

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	CASE NOS. CA2010-01-006
	:	CA2010-04-024
	:	
- vs -	:	<u>OPINION</u>
	:	10/12/2010
	:	
MICHAEL P. GRAY,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2009CR0303

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

Christine D. Tailer, P.O. Box 14, Georgetown, Ohio 45121, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, Michael P. Gray, appeals from his conviction in the Clermont County Court of Common Pleas for one count of rape and two counts of conspiracy to commit aggravated murder. For reasons outlined below, we affirm.

{¶2} On April 22, 2009, appellant was indicted for raping a six-year-old child, K.M., in violation of R.C. 2907.02(A)(1)(b), a first-degree felony, attempted rape in violation of R.C. 2923.02(A) and R.C. 2907.02(A)(1)(b), a second-degree felony, and gross sexual imposition

in violation of R.C. 2907.05(A)(4), a third-degree felony. The charges stem from acts that allegedly occurred while appellant was babysitting the child.

{¶3} On August 22, 2009, while being held in the Clermont County Jail, appellant asked another inmate to kill K.M. and her mother, M.P., so that they could not appear as witnesses against him in his upcoming rape trial. The inmate, who appellant called the "exterminator," informed the authorities of appellant's plan and a sting operation was set in motion. Thereafter, while working with police, the inmate recorded a conversation he had with appellant regarding the price to be paid, the time frame required, and the method to be used to effectuate the killings. The police also tracked telephonic and mail correspondence that contained details of the "hit."

{¶4} On August 26, 2009, appellant, along with his mother, Belinda Gray, and his girlfriend, Mary Woodrey, met with the inmate during a jail visit to discuss the details of the killings. That same day, and in furtherance of the sting operation, the Clermont County Sheriff's Office arranged for the inmate to be released from jail. Upon his release, the inmate contacted Belinda to set up a meeting with Woodrey so that he could be shown the victim's residence. Later that afternoon, Woodrey met with the inmate at a local restaurant, drove him to the victim's residence, pointed out where the child and her mother lived, and requested photographic evidence of the killings. Once the sting operation was complete, appellant, Belinda, and Woodrey were all arrested and charged with conspiring to kill the child and her mother.

{¶5} On November 19, 2009, the trial court held a plea hearing for appellant during which the following exchange occurred:

{¶6} "[THE STATE]: At this time, Judge, it's the State's understanding at this time [appellant] is going to withdraw his former pleas of not guilty, and be entering pleas of guilty as follows: In Case No. 09CR303, it's my understanding [appellant] will be entering a plea of

guilty to Count 1, the charge of Rape, which is a felony in the first degree. As indicated that carries either a term of life without parole, or a term of life – 15 to life depending on the Court's sentencing – at the time of sentencing.

{¶7} "In exchange for that plea of guilty to Count 1, the State is going to ask the Court dismiss Counts 2 and 3 at the time of sentencing. Further, it's our understanding in Case No. 09CR616 [appellant] will be entering a plea of guilty to Counts 1 and 2 of the indictment as charged. Count – both counts are counts of Conspiracy to Commit Aggravated Murder, both felonies of the first degree.

{¶8} "Further the State is not making any promises with what stance we will take against [appellant] at the time of sentencing. However, there have been extraneous plea negotiations, I would say, where [appellant] entering into this plea is contingent, if you will, upon plea offers being extended to both his mother and, I believe, his girlfriend, Ms. Woodrey in separate courtrooms. And those being tenured agreed plea deal for Ms. Woodrey in front of Judge Zuk which hopefully will take later this morning [sic].

{¶9} "In addition, a plea of guilty to one count against Belinda Gray, [appellant's] mother hopefully this morning as well in front of Judge McBride. I believe that's the extent of the plea offer, Judge. [Appellant's Trial Counsel], correct me if I'm wrong, or if I left anything out?

{¶10} "[APPELLANT'S TRIAL COUNSEL]: Just that I believe, Your Honor, that Judge McBride has indications that he would be sentencing * * * Ms. Gray at the very low end of the spectrum, somewhere in the lower end."

{¶11} "THE COURT: All right.

{¶12} "[THE STATE]: Thank you. That is also the State's understanding. * * * We will be recommending a 3-year prison term here.

{¶13} "THE COURT: All right. [Appellant's Trial Counsel], do you concur with what

the prosecutor has indicated that your client will plead to?

{¶14} "[APPELLANT'S TRIAL COUNSEL]: That's correct, Your Honor. Just for the record?

{¶15} "THE COURT: Yes.

{¶16} "[APPELLANT'S TRIAL COUNSEL]: I would like to point out that [appellant] has been asked to plead first prior to his co-defendants pleading. And he's also been asked to be sentenced first prior to his co-defendants being sentenced. I believe it's our understanding that if for some reason the other judges do not abide by what we have just discussed in terms of consideration for his co-defendants, that at that point [appellant] would file a motion to withdraw his plea, the Court would look fairly favorably upon that.

{¶17} "THE COURT: Understood. * * *

{¶18} "[THE STATE]: Yeah, that's the State's understanding as well. Obviously, if – we're hoping the judges will indicate what they've – gone through with what they've indicated.

{¶19} "THE COURT: Very good. All right. [Appellant], does that seem to comport with your understanding of everything?

{¶20} "[APPELLANT]: Yes, sir."

{¶21} Following this exchange, appellant pled guilty to rape and to two counts of conspiracy to commit aggravated murder. That same day Belinda and Woodrey also pled guilty to conspiracy to commit aggravated murder.

{¶22} On December 15, 2009, following the completion of presentence investigation report, the trial court sentenced appellant to life without parole for raping K.M., his six-year-old victim, as well as two ten-year prison terms to be served consecutively for his role in conspiring to kill the child and her mother so that they could not testify against him.

{¶23} On December 21, 2009, the trial court, Judge McBride presiding, sentenced Belinda to five years in prison. That same day, the trial court, Judge Zuk presiding,

sentenced Woodrey to a total of 13 years in prison.¹

{¶24} On January 15, 2010, without first filing a motion to withdraw his guilty plea, appellant filed a notice of appeal, raising two assignments of error.

{¶25} Assignment of Error No. 1:

{¶26} "APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE INSTANT APPEAL WAS FILED WITHOUT AFFORDING HIM THE OPPORTUNITY TO WITHDRAW HIS PLEA IN ACCORD WITH THE PLEA AGREEMENT."

{¶27} In his first assignment of error, appellant claims that he was subject to ineffective assistance of trial counsel because "he was never afforded the opportunity to address his sentencing court after the sentencing of his mother and girlfriend," and therefore, his "case should be remanded back to the trial court to allow [him] the opportunity to file a motion to vacate his plea." We disagree.

{¶28} To prevail on a claim of ineffective assistance of counsel, a criminal defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for his counsel's deficient performance, the result of the proceeding would have been different. *State v. Raleigh*, Clermont App. Nos. CA2009-08-046, CA2009-08-047, 2010-Ohio-2926, ¶13, citing *Strickland v. Washington* (1984), 466 U.S. 668, 690, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Bradley* at 142, quoting *Strickland* at 694.

{¶29} Initially, we note that appellant agreed to plead guilty and be sentenced *prior* to both his mother and his girlfriend. In turn, because appellant had full knowledge that his sentence would be imposed before both of his co-conspirators, appellant entered his guilty

1. This court affirmed Woodrey's conviction and sentence in *State v. Woodrey*, Clermont App. No. CA2010-01-008, 2010-Ohio-4079.

plea *knowing* any motion he filed to withdraw his guilty plea would be a postsentence request, and therefore, reviewed under a "manifest injustice" standard. See Crim.R. 32.1; see, also, *State v. Degaro*, Butler App. No. CA2008-09-227, 2009-Ohio-2966, ¶10, quoting *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus ("[a] defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice"). In addition, we note that there is no indication that appellant's motion to withdraw his guilty plea would have been based on anything other than his dissatisfaction with the sentence his mother and girlfriend received, nor is there any indication that if appellant had filed such a motion that it would have undoubtedly been granted.² See *State v. Neeley*, Clinton App. No. CA2008-08-034, 2009-Ohio-2337, ¶7 (decision to grant or deny postsentence motion to withdraw a guilty plea is within the trial court's discretion); see, also, *State v. Williams*, Warren App. No. CA2009-03-032, 2009-Ohio-6240, ¶11 ("a postsentence withdrawal motion is allowable only in extraordinary cases").

{¶30} That being said, and while we may agree that appellant's trial counsel provided him with less than ideal representation by not initially filing a motion to withdraw his guilty plea, we find appellant, who controls his own appeal, perpetuated his inability to file the requested motion by continuing to fully prosecute his appeal, which included an additional assignment of error challenging his sentence, instead of simply dismissing the appeal pursuant to App.R. 28. See *State v. Morgan*, Cuyahoga App. No. 87793, 2007-Ohio-398, ¶9 ("filing a notice of appeal divests the trial court of jurisdiction to consider a motion to withdraw a plea"); *State v. Winn* (Feb. 19, 1999), Montgomery App. No. 17194, 1999 WL 76797, *5. In other words, although appellant may claim he was subject to ineffective assistance of trial

2. In his brief, appellant even now acknowledges that "there is no guarantee that [his] motion to vacate his plea would be granted by the sentencing judge * * *."

counsel by being "denied the opportunity to set aside his plea before the sentencing Judge," such failure can be attributed, at least in part, to his continued efforts to fully prosecute his claims with this court on direct appeal.

{¶31} Regardless, contrary to appellant's assertions otherwise, by pleading guilty to rape and two counts of conspiracy to commit aggravated murder, appellant waived the right to claim he was prejudiced by the ineffective assistance of counsel except to the extent that the defects complained of caused the plea to be less than knowingly, intelligently, and voluntarily made. *State v. McMahon*, Fayette App. No. CA2009-06-008, 2010-Ohio-2055, ¶33; *State v. Bene*, Clermont App. No. CA2005-09-090, 2006-Ohio-3628, ¶26; *Neeley*, 2009-Ohio-2337 at ¶33; *State v. Barnett* (1991), 73 Ohio App.3d 244, 248. In this case, there is no question that appellant's plea was knowingly, intelligently, and voluntarily made at the time he entered his plea for the trial court provided him with a full Crim.R. 11 colloquy that complied with all constitutional and nonconstitutional notification requirements. *State v. Hargrove*, Butler App. No. CA2009-08-218, 2010-Ohio-2305, ¶7. In turn, because appellant's decision to continue pursuing his appeal left this court with no other option than to address his assignments of error, and because his plea was knowingly, intelligently, and voluntarily made, we find appellant was not subject to ineffective assistance of trial counsel. Accordingly, appellant's first assignment of error is overruled.

{¶32} Assignment of Error No. 2:

{¶33} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM TERM OF IMPRISONMENT OF LIFE WITHOUT PAROLE, CONSECUTIVE TO TWO TEN YEAR CONSECUTIVE SENTENCES, ON ONE COUNT OF RAPE, AND TWO COUNTS OF CONSPIRACY TO COMMIT AGGRAVATED MURDER IN VIOLATION OF R.C. 2907.02(A)(1)(b) AND R.C. 2923.01(A)(1)."

{¶34} In his second assignment of error, appellant argues that the trial court abused

its discretion in sentencing him to "the maximum prison sentence of life without parole running consecutive to two ten year consecutive sentences" because such a sentence was "clearly excessive and violates the underlying philosophy of felony sentencing."³ We disagree.

{¶35} Appellate review of felony sentencing is controlled by the two-step procedure outlined by the supreme court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. Under *Kalish*, this court must first examine the trial court's sentence to determine if "the sentence is clearly and convincingly contrary to law," and then, if the first prong is satisfied, review the sentence for an abuse of discretion. *State v. Bates*, Butler App. No. CA2009-06-174, 2010-Ohio-1723, ¶21, quoting *Kalish* at ¶4. "A sentence is not clearly and convincingly contrary to law, where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible range." *Woodrey*, 2010-Ohio-4079 at ¶24, citing *Kalish* at ¶18.

{¶36} In this case, again contrary to appellant's claim, the record indicates that before handing down its sentence the trial court properly considered the purposes and principles of sentencing under R.C. 2929.11, and balanced the seriousness and recidivism factors listed under R.C. 2929.12. See *State v. Wright*, Warren App. No. CA2008-03-039, 2008-Ohio-6765, ¶57. In addition, the record demonstrates that the trial court properly applied postrelease control and sentenced appellant to a prison term falling within the statutory range for each offense in question. See R.C. 2907.02(B); R.C. 2929.14(A)(1); *State v. Plummer*,

3. We note that appellant failed to object to his prison sentence, and therefore, has forfeited all but plain error. *State v. Humes*, Clermont App. No. CA2009-10-057, 2010-Ohio-2173, ¶15, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶15. However, although appellant has forfeited this error on appeal, we believe it necessary to analyze appellant's claimed error under *Kalish* as it is the most recent guidance the Ohio Supreme Court has offered to review sentencing issues. *State v. Simms*, Clermont App. No. CA2009-02-005, 2009-Ohio-5440, fn. 3; *State v. Burk*, Clermont App. No. CA2009-03-019, 2009-Ohio-5643, fn. 1.

Butler App. Nos. CA2009-06-148, CA2009-06-151 through CA2009-06-154, 2010-Ohio-849, ¶23; *Kalish* at ¶18. Therefore, we find appellant's sentence was not clearly and convincingly contrary to law.

{¶37} Furthermore, we also find the trial court did not abuse its discretion in ordering appellant to serve the maximum sentence for each count as it is evident from the record that the trial court gave careful and deliberate consideration to the relevant statutory considerations. *State v. Elliott*, Clermont App. No. CA2009-03-020, 2009-Ohio-5926, ¶10, citing *Kalish* at ¶20; *State v. Henry*, Clermont App. No. CA2009-12-081, 2010-Ohio-4571, ¶9. In fact, besides characterizing appellant's acts as "one of the more egregious offenses [it has] laid eyes on in a long time," the trial court explicitly stated that it "contemplated those provisions, and those purposes in fashioning the sentence." See *State v. Ligon*, Clermont App. No. CA2009-09-056, 2010-Ohio-2054, ¶18; *Burk*, 2009-Ohio-5643 at ¶12; *State v. Taylor*, Madison App. No. CA2007-12-037, 2009-Ohio-924, ¶69. Therefore, because we find the trial court did not abuse its discretion in sentencing appellant to life in prison without parole for raping a six-year-old child, nor in its decision sentencing appellant to serve two consecutive ten-year prison terms for plotting to kill the child and her mother so that they could not testify against him, appellant's second assignment of error is overruled.

{¶38} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.

[Cite as *State v. Gray*, 2010-Ohio-4949.]