[Cite as *State v. Bryant*, 2009-Ohio-3917.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

James C. Bryant

Appellant

Court of Appeals Nos. L-08-1138
L-08-1139

Trial Court Nos. CR 2008-1246
CR 2008-1786

DECISION AND JUDGMENT

Decided: August 7, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Nicole Y. Fech, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} In these consolidated appeals, appellant James C. Bryant, appeals judgments of conviction and sentence to four criminal offenses, each based upon no contest pleas.[1] The criminal charges relate to three separate incidents occurring on

[1]The charges were originally brought as separate counts to an indictment. To correct errors in the two robbery counts, the state dismissed and refiled those charges in a

January 4, 17, and 31, 2008 in Toledo, Ohio, in which the victims of the crimes were pizza deliverymen.

{¶ 2} In one judgment, appellant was convicted of two counts of robbery, violations of R.C. 2911.02(A)(2) and second degree felonies. Under the judgment, the trial court imposed a sentence of imprisonment for six years on each count.

{¶ 3} In the other judgment, appellant was convicted of one count of aggravated robbery, a violation of R.C. 2911.01(A)(1) and a first degree felony, and one count of abduction, a violation of R.C. 2905.02 and a third degree felony. The court sentenced appellant to serve terms of imprisonment of eight years for the aggravated robbery count and four years on the abduction count. The trial court ordered that the sentences be served consecutively.

{¶ 4} Appellant asserts one assignment of error on appeal:

{¶ 5} "Appellant received ineffective assistance of counsel when a competency evaluation was not requested by trial counsel."

{¶ 6} Appellant claims that he was provided ineffective assistance of counsel because trial counsel failed to raise the issue of his competency in the trial court and failed to secure a competency evaluation of appellant before appellant entered his no contest pleas. To prevail on a claim of ineffective assistance of counsel a defendant must prove two elements: "First, the defendant must show that counsel's performance was

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Bill of Information in order to comply with the requirements of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio 1624.

deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687.

{¶ 7} Prejudice under *Strickland v. Washington* requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. In a plea context, prejudice requires a showing "that there is a reasonable probability that, but for counsel's errors," the defendant would not have pled guilty or no contest. *Hill v. Lockhart* (1985), 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (guilty plea); *State v. Xie* (1992), 62 Ohio St.3d 521, 524 (guilty plea); *State v. Hurst*, 4th Dist. No. 08CA43, 2009-Ohio-3127, ¶ 71 (no contest plea); *State v. Barnett*, 11th Dist. No. 2006-P-0117, 2007-Ohio-4954, ¶ 52 (no contest plea). A determination of incompetency would have precluded a change of plea to no contest.

{¶ 8} The standard to determine a defendant's competency to stand trial is set forth in the United States Supreme Court's decision of *Dusky v. United States* (1960), 362 U.S. 402. *State v. Berry* (1995), 72 Ohio St.3d 354, 359, 1995-Ohio-310. The test of competency to stand trial under *Dusky v. United States* is whether the defendant "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him.'" *Dusky v. United States*, 362 U.S. at 402; *State v. Berry* at 359.

The same standard applies to test the competency of a defendant to enter a plea. *Godinez v. Moran* (1993), 509 U.S. 389, 399 (guilty plea); *State v. Spivey* (Mar. 15, 2002), 7th Dist. No. 00 CA 106 (no contest plea); *State v. Kovacek* (May 30, 2001), 9th Dist. No. 00CA007713 (no contest plea); *State v. Bolin* (1998), 128 Ohio App.3d 58, 61-62 (guilty plea).

{¶ 9} Appellant argues that at sentencing trial counsel informed the court that appellant had "previously been diagnosed with mild mental retardation, very low frustration tolerance." Trial counsel commented at sentencing on a need for appellant to receive "mental health treatment and also the drug treatment that he desires, because he does have these disorders both for substance abuse and for his mental health issues * * *." Trial counsel stated that appellant was drug dependent on crack cocaine.

{¶ 10} In our view, these statements do not provide evidence addressing the pertinent inquiry under *Dusky v. United States* to determine competency. The Supreme Court of Ohio has recognized that a distinction exists between being mentally or emotionally ill and not being competent to stand trial. "[A] defendant may be emotionally disturbed or even mentally ill and yet competent to stand trial." *State v. Ferguson,* 108 Ohio St.3d 451, 2006-Ohio-1502, ¶ 46, quoting *State v. Mink,* 101 Ohio St.3d 350, 2004-Ohio-1580, ¶ 38. In terms of the *Dusky* test, "[a] defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and assisting his counsel." *State v. Bock* (1986), 28 Ohio St.3d 108, 110.

{¶ 11} The state argues that the trial court engaged in a lengthy colloquy with the defendant in order to determine his understanding of the proceedings before accepting his change of pleas that provides evidence of competency to plead to the charges. The colloquy includes:

{¶ 12} "THE COURT: Mr. Bryant, how old are you, sir?

{¶ 13} "THE DEFENDANT: Thirty-two.

{¶ 14} "THE COURT: How far have you gone in school? How far have you gone in school?

{¶ 15} "THE DEFENDANT: Tenth. Tenth grade.

{¶ 16} "THE COURT: Are you able to read and write the English language?

{¶ 17} "THE DEFENDANT: No, I can't, Your Honor.

{¶ 18} "THE COURT: If somebody reads a document to you, do you understand it?

{¶ 19} "THE DEFENDANT: Yeah, but they got to go over it twice with me for me to understand it.

{¶ 20} "THE COURT: When Mr. Dech went over the plea of no contest form, did you understand it?

{¶ 21} "THE DEFENDANT: Yeah.

{¶ 22} "THE COURT: Okay. Do your understand what I'm saying in court?

{¶ 23} "THE DEFENDANT: Yeah.

{¶ 24} "THE COURT: Are you under the influence of any drugs, alcohol or medication that would affect your understanding of what's being asked of you?

{¶ 25} "THE DEFENDANT: No.

{¶ 26} "THE COURT: Your mind is clear?

{¶ 27} "THE DEFENDANT: Yeah.

{¶ 28} "THE COURT: You understand the crimes you're pleading to?

{¶ 29} "THE DEFENDANT: Yes.

{¶ 30} "THE COURT: What are the crimes you're pleading to?

{¶ 31} "THE DEFENDANT: To aggravated robbery, abduction and 2 robberies.

{¶ 32} "THE COURT: That's correct."

{¶ 33} The remainder of the plea colloquy proceeded in a similar fashion with the trial court engaging appellant in a conversation as to his understanding of the fines and terms of imprisonment that could be imposed on each offense and his understanding of the court's explanation of constitutional and other Crim.R. 11 rights he was waiving by pleading no contest to the charges. We agree with the state that appellant's statements in the plea colloquy demonstrate an understanding of the proceedings and significance of the change of pleas.

{¶ 34} A properly licensed attorney in Ohio is presumed to execute his duties in an ethical and competent manner. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56, sentence reversed on other grounds, *Hamblin v. Mitchell* (C.A.6, 2003), 354 F.2d 482. A defendant is presumed to be competent. *State v. Nickell*, 6th Dist. No. WD-07-015, 2008-

Ohio-1571, ¶ 13; *State v. Robinson*, 6th Dist. No. L-03-1307, 2005-Ohio-5266, ¶ 18; R.C. 2945.37(G).

{¶ 35} Even if we were to assume that trial counsel was deficient in failing to raise the issue of competency in the trial court and in failing to secure an examination of appellant to secure an evaluation of his competency prior to change of plea, appellant has failed to show prejudice from these claimed failures. In our view evidence in the record is lacking to support a claim that appellant was not competent to enter his no contest pleas. Accordingly, we conclude that appellant's assignment of error is not well-taken.

{¶ 36} On consideration whereof, the court finds that substantial justice has been done the party complaining and that appellant was not prejudiced or prevented from having a fair trial. The judgments of the Lucas County Court of Common Pleas are affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Richard W. Knepper, J.
CONCUR.

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JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.