[Cite as *State v. Crawford*, 2018-Ohio-3665.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105738

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN CRAWFORD

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Court of Common Pleas
Case No. CR-15-596358-A
Application for Reopening
Motion No. 518628

RELEASE DATE: September 12, 2018

FOR APPELLANT

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LARRY A. JONES, SR., J.:

{¶1} Applicant, John Crawford, pursuant to App.R. 26(B), timely seeks to reopen his appeal where this court affirmed his convictions for sexual battery, rape, and unlawful sexual conduct with a minor. *State v. Crawford*, 8th Dist. Cuyahoga No. 105738, 2018-Ohio-1188. Finding no merit, we deny his application to reopen.

{¶2} Crawford was convicted of sexual offenses involving three victims, for which he received a 17½-year prison sentence. In his direct appeal, Crawford raised assignments of errors related to the vagueness of his indictment and issues related to his sentence. Crawford also raised an assignment of error that stated "appellant's plea was not entered in accordance to Crim.R. 11." This court affirmed his convictions. Crawford now seeks to reopen his appeal asserting through his single proposed assignment of error that his appellate counsel was constitutionally ineffective for failing to argue that his plea was not entered knowingly, intelligently, and voluntarily.

{¶3} App.R. 26(B) gives a defendant in a criminal case the ability to apply for "reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." App.R. 26(B)(1). The application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{¶4} In order to establish a claim of ineffective assistance of appellate counsel, Crawford is required to establish his appellate counsel's performance was deficient and

that deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). He must demonstrate that "there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998).

{¶5} Crawford argues that his guilty pleas were not knowingly, intelligently, and voluntarily entered because his trial counsel advised him that he would receive a minimum sentence when he actually received maximum, consecutive sentences.

{¶6} At the sentencing hearing, Crawford stated that his attorney told him he would receive a minimum sentence. Trial counsel did not corroborate that statement, and the trial court said that this conflicted with Crawford's responses during the plea colloquy where Crawford indicated that no promises were made in order to induce him to plead guilty. Crawford then asserted that his attorney told him to say that no promises were made.

> THE DEFENDANT: I know I've pled guilty, as we first said, when there wasn't a victim or anybody. I gave you the reason why I was doing that. I apologize for how she may feel, and for — if it has affected her and for the misunderstanding. But I'm having a hard time with things [the prosecutor] was saying. I was not promised — I was guaranteed the minimum, or I would have fought for my life in trial. I would have fought for my live [sic] if I was going to be told 10 to 15 years for something I'm saying on the record I didn't do. I'm pleading — taking a plea because I have five children. I have a fiancee sitting behind me. I have a one-year-old baby who I've been there for from day one, as opposed to stepchildren and my own children. I was taking a plea under the pretense that I was guaranteed the minimum, or I would have fought for my life.

> THE COURT: You weren't guaranteed anything. I asked you at the plea, if any promises had been made, and you said no.
>
> THE DEFENDANT: I never was told it was —
>
> THE COURT: I asked you if you understood that there was no promise of any particular sentence.
>
> THE DEFENDANT: I was told to tell you that. I was told you were supposed to say no.
>
> * * *
>
> THE DEFENDANT: I'm sorry, [prosecutor]. She didn't feel I deserved the minimum, but didn't feel I deserved the maximum. I asked him do you think [the judge] would give me the minimum. [trial counsel] said, yeah, I'm sure of it, it's old, it's tired, they want to get rid of it. I understand it's [the court's] decision.
>
> THE COURT: It's my decision. You're not getting the minimum. Is there anything else you want to say?

(Tr. 49-50, 57.)

{¶7} The exchange that occurred on the record does not demonstrate a claim of ineffective assistance of counsel.

{¶8} "In order for a guilty plea to comply with due process, it must be voluntarily given by defendant, and '[a] guilty plea induced by "unfulfilled or unfulfillable promises," made by either the prosecution, the court, or defendant's counsel is not voluntary.'" *State v. Aponte*, 145 Ohio App.3d 607, 614, 763 N.E.2d 1205 (10th Dist.2001), quoting *State v. Hawk*, 81 Ohio App.3d 296, 299, 610 N.E.2d 1082 (9th Dist.1992), quoting *Brady v. United States*, 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.Ed.2d

747 (1970). However, this court has previously held that an inaccurate prediction of the sentence ultimately imposed does not constitute ineffective assistance of counsel.

> "A good faith but erroneous prediction of sentence by defense counsel does not render the plea involuntary. Where the representations made by defense counsel were hopeful, good faith estimates, not promises, the fact that defendant may have had expectations of leniency is not sufficient, absent evidence that the government induced such expectation, to justify withdrawal of the plea."

State v. Vinson, 2016-Ohio-7604, 73 N.E.3d 1025, _ 32 (8th Dist.), quoting *State v. Sally*, 10th Dist. Franklin No. 80AP-850, 1981 Ohio App. LEXIS 10295, 10-11 (June 11, 1981). *See also State v. Longo*, 4 Ohio App.3d 136, 139-140, 446 N.E.2d 1145 (8th Dist.1982) (counsel's error in "predict[ing] a sentencing result based on an educated judgment" that "did not pan out" did not render his assistance ineffective); *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, 884 N.E.2d 607, ¶ 10 (8th Dist.) ("A lawyer's mistaken prediction about the likelihood of a particular outcome after correctly advising the client of the legal possibilities is insufficient to demonstrate ineffective assistance of counsel.").

{¶9} The Seventh District has also found that promises made by trial counsel of a certain sentence are insufficient to demonstrate a meritorious issue in an application for reopening where the trial court explains the possible sentence a defendant faces. *State v. Parks*, 7th Dist. Carroll No. 04 CA 803, 2006-Ohio-7269.

{¶10} There, an applicant raised a very similar argument to the present case:

> Specifically, Appellant claims that his trial counsel promised him a total eight-year concurrent sentence in exchange for his six guilty pleas to rape in violation of R.C. 2907.02(A)(1)(b) in Carroll County. Appellant claims that

> the promised eight-year total sentence was designed to be a global plea agreement covering both his Carroll County and Columbiana County rape convictions. Appellant also states that trial counsel advised him to answer yes to the judge's questions at his plea agreement hearing and that everything would go as planned. Appellant also states that his trial counsel * * * has since been disbarred from the practice of law based, in part, on the mishandling of Appellant's cases.

Id. at ¶ 6. The *Parks* court explained that the trial court's proper advisement of the maximum penalties, the fact that the judge could impose any sentence within the statutory range, and Parks's answers to the judge's questions during the Crim.R. 11 plea colloquy, meant that there was no reasonable probability of success as to the issue raised. *Id.* at _ 10-12.

{¶11} Here, the trial court explained the maximum penalties Crawford faced, and the record demonstrates that Crawford's trial attorney also explained the potential penalties. As the state points out in opposition to Crawford's application, this court, in Crawford's direct appeal, already determined that the trial court complied with Crim.R. 11. The trial court gave similar advisements to those given in *Parks*.

{¶12} Further, the promises Crawford claims were made by his attorney are not established on this record. Crawford's claims made at sentencing do not demonstrate such promises were made. Generally, matters outside of the record do not provide a basis for reopening under App.R. 26(B). *State v. Hicks*, 8th Dist. Cuyahoga No. 83981,

2005-Ohio-1842. Given the record in this case, it is impossible to determine whether counsel had a good faith belief in any indication of sentence he may have given Crawford. More properly, any allegations of ineffectiveness of counsel based upon facts not appearing in the trial court record must be raised using other postconviction remedies. *State v. Coleman*, 85 Ohio St.3d 129, 707 N.E.2d 476 (1999); *State v. Carmon*, 8th Dist. Cuyahoga No. 75377, 2005-Ohio-5463.

{¶13} While not addressed specifically by his proposed assignment of error, Crawford argues in the body of his application that trial counsel should not have been representing him at all because he was fired. This also does not provide a basis for reopening in this case.

{¶14} Crawford retained counsel to represent him. During a pretrial hearing, a discussion was had on the record where Crawford indicated he wished to retain different counsel. The trial court delayed proceedings for a significant period of time in order to give Crawford the opportunity to do so. When proceedings reconvened, Crawford was represented by the same trial counsel, and Crawford informed the court that he was unable to retain his desired attorney.

{¶15} This cannot result in a claim that appellate counsel was ineffective for failing to raise this issue. When Crawford indicated a desire to retain different counsel, the trial court gave him that opportunity. While not clearly stated on the record, it appears desired counsel refused to represent him. Crawford proceeded with his originally retained attorney, who represented him for the remainder of the case.

Crawford's failure to retain new counsel does not amount to a colorable claim of ineffective assistance of appellate counsel for failing to raise this issue under the umbrella of a less than knowing, intelligent, and voluntary plea.

{¶16} Therefore, Crawford has not demonstrated a colorable claim of ineffective assistance of appellate counsel.

{¶17} Application denied.

LARRY A. JONES, SR., JUDGE

TIM McCORMACK, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR