

# OHIO COURT OF APPEALS, FIFTH APPELLATE DISTRICT, STARK COUNTY

## State v. Penick

2020 Ohio 6897 (Ohio Ct. App. 2020) · No. 2020CA00092 & 2020CA00106 · Decided December 22, 2020

### SUMMARY

The Fifth District Court of Appeals of Ohio affirmed Wayne A. Penick’s convictions and sentences for failure to comply with a police officer’s order or signal and aggravated possession of drugs. The court rejected challenges concerning the guilty plea, sentencing factors, consecutive sentences, and ineffective assistance of counsel, noting the absence of a hearing transcript and the jointly recommended consecutive sentences.

### CASE DETAILS

|                       |                                                                                                                                                                                                       |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Ohio Court of Appeals, Fifth Appellate District, Stark County                                                                                                                                         |
| WRITING FOR THE COURT | William B. Hoffman, P.J.; John W. Wise, J.; Craig R. Baldwin, J.                                                                                                                                      |
| JURISDICTION          | Ohio                                                                                                                                                                                                  |
| DECIDED               | December 22, 2020                                                                                                                                                                                     |
| DOCKET                | 2020CA00092 & 2020CA00106                                                                                                                                                                             |
| DISPOSITION           | affirmed                                                                                                                                                                                              |
| PROCEDURAL POSTURE    | Defendant appealed from a judgment of conviction and sentence entered after guilty pleas in the Stark County Court of Common Pleas.                                                                   |
| STANDARD OF REVIEW    | When a transcript necessary to resolve an assigned error is omitted from the appellate record, the reviewing court presumes the regularity and validity of the lower court's proceedings and affirms. |
| PRECEDENTIAL VALUE    | Published Ohio Court of Appeals opinion                                                                                                                                                               |
| PARTIES               | Wayne A. Penick v. State of Ohio                                                                                                                                                                      |

### TOPICS

[criminal procedure](#) [appellate procedure](#) [sentencing](#) [ineffective assistance](#) [preservation of error](#)

### PRACTICE AREAS

[criminal procedure](#) [appellate practice](#) [sentencing](#) [ineffective assistance of counsel](#)

## QUESTIONS PRESENTED

1. Whether Penick's guilty pleas were invalid because the trial court failed to substantially comply with Crim.R. 11.
2. Whether the trial court failed to consider the sentencing factors under R.C. 2929.12 and R.C. 2929.13.
3. Whether the jointly recommended consecutive sentences were appealable.
4. Whether Penick received ineffective assistance of counsel.

## HOLDINGS

1. When the transcript portions necessary to resolve an assigned error are absent from the appellate record, the appellate court presumes the regularity and validity of the lower court's proceedings and affirms.
2. A jointly recommended sentence is authorized by law and is not appealable under R.C. 2953.08(D) when the trial court does not make consecutive-sentence findings.
3. An ineffective-assistance claim cannot be sustained on direct appeal when it is unsupported by the record as it existed at the time of the judgment under review.

## KEY QUOTATIONS

*“When portions of the transcript necessary for resolution of the assigned error(s) are omitted from the record, the court has no choice but to presume the validity of the lower court’s proceedings, and to affirm.” (¶ 5)*

## FACTUAL BACKGROUND

Penick pleaded guilty to third-degree-felony failure to comply with an order or signal of a police officer and fifth-degree-felony aggravated possession of drugs. The trial court sentenced him to nine months on the failure-to-comply charge and six months on the drug charge. The parties jointly recommended consecutive sentences, and the trial court's sentencing entry referenced consideration of the applicable sentencing statutes.

## PROCEDURAL HISTORY

Penick pleaded guilty to failure to comply with an order or signal of a police officer and aggravated possession of drugs. The trial court imposed nine months and six months of imprisonment, respectively, and journalized the judgment on May 14, 2020. Penick appealed, challenging the plea proceedings, sentencing, consecutive sentences, and effectiveness of counsel, but did not provide a transcript of the plea and sentencing hearing.

## DISPOSITION

affirmed

## CASES CITED

- Knapp v. Edwards Laboratories, 61 Ohio St.2d 197 (1980)
- State v. Sergeant, 148 Ohio St.3d 94 (2016)

## OPINION

PER CURIAM.

[Cite as State v. Penick, 2020-Ohio-6897.] COURT OF APPEALS STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT STATE OF OHIO JUDGES: Hon. William B. Hoffman, P.J.  
Plaintiff-Appellee Hon. John W. Wise, J. Hon. Craig R. Baldwin, J. -vs- Case Nos. 2020CA00092  
& 2020CA00106 WAYNE A. PENICK Defendant-Appellant O P I N I O N CHARACTER OF  
PROCEEDINGS: Appeal from the Stark County Court of Common Pleas, Case Nos. 2020-CR-  
0451(B) & 2020-CR-405 JUDGMENT: Affirmed DATE OF JUDGMENT ENTRY: December 22,  
2020 APPEARANCES: For Plaintiff-Appellee For Defendant-Appellant JOHN D. FERRERO  
WAYNE A. PENICK Prosecuting Attorney Inmate No. A772-868 Stark County, Ohio Belmont  
Correctional Institution P.O.

Box 540 KRISTINE W. BEARD St. Clairsville, Ohio 43950 Assistant Prosecuting Attorney  
Appellate Section 110 Central Plaza, South – Suite #510 Canton, Ohio 44702-1413 Stark County,  
Case Nos. 2020CA00092 & 2020CA00106 2 Hoffman, P.J. {¶1} Defendant-appellant Wayne A.  
Penick appeals the May 14, 2020 Entry entered by the Stark County Court of Common Pleas,  
convicting and sentencing him on one count of failure to comply with an order or signal of a  
police officer, in violation of R.C.

2921.331(B)(C)(5)(a)(ii), a felony of the third degree; and one count of aggravated possession of  
drugs, in violation of R.C. 2925.11(A)(C)(1)(a), a felony of the fifth degree, emanating from trial  
court case numbers 2020CR0451(B) and 2020CR0405.

The state of Ohio is plaintiff-appellee. {¶2} We begin by noting Appellant’s brief does not comply  
with App.R. 16 in numerous ways. Such noncompliance is sufficient grounds to dismiss his  
appeal. Nevertheless, we elect to briefly address the arguments he raises therein. STATEMENT  
OF THE CASE1 {¶3} On May 1, 2020, Appellant appeared before the trial court represented by  
counsel and changed his plea to guilty to the two aforementioned charges.

The trial court sentenced him to nine months in prison on the failure to comply charge and six  
months in prison on the drug charge. The trial court journalized its decision via Entry filed May  
14, 2020. It is from that entry Appellant prosecutes this appeal. {¶4} Appellant has not separately  
listed his assigned error(s), but makes a number of arguments bracketed in his purported brief with  
four numbered sections.

We will attempt to summarize them as follows: 1 A rendition of the underlying facts forming the  
basis of the charges is unnecessary for our resolution of this appeal. Stark County, Case Nos.  
2020CA00092 & 2020CA00106 3 1) invalid plea as a result of the trial court’s failure to  
substantially comply with Crim.R. 11; 2) failure of the trial court to consider the factors set forth  
in R.C.

2929.12 and 2929.13; 3) error by the trial court in imposing consecutive sentences; and 4) ineffective assistance of counsel. {¶5} We begin by noting Appellant has failed to provide this Court with a transcript of the May 1, 2020 Change of Plea and Sentencing Hearing. When portions of the transcript necessary for resolution of the assigned error(s) are omitted from the record, the court has no choice but to presume the validity of the lower court's proceedings, and to affirm.

*Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197 (1980). We find this presumption of regularity applies to Appellant's argument raised in his first and second numbered brackets in his brief. We additionally note the trial court specifically considered R.C. 2929.11 and 2929.12 in its entry sentencing Appellant and also specifically referenced R.C. 2929.13 therein. {¶6} In Appellant's argument raised in bracket three of his brief, Appellant challenges the imposition of consecutive sentences.

However, as noted in the trial court's sentencing entry, consecutive sentences were jointly recommended by Appellant and Appellee under R.C. 2953.08(D). Pursuant to *State v. Sergeant*, 148 Ohio St.3d 94 (2016), jointly recommended sentences where the trial judge fails to make the consecutive- sentence findings are, nevertheless, authorized by law; therefore, are not appealable.

*Stark County, Case Nos. 2020CA00092 & 2020CA00106* 4 {¶7} Finally, with respect to Appellant's argument he was denied the effective assistance of counsel, we find his claims are not supported by anything in the record as it existed on the date of the judgment under appeal. {¶8} For the foregoing reasons, we overrule all four of Appellant's arguments and affirm the judgment of the trial court.

By: Hoffman, P.J. Wise, John, J. and Baldwin, J. concur