[Cite as *State v. Shugart*, 2009-Ohio-6807.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 238
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
JEFFREY SHUGART,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 07CR195.
JUDGMENT:	Affirmed.

APPEARANCES:

For Plaintiff-Appellee:	Attorney Paul Gains Prosecuting Attorney Attorney Ralph Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Attorney Douglas King 91 West Taggart Street P.O. Box 85 East Palestine, Ohio 44413

JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 18, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Jeffrey Shugart appeals from a probation violation and revocation decision of the Mahoning County Common Pleas Court. The issues on appeal revolve around sentencing and a claim of ineffective assistance of trial counsel concerning the advice to stipulate to a probation violation. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} Appellant was indicted on two fourth-degree felony counts of trafficking in marijuana within the vicinity of a school. Pursuant to a negotiated plea agreement memorialized on January 20, 2008, the state dismissed one count, and appellant pled guilty to an amended count of fourth-degree felony attempted possession of marijuana. The state agreed to stand silent at sentencing. On March 14, 2008, the trial court sentenced appellant to three years of community control, giving notice that if he failed to abide by all laws or otherwise violated his probation, he could be sentenced to longer or more restrictive sanctions including up to eighteen months in prison.

¶{3} On August 19, 2008, appellant was arrested for possession of cocaine and failure to comply with an order of a police officer. As a result, the state filed a motion to extend or revoke community control in this case. On October 28, 2008, appellant agreed to stipulate to the probation violation, and the state agreed to recommend ten months in prison and to not take a position on judicial release. At the time, an indictment was pending for the fifth-degree felony possession of cocaine charge that arose from his arrest on August 19, 2008.

¶{4} The court accepted the stipulation after questioning the defendant on his right to make the state prove the violation and his understanding that he was waiving this right to a hearing and stipulating to the violation. In a November 3, 2008 entry, the court revoked appellant's community control and sentenced him to ten months in prison. The court specified that appellant was not amenable to community control

sanctions and that prison was consistent with the purposes of sentencing in R.C. 2929.11.

¶{5} Appellant filed timely notice of appeal and was appointed new counsel for purposes of appeal. Appellant sets forth a total of five assignments of error. We will first address the four assignments dealing with sentencing that were argued by appellate counsel. We will then address a separate assignment of error dealing with ineffective assistance of trial counsel, which was outlined by new counsel but is considered to have no merit by said counsel. We shall utilize a pro se brief filed by appellant to ascertain his position on the topic.

ASSIGNMENT OF ERROR NUMBER ONE

¶{6} Appellant's first assignment of error provides:

¶{7} "THE DEFENDANT/APPELLANT'S SENTENCE WAS NOT PROPORTIONAL RELATIVE TO THE DEFENDANT'S CONDUCT LEADING TO THE CHARGE AND THEREFORE THE SENTENCE IS CONTRARY TO LAW."

¶{8} Appellant argues that R.C. 2929.14(E)(4) requires a proportionality analysis, that there is no indication that a ten-month sentence is proportionate to his conduct, and that the court should be required to set forth its reasons as to why the sentence is proportionate. The state responds with an argument as to why the sentence did not violate the Eighth Amendment. However, since this assignment does not raise this amendment or argue that the sentence is shocking to a reasonable person, we need not delve into this principle.

¶{9} R.C. 2929.14(E)(4) previously required a sentencing court to find, inter alia, "that the consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public" before imposing consecutive sentences. The court also had to state its reasons for such finding under R.C. 2929.19(B)(2)(c).

¶{10} However, *Foster* severed these provisions so that a sentencing court no longer has to provide findings or reasons. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶97, 99 (severed R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2) and their requirements). The two cases cited in appellant's brief were pre-*Foster* decisions. See

State v. Berryman, 2d Dist. No. 18770, 2002-Ohio-264; *State v. Reese*, 2d Dist. No. 2001-CA-48, 2002-Ohio-937.

¶{11} In any event, R.C. 2929.14(E)(4) dealt solely with consecutive sentences, which is not an issue here. Thus, R.C. 2929.14(E)(4) is neither existent nor applicable, and a sentencing court is not required to give reasons concerning proportionality.

¶{12} Finally, there is no indication that appellant's sentence is not proportionate to appellant's conduct. The range for a fourth degree felony is six to eighteen months. Thus, his ten-month sentence is nowhere near a maximum sentence. It is even lower than a mid-range sentence. The court was permitted to consider that he was originally charged with two counts of trafficking and that the offenses were alleged to have occurred within the vicinity of a school. See, e.g., *State v. Cooey* (1989), 46 Ohio St.3d 20, 35; *State v. Burton* (1977), 52 Ohio St.2d 21, 23; *State v. Moore*, 7th Dist. No. 03BE22, 2003-Ohio-4888, ¶18-21.

¶{13} Moreover, the court originally gave appellant community control. However, within five months, he violated his community control. In fact, he did so by committing another felony drug offense. This time the drug was cocaine as opposed to marijuana. As such, the sentencing court could have rationally found that a lower than mid-range prison term was proportionate to appellant's conduct in this case. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

¶{14} Appellant's second assignment of error alleges:

¶{15} "DEFENDANT/APPELLANT'S SENTENCE IS CONTRARY TO LAW AS IT DOES NOT SERVE THE OVERRIDING PURPOSES AND PRINCIPLES OF SENTENCING AS EXPRESSED IN ORC 2929.11."

¶{16} R.C. 2929.11 provides in pertinent part:

¶{17} "(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others

from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

¶{18} "(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders."

¶{19} The trial court stated, "Upon review of the matters set forth, the Court believes that the Defendant is not amenable to community control and that prison is consistent with the purposes of R.C. 2929.11." See *State v. Mayor*, 7th Dist. No. 07MA177, 2008-Ohio-7011, ¶40 (if court had to show consideration of the statute, statement in judgment entry is sufficient), citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶5, 18. In any event, this court recently held that a sentencing court's consideration of R.C. 2929.11 is presumed from a silent record. *State v. James*, 7th Dist. No. 07CO47, 2009-Ohio-4392, citing *Kalish*, 120 Ohio St.3d at fn.4, and *State v. Adams* (1988), 37 Ohio St.3d 295. Regardless, appellant is raising the sentence's factual and actual consistency with R.C. 2929.11, not whether the trial court evidenced that it considered R.C. 2929.11.

¶{20} Contrary to appellant's assertion, there is no indication that the sentence of ten months is not consistent with the need for protection and deterrence. There is also no indication that the sentence is not commensurate with the seriousness of appellant's conduct. He was given a good plea deal in the first instance, and he was then given a chance to avoid prison and abide by the laws of society. However, in a mere five months he reoffended with a more serious drug. He was then given a sentence less than mid-range. The purposes and principles of sentencing set forth in R.C. 2929.11 were not violated here.

ASSIGNMENT OF ERROR NUMBER THREE

¶{21} Appellant's third assignment of error proposes:

¶{22} "THE TRIAL COURT ERRED IN IMPOSING A NON MINIMUM SENTENCE UPON DEFENDANT/APPELLANT."

¶{23} Appellant acknowledges that *Foster* excised R.C. 2929.14(B), which required certain findings to be made in order to deviate upwards from a minimum sentence. Yet, he urges that the statutory policy remains clear that the shortest prison term is the starting point, which should be maintained unless it would not adequately protect the public or it would demean the seriousness of the offender's conduct.

¶{24} However, the trial court is free to use its discretion to impose any sentence in the range, and there is no presumptive right to a minimum sentence. See *Foster*, 109 Ohio St.3d 1 at ¶96 ("Without the mandatory judicial fact-finding, there is nothing to suggest a 'presumptive term'."), ¶97 (holding that R.C. 2929.14(B), dealing with deviation from the minimum, is severed and no longer has meaning). See, also, *State v. Frost*, 7th Dist. No. 08MA44, 2009-Ohio-1014, ¶13 (finding no sentencing problem where the trial court failed to follow the excised mandates of R.C. 2929.14(B) concerning imposition of a minimum sentence).

¶{25} Since appellant was already given a sentencing break when he received community control, a minimum sentence the second time around is not such an appropriate starting point. The imposition of more than the minimum here was neither contrary to law nor an abuse of discretion. See *State v. Gray*, 7th Dist. No, 07MA156, 2008-Ohio-6592, ¶12-17 and *State v. Mann*, 7th Dist. No. 08JE12, 2008-Ohio-6365, ¶19-24, citing and applying *Kalish*, 120 Ohio St.3d 23.

ASSIGNMENT OF ERROR NUMBER FOUR

¶{26} Appellant's fourth assignment of error provides:

¶{27} "THE TRIAL COURT'S IMPOSITION OF A TEN (10) MONTH SENTENCE IN THE PRESENT CASE IS CONTRARY TO LAW AND/OR VIOLATES THE MANDATES OF ORC 2929.13(A).

¶{28} Appellant claims that a ten-month sentence violates the following portion of R.C. 2929.13(A): "The sentence shall not impose an unnecessary burden on state or local government resources."

¶{29} Contrary to appellant's initial suggestion, the sentencing court need not specifically make a finding that the sentence does not impose an unnecessary burden on government resources. *State v. Clay*, 7th Dist. No. 08MA2, 2009-Ohio-1204, ¶182. Moreover, there is no indication that a ten-month prison term for attempted drug

possession (lowered from trafficking in the vicinity of a school) and for a probation violation a few months thereafter is unnecessarily burdensome to the government where the court already tried to give the offender a chance to serve his punishment through community control but where the offender failed to stop committing drug offenses and escalated to a more serious type of drug.

¶{30} As such, the sentencing court could have rationally used its discretion to find that the burden on resources in imprisoning appellant was not unnecessary but was in fact necessary to deter him and others not only from committing the original offense but from ignoring the terms of community control and reoffending with no regard for the probationary nature of the offender's status. This assignment of error is without merit.

¶{31} Consequently, the sentencing assignments of error are overruled on the merits. We also note that, although the issue was not raised by the state at oral argument or elsewhere, it appears that the sentencing issues may be moot as his sentence may have been served on the probation violation.

PRO SE ASSIGNMENT OF ERROR

¶{32} Appellant's pro se assignment of error contends:

¶{33} "DEFENDANT/APPELLANT WAS DENIED SUBSTANTIVE DUE PROCESS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL."

¶{34} To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687. Deficient performance is demonstrated by showing counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 156. When reviewing whether counsel's performance was deficient, courts must refrain from second-guessing strategic decisions of trial counsel. *State v. Sallie* (1998), 81 Ohio St.3d 673, 674. There is a strong presumption that trial counsel's decisions fell within the wide range of reasonable professional assistance. Id. at 674-475. This is partly because a licensed attorney is presumed to execute his duties in a competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

¶{35} To establish prejudice, a defendant must show there is a reasonable possibility that, but for counsel's errors, the result of the proceeding would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, citing *Strickland*, 466 U.S. at 694. A reasonable probability is that sufficient to undermine our confidence in the outcome of the case. Id. The defendant bears the burden of proof in demonstrating ineffective assistance of counsel. *Smith*, 17 Ohio St.3d at 100.

¶{36} Appellant states that he asked his attorney to seek a copy of the discovery information for him but that counsel never provided him with such information. Appellant then suggests that it could not be determined that he violated his community control until he was convicted of the new criminal charge, which was the reason for the issuance of the notice of violation. He states that he did not want to take the deal, which entailed him stipulating to the violation and the state recommending ten months in prison and taking no position on judicial release. He claims that he only took the deal because his counsel told him that if he did not, then he could get the maximum sentence of eighteen months which could run consecutive to his pending charge.

¶{37} First, an attorney's advice to take a plea deal is not ineffective assistance of counsel. See, e.g., *State v. Jones*, 7th Dist. No. 06MA17, 2008-Ohio-3352, ¶9. The attorney is there to give informed advice, to relate worse case scenarios to his client, and to make a recommendation regardless of whether it makes the client upset. There is no serious error alleged to have occurred here.

¶{38} Second, a hearing on a community control violation can take place even though the trial on the offense which resulted in the violation has not yet occurred. Notably, the standards of proof are different. See, e.g., *State v. Wallace*, 7th Dist. No. 05MA172, 2007-Ohio-3184, ¶16 (trial court need not find the probation violation established beyond a reasonable doubt but must merely find substantial evidence that a term or condition of probation was breached); *State v. Walker* (July 26, 1995), 7th Dist. No. 93J48. See, also, *State ex rel. Coulverson v. Ohio Adult Parole Auth.* (1991), 62 Ohio St.3d 12, 15 (regarding parole violations).

¶{39} We next point out that appellant stipulated to the violation notwithstanding that he wished to see discovery. Ineffective assistance of counsel

issues such as this are waived upon a guilty plea. See *State v. Buchanan*, 7th Dist. No. 05MA60, 2006-Ohio-5653, ¶17.

¶{40} Furthermore, only issues occurring on the record can be evaluated in a direct appeal. *State v. Hartman* (2001), 93 Ohio St.3d 274, 299 (if establishing ineffective assistance of counsel requires proof outside the record, then such claim is not appropriately considered on direct appeal); *State v. Ishmail* (1978), 54 Ohio St.2d 402, 406 (the appellate court is limited to what transpired as reflected by the record on direct appeal and cannot rely upon evidence de hors the record). Thus, any allegations of events occurring off the record are not the proper topic for direct appeal. Id.

¶{41} Finally, even if we could look beyond the record in this case, this would reveal that appellant ended up pleading guilty to the pending criminal charge as well, showing there was no outcome-determinative prejudice in this case. See *State v. Shugart* (12/12/2008 Plea J.E.), Mah. Cty. Case No. 2008CR1014. This assignment of error is without merit.

¶{42} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
Waite, J., concurs.