, we affirm the Judgments of the court below.

{¶2} On June 18, 2009, Anders was indicted by the Portage County Grand Jury on three counts of Burglary, felonies of the second degree in violation of former R.C. 2911.12(A)(2) and (B).

{¶3} On June 22, 2009, Anders was arraigned and entered a plea of "not guilty."

{¶4} On August 25, 2009, Anders filed a Motion to Suppress Oral Statements, requesting the trial court to suppress "any and all statements obtained as a result of his interrogation, detention and arrest."

{¶5} On February 19, 2010, a suppression hearing was held. At the hearing, Police Chief David Blough of the Brimfield Police Department testified on behalf of the State.

{¶6} Chief Blough testified that Anders was a suspect in "a rash of car break-ins and entering of occupied structures, meaning attached garages and thefts." On June 11, 2009, Chief Blough went with another Brimfield Police Officer (Captain Reese) and an Akron Police Officer (Patrolman Kennedy) to a residence on Allyn Street in Akron, Ohio. When Anders came to the door, Chief Blough asked him, "Mind if I talk to you?" Anders replied, "no," and accompanied Chief Blough to the sidewalk. Chief Blough told him that he was "investigating numerous break-ins" and "the only question I had for him was, was he a ringleader or the middle man." Anders initially denied knowing anything about the break-ins. Chief Blough said, "You definitely know

something. I just need to know where you are in the hierarchy of things." Anders responded that he was a "middle man."

{¶7} Chief Blough asked Anders if he would come to the police station. Anders agreed and sat himself in the rear passenger seat of Chief Blough's patrol car. Captain Reese sat in the front passenger seat. Chief Blough testified that Anders was not under arrest or handcuffed at this point, and that he advised Anders that he was not under arrest. Chief Blough testified that there was no cage in the back of the patrol car or lock that would have prohibited Anders from exiting the vehicle.

{¶8} Shortly after beginning the drive to Brimfield, Chief Blough verbally administered the Miranda warnings. Anders responded that he understood his rights: "You haven't seen my record, obviously. I understand my rights. I know my rights." In a recorded interview at the police station, Anders acknowledged that he received the Miranda warnings.

{¶9} Chief Blough testified that, after discussing the incidents with Anders at the police station, they decided to visit the locations of the break-ins, with Anders acting as a guide, identifying the locations and the items taken. Chief Blough spent the rest of the day driving around with Anders identifying crime scenes. Anders sat in the front passenger seat while Captain Reese and a Brimfield detective sat in the back seats.

{¶10} At sometime between nine and eleven that evening, Anders was returned to the Allyn Street address. Chief Blough asked Anders, "if it would be okay if we met again the next day." Anders said, "yes," but that he needed to be in court in Stark County the next morning. Anders said that he would be taking the bus to the courthouse. Chief Blough offered to drive him and Anders accepted.

{¶11} The next day, June 12, Chief Blough picked Anders up at about 7:00 a.m., and drove him to Stark County. Chief Blough did not Mirandize Anders on June 12. Chief Blough testified: "When I got in the vehicle, we started driving, and I said to him, 'You know your rights, I'm not going to go through them again,' and he said, 'Yeah, I know.'" After taking Anders to court in Stark County, Chief Blough, Anders, Captain Reese and a Brimfield detective spent the rest of the day, until the early morning hours of June 13, visiting between 150 and 300 sites of purported break-ins and/or thefts.

{¶12} After returning to the police station, Anders was presented with two waiver of Miranda rights forms, one for the eleventh and one for the twelfth. Chief Blough testified that Anders signed the form for the eleventh, but refused to sign for the twelfth. According to Chief Blough, "[h]is words were, 'You didn't read me my rights today and anything I told you isn't going to be admissible in court.'"

{¶13} On March 12, 2010, Anders was indicted on an additional three counts of Burglary, felonies of the second degree in violation of former R.C. 2911.12(A)(1) and (B).

{¶14} On March 17, 2010, Anders was charged, by way of an Information, with three counts of Breaking and Entering, felonies of the fifth degree in violation of R.C. 2911.13, sixteen counts of Theft, felonies of the fifth degree in violation of R.C. 2913.02, and five counts of Grand Theft, felonies of the fourth degree in violation of R.C. 2913.02.

{¶15} On March 17, 2010, the trial court denied Anders' Motion to Suppress.

{¶16} Also on March 17, 2010, Anders entered a Written Plea of Guilty to the six counts of the Indictment, amended to fifth-degree Breaking and Entering, and the twenty-four counts contained in the Information.

{¶17} On April 19, 2010, the trial court held a sentencing hearing. Counsel argued on Anders' behalf that his client cooperated with the police and, although a thief, avoided confrontations, violence, and property damage. The State argued for an aggregate sentence of twenty years, noting that additional charges were not brought in exchange for Anders' plea. On his own behalf, Anders argued that "there has been a lot of people doing what I was doing, so it's not like I'm the only person." Anders also referred to the difficulty in finding employment, his neurological problems, his handicapped sister, and a nephew who has to take thirty pills a day.

{¶18} At the conclusion of the hearing, the trial court sentenced Anders to six months in prison for each count to be served consecutively, for an aggregate prison sentence of fifteen years. The court further ordered Anders to pay restitution to several victims and their insurers in the aggregate amount of $14,776.71 (based on the written Judgment Entry) and a fine of $250.

{¶19} On April 23, 2010, the trial court issued a written Judgment Entry memorializing Anders' sentence.

{¶20} On May 18, 2011, Anders filed his Notice of Appeal and Motion for Leave to File Delayed Appeal.

{¶21} On September 22, 2011, this court granted Anders leave to file his appeal, pursuant to Appellate Rule 5(A).

{¶22} On appeal, Anders raises the following assignments of error:

{¶23} "[1.] The trial court erred in denying defendant's motion to suppress."

{¶24} "[2.] The trial court committed an abuse of discretion in imposing consecutive sentences on all counts."

{¶25} "[3.] The defendant was provided ineffective assistance of counsel."

{¶26} In the first assignment of error, Anders challenges the denial of his Motion to Suppress. Anders contends that he was in custody for Miranda purposes on both days of questioning with Chief Blough, and that the Miranda warnings given on the first day of questioning had become "stale" by the second, thus requiring them to be given again.

{¶27} At a suppression hearing, "the trial court is best able to decide facts and evaluate the credibility of witnesses." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶ 41. "Its findings of fact are to be accepted if they are supported by competent, credible evidence, and we are to independently determine whether they satisfy the applicable legal standard." *Id.*, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *State v. Serafin*, 11th Dist. No. 2011-P-0036, 2012-Ohio-1456, ¶ 21 ("[o]nce the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial court's application of the law to these facts") (citation omitted).

{¶28} In the present case, the issue of whether the Miranda warnings given on June 11, 2009, had become stale is determinative of this assignment of error. Anders was properly Mirandized on June 11, prior to the extended interview with Chief Blough, in which he admitted to committing numerous break-ins. If the efficacy of the warnings given on June 11 continued through the resumption of the interview on June 12, the issue of whether Anders was "in custody" for Miranda purposes during the course of the interview becomes moot. *State v. Smith*, 5th Dist. No. 93-CA-116, 1994 Ohio App. LEXIS 2202), *4 (May 2, 1994). For the reasons stated below, it was not necessary to re-Mirandize Anders on June 12 or, therefore, to determine whether Anders was in custody.

{¶29} "It is well established that a defendant who is subjected to custodial interrogation must be advised of his or her *Miranda* rights and make a knowing and intelligent waiver of those rights before statements obtained during the interrogation will be admissible. It is also well established, however, that a suspect who receives adequate *Miranda* warnings prior to a custodial interrogation need not be warned again before each subsequent interrogation." *State v. Treesh*, 90 Ohio St.3d 460, 470, 739 N.E.2d 749 (2001).

{¶30} The Ohio Supreme Court has adopted a totality of the circumstances test to determine whether the initial warnings are "*sufficiently proximate in time and place to custodial status to serve as protection 'from the coercive pressures that can be brought to bear upon a suspect in the context of custodial interrogation.*'" (Emphasis sic.) *State v. Roberts*, 32 Ohio St.3d 225, 232, 513 N.E.2d 720 (1987), citing *Berkemer v. McCarty*, 468 U.S. 420, 428, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). The factors to consider include: "(1) [T]he length of time between the giving of the first warnings and subsequent interrogation, * * * (2) whether the warnings and the subsequent interrogation were given in the same or different places, * * * (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers, * * * (4) the extent to which the subsequent statement differed from any previous statements; * * * [and] (5) the apparent intellectual and emotional state of the suspect." (Citation omitted.) *Id.*

{¶31} Considering the totality of the circumstances in the present case, the Miranda warnings given on June 11, 2009, retained their efficacy through the resumption of the interview on June 12.

{¶32} With respect to the length of time between the initial warning and the subsequent interview, a period of less than twelve hours had elapsed. Far longer periods of time have been found not to diminish the warnings' efficacy. *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 120 ("[m]ore than 30 hours elapsed between the initial *Miranda* warnings and [appellant's] second interview"); *State v. Barnes*, 25 Ohio St.3d 203, 208, 495 N.E.2d 922 (1986) ("[a]ppellant had received and waived his *Miranda* warnings less than twenty-four hours prior to the [subsequent] conversation as well as having been told on this occasion that his rights still applied").

{¶33} In the present case, the subsequent interview was conducted in the same place (Chief Blough's patrol car) as the Miranda warnings were given and with the same officers present. Moreover, the record demonstrates that the June 12 interview was in every substantive respect a continuation of the process started on June 11. Throughout the afternoon and evening of June 11, Anders voluntary identified crime sites while being driving around by Chief Blough. This proved to be an insufficient amount of time to complete the task of identifying crime sites. Accordingly, when Chief Blough dropped Anders off at his sister's home, he asked "if it would be okay if we met again the next day." Anders assented, as well as accepting Chief Blough's offer to drive him to Stark County for a court hearing in an unrelated matter.

{¶34} The fact that the June 12 interview was a continuation of the interview begun on June 11 militates strongly against Anders' position that it was necessary to re-Mirandize him on that date. *Powell* at ¶ 121 ("[appellant's] second statement was primarily a more detailed retelling of the story he had already voluntarily told in his first statement, even though some new information was provided"); *State v. Brewer*, 48 Ohio St.3d 50, 60, 549 N.E.2d 491 (1990) ("while a great deal of time had passed [since the

Miranda warnings were given the previous day], the interrogation * * * was part of a series of discussions which appellant had with the police," in which the "[a]ppellant had * * * indicated his awareness of his rights," and "[t]he statements he gave were simply more detailed retellings of the story which he had already voluntarily given the * * * police").

{¶35} Finally, the record demonstrates that Anders was not under any particular emotional stress during the interviews, and was aware of his rights and the potential implications of Chief Blough's failure to advise him thereof. In this respect, the following incidents are noteworthy: When Mirandized on June 11, Anders acknowledged his familiarity with his rights as a result of his considerable criminal record. Anders' cooperation with the police was voluntary and his interactions with the police were relaxed, e.g., he was not restrained or formally arrested, and enjoyed several meals at the officers' expense. Anders affirmed Chief Blough's statement on June 12 that it was not necessary to review his constitutional rights again because he was already familiar with them. At the conclusion of the second day of the interview, Anders advised Chief Blough that his failure to re-Mirandize that morning could result in the suppression of statements made that day.

{¶36} The first assignment of error is without merit.

{¶37} In the second assignment of error, Anders argues that the trial court's imposition of consecutive sentences resulted in an unreasonable term of imprisonment, constituting an abuse of the court's discretion.

{¶38} "[A]ppellate courts must apply a two-step approach when reviewing felony sentences. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the

sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26.

{¶39} A sentencing court "has discretion to determine the most effective way to comply with the purposes and principles of sentencing." R.C. 2929.12(A). A decision constitutes an abuse of discretion when it is unreasonable, i.e., "there is no sound reasoning process that would support that decision." *AAAA Ents., Inc. v. River Place Urban Community Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶40} Anders does not contend that the trial court failed to comply with the statutes governing felony sentencing, rather, his position is that the sentence imposed is excessive in light of the following considerations: there was no physical or mental injury to any victim; the highest loss to an individual victim was $2,000; Anders only entered unlocked dwellings "so that he did not have to cause any property damage and was careful to remain undetected so as not to provoke any response from his victims"; the criminal activity was motivated by personal/familial issues; and Anders cooperated with law enforcement and showed genuine remorse.

{¶41} The fifteen-year sentence imposed on Anders is reasonable in light of his considerable criminal history, which began in 1987, and includes convictions for crimes such as Domestic Violence, Assault, Aggravated Possession of Drugs, and Failure to Register Dog. Anders' criminal record distinguishes the present case from *State v. Parker*, 193 Ohio App.3d 506, 2011-Ohio-1418, 952 N.E.2d 1159 (2nd Dist), cited by Anders. In *Parker*, the court of appeals reversed the imposition of consecutive

sentences resulting in a fifteen-year sentence. *Id.* at ¶ 63. Among several distinguishing characteristics between these two cases, the defendant in *Parker*, unlike Anders, was a "first time offender with no prior criminal record of any kind." *Id.* at ¶ 60.

{¶42} Additionally, we note that, while the individual break-ins may have constituted "low level criminal activity," their cumulative impact was of considerable magnitude. The amount of law enforcement resources required to investigate Anders' crimes was described as "staggering." The Brimfield Police Department had to rent storage space to contain the amount of personal property recovered and notify approximately 200 individual victims to identify recovered items.

{¶43} The second assignment of error is without merit.

{¶44} In the third and final assignment of error, Anders contends that he received ineffective assistance of counsel, in that "[a]fter the imposition of consecutive sentences on all thirty counts and the resulting sentence of fifteen years, * * * counsel did not object on either grounds of consistency or proportionality."

{¶45} To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 721 N.E.2d 52 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶46} Assuming, arguendo, that counsel's performance fell below an objective standard of reasonableness, Anders has failed to demonstrate any prejudice as a result of counsel's failure to specifically raise an argument regarding consistency or proportionality. This court has previously held that, within the context of a claim of

ineffective assistance, "a proper and circumspect application of the sentencing guidelines acts to ensure proportionality and consistency under R.C 2929.11(B)," so that, "to the extent the trial court considered and applied the necessary statutory provisions, a sentence shall be deemed consistent and proportionate to those imposed for similar crimes." *State v. Marker*, 11th Dist. No. 2006-P-0014, 2007-Ohio-3379, ¶ 34; *accord State v. Gabel*, 8th Dist. No. 91788, 2009-Ohio-3735, ¶ 17. Given that the length of Anders' sentence was proper in light of his criminal record and the cumulative magnitude of his crimes, Anders cannot demonstrate prejudice.

{¶47} The third assignment of error is without merit.

{¶48} For the foregoing reasons, the Judgments of the Portage County Court of Common Pleas, denying Anders' Motion to Suppress and sentencing him to an aggregate prison term of fifteen years, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.