

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-08-072

Appellee

Trial Court No. 2007-CR-699

v.

William I. Keyes

DECISION AND JUDGMENT

Appellant

Decided: December 4, 2009

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Loretta A. Riddle, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, William I. Keyes, appeals from his conviction and sentence entered by the Erie County Court of Common Pleas in the above-captioned case. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On December 13, 2006, appellant was indicted by the Erie County Grand Jury on one count of murder, one count of involuntary manslaughter, a felony of the first degree, one count of felonious assault, a felony of the second degree, and two counts of aggravated robbery, both felonies of the first degree. Further, all counts of the indictment carried a physical harm specification.

{¶ 3} On December 21, 2007, appellant entered a plea of not guilty to the indictment.

{¶ 4} On July 25, 2008, appellant changed his plea of not guilty to one of guilty to a single count of aggravated robbery with a physical harm specification, a felony of the first degree. At the plea hearing, the state represented that the principal offender in the crime, which resulted in the death of victim Steven Cobb, was Michael McGee, a juvenile offender, who pleaded guilty to involuntary manslaughter. The state further represented that the evidence did not support a murder conviction, but "certainly" supported a conviction for aggravated robbery. Finally, the state expressed that it would be seeking the maximum prison term of ten years in this case.

{¶ 5} Defense counsel stated on the record at the hearing that she had apprised appellant of the state's position with regard to his sentence. In addition, the trial court asked appellant if he understood that his prison sentence would be "anywhere from three up to ten years." Appellant answered that he did.

{¶ 6} At the end of the hearing, the trial court found appellant guilty.

{¶ 7} A sentencing hearing was held on the matter on September 23, 2008. At the hearing, the state represented that it believed the statement of codefendant McGee, who stated that appellant, an adult at the time of the offense, "coaxed" and "directed" Michael McGee to punch the victim, who fell backwards and hit his head on the concrete and, as a result of his injuries, passed away several days later. According to the state, McGee's story was confirmed by two jailhouse informants who claimed that they had spoken to appellant.

{¶ 8} Appellant's attorney stated in her argument that appellant was "culpable, responsible for robbing Mr. Cobb, of going into his wallet, of having a * * * first priority motive of theft and trying to ascertain [sic] money from Mr. Cobb instead of trying to help him when he was down." She also stated that appellant "egg[ed] on" McGee "to commit some harm upon the victim in this case in order that * * * Mr. Keyes could then * * * go into his wallet * * *."

{¶ 9} After hearing the arguments of counsel for both sides, the trial court sentenced appellant to serve the maximum of ten years in prison.

{¶ 10} Appellant filed an appeal from the trial court's September 23, 2008 judgment entry, raising the following assignments of error:

{¶ 11} I. "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN HANDING OUT THE MAXIMUM SENTENCE."

{¶ 12} II. "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 13} Appellant argues in his first assignment of error that the trial court abused its discretion in sentencing appellant. The law is clear that trial courts now 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 minimum sentences. See *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, ¶ 7. Courts need only consider the basic purposes and principles of sentencing and determine the most effective way to comply with those purposes and principles. *Id.*; see, also, R.C. 2929.11(A) and (B) (the overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender through reasonable and proportionate sentences); and R.C. 2929.12 (grants the trial court discretion in sentencing and guides that discretion with a nonexclusive list of seriousness factors to consider except where a mandatory sentence is required).

{¶ 14} Appellant argues that the court erred in considering "way too many irrelevant facts that had nothing to do with the charge that Appellant pled to in the court." According to appellant, the only evidence that should have been considered was "how the 'robbery' affected the victim when the victim was alive." Appellant goes on to argue that "[t]here was no robbery and nothing was taken," and "[t]here was no evidence that Appellant intended or caused serious physical harm when he unilaterally went through the wallet." None of these arguments has any merit.

{¶ 15} Pursuant to R.C. 2911.01(A)(3), which deals with the crime of aggravated robbery, "[n]o person, in attempting or committing a theft offense, * * * or in fleeing

immediately after the attempt or offense, shall * * * [recklessly] inflict, or attempt to inflict, serious physical harm on another." Moreover, the physical harm specification provides that the grand jurors found that appellant "did cause or threaten to cause physical harm during the commission of the offense."

{¶ 16} The record demonstrates that the trial court properly considered all of the factors in sentencing appellant as required by R.C. 2929.11 and 2929.12. Specifically, the court stated in its September 23, 2008 judgment entry 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 Ohio Revised Code §2929.11, and [had] balanced the seriousness and recidivism factors of Ohio Revised Code §2929.12." In addition, at the sentencing hearing itself, the trial court stated:

{¶ 17} "What strikes the Court is, first off, not, besides the point of you stating there that you didn't call for help, is the fact that you lied during the investigation.

{¶ 18} "* * *

{¶ 19} "You didn't always tell the truth."

{¶ 20} "* * *

{¶ 21} "And, additionally, two different informants from the jail told similar statements, how you had one statement, one story for the police, and then what really happened, and both of those indicated that you, as your counsel said, egged on the co-defendant in some of this activity; that it was you, the one that instigated the assault; that you went through his wallet after he knocked the guy out. The intent was robbery, not

murder. And as a matter of fact, one of the informants even stated that the victim started to sit up that you both started kicking him. And your counsel is correct, it's a senseless act. The co-defendant just turned 15, you're 20. You were five years older than him. You should have been the example."

{¶ 22} That the victim is dead as a result of appellant's actions, that appellant lied to investigators, that appellant instigated the offense, and that appellant went through the victim's wallet looking for money after he was knocked out are all facts that the court appropriately considered in connection with the offense of aggravated robbery with the physical harm specification.

{¶ 23} The statutory range of a felony of the first degree is a prison term of no less than three years and no more than ten years. R.C. 2929.14(A)(1). Appellant was sentenced to serve ten years in prison, which sentence was within the statutory range. That appellant was sentenced to serve the maximum sentence within the statutory range was appropriate in light of the following: the extent of the harm suffered by the victim, the fact that the victim did not induce the offense or provoke the act, and the fact that appellant expected to cause physical harm. See R.C. 2929.12. The only mitigating factor was that appellant had no prior record. *Id.* On the basis of the foregoing, we find that the trial court did not abuse its discretion in sentencing appellant to the maximum sentence of ten years in prison. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 24} Appellant argues in his second assignment of error that he was denied effective assistance of counsel. In order to establish a claim for ineffective assistance of counsel, a defendant must demonstrate: (1) that counsel's performance was deficient or unreasonable under the circumstances; and (2) that the deficient performance prejudiced the defendant. *State v. Kole* (2001), 92 Ohio St.3d 303, 306, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687.

{¶ 25} To show that counsel's conduct was deficient or unreasonable, the defendant must overcome the presumption that counsel provided competent representation and must show that counsel's actions were not trial strategies prompted by reasonable professional judgment. *State v. Sanders*, 3d Dist. No. 1-09-1, 2009-Ohio-5437, ¶ 60. Counsel enjoys a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675. In general, tactical or strategic trial decisions, even if unsuccessful, do not constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558. Instead, the errors complained of must amount to a substantial violation of counsel's essential duties to his client. *State v. Sanders*, supra. Prejudice results when "there is a reasonable probability that, but for counsel's unprofessional 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. 691. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; *Strickland*, 466 U.S. at 694.

{¶ 26} Appellant initially argues that his counsel did not have sufficient information about the case to provide effective assistance. To the contrary, abundant discovery -- in the form of police reports, prior records, witness lists, the autopsy report, the pathology reports, indictments and recorded statements -- was provided to appellant and his counsel. In light of the amount and type of discovery that was provided, we find that appellant's trial counsel was, in fact, in a position to analyze the case.

{¶ 27} Appellant next appears to argue that his counsel was deficient for failing to file a sufficient number of motions. (We note that nowhere does appellant argue what types of motions he believes should have been filed.) The number (and types) of motions that are filed by an attorney in any given case is a matter of trial strategy and is not, itself, an indicator of ineffective assistance. See *State v. Lester*, 3d Dist. No. 12-08-03, 2008-Ohio-6070, ¶ 69; *State v. Carter*, supra, at 558.

{¶ 28} Appellant points out that on March 4, 2008, appellant's attorney requested a continuance in order to seek an expert, but that an expert was never actually hired. According to appellant, the mere fact that an expert was sought indicates a need for one and that, by not getting an expert, appellant's counsel fell below an "objective standard." We note that appellant fails to state what type of expert would have or should have been requested or how that expert's opinion would have aided in appellant's defense. The decision of whether or not to hire an expert is a matter of trial strategy, and does not, in and of itself, amount to ineffective assistance of counsel. See *State v. Conway*, 109 Ohio St.3d 412, ¶ 18; *State v. Carter*, supra, at 558.

{¶ 29} As we find nothing in the record to show that appellant's trial counsel's conduct was deficient, unreasonable, or in any way prejudicial, we find appellant's second assignment of error not well-taken. See *State v. Kole* (2001), 92 Ohio St.3d 303, 306; *Strickland v. Washington* (1984), 466 U.S. 668, 687.

{¶ 30} Based on all of the foregoing, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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