

[Cite as *State v. Smith*, 2010-Ohio-5784.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94419

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RASHAWN SMITH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524220

BEFORE: Cooney, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: November 24, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Rashawn Smith (“Smith”), appeals the denial of his motion to withdraw his guilty pleas, his convictions, and sentence. We find no merit to the appeal and affirm.

{¶ 2} In February 2009, Smith was indicted on two counts of aggravated murder, two counts of burglary, five counts of aggravated robbery, three counts of kidnapping, and one count of felonious assault. In October 2009, pursuant to a plea bargain, the State moved to amend Count 1 of the indictment from aggravated murder to involuntary manslaughter in violation of R.C. 2903.04(A);

causing the death of another during the commission of a felony. The State also moved to amend Count 5, which alleged aggravated robbery, by deleting both firearm specifications and adding names of additional victims. Finally, the State moved to amend Count 3, which alleged aggravated burglary, by deleting both firearm specifications and adding names of additional victims. The remaining counts were to be nolle.

{¶ 3} At the plea hearing, the State advised the court that the plea agreement included an agreed sentence of 22 years with no judicial release and five years mandatory postrelease control. As part of the agreement, Smith promised to testify truthfully against codefendants in three other cases arising out of the same incident. Smith pled guilty to the three amended charges, and the case was continued for sentencing to a later date.

{¶ 4} Smith filed a motion to withdraw his guilty pleas prior to sentencing claiming that, due to his young age, he was overwhelmed by the criminal justice system and “susceptible to the intimidation of a plea.” Smith further asserted that he is not guilty and that innocence is a factor that weighs heavily in favor of vacating his plea. In response, the State informed the court that Smith had made a written confession in which he admitted his role in the crimes. The trial court denied Smith’s motion and sentenced him to ten years for involuntary manslaughter, eight years for aggravated burglary, and four years for aggravated robbery, to be served consecutively for a total of 22 years in prison as agreed at

the plea hearing and five years of postrelease control. Smith now appeals, raising four assignments of error.

Guilty Plea

{¶ 5} In the first assignment of error, Smith argues the trial court erred in denying his motion to withdraw his guilty plea prior to sentencing. Smith asserts that at the sentencing hearing it became evident that his trial counsel was not aware that Smith had signed a written confession, and the trial court erroneously failed to investigate why his trial counsel had not been made aware of it before the plea hearing. As such, Smith claims the trial court breached its duty to ensure that Smith's plea was knowingly, intelligently, and voluntarily made. We disagree.

{¶ 6} In *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715, the Ohio Supreme Court held that a presentence motion to withdraw a guilty plea should be freely and liberally granted. *Id.* at 527. However, "[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing." *Id.* at paragraph one of the syllabus. Therefore, "a trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Id.*

{¶ 7} In order for a plea to be made knowingly and voluntarily, the trial court must follow the mandates of Crim.R. 11(C). If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is

void. *State v. Irizzary*, Cuyahoga App. No. 93352, 2010-Ohio-3868, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. A defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 364 N.E.2d 1163; Crim.R. 52(A). The test of prejudicial effect is whether the plea would have been otherwise made. *Id.* at 108, 364 N.E.2d 1163.

{¶ 8} The decision whether to grant a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court. *Xie* at paragraph two of the syllabus. In reviewing whether a trial court abused its discretion in deciding the defendant's motion to withdraw a guilty plea, we must consider the following factors: "(1) whether the accused was represented by highly competent counsel; (2) whether the accused was given a full Crim.R. 11 hearing before entering the plea; (3) whether a full hearing was held on the withdrawal motion; and (4) whether the trial court gave full and fair consideration to the motion." *State v. McNeil* (2001), 146 Ohio App.3d 173, 176, 756 N.E.2d 885, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 214, 428 N.E.2d 863.

{¶ 9} In addition, the following factors are helpful in determining whether a trial court abused its discretion: "(1) whether the motion was made within a reasonable time; (2) whether the motion set out specific reasons for the withdrawal; (3) whether the accused understood the nature of the charges and

the possible penalties; and (4) whether the accused was perhaps not guilty or had a complete defense to the charges.” *McNeil*, citing *State v. Fish* (1995), 104 Ohio App.3d 236, 240, 661 N.E.2d 788. A change of heart or mistaken belief about pleading guilty is not a reasonable basis for withdrawal of a guilty plea. *State v. Lambros* (1988), 44 Ohio App.3d 102, 103, 541 N.E.2d 632.

{¶ 10} In the instant case, we find that the trial court reasonably refused to allow Smith to withdraw his guilty plea. The record reflects that: (1) Smith was represented by competent counsel; (2) the trial court afforded Smith a full Crim.R. 11 hearing before he entered his plea; (3) the trial court held a hearing on Smith’s Crim.R. 32.1 motion before sentencing; (4) the trial court gave full and fair consideration to Smith’s motion to withdraw his guilty plea;¹ and (5) Smith understood the nature of the charges and the possible penalties.

{¶ 11} Additionally, the trial court complied with Crim.R. 11 when it accepted Smith’s guilty plea. The transcript reveals that Smith knowingly, intelligently, and voluntarily entered his plea. Appellant stated on the record that (1) he voluntarily entered his guilty plea; (2) he understood the nature of the charges and the penalties involved; (3) he understood the rights he waived by pleading guilty; and (4) he consulted with trial counsel before entering his guilty plea and that he understood all of his rights and defenses.

¹ The trial court ordered a copy of the transcript of the plea hearing and reviewed it together with Smith’s motion and the State’s response before hearing oral arguments from both sides in open court.

{¶ 12} We also disagree with Smith's assertion that due to his young age, he was unable to understand the consequences of his guilty plea. Smith never informed anyone, including his counsel or the court, that he felt incapable of comprehending the proceedings or the consequences of pleading guilty. Moreover, juveniles are routinely bound over to the common pleas court where they often enter guilty pleas in hopes of receiving a reduced sentence. A defendant's young age, by itself, is not sufficient evidence to establish that a plea was not knowingly, voluntarily, and intelligently made.

{¶ 13} Smith also claims the trial court should have inquired as to why Smith's trial counsel was unaware of his written confession. However, Smith's counsel merely asserted that the alleged confession was not in his client's writing but was a typed statement Smith signed. Thus, trial counsel was aware of the "confession" and attempted to discredit it.

{¶ 14} Finally, Smith asserts he felt threatened and intimidated into pleading guilty because he was told that some people, whom he could not identify, were going to falsely testify against him at trial. However, during the Crim.R. 11(C) colloquy, Smith informed the court that no threats had been made to induce him to plead guilty. There is no evidence in the record demonstrating that Smith had been threatened by anyone. Rather, it appears that he accepted an agreed 22-year sentence as opposed to a possible life sentence without the possibility of parole, which was the potential sentence he faced if convicted at trial.

Therefore, we find no abuse of discretion in the trial court's denial of the motion to withdraw his guilty plea.

{¶ 15} Accordingly, the first assignment of error is overruled.

Allied Offenses

{¶ 16} In the second assignment of error, Smith argues that the trial court erred by imposing consecutive sentences on his aggravated robbery and involuntary manslaughter convictions. Smith claims that the consecutive terms should have merged for purposes of sentencing because they are allied offenses of similar import, involving the same conduct and the same animus.² We disagree.

{¶ 17} It is well established that involuntary manslaughter and aggravated robbery are not allied offenses of similar import as defined by R.C. 2941.25. In *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, the Ohio Supreme Court held that “[i]nvoluntary manslaughter and aggravated robbery are not allied offenses of similar import.” *Id.* at paragraph two of the syllabus. In reaching this conclusion, the *Rance* court explained:

² We review the merger issue for plain error because Smith did not raise it below. Crim.R. 52(B) provides that, “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” In order to find plain error under Crim.R. 52(B), it must be determined, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

“In this case, the particular charge was causing the death of another during the commission of a felonious assault — the assault, in turn, occurred during a robbery. Involuntary manslaughter requires causing the death of another as a proximate result of committing or attempting to commit a felony. R.C. 2903.04(A). Aggravated robbery does not require that the victim be killed or even injured. Violation of the particular code section with which *Rance* was charged requires only that the defendant inflict, or attempt to inflict, serious physical harm. * * * Aggravated robbery requires a theft offense or an attempt to commit one. Involuntary manslaughter does not, since aggravated robbery is only one of the many felonies that may support a charge of involuntary manslaughter. Because each offense requires proof of an element that the other does not, they are not allied offenses of similar import.” See, also, *State v. Garrett*, Cuyahoga App. No. 90428, 2008-Ohio-3549.

{¶ 18} Therefore, the trial court properly sentenced Smith for both involuntary manslaughter and aggravated robbery.

{¶ 19} Accordingly, the second assignment of error is overruled.

Consecutive Sentences

{¶ 20} In the third assignment of error, Smith argues the trial court erred in imposing consecutive sentences without first making findings required by R.C. 2929.14(e)(4). This court has consistently rejected this argument, deferring the possible application of *Oregon v. Ice* (2009), 555 U.S. ___, 129 S.Ct. 711, 714, 172 L.Ed.2d 517, to the Ohio Supreme Court. See, e.g., *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, at ¶29 (concluding that, in regard to *Ice*, “we decline to depart from the pronouncements in [*State v.*] *Foster*, [109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470,] until the Ohio Supreme Court orders otherwise”); see, also, *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912

N .E.2d 582, ¶35 (“*Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge’s duty to make findings before doing so. The trial court thus had authority to impose consecutive sentences on Elmore.”).

{¶ 21} Furthermore, Smith received an agreed sentence that was authorized by law. He cannot now complain of its consecutive nature. As the Ohio Supreme Court has held, “[o]nce a defendant stipulates that a particular sentence is justified, the sentencing judge need not independently justify the sentence.” *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, at paragraph three of the syllabus.

{¶ 22} Accordingly, this assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 23} In the fourth assignment of error, Smith argues he was denied his constitutional right to effective assistance of counsel. Smith claims that because his trial counsel was unaware of Smith’s confession to police, he must have been ineffective.

{¶ 24} To prove ineffective assistance of counsel, the accused has the burden of demonstrating that his attorney seriously erred and that the deficient performance actually prejudiced him. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. In order to satisfy the prejudice requirement, “the defendant must show that there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would be different." *Strickland* at 694. Both prongs of this "*Strickland* test" must be met in order to deem counsel ineffective. *Id.*

{¶ 25} Smith contends his counsel was ineffective because he did not know that Smith had signed a typed confession admitting his role in the crimes. However, Smith's counsel challenged the confession because it was not written by Smith. Thus, he was aware of the "confession." Moreover, because Smith entered a guilty plea, he is precluded from claiming ineffective counsel, except "to the extent that the defects complained of caused the plea to be less than knowing and voluntary." *State v. Cooper*, Cuyahoga App. No. 93308, 2010-Ohio-1983, ¶40, citing *State v. Barnett* (1991), 73 Ohio App.3d 244, 249, 596 N.E.2d 1101.

As previously discussed, Smith has not demonstrated that his plea was less than knowingly, voluntarily, and intelligently entered. Therefore, Smith has not shown ineffective assistance of counsel, requiring reversal of his conviction.

{¶ 26} Accordingly, the fourth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of 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.

COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR