

{¶7} THE APPELLANT WAS PREJUDICED BY THE ADDMISSION [sic] OF OTHER CRIMES EVIDENCE THAT WAS IRRELAVENT [sic] TO THE APPELLANTS [sic] CONVICTIONS.

{¶8} "ASSIGNMENT OF ERROR NO. FOUR

{¶9} THE SENTENCE IMPOSED IS CONTRARY TO LAW AND NOT SUPPORTED BY THE RECORD."

{¶10} In 1997, appellant was indicted on three counts of felonious assault in violation of R.C. 2903.11(A)(2) and one count of carrying a concealed weapon in violation of R.C. 2923.12(A). Each count also carried a firearm specification. Following a jury trial, appellant was convicted of three counts of complicity to commit felonious assault and was sentenced to six years of imprisonment on each count, to be served consecutively. On appeal to this court in 1999, appellant asserted that the trial court erred as a matter of law by ordering the sentences to run consecutively. We agreed, finding that the trial court failed to make the specific findings required by R.C. 2929.14(E)(3). We therefore vacated the sentence and remanded the case to the trial court for resentencing. *State v. Jackson* (Feb. 5, 1999), Erie App. No. E-97-116.

{¶11} Appellant was resentenced on March 1, 1999. The trial court, however, resentenced appellant to three consecutive five-year prison terms without making any of the findings required by R.C. 2929.14(E)(3). On January 12, 2000, appellant filed a mandamus action to compel the trial court to make the necessary statutory findings before ordering that his sentences run

consecutively. On March 2, 2000, we granted appellant's mandamus action and ordered the trial court to comply with our previous mandate. *State v. Jackson* (Mar. 2, 2000), Erie App. No. E-00-001.

{¶12} Appellant was resentenced on April 13, 2000 to five years imprisonment on each count, with the sentences to run consecutively. The court found that appellant met the criteria set forth in R.C. 2929.14(E)(4)ⁱ for imposition of consecutive sentences and that consecutive sentences were necessary to protect the public from future crime or to punish appellant and that consecutive sentences were not disproportionate to the seriousness of the crime and the danger appellant poses to the public. At the sentencing hearing, the judge stated that these findings were based upon appellant's juvenile record and criminal convictions and the events of the crimes for which he was convicted in this case. The court also noted that appellant showed no remorse and that his record indicates that there was a great probability that he would commit other crimes in the future.

{¶13} Appellant appealed that judgment to this court, where he argued in pertinent part that the trial court abused its discretion and committed plain error when it used evidence of crimes for which appellant was acquitted or where the charges were dismissed as a basis for its findings under R.C. 2929.14(E)(4). Appellant asserted that three of the twenty-nine convictions listed in the presentence report were inaccurate. Upon review, we concluded that because appellant had raised the issue of the accuracy of his criminal record at the sentencing hearing, the trial court was

obligated under R.C. 2951.03(B)(5) to investigate the issue and determine whether there were any errors or whether the accuracy of the report was relevant to the sentencing hearing. At the resentencing hearing, the trial court quoted the criminal record without addressing the factual accuracy of the report. The court then stated that, in part based upon that record, appellant needed to be incarcerated for a lengthy period of time in order to protect the public. Accordingly, we concluded that the trial court failed to comply with R.C. 2951.03(B)(5) and again remanded the case to the trial court for resentencing. See *State v. Jackson* (Mar. 30, 2001), Erie App. No. E-00-023.

{¶14} On May 24, 2001, the case again came before the trial court for resentencing. At the beginning of the hearing, however, appellant's counsel informed the court that appellant wanted new counsel. Appellant himself then explained that because he had already argued to the court of appeals that his counsel was ineffective for failing to timely raise the issue of allied offenses of similar import, it would be a conflict of interest for that counsel to continue to represent him. The trial court, however, denied the request, noting that we had already determined that counsel was not ineffective for failing to raise the issue of allied offenses of similar import. The court then addressed several motions which appellant had filed with the court pro se, including a motion requesting Judge Cirigliano to recuse himself and a motion for a copy of a complete trial transcript and sentencing transcript at state expense. The court denied the motion for recusal, noting that appellant had not followed the

proper procedure, denied the motion for a complete trial transcript for the reason that appellant had already been provided with a copy of that transcript and granted appellant's motion for a transcript of the sentencing hearing at state expense. Appellant then complained that he and his counsel had not had time to prepare for the hearing. Appellant's counsel then moved to continue the hearing so that he and appellant could discuss the issues. The trial court granted the motion and rescheduled the hearing for June 7, 2001.

{¶15} At the beginning of the June 7 hearing, the court revisited the motion for recusal and asked if anyone wanted to be heard on the matter. No one responded and the court again denied the motion. The court then proceeded to hear the state's evidence to determine if there were any mistakes in the presentence investigation report. The state presented certified copies of records from the Erie County Court of Common Pleas, Juvenile Division, which showed adjudications for offenses that appellant had committed as a juvenile. These offenses included obstructing official business, assault, criminal damaging, drug abuse, drug trafficking, incorrigibility, a curfew violation, a probation violation, driving without a driver's license, and permitting an unlicensed driver to drive. The court also admitted into evidence and considered a document titled "Institution Summary Report" which documents appellant's disciplinary record since he has been incarcerated. Appellant argued that these exhibits did not establish a serious criminal record which would support a likelihood of recidivism on his part and were not "convictions."

In making his own statement to the court, appellant stated that although he felt bad for the victims of the shooting incident, he did not feel remorseful because he did not have a gun or shoot at the victims himself.

{¶16} The court then reimposed the previous sentence, ordering appellant to serve three consecutive sentences of five years each.

In imposing this sentence, the court stated:

{¶17} "The reason for that is your past record, Exhibits 1 through 10, and the Court's Exhibit Number 1, clearly indicate to this Court that you had no respect for the law as a juvenile and, apparently, you had no respect for the law or rules after you were put in the -- after you were put in the prison. *** The Court finds and believes that if you were to be released from prison early you would be back in prison because you have a tendency to recidivism, that the seriousness of these crimes clearly indicate that you have no respect for the law whatsoever, and to give you a lesser sentence would diminish the seriousness of the crime and would not protect the general public from any future activity of yours. Your history frightens this Court, to be honest with you, and your past record clearly indicates to this Court that you're a menace to society and, as a result, those sentences that were heretofore imposed are proper sentences."

{¶18} The trial court subsequently filed a judgment entry resentencing appellant to three consecutive terms of five years each. In that judgment entry, the court noted that it had considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and

purposes of sentencing under R.C. 2929.11, and had balanced the seriousness and recidivism factors of R.C. 2929.12. With regard to the imposition of consecutive sentences, the court found that appellant met the criteria set forth in R.C. 2929.14(E)(4), that consecutive service was necessary to protect the public from future crime or to punish appellant and that consecutive sentences were not disproportionate to the seriousness of appellant's conduct or to the danger appellant poses to the public. It is from that sentence that appellant now appeals.

{¶19} Appellant has raised a number of issues under his four assignments of error. Nevertheless, because we find plain error in the trial court's resentencing of appellant, we are compelled to reverse that judgment and again remand this case to the trial court for resentencing.

{¶20} The overriding purposes of the felony sentencing statutes are to "protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.11(A). Accordingly, the trial court's sentence should be reasonably calculated to achieve these purposes, mindful of the seriousness of the offender's conduct and its impact upon the victim, and consistent with other sentences imposed for similar conduct by similar offenders. R.C. 2929.11(B).

{¶21} Pursuant to R.C. 2929.12(A), the trial court has discretion in determining the most effective way to comply with the principles and purposes of sentencing set forth in R.C. 2929.11. In exercising its discretion, however, a trial court must consider the factors enumerated in R.C. 2929.12(B) and (C) to determine

whether the offender's conduct is more serious or less serious than conduct normally constituting the offense. The court must further evaluate the factors enumerated in R.C. 2929.12(D) and (E), which relate to the likelihood that the offender will commit future crimes.

{¶22} In addition to the above, R.C. 2929.14(B) mandates that for a defendant who has not previously been sentenced to prison, the trial court must impose the shortest prison term possible unless it finds on the record that the shortest prison term will demean the seriousness of the offense or that such a term "will not adequately protect the public from future crime by the offender or others." Finally, the court can impose consecutive sentences for multiple offenses, only if the court finds:

{¶23} "[T]hat the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

{¶24} "(a) The offender committed the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

{¶25} "(b) The harm caused by the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects

the seriousness of the offender's conduct.

{¶26} "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender." R.C. 2929.14(E)(4).

{¶27} A trial court must articulate its reasons for imposing consecutive sentences on a defendant. R.C. 2929.19(B)(2)(c).

{¶28} In the present case, the trial court explained its reasons for imposing consecutive sentences on appellant when it stated that appellant's "past record, Exhibits 1 through 10, and the Court's Exhibit Number 1, clearly indicate to this Court that you had no respect for the law as a juvenile and, apparently, you had no respect for the law or rules after you were put in the -- after you were put in the prison." Court's exhibit one is a document titled "Institution Summary Report" which lists appellant's disciplinary record since he has been in prison. The report lists three infractions which resulted in appellant's being placed under disciplinary control. During the hearing below, the court asked appellant's counsel if he had seen the report, to which appellant's counsel responded that he had. Counsel, however, also explained to the court that the hearing was for resentencing and not an early release hearing. The court stated that it understood the purpose of the hearing. Nevertheless, the court marked the report as court's exhibit one and gave appellant an opportunity to explain the violations. The court then clearly used the violations as support for its imposition of consecutive sentences.

{¶29} Nothing in our reading of the sentencing statutes gives a

trial court the authority to consider a defendant's subsequent institutional record in determining whether consecutive sentences are appropriate. Upon a court of appeal's remand and mandate to resentence a defendant, a trial court must return to the time when the defendant was originally sentenced and consider only those matters that could properly be considered at that time. Because the trial court considered factors which it was not statutorily authorized to consider, it erred in sentencing appellant and this case must be remanded for resentencing.

{¶30} In light of this ruling, the fourth assignment of error, which challenges appellant's sentence, is moot.

{¶31} In his second assignment of error, appellant asserts that he was denied the effective assistance of counsel during the resentencing proceeding below. Specifically, appellant argues that his counsel was ineffective for failing to file a proper motion for recusal after the court notified him that the pro se motion filed by appellant was improper; failing to argue the motion for recusal to the trial court; failing to seek a continuance so that he could file a motion for recusal in the Ohio Supreme Court; and failing to argue that state's exhibits one through ten were inadmissible under Evid.Rs. 401 and 402.

{¶32} The standard of review for evaluating claims of ineffective assistance of counsel was enunciated by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, as follows:

{¶33} "2. Counsel's performance will not be deemed ineffective

unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391; *Strickland v. Washington* [1984], 466 U.S. 668, followed.)

{¶34} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶35} Further, there is "a strong presumption that counsel's conduct falls within the wide range of professional assistance ***." *Bradley, supra*, at 142, quoting *Strickland, supra*, at 689. In this regard, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland, supra*, at 689, quoting *Michael v. Louisiana* (1955), 350 U.S. 91, 101. Ohio presumes a licensed attorney is competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299.

{¶36} Three of appellant's four arguments relate to his assertion that Judge Cirigliano should have been recused from resentencing him in the proceedings below. Appellant contends that because Judge Cirigliano had presided over his previous sentencing, he was biased against appellant. Appellant further contends that Judge Cirigliano demonstrated his bias against appellant in his treatment of appellant at the resentencing hearing. As such, appellant asserts that his trial counsel should have filed a proper motion for recusal in the Ohio Supreme Court, should have argued

for Judge Cirigliano to voluntarily recuse himself from the proceeding below, and should have sought a continuance to pursue Judge Cirigliano's recusal.

{¶37} In *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 188, the Supreme Court of Ohio stated that "[a] judge need not recuse himself simply because he acquired knowledge of the facts during a prior proceeding. *** '[W]hat a judge learns in his judicial capacity - whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both - is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification.'" Accordingly, the fact that Judge Cirigliano presided over the previous sentencing hearings was not, standing alone, a basis for his recusal. We further find no other evidence of bias on the record that would support an argument for recusal. As such, appellant's trial counsel was not ineffective for failing to seek the judge's recusal on that basis.

{¶38} Appellant further asserts that his trial counsel was ineffective for failing to argue that state's exhibits one through ten were inadmissible under Evid.Rs. 401 and 402. It is well-established that the Rules of Evidence do not apply to sentencing hearings. Evid.R. 101(C); *State v. Cook* (1998), 83 Ohio St.3d 404, 425. Accordingly, appellant's trial counsel was not ineffective for failing to argue that the exhibits were inadmissible. The second assignment of error is therefore not well-taken.

{¶39} Because the issue will again be raised at appellant's resentencing, we are compelled to address the third assignment of

error in which appellant asserts that the trial court erred by considering evidence of appellant's juvenile record in its sentencing of appellant. Appellant asserts that state's exhibits one through ten were evidence of other crimes, wrongs or acts and were therefore inadmissible pursuant to Evid.R. 404(B). As we stated above, the Ohio Rules of Evidence do not apply to sentencing hearings. Furthermore, R.C. 2929.12(D), provides in pertinent part:

{¶40} "The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

{¶41} "***

{¶42} "(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code *** or the offender has a history of criminal convictions.

{¶43} "(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code *** or the offender has not responded favorably to sanctions previously imposed for criminal convictions."

{¶44} Accordingly, a sentencing court is required to consider an offender's juvenile record in determining whether the offender is likely to reoffend, and, therefore, in sentencing the offender. Appellant's third assignment of error is not well taken.

{¶45} In this first assignment of error, appellant asserts that

the trial court abused its discretion in sentencing appellant. Under this assignment of error, however, appellant raises five issues for our review. Appellant argues that the court erred in refusing to allow appellant's trial counsel to withdraw; in refusing to allow appellant to consult with his counsel regarding the proper procedure for the judge's recusal and in denying appellant's request that the judge voluntarily recuse himself; in refusing to recuse himself; in refusing to grant appellant a copy of his trial transcript; and in refusing to allow appellant to state his objections to the sentence on the record. Given our findings above, appellant's arguments regarding recusal are not well-taken. In addition, because this case is being remanded for resentencing, appellant's argument regarding the judge's alleged refusal to allow appellant to place his objections on the record is moot. We will, however, address the two remaining arguments raised by appellant.

{¶46} Appellant asserts that the court erred in refusing to allow appellant's trial counsel to withdraw from the case.

{¶47} It is well-established that:

{¶48} "An indigent defendant has a right to competent counsel, not a right to counsel of his own choosing. *Thurston v. Maxwell* (1965), 3 Ohio St.3d 92, 93 ***. The right to competent counsel does not require that a criminal defendant develop and share a 'meaningful relationship' with his attorney. *Morris v. Slappy* (1983), 461 U.S. 1, 13 ***. Rather, an indigent defendant is entitled to the appointment of substitute counsel only upon a showing of good cause, such as a conflict of interest, a complete

breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust result. *State v. Pruitt* (1984), 18 Ohio App.3d 50, 57 ***." *State v. Blankenship* (1995), 102 Ohio App.3d 534, 558.

{¶49} "It is within the trial court's discretion to decline to replace appointed counsel." *State v. McNeill* (1998), 83 Ohio St.3d 438, 452. In the present case, we find no abuse of discretion in the trial court's refusal to replace appellant's appointed counsel. Appellant's only cited reason for seeking new counsel was his prior argument before this court that trial counsel was ineffective for failing to timely raise the issue of allied offenses of similar import. In our decision and judgment entry of March 20, 2001, however, we determined that the offenses for which appellant was convicted were not allied offenses of similar import. Accordingly, we found that appellant's counsel was not ineffective for failing to raise the issue.

{¶50} Finally, appellant argues that the trial court erred in refusing to grant his request for a copy of the trial transcript at state expense. It is well-established that while the state must provide an indigent criminal defendant "with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal," *Britt v. North Carolina* (1971), 404 U.S. 226, 227, "[t]he state is under no duty to provide multiple transcripts at state expense to an indigent defendant." *State v. Moss* (1988), 44 Ohio App.3d 27, 27, citing *State ex rel. Ralston v. Hill* (1981), 65 Ohio St.2d 58. The record in the present case is clear. Appellant was provided with a copy of the trial transcript at state expense

upon his direct appeal of his conviction to this court. Accordingly, the trial court did not err in denying his request for another copy of that transcript.

{¶51} The first assignment of error is, therefore, not well-taken.

{¶52} Having found that the trial court committed error prejudicial to appellant with respect to his sentence, the judgment of the Erie County Court of Common Pleas is reversed and appellant's sentence is vacated. This case is remanded to the trial court for resentencing in accordance with this decision. Appellee is ordered to pay the court costs of this appeal.

JUDGMENT REVERSED.

James R. Sherck, J.

JUDGE

Richard W. Knepper, J.

JUDGE

Mark L. Pietrykowski, P.J.
CONCUR.

JUDGE

¹R.C. 2929.14 (E) was subsequently amended. The criteria for imposing consecutive sentences is now set forth in R.C. 2929.14 (E) (4).