[Cite as *State v. Switzer*, 2010-Ohio-2473.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93533

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL SWITZER

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519401

BEFORE: Dyke, J., Gallagher, A.J., and Boyle, J.

RELEASED: June 3, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant-appellant, Michael Switzer ("appellant"), appeals the trial court's refusal to accept his plea agreement with the state, as well as his conviction for gross sexual imposition. For the reasons that follow, we reverse and remand for proceedings consistent with this opinion.

{¶ 2} On January 20, 2009, the Cuyahoga County Grand Jury indicted appellant on one count of kidnapping in violation of R.C. 2905.01(A)(4) with a sexual motivation specification and one count of gross sexual imposition in violation of R.C. 2907.05(A)(1). He pled not guilty to all charges.

{¶ 3} On the day the trial was scheduled to commence, April 29, 2009, appellant indicated a desire to plead guilty to lesser charges as a result of negotiations with the state. The trial court, however, refused to entertain the state and appellant's plea agreement based upon its blanket policy to reject agreements proposed on the day of trial. In so finding, the trial court stated the following:

{¶ 4} "The purpose of a rule is so that everybody knows what's going on. This rule has been in effect basically since August 1 of last year. If every time the Court deviates from that rule, then there is no rule because historically what has happened in this Court is that the criminal division and criminal lawyers at the last minute try to resolve these cases.

{¶ 5} "It's not going to happen anymore. These cases need to be prepared beforehand so that everybody knows what's going on. There is no deviation from that rule for anybody, including people I have known for years or

anything else, judges' husbands or anything like that. This is what the rule is. It's applied fairly, it's applied uniformly, and will be applied consistently throughout my tenure as a judge.

{¶ 6} "Now, I don't pull favorites, I don't put people in positions that they don't want to be. Time to make decisions are before the date of trial. We are here on the date of trial. I'm ready to proceed. I would have been ready to proceed yesterday, but for the fact that no jury was available. We are ready today. We will proceed with this trial today."

{¶ 7} Per the directives of the court, the case proceeded to trial. The following day, the jury found appellant not guilty of the kidnapping charge but guilty of gross sexual imposition.

{¶ 8} On May 26, 2009, the trial court sentenced appellant to 18 months imprisonment and ordered said sentence to run concurrently to Cuyahoga County Court of Common Pleas Case No. CR-516513 and consecutive to Case No. CR-519390, for a total of 30 months imprisonment. Additionally, the court imposed five years of postrelease control.

{¶ 9} Appellant now appeals and presents two assignments of error for our review. We will address his second assignment of error first, which provides:

{¶ 10} "The Trial Court Abused Its Discretion In Summarily Refusing To Consider The Proposed Plea Agreement."

{¶ 11} A defendant does not have an absolute right under the United States Constitution to have the court accept his guilty plea. *N. Carolina v. Alford* (1970),

400 U.S. 25, 38, 91 S.Ct. 160, 27 L.E.2d 162, fn.11. Rather, the decision to accept or reject a guilty plea is within the sound discretion of the trial court. *City of Akron v. Ragsdale* (1978), 61 Ohio App.2d 107, 399 N.E.2d 119, paragraph one of syllabus. Accordingly, this court may not reverse a trial court's rejection of a plea agreement absent an abuse of that discretion. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222-223, 473 N.E.2d 264.

{¶ 12} A trial court, however, abuses its discretion when it rejects a plea agreement by relying on a blanket policy rather than considering the facts and circumstances of the particular case. *State v. Raymond*, Franklin App. No. 05AP-1043, 2006-Ohio-3259, at ¶15; *State v. Graves* (Nov. 19, 1998), Franklin App. No. 98AP-272 (finding an abuse of discretion after trial court refused the defendant's plea based upon its blanket policy of not accepting no contest pleas); *State v. Hunt* (Oct. 22, 1985), Scioto App. No. 1536 (finding abuse of discretion when the trial court refused to accept a plea agreement because it had a policy of rejecting agreements after jury cards were mailed to prospective jurors in a case). See, also, *United States v. Miller* (C.A.9, 1983), 722 F.2d 562, 565 (finding categorical rules limiting the type of plea bargains a court can accept impermissible).

{¶ 13} In *State v. Raymond*, supra, the trial court rejected a plea agreement reached by the state and the defendant due to its "blanket policy of not accepting 'pleas from people that don't think they did anything wrong.'" Id. at ¶11. In finding that the trial court abused its discretion in employing its overarching policy

rather than examining the particular circumstances of the case, the Tenth District reasoned the following:

{¶ 14} "Under those circumstances, the trial court's refusal to accept appellant's plea was an abuse of discretion, or more precisely, it was a refusal to exercise the court's discretion. The trial court arbitrarily refused to consider the facts and circumstances presented, 'but instead relied on a fixed policy established at its whim.' *State v. Graves* (Nov. 19, 1998), 10th Dist. No. 98AP-272, * * * quoting [*State v.*] *Carter* [(1997), 124 Ohio App.3d 423, 428, 706 N.E.2d 409]. The *Graves* court held, '[a]lthough the trial court has the discretion to refuse to accept a no-contest plea, it must exercise its discretion based on the facts and circumstances before it, not on a blanket policy that affects all defendants regardless of their circumstances.' *Graves*, supra, at *10." Id.

{¶ 15} Here, the trial court refused to accept the plea agreement reached by the state and appellant based on its unvaried policy of not accepting plea agreements on the day of trial. Under these circumstances, the trial court abused it discretion when it employed its blanket policy rather than examining the particular facts and circumstances of the case. Accordingly, we reverse and remand to the trial court for proceedings consistent with this opinion.

{¶ 16} The state concedes that the trial court erred in rejecting the plea agreement but proposes that the issue is moot. The state argues that, because the plea agreement included a plea of abduction, a lesser included offense of kidnapping, and appellant was ultimately acquitted of that charge, appellant

suffered no prejudice. The record does not reveal the actual terms of the plea agreement. While it is apparent from the record that part of the plea agreement was that the defendant would plead guilty to an abduction charge rather than kidnapping as originally indicted, it is unclear what the status of the gross sexual imposition charge would be following the plea agreement. Accordingly, we find this argument without merit.

{¶ 17} Having found appellant's second assignment of error dispositive of this appeal, we decline to address the merits of his first assignment of error[1] pursuant to App.R. 12(A).

{¶ 18} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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[1] "The Evidence Was Insufficient To Sustain The Guilty Verdict, Or, In The Alternative, The Verdict Was Against The Weight Of The Evidence."

ANN DYKE, JUDGE

MARY J. BOYLE, J., CONCURS.
SEAN C. GALLAGHER, A.J., DISSENTS. (SEE ATTACHED DISSENTING OPINION)

SEAN C. GALLAGHER, A.J., DISSENTING:

{¶ 19} I respectfully dissent from the majority opinion on the second assigned error. I would find no merit in either assigned error and affirm the conviction and sentence in full.

{¶ 20} I do not view the trial court's refusal to entertain a plea bargain or accept a plea on the date of trial as a blanket policy of refusing to accept a plea without consideration of the facts and circumstances presented. Rather, the court is imposing a reasonable deadline for entertaining plea bargains and exercising its inherent right to control its docket.

{¶ 21} In this instance, nothing in the record suggests that the state and the defendant had an inability to arrive at a negotiated plea prior to the date of trial. The trial court expressed its concerns with such last minute attempts to resolve cases that result in cases not being prepared for trial when the court and jury are ready to proceed. This is not a situation where the trial court's preclusion against pleas fails to consider the facts and circumstances presented.

{¶ 22} None of the cases cited by the majority in support of reversal are from this district, and they are easily distinguished. In *Raymond,* supra, the

dispute involved a trial court's arbitrary refusal to accept an *Alford* plea. In *Graves*, supra, the issue involved a trial court's blanket policy of refusing to accept no contest pleas. In *Hunt,* supra*,* the issue involved a court's refusal to accept a plea agreement after jury cards were mailed. Finally, in *Miller*, 722 F.2d 562*,* the issue involved a trial court's categorical rule of refusing to accept any plea bargains that left one count unresolved on a multi-count indictment.

{¶ 23} All of these cases are distinct from the policy at issue in the present case. This is not a situation where a judge adopts a policy precluding no contest pleas or *Alford* pleas as a matter of course. Nor is this a situation where the court puts an unreasonable cut-off period on the taking of a plea.

{¶ 24} Here, the judge never expressed the view that he would not take a plea, only that he would not entertain a plea bargain on the morning of a scheduled trial date. Nothing in the record indicates that had the defense attorney, his client, and the prosecutor come to the judge before the trial date, the trial judge would have rejected the plea. Further, the trial court stated on the record its reasons for refusing to entertain the plea bargain.

{¶ 25} I believe the analysis in *State v. Irish*, Ashtabula App. No. 2008-A-0051, 2009-Ohio-3791, ¶ 20-21, is instructive in this matter: "[T]he trial court expressed, on the record, its reasoning in refusing to accept the plea bargain. [The defendant] was aware that the trial court imposed [a] deadline for accepting a plea. Certainly, plea bargains should not be discouraged; however, there is nothing in the record to justify the inability of the state and [the defendant]

to arrive at an agreement by the deadline imposed by the court. It is a well-established principle that a trial court has wide discretion in control of its docket. * * * Under the facts and circumstances of the instant case, the trial court did not abuse its discretion in refusing to accept a negotiated plea * * *." (Internal citation omitted.)

{¶ 26} We are all familiar with the challenges that trial judges face on the morning of a trial date. Allowing them to control the process and not create delays for jurors is hardly an abuse of discretion. Accordingly, under the facts and circumstances of this case, I do not believe the trial court abused its discretion in refusing to entertain the plea bargain.

{¶ 27} I also believe that the first assignment of error raising a sufficiency challenge is not rendered moot by the majority's disposition of the second assignment of error. If the matter is being remanded, it should be remanded solely for consideration of the plea bargain between the parties. I believe the conviction was supported by sufficient evidence and would affirm the judgment of the trial court.