

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93761

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MURDOCK DRAKE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521897

BEFORE: Blackmon, J., Kilbane, P.J., and Sweeney, J.

RELEASED: March 18, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} In this accelerated appeal, appellant Murdock Drake appeals his guilty plea to aggravated robbery, failure to comply with the order or signal of a police officer, and burglary. He assigns the following errors for our review:

“I. The defendant was denied the assistance of counsel, by virtue of his attorney’s complete abandonment of this role as an advocate for his client, in violation of defendant’s rights under the 6th Amendment to the Constitution of the United States and Article I, Section 10 of the Ohio Constitution.”

“II. The trial court erred in denying defendant’s motion to withdraw his plea without affording defendant the assistance of counsel at the hearing on the motion to withdraw.”

{¶ 2} Having reviewed the record and pertinent law, we affirm Drake’s convictions. The apposite facts follow.

FACTS

{¶ 3} The Cuyahoga County Grand Jury indicted Drake on five counts: one count of aggravated robbery with one and three-year firearm specifications, two counts of failure to comply with the order or signal of a police officer, one count of burglary, and one count of receiving stolen property.

{¶ 4} On the day of trial, Drake entered into a plea agreement with the state, whereby Drake pleaded guilty to aggravated robbery with a one-year firearm specification, one count of failure to comply, and burglary. The

remaining counts were nolle. The state agreed it would not object to the minimum sentence of five years. In exchange, Drake would provide testimony against his co-defendants.

{¶ 5} Prior to his sentencing, Drake filed a motion to withdraw his guilty plea. He argued that he misunderstood his counsel and did not understand the consequences of his plea. The trial court set the matter for a hearing. At the hearing, Drake's attorney informed the court that the plea was a fair agreement and that he disagreed with Drake's request to withdraw the plea. The trial court reviewed the transcript of the plea hearing and concluded that Drake entered the plea knowingly and voluntarily and that Drake filed the motion because he had a change of heart regarding the plea. The trial court denied the motion to withdraw and sentenced Drake to five years in prison.

Abandonment by Counsel

{¶ 6} In his first assigned error, Drake contends that his counsel abandoned him at the plea hearing; therefore, his Sixth Amendment right to counsel was violated. In so arguing, Drake contends the standard of review for ineffective assistance of counsel does not apply because abandonment by counsel constitutes a structural error, which requires no showing of prejudice.

{¶ 7} Our review of the record shows that Drake's counsel attended the hearing; therefore, he did not abandon Drake. Drake, however, argues he

was abandoned because his counsel disagreed with his attempt to withdraw his plea. In support of his argument that he is not required to show prejudice due to counsel's failure to act on Drake's desire to withdraw his plea, he relies on the United States Supreme Court cases of *United States v. Cronin*¹ and *Penson v. Ohio*.² These cases are distinguishable from the instant case.

{¶ 8} In *Cronin*, the United States Supreme Court created a narrow exception to the *Strickland* requirements, when it determined that prejudice should be presumed in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."³ Specifically, the Supreme Court found that if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. In *Cronin*, the trial court denied the newly appointed trial attorney's motion for a continuance in a complicated case. The Supreme Court concluded the trial court's failure to grant the attorney a continuance resulted in counsel not being able to subject the prosecutor's case to "meaningful adversarial testing," which deprived the

¹(1984), 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657.

²(1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300.

³*Cronin*, 466 U.S. at 658.

defendant of his Sixth Amendment Right to counsel. The proceedings in the instant case did not require the testing of the prosecutor's case against Drake, because he had entered into a plea. Also, the adversarial process did not break down because the trial court considered the appropriate factors in determining whether to grant Drake's motion, in spite of his attorney's belief that the plea was valid.

{¶ 9} In *Person*, the appellate counsel for defendant submitted an *Anders* brief and filed a motion to withdraw, which the appellate court granted. The United States Supreme Court held that the appellate court erred when it failed to appoint new counsel after finding that the record supported several arguably meritorious grounds for reversal of defendant's conviction and modification of his sentence. The Supreme Court concluded that the failure to appoint new counsel left the defendant without constitutionally adequate representation on appeal. This differs from the instant case where the court conducted a hearing and gave full consideration to Drake's argument for withdrawal, irrespective of his counsel's opinion, and found no merit to Drake's grounds for withdrawal. Thus, in spite of Drake's arguments to the contrary, we conclude Drake raises an ineffective assistance of counsel argument, not an abandonment argument.

{¶ 10} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington*.⁴ Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance.⁵ To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different.⁶ Judicial scrutiny of a lawyer's performance must be highly deferential.⁷

{¶ 11} In *State v. Jones*,⁸ the appellant argued his counsel was ineffective for refusing to file a motion to withdraw the appellant's guilty plea. This court stated as follows:

“A defendant receives ineffective assistance of counsel when his trial counsel ‘fails to act on his request to withdraw his plea when the possibility that he would have been allowed to withdraw his plea is not insubstantial.’ *State v. Strutton* (1998), 62 Ohio App.3d 248, 252.”

⁴(1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

⁵*State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of the syllabus.

⁶Id. at paragraph two of the syllabus.

⁷*State v. Sallie*, 81 Ohio St.3d 673, 1998-Ohio-343, 693 N.E.2d 267.

⁸(Aug. 24, 1995), Cuyahoga App. Nos. 68284, 68285, 68286, 68287, 68288.

{¶ 12} In that case, this court concluded that counsel was not ineffective because the appellant “set forth no reasonable or legitimate basis for the withdrawal of his plea.”

{¶ 13} In *State v. Carr*,⁹ the Fifth District concluded that counsel’s refusal to abide by his client’s request to file a motion to withdraw a plea, did not constitute abandonment of counsel and that the court did not err by requiring the defendant to act pro se in arguing his motion to withdraw his plea. The court concluded the trial court appropriately considered the factors to be considered when withdrawal of a plea is requested. The court also concluded that the defendant’s counsel was acting in defendant’s best interest by refusing to vacate a reasonable plea bargain given the overwhelming evidence against his client.

{¶ 14} In *State v. Jones*,¹⁰ the Second District held that counsel was not ineffective for stating that the withdrawal of the plea was not in his client’s best interest. The court concluded defendant was not prejudiced by counsel’s passive representation because the defendant failed to provide a “legitimate reason” to permit the withdrawal. The court also noted that:

“[I]n some cases, criminal defendants have been required to present their withdrawal motions without the benefit of

⁹5th Dist. No. 01AP-849, 2002-Ohio-1314.

¹⁰(Apr. 30, 1999), 2nd Dist. No. 98-CA-42.

counsel, and courts have not found a Sixth Amendment violation. See, e.g. *Shufflebean* (June 18, 1998) 4th Dist. No. 97 CA 40.”

{¶ 15} In *State v. Young*,¹¹ the Fifth District concluded the trial court did not err by refusing to continue the hearing on the defendant’s motion to withdraw his plea, even though his counsel was unable to attend. The appellate court concluded that the defendant had failed to show he was prejudiced by not having his counsel present because there was no valid basis for withdrawing the plea.

{¶ 16} Likewise, we conclude Drake has failed to show that but for his counsel’s actions, the outcome of the hearing to withdraw the plea would have been different. The trial court reviewed the transcript from the prior hearing and concluded that Drake was fully advised of his rights, the plea was voluntarily and knowingly entered, and that a discussion regarding his culpability was placed on the record. The court found Drake’s impetus for withdrawing the plea was a change of heart. A change of heart does not constitute proper grounds to vacate a plea.¹² Thus, because Drake has failed to demonstrate the requisite prejudice, his first assigned error is overruled.

¹¹(Oct. 24, 1994), 5th Dist. No. 94-CA-16.

¹²*State v. Lambros* (1988), 44 Ohio App.3d 102, 541 N.E.2d 632; *State v. Salter*, Cuyahoga App. No. 82488, 2003-Ohio-5652; *State v. Drake* (1991), 73 Ohio App.3d 640, 645, 598 N.E.2d 115.

Failure to have an Impartial Hearing

{¶ 17} In his second assigned error, Drake argues that the court erred by refusing to allow him to withdraw the plea because he was not represented by “highly competent counsel” at the hearing to withdraw.

{¶ 18} “[A] presentence motion to withdraw a guilty plea should be freely and liberally granted. Nevertheless, it must be recognized that a defendant does not have an absolute right to withdraw a plea prior to sentencing.”¹³ We review presentence motions to withdraw guilty pleas for an abuse of discretion.¹⁴

{¶ 19} In determining whether the trial court abused its discretion by denying a defendant's motion to withdraw a plea, we consider the following factors: (1) whether the accused was represented by highly competent counsel; (2) whether the accused was afforded a full hearing pursuant to Crim.R. 11 before he entered the plea; (3) whether, after the motion to withdraw was filed, the accused was given a complete and impartial hearing on the motion; and (4) whether the record reveals that the court gave full and fair consideration to the plea withdrawal request.¹⁵

¹³*State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715.

¹⁴*Id.*

¹⁵*State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863.

{¶ 20} Drake contends that the first consideration, whether he was represented by “highly competent counsel,” affected the third consideration, whether he was given a complete and impartial hearing on the motion. He claims that because he was not represented by competent counsel, his hearing was not “complete and impartial.” However, our reading of the considerations indicates that the first consideration concerns the attorney’s representation at the plea hearing, not at the hearing to withdraw the plea.

{¶ 21} Nonetheless, Drake was represented by attorney Harvey Bruner, who has extensive experience in criminal law. Bruner had obtained a reasonable plea bargain for his client. As Bruner explained at the hearing, although Drake disputed being a part of the plan to commit the aggravated robbery, the evidence regarding the burglary and failure to comply with the signal of a police officer was substantial. Drake was identified as the driver of the get-away vehicle that failed to stop when the officer activated the car’s lights and sirens. Drake was also identified as the man that was found in the basement of a home that he had broken into in order to hide from the police. The failure to comply offense alone could have resulted in a five-year prison term. Thus, contra to Drake’s argument, appointed counsel did not stop representing Drake. Instead, counsel refused to help Drake harm his own best interests by withdrawing a favorable plea deal.

{¶ 22} Additionally, the trial court afforded Drake a full hearing on his motion to withdraw his plea and gave full and fair consideration to the plea withdrawal request. Although Drake contended that he misunderstood the implications of his plea, the trial court reviewed the transcript from the plea and found that a hearing pursuant to Crim.R. 11 was conducted prior to the court's acceptance of the plea. During the plea the court also ascertained that Drake fully understood the nature of the charges and possible penalties. The court also determined that the plea was knowingly, intelligently, and voluntarily made. Based on its review of the plea transcript, the trial court found no basis for Drake's contention that he misunderstood the implications of his plea.

{¶ 23} The court also considered Drake's assertion that he was innocent of the aggravated robbery count; the court asked the state what evidence it planned to present in support of this count. The state informed the court that it had three lay witnesses who observed Drake circling the area in a car with his co-defendants prior to the robbery. The court then gave Drake the opportunity to refute the allegations. Drake informed the court that he was purchasing drugs while the robbery occurred and returned after the co-defendants had already committed the robbery. After considering this testimony, the court concluded that Drake was having a change of heart regarding the plea and denied his motion.

{¶ 24} It was within the trial court's province to determine whether Drake's arguments in support of his motion were reasonable and legitimate. We defer to the trial court's judgment in evaluating the “good faith, credibility and weight” of Drake’s motivation and assertions in entering and attempting to withdraw his plea.¹⁶ We, therefore, do not find the trial court's decision was unreasonable, arbitrary, or unconscionable. Accordingly, Drake’s second assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR

¹⁶See, *Xie*, 62 Ohio St.3d at 525, 584 N.E.2d 715.