[Cite as *State v. Neal*, 2004-Ohio-4518.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 2003-CA-51

vs. : T.C. CASE NO. 03CR372

CHRISTOPHER T. NEAL : (Criminal Appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 27th day of August, 2004.

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GRADY, J.

{¶1} Defendant, Christopher T. Neal, appeals from his convictions for Rape and Gross Sexual Imposition, which were entered on his pleas of guilty given in exchange for the State's dismissal of other charges.

FIRST ASSIGNMENT OF ERROR

{¶2} "THE TRIAL COURT COMMITTED PLAIN ERROR IN DENYING DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA."

{¶3} The trial court accepted Neal's guilty pleas on June 25, 2003. When the case came on for sentencing on July 16, 2003, the following colloquy ensued:

{¶4} "THE COURT: Thank you.

{¶5} "Case 03-CR-372, State of Ohio versus Christopher Neal. Mr. Neal is here for sentencing hearing.

{¶6} "Are you ready to proceed on sentencing?

{¶7} "THE DEFENDANT: No. I'd like to withdraw my plea and enter a plea of not guilty seeing as how the - I thought I was going to get the minimum of the charges of the four years, not from four to 15, you know. I was believed that I was only getting the four years, not the four to 15; and I took the plea bargain.

{¶8} "MR. THOMAS (defense counsel): Your Honor, there was nothing stated in the plea bargain. I never indicated to the defendant what his sentence would be, and I gave him a complete range of his options.

{¶9} "THE COURT: There is no agreed sentence. There is nothing in the plea agreement that provides a sentence.

{¶10} "THE DEFENDANT: With the minimum sex offender thing, I though that meant I was going to get the minimum sentence too.

{¶11} "MR. THOMAS: Your Honor, that was never told to him. That was never alluded to him in any way, shape, or form. In fact, we talked about what the maximum sentence would be.

{¶12} "THE COURT: Okay. Well, the Court record indicates that

there is a plea agreement here; and it simply indicates that the State will dismiss – they will dismiss several counts.

{¶13} "You entered a plea of guilty to Count 2, charge of gross sexual imposition, felony of the third degree, and to Count 3, a charge of rape, a felony of the first degree.

{¶14} "The other counts in the indictment were all dismissed. There were a total of five counts in the indictment. You pled guilty to two, and three were dismissed.

{¶15} "Do you understand that?

{¶16} "THE DEFENDANT: Yes, sir.

{¶17} "THE COURT: Okay. Now. There was no agreement with respect to the sentence in the plea agreement. The Court reviewed your rights with you at the time you entered a plea of guilty to Count 2 and Count 3, and the Court determined that you understood your rights and voluntarily entered a plea of guilty waiving your rights as stated to you at the time.

{¶18} "I don't understand your question now. You said something about you thought you were going to get a minimum sentence?

{¶19} "THE DEFENDANT: Yeah. With the – said I was gonna get the classification of a minimum sex offender or something like that.

{¶20} "THE COURT: Yes.

{¶21} "THE DEFENDANT: I thought that meant I got the minimum sentence too along with that.

{¶22} "MR. THOMAS: Your Honor, that was – we set that out

clearly for him. The Court reviewed for him what the maximum sentences were on the plea, and he subjected himself to those maximum possibilities in entering a plea.

{¶23} "I reviewed that with him in great detail, what the classification was, what that meant, and what his possible minimums and maximums were both on the five-count indictment and on the plea bargain, cutting his liability more than a third.

{¶24} "Then the Court reviewed with him in this – in the plea what his maximum that he was subjecting himself to.

{¶25} "THE COURT: Okay. Well, the sentencing range is a three - to ten-year sentencing range on the charge of rape; and on the gross sexual imposition the sentencing range is a one - to five-year sentencing range. No sentence has been imposed or agreed upon at this time.

{¶26} "Do you understand that?

{¶27} "THE DEFENDANT: Yes, sir.

{¶28} "THE COURT: All right. Are you admitting your guilt? You entered a plea of guilty to the charge admitting your guilt, and the Court reviewed the nature of the charge and the consequence of the plea with you indicating the offense and the maximum penalty that could be imposed.

{¶29} "And at that plea you indicated that you did understand the nature of the charge. You did understand the consequence of the plea. That is, the maximum penalty that could be imposed.

{¶30} "And I don't see any reason why the Court should withdraw your plea, allow you to withdraw the plea. You're not

indicating that you didn't commit the offense. You're simply indicating some confusion maybe whether or not you were going to get the minimum sentence.

{¶31} "But nowhere in the record did you ever have a promise of a minimum sentence or any agreement with respect to sentencing. So that's still open at this time as to whether sentence – what sentence the Court will impose.

{¶32} "Do you understand that?

{¶33} "THE DEFENDANT: Yes, sir.

{¶34} "THE COURT: All right. Do you want to proceed, then, with the sentencing hearing?

{¶35} "THE DEFENDANT: Yes, sir." (T. 3-7).

{¶36} Motions to withdraw pleas of guilty and no contest which are made before sentence is imposed should be liberally allowed. *State v. Xie* (1992), 62 Ohio St.3d 521. Whether to grant the motion is contributed to the trial court's sound discretion. *Id.* On that standard, we may reverse only for an abuse of discretion. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶37} When a motion to withdraw a plea which is made before sentencing is denied, the following factors are considered by the appellate court on a defendant's claim that the trial court abused its discretion when it denied the motion: "(1) whether the accused is 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 motion, (4) whether the trial court gave full and fair consideration to the motion, (5) whether the motion was made within a reasonable time, (6) whether the motion sets out specific reasons for the withdrawal, (7) whether the accused understood the nature of the charges and possible penalties, (8) whether the accused was perhaps not guilty of or had a complete defense to the charge or charges, and (9) whether the state is prejudiced by withdrawal of the plea."

{¶38} ***State v. Fish*** **(1995), 104 Ohio App.3d 236, 240.**

{¶39} Defendant-Appellant in his brief reviews each of the *Fish* factors as they apply to him. His argument focuses on three.

{¶40} Defendant-Appellant argues that when his attorney spoke out as he did, and though his attorney was competent, it necessarily denied Defendant the representation to which he was entitled. This appears to be more of a *Strickland* claim of ineffective assistance of counsel in relation to the Defendant's motion to withdraw the plea than a claim that the legal assistance Defendant was afforded when he entered the plea was not "highly competent." *Fish*.

{¶41} ***Strickland v. Washington*** **(1984), 466 U.S. 668, held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686. The same reasonably applies to counsel's assistance in the prosecution of a motion.**

{¶42} Defendant-Appellant's attorney, after Defendant-Appellant had asked the court to withdraw his guilty pleas, would have done better to ask the court for leave to consult with Defendant-Appellant in order to determine his grounds for withdrawal, and then to advocate on behalf of his client on those grounds if he could. That was a problem in *State v. Cuthbertson* (2000), 139 Ohio App. 895, wherein the defendant argued that his attorney had pressured him to enter a plea. We are not told by the opinion in *Cuthbertson* what the attorney then did, but the appellate court observed that "the transcript leaves one with the impression that appellant's attorney was preoccupied with making a record to establish that he did not coerce the plea rather than to assist appellant in a successful plea withdrawal." *Id.*, at 899.

{¶43} We do not see a similar difficulty here. Defendant-Appellant didn't claim that his attorney had misled or pressured him. Rather, Defendant-Appellant indicated that he misunderstood what his sentence would be. (It appears that he'd since learned what sentence the court intended to impose.) In any event, his attorney's disclaimer of any responsibility for Defendant-Appellant's belief did not, in our view, so undermine Defendant-Appellant's claim, which is discussed more fully below, that he was prejudiced as a result, at least on the standard *Strickland* imposes. That standard is that in all probability, but for counsel's performance the outcome of the trial or other proceeding would have been different. *Id; State v. Crickton* (1988), 43 Ohio App.3d 171.

{¶44} Defendant-Appellant's two offenses are classified as

felonies. Rape is a felony of the first degree. Gross Sexual Imposition is a felony of the third degree. A prison term is mandatory, as the court explained to Defendant-Appellant before it accepted his guilty pleas. (T. 6). The court also explained that the maximum sentence for the Rape is ten years and the maximum for the GSI is five years, that the sentences might be imposed as consecutive, and in that event the maximum term the court could impose was fifteen years. (T. 7). After Defendant-Appellant acknowledged an understanding of those matters, the court went on to state:

{¶45} "THE COURT: Do you understand that in pleading guilty to a sexual offense, the Court is required to classify you as a sexually orientated offender and you would be subject to – is there an agreement on the classification?

{¶46} "THE PROSECUTOR: Yes, Your Honor. We were going to ask for the minimum classification." (T. 8-9).

{¶47} The court then explained the registration requirements that attach to the sexual offender classification and Defendant-Appellant acknowledged that he understood them. (T. 9).

{¶48} The sentence that the trial court imposed, and which Defendant-Appellant presumably knew of and sought to avoid, was five years on the Rape and three years on the GSI, to be served consecutively, for a total of eight years. The minimum time for each charge is three years and one year, respectively, which if served consecutively would result in a term of four years. It appears that this was the "minimum" term Defendant-Appellant said he expected the court to impose.

{¶49} The two other *Fish* factors on which Defendant-Appellant relies in support of his abuse of discretion claim are: (1) whether a full hearing was held on the motion to withdraw, and (2) whether the trial court gave full and fair consideration to the motion. Defendant-Appellant argues that the trial court failed in both respects because it made no inquiry concerning his reasons and did no more than repeat the terms of his plea.

{¶50} On this record, we believe that no further inquiries were required. Defendant-Appellant stated that he expected a minimum term of incarceration because, as the prosecutor had stated at the plea hearing, the plea agreement called for the State to ask for the minimum sexual offender classification. Defendant-Appellant's assertion was that this caused him to believe that he would also receive a "minimum" sentence of four years. His reasons for withdrawing his plea were reasonably clear, therefore, and the court did not abuse its discretion because it failed to make any further inquiries.

{¶51} Defendant-Appellant's claim of mistake or misunderstanding is wholly belied by the record. He concedes that the plea proceeding satisfied Crim.R. 11(C). Brief, p. 7. The court carefully explained to him in that proceeding the maximum sentences it could impose, and Defendant-Appellant acknowledged an understanding of that. No mention was made of a lesser sentence. The matter of the agreed "minimum" sexual offender classification was related to him wholly separate from the court's explanation of potential terms of imprisonment the court could impose, and was specifically connected by the court to the resulting registration

requirements. Defendant-Appellant's attorney reiterated for the court that he had not given Defendant-Appellant any understanding of his potential maximum sentence that was different from what the court explained, carefully and in detail.

{¶52} We cannot find that the trial court denied Defendant-Appellant a hearing to argue the grounds for his motion to withdraw. The court merely rejected those grounds with reference to the plea colloquy and the lack of any terms that implicated a promise of a minimum sentence. No abuse of discretion is demonstrated.

{¶53} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶54} "THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO CONSECUTIVE SENTENCES."

{¶55} The trial court made the findings required by R.C. 2929.14(E)(4) in order to impose consecutive sentences. The court was further required by R.C. 2929.19(B)(2)(c) to state the reasons for its findings. *State v. Comer,* 99 U.S. 3d 463, 2003-Ohio-4165. The trial court stated no reasons for the findings it made, which is reversible error. *Id.*

{¶56} The second assignment of error is sustained.

{¶57} Having sustained the second assignment of error, we will vacate the sentence the trial court imposed and remand for resentencing.

FAIN, P.J. and BROGAN, J., concur.

Copies mailed to:

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