

[Cite as *State v. Brantley*, 2010-Ohio-5760.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94508

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEREK BRANTLEY, II

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-527516 and CR-528800

BEFORE: Celebrezze, J., Rocco, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: November 24, 2010

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ON RECONSIDERATION¹

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Derek Brantley II, appeals his convictions and sentence. After a thorough review of the record and pertinent case law, we affirm.

{¶ 2} Appellant was indicted on drug offenses in two separate cases. In CR-527516, he was indicted in a four-count indictment on one count of drug trafficking, one count of drug possession, one count of possessing

¹The original announcement of decision, *State v. Brantley*, Cuyahoga App. No. 94508, 2010-Ohio-5248, released October 28, 2010, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. 2.2(A).

criminal tools, and one count of endangering children. In CR-528800, he was indicted in a four-count indictment on one count of drug possession, one count of drug trafficking, one count of corrupting another with drugs, and one count of possessing criminal tools.

{¶ 3} On November 23, 2009, appellant entered voluntary pleas in both cases as part of a plea deal. In CR-527516, he pled guilty to drug trafficking with forfeiture and juvenile specifications. In CR-528800, he pled guilty to drug trafficking with juvenile, schoolyard, and forfeiture specifications.² The remaining counts were nolle.

{¶ 4} On December 14, 2009, appellant, acting pro se, filed a “motion to withdraw plea via forfeiture objection at 11/23/09 change of plea hearing.” No hearing was held on this motion, and the trial court proceeded to sentencing on December 17, 2009.

{¶ 5} In CR-527516, appellant was sentenced to four years. In CR-528800, he received an eight-year sentence. These sentences were to run concurrently to one another for an aggregate sentence of eight years. Appellant was also ordered to forfeit several items of property and was ordered to pay fines and court costs.

{¶ 6} Subsequent to the sentencing hearing, the trial court issued an entry denying appellant’s motion to withdraw his guilty plea. This appeal

²R.C. 2925.03(A)(2), second-degree felonies.

followed wherein appellant argues that 1) the trial court erred in denying his motion to withdraw his guilty plea without holding a hearing, 2) the trial court erred when it imposed fines and costs against him after he had filed an affidavit of indigency, 3) the trial court failed to comply with the requirements of R.C. 2933.43 when granting the state's forfeiture petition, and 4) he was denied the effective assistance of counsel.

Law and Analysis

Motion to Withdraw Guilty Plea

{¶ 7} In his first assignment of error, appellant argues that the trial court erred in denying his presentence motion to withdraw his guilty plea without holding a hearing. The decision of a trial court to grant or deny a motion to withdraw a guilty plea is reviewed using an abuse of discretion standard. *State v. Van Dyke*, Lorain App. No. 02CA008204, 2003-Ohio-4788, ¶7, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863, paragraph two of the syllabus. To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 8} Crim.R. 32.1 governs motions to withdraw guilty pleas and states in pertinent part that “[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed * * *.” Although “presentence

motions to withdraw guilty pleas should be freely granted, a defendant ‘does not have an absolute right to withdraw a plea prior to sentencing.’” *State v. McGregor*, Cuyahoga App. No. 86165, 2005-Ohio-5561, ¶3, quoting *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715. “Instead, the trial court ‘must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.’” *Id.*

{¶ 9} A review of the record reveals that the trial court failed to hold any hearing on appellant’s motion to withdraw his guilty plea. Although a court is ordinarily required to hold a hearing on a presentence motion to withdraw a guilty plea, “the scope of a hearing on an appellant’s motion to withdraw his guilty plea should reflect the substantive merits of the motion. * * * ‘Hence, bold assertions without evidentiary support simply should not merit the type of scrutiny that substantiated allegations would merit. The scope of the hearing is within the sound discretion of the trial judge, subject to our review for an abuse of that discretion.’” *State v. Irizarry*, Cuyahoga App. No. 93352, 2010-Ohio-3868, ¶16-17, quoting *State v. Smith* (Dec. 10, 1992), Cuyahoga App. No. 61464.

{¶ 10} In his motion to withdraw, appellant argued that he did not understand exactly what property he was forfeiting as a result of his guilty plea. He specifically challenged the forfeiture of a 2003 Chevy Tahoe. In his motion, appellant argued that “the record will clearly show Defendant

informing this Honorable Court that the Chevy truck wasn't his nor was it used to help facilitate an offense under forfeiture laws of Ohio.”³

{¶ 11} In order for appellant's motion to have merit, he would have to show that he was mistaken with regard to forfeiting the property and that this mistake prejudiced him. Appellant asserted both in his motion to withdraw and in his merit brief on appeal that he does not own, nor has he ever owned, the 2003 Chevy Tahoe. Based on this assertion, appellant had no actual ownership interest to forfeit, and his agreement to forfeit that interest will not prejudice him in any way. Based on this lack of prejudice, we cannot find that the trial court abused its discretion in failing to hold a hearing on appellant's motion to withdraw his guilty plea and in ultimately denying that motion. Appellant's first assignment of error is overruled.

Costs and Fines

{¶ 12} In his second assignment of error, appellant argues that the trial court erred in imposing costs and fines after he had filed an affidavit of indigency. R.C. 2947.23 mandates that court costs be imposed as part of a criminal defendant's sentence. *State v. Hughley*, Cuyahoga App. No. 90323, 2009-Ohio-3274, ¶12. The trial court then has the discretion to waive these costs if the defendant is indigent. *Id.* Upon the defendant's motion, it is

³ Appellant specifically said, "The Tahoe was not mine, I just drove it that day. So I could forfeit anything else, but I'm saying the truck, that's not my truck."

then within the trial court's discretion to waive those costs. *Id.* As an appellate court, we ordinarily review the trial court's decision to grant or deny the defendant's motion to waive costs for an abuse of discretion as defined above. *Id.* Because the record reveals that appellant failed to object to the imposition of fines and costs, however, we review the imposition of fines and costs for plain error. *State v. Gabriel*, Mahoning App. No. 09 MA 108, 2010-Ohio-3151, ¶9. "Plain error consists of an obvious error or defect in the trial proceedings that affects a substantial right." *State v. Moore*, Butler App. No. CA20006-09-242, 2007-Ohio-3472, ¶7, citing Crim.R. 52.

{¶ 13} "Ohio law does not prohibit a court from imposing a fine on an indigent defendant. *State v. Roark*, Cuyahoga App. No. 84992, 2005-Ohio-1980. Except for violations 'of any provisions of Chapter 2925., 3719., or 4729. of the Revised Code,' a sentencing court is not barred by statute from imposing a fine upon an indigent person. See R.C. 2929.18(B)(1); *State v. Gipson* (1998), 80 Ohio St.3d 626, 687 N.E.2d 750. The Revised Code simply requires the sentencing court to 'consider the offender's ability to pay.' R.C. 2929.19(B)(6)." *State v. Ramos*, Cuyahoga App. No. 92357, 2009-Ohio-3064, ¶7. Nonetheless, this court has held, "[i]t is clear that the court should consider the impact a fine has on the offender; however, the court is required to consider such factors only if evidence is offered at the sentencing hearing. Where the offender does not object at the

sentencing hearing to the amount of the fine and does not request an opportunity to demonstrate to the court that he does not have the resources to pay the fine, he waives any objection to the fine on appeal.’ (Citations omitted.)” *State v. Dailey*, Cuyahoga App. No. 89289, 2007-Ohio-6650, ¶41. Appellant made no objection at sentencing to the imposition of the fine and has waived any objection to the fine on appeal. Appellant’s second assignment of error is overruled.

Forfeiture

{¶ 14} In his third assignment of error, appellant argues that the trial court failed to follow the procedures set forth in R.C. 2933.43, and thus the trial court’s journal entry requiring the forfeiture of his property was invalid. We note at the outset that R.C. 2933.43 was repealed in 2007 and replaced with R.C. 2981.01 through 2981.14. *State v. Hall*, Cuyahoga App. No. 92952, 2010-Ohio-1665, ¶13-14. Nonetheless, appellant has failed to point to any specific provision that the trial court violated when it ordered that he forfeit certain property. Since appellant has failed to establish any statutory error on the part of the trial court, his third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 15} In his fourth assignment of error, appellant argues that he was denied the effective assistance of counsel. In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 16} Appellant first argues that his counsel was ineffective in advising him to enter a voluntary guilty plea before receiving discovery responses from the state. A review of the record, however, reveals that appellant pled guilty to only two of the eight counts he was charged with. Although he was sentenced to eight years in prison, he could have faced a considerably harsher sentence had he been convicted under the indictments as charged.

{¶ 17} Appellant also argues that his counsel was ineffective for failing to make an objection at sentencing pursuant to *Oregon v. Ice* (2009), 555 U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517. According to appellant, *Ice* required the trial court to state its reasons for imposing maximum sentences. In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶100, the Ohio Supreme Court held that trial courts were no longer required to make

findings when “imposing maximum, consecutive, or more than the minimum sentences.” This court has acknowledged the holding in *Ice*, but we have repeatedly held that until the Ohio Supreme Court overrules its holding in *Foster*, *Foster* remains binding on this court and will be applied. *State v. Cooper*, Cuyahoga App. No. 92911, 2010-Ohio-4106, ¶32. We cannot find that appellant’s counsel was deficient for failing to object on the basis of *Ice* when such an objection would have been unsuccessful. Appellant’s fourth assignment of error is overruled.

Conclusion

{¶ 18} The trial court did not abuse its discretion in denying appellant’s motion to withdraw his guilty plea without a hearing when appellant did not make a meritorious argument that would, if found to be true, entitle him to relief. Appellant failed to object to the imposition of fines and costs, and therefore waived any argument that such fines and costs should not have been imposed. The trial court followed the required statutory procedures in ordering the forfeiture of appellant’s property. Finally, appellant has failed to demonstrate any facts suggesting his counsel was deficient, and thus we cannot find that he was denied the effective assistance of counsel.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., JUDGE

KENNETH A. ROCCO, P.J., and
MARY J. BOYLE, J., CONCUR