

[Cite as *State v. Kelly*, 2010-Ohio-432.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 91875 and 91876

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT KELLY

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-490724 and CR-500174

BEFORE: Dyke, P.J., Celebrezze, J., and Sweeney, J.

RELEASED: February 11, 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, P.J.:

{¶ 1} In these consolidated appeals, defendant Robert Kelly appeals from his convictions following his guilty pleas for having a weapon while under disability (Case No. CR-490724) and drug trafficking with a forfeiture specification (Case No. CR-500174). For the reasons set forth below, both cases are reversed and remanded for further proceedings.

{¶ 2} On January 10, 2007, defendant and co-defendant Taiwan Wiggins were indicted in Case No. CR-490724 pursuant to a five-count indictment. The first four counts charged both co-defendants with the following offenses: kidnapping with firearm specifications, notice of prior conviction, and repeat violent offender specifications; aggravated robbery with the same specifications; carrying a concealed weapon; and possession of criminal tools. The fifth count of the indictment pertained solely to defendant Kelly and charged him with having a weapon while under disability.

{¶ 3} The record reflects that both co-defendants retained the same attorney. The record further reflects that on March 29, 2007, defendant pled guilty to one count of having a weapon while under disability, and the remaining charges were dismissed. Defendant was sentenced on April 26, 2007. At this time, defendant indicated that he was in Wiggins's car at the time of the offense and did not possess the weapon that is the subject of the charge of having a weapon while under disability. The trial court subsequently sentenced defendant to three years of community control sanctions. The court further ordered that a violation of community control sanctions would result in a prison term of five years

of imprisonment.

{¶ 4} As the case proceeded against co-defendant Wiggins, the state filed a motion to disqualify retained counsel, arguing that it subpoenaed defendant as a witness and “anticipates that Mr. Kelly’s testimony will establish several essential elements of the Kidnapping and Robbery charges pending against Defendant Wiggins[,]” and that retained counsel had a conflict of interest in representing both co-defendants.

{¶ 5} The record further reflects that on August 17, 2007, defendant was indicted in Case No. CR-500174 for two counts of drug trafficking, one count of possession of drugs, and one count of possession of criminal tools, all with forfeiture specifications.¹ The trial court appointed new counsel to represent him. The record indicates that on June 9, 2008, the trial court held a lengthy discussion with defendant and attorneys present and participating. During this proceeding, the trial court explained that defendant faced from two to eight years of imprisonment, but the court stated that it would not impose the five-year term announced in Case No. CR-490724. Defendant indicated, however, that he was not guilty of that offense, that the weapon was not his, and that it belonged to co-defendant Wiggins who had a permit for it. Defendant stated:

{¶ 6} “[My former attorney] told me to cop out * * * because if my

¹ Although it is not part of the instant appeal, defendant was also indicted in Case No. CR-506768 for escape, apparently in connection with his alleged failure to report to his probation officer.

co-defendant got found guilty of it, it would enhance his sentencing guidelines in the federal system[.] * * * Mr. Wiggins was going to get 10 years in the federal system had he been found guilty in the state with a prior conviction. He told me, like, Kelly, you ain't got nothing to worry about. You already on parole. If you get found guilty, they are going to give you paper on top of paper. You're going to be okay."

{¶ 7} The trial court stated that it had discussed the issue with defendant's counsel² and counsel assured him that defendant consented to the representation. The trial court then informed defendant that "the max I'll give you is two years." Defendant denied that he committed the offense and stated "I wasn't even down there." Later, the court stated, "[i]f we prove it, you're going to do 8 years." Defendant subsequently pled guilty to the charge and was sentenced to three years of imprisonment, to be served consecutively to the escape charge, Case No. CR-506768.

{¶ 8} Defendant now appeals and assigns four errors for our review.

{¶ 9} For his first assignment of error, defendant asserts that the trial court violated its duty to inquire whether a conflict of interest was presented in Case No. CR-490724. He further asserts that because he and co-defendant Wiggins blamed each other for possession of the gun, an actual conflict of interest was presented so the trial court was required to obtain defendant's voluntary

² This discussion is not set forth in our record, however.

agreement on the record. The state asserts that the trial court had no such duties.

{¶ 10} The Sixth Amendment to the United States Constitution guarantees that representation shall be free from conflicts of interest. *State v. Dillon* (1995), 74 Ohio St.3d 166, 657 N.E.2d 273. A possibility of a conflict exists if the “interests of the defendants may diverge at some point so as to place the attorney under inconsistent duties.” *Cuyler v. Sullivan* (1980), 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333. “A lawyer represents conflicting interests when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.” *State v. Manross* (1988), 40 Ohio St.3d 180, 182, 532 N.E.2d 735, 738. Similarly, in *State v. Dillon*, supra, the Court considered the issue of a conflict of interest with regard to whether the defendants would employ a blame-shifting strategy.

{¶ 11} In *State v. Garcia*, Huron App. No. H-06-003, 2007-Ohio-1525, the court held that when a trial court knows or has reason to know of a conflict of interest, it has a duty to inquire about the issue and to ensure that the representation is conflict free. The *Garcia* court stated:

{¶ 12} “Both defense counsel and the trial court are under an affirmative duty to ensure that a defendant's representation is conflict free. *Id.* The trial court's duty arises only when the court knows or reasonably should know a particular conflict of interest exists, or when the defendant objects to multiple representation. *State v. Manross* (1988), 40 Ohio St.3d 180, 181.

{¶ 13} “When a party alerts the court to a potential conflict of interest, the trial court then has a duty to inquire whether a conflict actually exists. *State v. Gillard* (1992), 64 Ohio St.3d 304, syllabus. Once the court has ascertained that an actual or potential conflict exists, it must inform the defendant of the possible conflict-of-interest ramifications and secure his voluntary agreement to the representation on the record. *Id.*; *State v. Johnson* (1980), 70 Ohio App.2d 152, 160.”

{¶ 14} In this matter, the trial court clearly had notice of the issue of the attorney’s conflict of interest. Although the trial court stated that had it discussed this issue with counsel, this discussion is not part of our record, and, in any event, because both defendant and co-defendant Wiggins blamed each other for having the weapon, a clear conflict is present. The trial court was therefore required to speak to defendant on the record and obtain his consent to a conflict before allowing the representation to proceed. The first assignment of error is well-taken. Case No. CR-490724 is reversed and remanded for further proceedings.

{¶ 15} For his second assignment of error, defendant asserts that his trial counsel was ineffective due to the conflict of interest presented from his representation of the co-defendant. In his third assignment of error, defendant maintains that the trial court exhibited a “negative attitude” toward him, thus denying him a fair hearing. In light of our disposition of the first assignment of error, these assignments of error are moot. App.R. 12(A)(1)(C).

{¶ 16} In his fourth assignment of error, defendant contends that the trial court committed reversible error in Case No. CR-500174 by inducing defendant to plead guilty by promising a lenient sentence, then imposing a sentence that was more harsh.

{¶ 17} In *State v. Sawyer*, 2009-Ohio-3097, 183 Ohio App.3d 65, 915 N.E.2d 715, the court noted that a trial court's participation in the plea-bargaining process presents a “high potential” for coercion, as the court's power is intimidating and may appear to interfere with, or actually interfere with, the court's role as an impartial arbiter. *Id.*, quoting *State v. Byrd* (1980), 63 Ohio St.2d 288, 292, 407 N.E.2d 1384. As explained in *State v. Byrd*, supra:

{¶ 18} “There are a number of valid reasons for keeping the trial judge out of the plea discussions, including the following: (1) judicial participation in the discussion can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to trial before this judge; (2) judicial participation in the discussion makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered; (3) judicial participation to the extent of promising a certain sentence is inconsistent with the theory behind the use of the presentence investigation report; and (4) the risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent.

{¶ 19} “* * *

{¶ 20} “Ordinarily, if the judge's active conduct could lead a defendant to

believe he cannot get a fair trial because the judge thinks that a trial is a futile exercise or that the judge would be biased against him at trial, the plea should be held involuntary and void under the Fifth Amendment and Section 10, Article I of the Ohio Constitution.”

{¶ 21} Moreover, a guilty plea, if induced by promises or threats that deprive it of the character of a voluntary act, is void. *State v. Allen*, Sandusky App. No. S-09-004, 2009-Ohio-3799, citing *State v. Bowen* (1977), 52 Ohio St.2d 27, 28, 368 N.E.2d 843. That is, when a trial court promises a certain sentence, the promise becomes an inducement to enter a plea, and unless that sentence is given, the plea is not voluntary. *State v. Triplett* (Feb. 13, 1997), Cuyahoga App. No. 69237.

{¶ 22} At the plea proceedings in Case No. CR-500174, the trial court indicated that it would impose a two-year prison term if defendant pled guilty. Defendant protested that he was innocent, and the court later said, “[i]f we prove it, you’re going to do 8 years.” Defendant then pled guilty and was sentenced to three years of imprisonment. On this record, we find an impermissible and coercive degree of participation from the trial court and an improper inducement for defendant’s guilty plea.

{¶ 23} The fourth assignment of error is well-taken. Case No. CR-500174 is reversed and remanded for further proceedings.

{¶ 24} 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 his 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.

ANN DYKE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES J. SWEENEY, J., CONCUR