

[Cite as *Stat v. McCants*, 2014-Ohio-4044.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 13 MA 25
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
WILLIAM McCANTS,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 10 CR 638.

JUDGMENT: Affirmed.

APPEARANCES:
For Plaintiff-Appellee: Attorney Paul J. Gains
Prosecuting Attorney
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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: September 5, 2014

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DeGenaro, P.J.

{¶1} Defendant-Appellant William McCants appeals the judgment of the Mahoning County Court of Common Pleas accepting his guilty plea and sentencing him to sixteen years of incarceration, contending that his plea was not knowingly, intelligently or voluntarily made because of the ineffective assistance of his counsel; specifically because counsel failed to file a motion to suppress, obtain the State's witness list and seek discovery sanctions.

{¶2} McCants' arguments that counsel was ineffective to such an extent that it undermined the validity of his plea are meritless. Counsel was not deficient for failing to file a motion to suppress the flash drive because it was voluntarily turned over to police by McCants' wife, a private actor. Nor was counsel deficient for failing to obtain a witness list from the State or seek discovery sanctions; voluminous discovery was exchanged by the parties, and McCants' argument regarding a witness list is speculative at best. Further, McCants failed to demonstrate that he suffered any resulting prejudice. Because McCants entered his plea knowingly, intelligently and voluntarily, the trial court's decision is affirmed.

Relevant Facts and Procedural History

{¶3} On June 24, 2010, the Mahoning County Grand Jury returned an indictment against McCants charging him with fifty felony counts of offenses involving minors and sexually oriented or obscene material. The charges arose from images discovered on a flash drive that McCants left at the home of his wife, Jalyn McCants.

{¶4} On April 26, 2012, the Mahoning County Grand Jury issued a superseding indictment charging McCants with the following: Counts 1 through 10, Illegal Use of a Minor in Nudity Oriented Material, R.C. 2907.323(A)(1)(B), second degree felonies; Counts 11 through 25, Pandering Obscenity Involving a Minor, R.C. 2907.321(A)(5)(C), fourth degree felonies; Counts 26 through 82, Pandering Sexually Oriented Matter Involving a Minor, R.C. 2907.322(A)(1)(C), and Counts 83 through 100, Illegal Use of a Minor in Nudity Oriented Material, R.C. 2907.323(A)(1)(B), all second degree felonies.

{¶5} McCants filed a Motion for a Bill of Particulars, Request for Discovery, and Motion to Examine Exculpatory/Mitigation Material on July 8, 2010, which the State

answered approximately a week later and supplemented several times. After the superseding indictment was issued, McCants filed another motion for a Bill of Particulars on November 28, 2012, which the State filed two days later. McCants' counsel filed a motion to compel the State to provide a witness list on December 6, 2012.

{¶6} On December 14, 2012, the State of Ohio and McCants entered into a Crim.R. 11 plea agreement. McCants pled guilty to all counts indicted, for which the State recommended a sixteen year sentence. At the sentencing hearing McCants requested a three to five year sentence which the trial court rejected, and imposed the prosecutor's recommended sixteen year term of incarceration.

Ineffective Assistance of Counsel

{¶7} In his sole assignment of error, McCants asserts:

{¶8} "Appellant was denied the effective assistance of trial counsel when counsel failed to file a motion to suppress evidence and failed to seek discovery sanctions, rendering the plea not knowing and not intelligently done."

{¶9} To prove an allegation of ineffective assistance of counsel, the defendant must satisfy a two-prong test; that counsel's performance has fallen below an objective standard of reasonable representation, and that he was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), at paragraph two of the syllabus. To demonstrate prejudice, the defendant must prove that, but for counsel's errors, the result of the trial would have been different. *Id.* at paragraph three of the syllabus. The "entry of a voluntary guilty plea waives ineffective assistance of counsel claims except to the extent that counsel's performance causes the waiver of Defendant's trial rights and the entry of his plea to be less than knowing and voluntary." *State v. Fatula*, 7th Dist. No. 07 BE 24, 2008-Ohio-1544 at ¶9, quoting *State v. Kidd*, 2d Dist. No. 03CA43, 2004-Ohio-6784, ¶16. Thus, McCants is not precluded from challenging the effectiveness of counsel's representation as he asserts it undermined the validity of his plea.

Validity of Plea

{¶110} A plea must be made knowingly, intelligently, and voluntarily. *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450. "Failure on any of these points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *Id.* A determination whether a plea is knowing, intelligent, and voluntary is based upon a review of the record. *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130, 595 N.E.2d 351. *State v. Kelley*, 57 Ohio St.3d 127, 129, 566 N.E.2d 658 (1991).

{¶111} Crim.R. 11(C) sets forth specific procedural requirements that a trial judge follows when accepting a guilty plea from a defendant to ensure that pleas are made in a knowing, intelligent and voluntary manner:

"(C) Pleas of guilty and no contest in felony cases.

"(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

"(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

"(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

"(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

"(c) Informing the defendant and determining that the defendant

understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶12} "Subsection (2)(c) sets forth various constitutional rights that the trial court must discuss with the defendant prior to accepting a plea." *State v. Owens*, 181 Ohio App.3d 725, 2009-Ohio-1508, 910 N.E.2d 1059, ¶52 (7th Dist.). By entering a plea the defendant is waiving these rights which must be explained by the court. *Id.* "A trial court must strictly comply with the provisions of Crim.R. 11(C) which relate to the waiver of constitutional rights." *State v. Green*, 7th Dist. No. 02 CA 217, 2004-Ohio-6371, ¶11 citing *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), paragraph one of the syllabus.

{¶13} Subsections (2)(a) and (b) set forth various non-constitutional rights that the trial court must also discuss with the defendant prior to accepting his plea. See *State v. Root*, 7th Dist. No. 07 MA 32, 2007-Ohio-7202, ¶14. With respect to these non-constitutional rights, only substantial compliance with Crim.R. 11(C) is required. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). "Substantial compliance means that under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving." *Id.*

{¶14} Here the plea hearing transcript demonstrates that the trial court complied with all portions of Crim.R. 11(C). McCants was represented by counsel during the hearing. The trial court explained to McCants that by pleading guilty he would relinquish his constitutional rights to a jury or bench trial, to have the state prove his guilt beyond a reasonable doubt, to confront adverse witnesses, and to compel the attendance of witnesses he might wish to present in his favor, and that he could not be compelled to testify against himself. The trial court also explained to McCants his non-constitutional rights, informing McCants of the nature of the charges against him and the maximum

penalties involved, post-release control, and that upon accepting his plea the court could proceed to judgment and sentencing.

{¶15} McCants indicated to the trial court that he understood he was waiving all of these rights, acknowledging that he entered into a plea agreement which he signed and that he wished to go forward. McCants stated he had no questions and entered a plea of guilty. As a result, the trial court determined that his plea was made freely and voluntarily with full knowledge of the consequences. Because all of the Crim.R. 11 requirements were satisfied, McCants' plea was knowing, intelligent and voluntary.

Motion to Suppress

{¶16} Nonetheless, McCants argues that his plea was not made knowingly and intelligently due to his counsel being ineffective for failing to file a motion to suppress, obtaining a witness list and seeking discovery sanctions against the State. The charges against McCants arose from images discovered on a flash drive that McCants left at the home of his wife, Jalyn; she discovered what was on the flash drive and turned it over to the police. McCants first argues that counsel should have filed a motion to suppress the flash drive.

{¶17} "[F]ailure to file a suppression motion does not constitute per se ineffective assistance of counsel." *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52, quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). The defendant must prove that there was a basis to suppress the evidence in question. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶35.

{¶18} Generally, searches and seizures conducted by private individuals are beyond constitutional protection because the Fourth Amendment protects individuals from state, not private action. *State v. Morris*, 42 Ohio St.2d 307, 316, 329 N.E.2d 85 (1975). Here, there was no basis to suppress the evidence in question as state action was not implicated. Accordingly, McCants trial counsel was not deficient for failing to file a motion to suppress.

Witness List and Discovery Sanctions

{¶19} McCants next argues that counsel was deficient due to not having a witness list from the State and not pursuing discovery sanctions. McCants speculates that trial counsel had no "sound basis for informing him who would likely testify, if any expert witnesses would testify and what those experts would say," and had discovery remedies been pursued the trial court may have prohibited non-disclosed witnesses from testifying.

{¶20} "[T]he reasonableness of counsel's determination concerning the extent, method and scope of any criminal discovery necessarily depends upon the particular facts and circumstances of each case." *State v. Wilson*, 8th Dist. No. 61199, 1992 WL 309378, *1 (Oct. 22, 1992). There is a "strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

{¶21} Although the record demonstrates the State did not file a witness list, McCants' suggestion on appeal that no discovery was conducted at all is unfounded. Between the issuance of the original and the superseding indictment, several judgment entries reference the voluminous nature of the discovery and the ongoing review and exchange between the parties. Significantly, McCants' trial counsel sought and was appointed a computer forensic expert. While trial counsel may have not been furnished a formal witness list, it does not logically follow that counsel could not ascertain who would be testifying, what the substance of that testimony would be, and what other evidence would be presented by the State based upon the ongoing exchange of discovery.

{¶22} McCants advances the argument that had trial counsel pursued sanctions for the State's alleged discovery violation, i.e. not filing a witness list, then the trial court may have prohibited the use of non-disclosed witnesses. This is speculation at best and not consistent with the well-settled proposition that a trial court must typically impose the least severe sanction that is consistent with the purpose of the rules of discovery. See *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, syllabus. Accordingly, McCants trial counsel was not deficient for failing to acquire a witness list or to pursue discovery sanctions.

{¶23} In conclusion, McCants arguments that counsel was ineffective to such an extent that it undermined the validity of his plea are meritless. Counsel was not deficient for failing to file a motion to suppress the flash drive because it was voluntarily turned over to police by McCants' wife, a private actor. Nor was counsel deficient for failing to obtain a witness list from the State or seek discovery sanctions; voluminous discovery was exchanged by the parties, and McCants' argument regarding a witness list is speculative at best. Further, McCants failed to demonstrate that he suffered any resulting prejudice. McCants entered his plea knowingly, intelligently and voluntarily. As such, the judgment of the trial court is affirmed.

Vukovich, J., concurs.

Waite, J., concurs.