[Cite as *State v. Thomas-Kuhns*, 2007-Ohio-3851.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2006-P-0012**
- vs -	:	
APRIL D. THOMAS-KUHNS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2005 CR 0502.

Judgment: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor and *Pamela J. Holder*, Assistant Prosecutor, 466 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Jill K. Fankhauser, 231 South Chestnut Street, P.O. Box 489, Ravenna, OH 44266 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, April D. Thomas-Kuhns, appeals from the January 10, 2006 judgment entry of the Portage County Court of Common Pleas, in which she was sentenced for burglary.

{¶2} Appellant was indicted on September 23, 2005 for aggravated burglary in violation of R.C. 2911.11(A)(1)(B). On November 18, 2005, appellant and her appointed counsel appeared before the court for the purpose of accepting a plea offer

from appellee, the state of Ohio. However, prior to the hearing, appellant advised counsel of her desire to reject the state's offer and interest in obtaining new counsel.

{¶3} At the outset of the hearing, counsel addressed the court and communicated appellant's positions. Counsel noted he had advised appellant of the risks of rejecting the offer, including the possibility of the state filing additional charges in light of certain newly discovered evidence. Counsel then moved the court to allow him to withdraw as counsel of record because he believed he could no longer effectively represent her due to a communication breakdown. The court denied both requests and adjourned.

{¶4} Later that morning, appellant entered a written plea of guilty to a reduced charge of burglary in violation of R.C. 2911.12(A)(1), (2)(c), a felony of the second degree. The trial court accepted appellant's plea and referred the matter to the Adult Probation Department for a pre-sentence investigation. On January 10, 2006, the trial court sentenced appellant to a term of six years incarceration and ordered her to pay a fine in the amount $250 plus court costs. Appellant now appeals and asserts three assignments of error for our review:

{¶5} "[1.] [Appellant] was denied the effective representation of counsel.

{¶6} "[2.] [Appellant's] sentence is not supported by the record and is contrary to law because the court failed to make the finding that imposing the minimum sentence would demean the seriousness of the offense as required by [R.C.] 2929.14(B).

{¶7} "[3.] The trial court erred to [appellant's] prejudice by imposing more than the minimum sentence."

{¶8} In her first assignment of error, appellant argues she was denied the effective assistance of counsel because the court failed to inquire into her concerns regarding her trial counsel after: (1) the court was made aware of her desire to retain new counsel and (2) counsel stated he did not believe he was able to effectively represent her due to a breakdown in communications. In appellant's view, the court's failure to inquire into the adequacy of counsel's representation rendered counsel's assistance ineffective and her ultimate plea invalid.

{¶9} Although appellant styles her first assignment of error as an ineffective assistance claim, it appears that she is actually alleging that the trial court erred by refusing to let her address the court.

{¶10} At the beginning of the November 18, 2005 hearing, the following exchange took place:

{¶11} "[DEFENSE COUNSEL]: May it please the Court. Your Honor, we originally had a plea agreement worked out and we set the matter for this morning. My client now informs me that she will not be entering a plea this morning. Further, she informed me she wants new counsel. I have informed her of the events that have taken place in the trial in this case this week, with new evidence and new witnesses that have surfaced. I've indicated to her what the evidence would be presented against her. I've also indicated that there is a strong likelihood of additional charges being brought by the Prosecutor; potentially, tampering with evidence, which is a felony of the third degree, obstructing justice and other matters. She's informed me that she understands that, she would wish new counsel. I would ask to withdrawal [sic] as Attorney of record. I don't believe that I can effectively represent her anymore, given the communications.

Further, if the Court does not allow me to withdrawal [sic], I ask for a continuance of the trial to better prepare for the charges forthcoming from the Prosecutor's office.

{¶12} "THE COURT: Mr. Muldowney.

{¶13} "[PROSECUTOR]: Your Honor, it's incredible to me that the Defendant is rejecting the offer, which I was very reluctant to make the Defendant in this matter. I have in my hand a letter that she wrote to her alibi witness, telling her in detail what to say during the trial. And we're going to follow-up with the investigation and investigating this, and if additional charges are appropriate, they will be presented to the Grand Jury.

{¶14} "THE COURT: They will be tried separate from the case that's set for Tuesday?

{¶15} "[PROSECUTOR]: Yes, Your Honor. We're prepared to go forward on Tuesday. And in so much as the Defendant has rejected the State's offer and is not going to take it today, it will be withdrawn.

{¶16} "DEFENDANT: May I speak?

{¶17} "THE COURT: No, ma'am. Not at this time. What I'm going to do, because this is set for jury trial on Tuesday, we cleared our docket specifically for this case, I'm going to require that it go forward. And, again, Mr. Muldowney is pulling the offer off the table as of now or today?

{¶18} "[PROSECUTOR]: Well, if she doesn't take the plea this morning, it's going to be off.

{¶19} "THE COURT: It's off the table. As long as you know that, ma'am. Mr. Breiding, I'm not going to allow you to withdraw as counsel of record. You are

appointed on this case. You know, you are a very good Attorney and there is no reason for you to withdrawal [sic] on this matter. ***"

{¶20} In the instant matter, we agree with appellant's reliance upon *State v. Deal* (1969), 17 Ohio St.2d 17. In *Deal*, the Supreme Court of Ohio held that "[w]here, during the course of [a defendant's] trial for a serious crime, an indigent accused questions the effectiveness and adequacy of assigned counsel *** it is the duty of the trial judge to inquire into the complaint and make such inquiry a part of the record." Id. at syllabus. Here, it is clear from the plea colloquy at issue that appellant was denied her right to speak. The trial judge failed to inquire into the nature of the breakdown between appellant and her appointed counsel.

{¶21} Accordingly, appellant's first assignment of error is with merit.

{¶22} In her second assignment of error, appellant contends that her sentence is contrary to law because the trial court failed to make findings under R.C. 2929.14(B) to support its imposition of a six year term of imprisonment.

{¶23} In her third assignment of error, appellant appears to challenge the remedy announced under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In particular, appellant asserts *Foster* violates the Due Process Clause and the prohibition against ex post facto laws contained in the United States Constitution. Appellant additionally argues that *Foster* fundamentally violates the rule of lenity.

{¶24} Based on our determination of appellant's first assignment of error, her second and third assignments of error are moot.

{¶25} For the foregoing reasons, appellant's first assignment of error is well-taken. Appellant's second and third assignments of error are moot. The judgment of

the Portage County Court of Common Pleas is reversed and the matter is remanded for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion,

CYNTHIA WESTCOTT RICE, P.J., dissents with Dissenting Opinion.

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DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶26} While I concur in the decision to reverse and remand this action, I do so solely on the grounds that once appellant's counsel moved the court to allow him to withdraw, the trial court should have inquired into the matter on the record to assure that appellant received effective and adequate counsel. The issue is not whether and when a defendant can speak. Rather, in this case the question is whether appellant could continue to provide effective and adequate counsel after moving to withdraw as counsel. See *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, at ¶135 (Substitution of counsel is warranted where "a breakdown of the attorney-client relationship *** is so severe as to jeopardize the defendant's right to effective assistance of counsel").

{¶27} In the instant matter, appellant's attorney motioned the court to withdraw as attorney of record, expressing doubt to the court that he could effectively represent appellant's interests due to a breakdown in communication between them. The court did not address this issue before denying defense counsel's motion. If the breakdown in the relationship between appellant and her trial counsel prevented that attorney from

effectively advising appellant on the effects of pleading guilty, the knowing and voluntary character of her plea becomes an issue that, at a minimum, deserved more consideration at the trial level. Without effective counsel, appellant could not knowingly waive her right to raise the issue currently before us. While the lower court's concern for its docket and scheduling is understandable and admirable, the withdrawal of counsel issue in this case deserved further consideration.

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CYNTHIA WESTCOTT RICE, P.J., dissents with Dissenting Opinion.

{¶28} I disagree with the majority's resolution of appellant's first assignment of error and therefore dissent.

{¶29} Once a guilty plea is entered and a judgment is rendered on the basis of that guilty plea, the ability to challenge the judgment on appeal is severely limited. In particular, a party who has entered a guilty plea may appeal: (1) a lack of subject matter jurisdiction of the court; or (2) the lack of a knowing, voluntary, and intelligent plea required by Crim.R. 11. See *State v. Fitzgerald,* 102 Ohio St.3d 321, 2004-Ohio-3167, ¶78; see, also, *State v. Kiddy* (Nov. 30, 1990), 11th Dist. No. 89-P-2107, 1990 Ohio App. LEXIS 5248, *9-*10. "As a result, if a criminal defendant admits [her] guilt in open court, [she] waives the right to challenge the propriety of any action taken by the court or counsel prior to that point in the proceeding unless it affected the knowing and voluntary character of the plea." *State v. Haynes* (Mar. 3, 1995), 11th Dist. No. 93-T-4911, 1995 Ohio App. LEXIS 780, *4.

{¶30} Here, appellant neither charges nor do we discern anything in the record affecting the knowing and voluntary character of the plea. As the issue of the trial court's refusal to allow appellant to air her grievances on record involves a challenge to the propriety of the court's action prior to admitting her guilt, it was therefore waived.

{¶31} Waiver aside, I have concerns with the substantive foundation of the majority opinion. I take particular issue with the conclusion that the trial court's failure to inquire violated a vested right possessed by appellant. To be sure, a defendant has certain allocution rights at a plea hearing. See Crim.R. 11. However, appellant was *not* denied any such rights. The trial court's instruction to appellant that she could not speak occurred during a hearing which *preceded* her plea hearing. The record is clear that appellant was not silenced during her plea colloquy: The court thoroughly and scrupulously apprised appellant of her rights pursuant to Crim.R. 11 during which appellant represented she accepted the plea offer knowingly, intelligently, and voluntarily. Appellant was afforded the opportunity to address the court regarding the rights she was giving up and any other lingering concerns relating to her acceptance of the plea. I believe if appellant had any problems regarding the purported "communication breakdown" she experienced with her attorney, she had an affirmative obligation to address them to the court during the actual plea colloquy. She did not do so. Given the record, it is clear that the alleged "breakdown" was amicably resolved prior to appellant's entry of her guilty plea.

{¶32} Furthermore, I do not believe the Supreme Court's holding in *State v. Deal* (1969), 17 Ohio St.2d 17 applies to the facts before this court. In *Deal,* the indigent defendant ("Deal") was charged on three counts of armed robbery. After the state

rested, Deal attempted to discharge his attorney. The trial court provided Deal an opportunity to place his complaint on the record, whereupon Deal asserted defense counsel failed to subpoena witnesses and failed to set forth an alibi defense. The trial court determined Deal's complaint was unreasonably late and proceeded with trial. The court asked Deal if he had any witnesses or wished to testify. Deal indicated he had witnesses, but they were not present and he would not consider testifying as long as he was represented by his current counsel. Deal was convicted and the appellate court affirmed the conviction.

{¶33} After accepting jurisdiction over the matter, the Supreme Court observed that it was impossible to determine if Deal was adequately represented because the record was silent concerning any indication why witnesses were not called or why no alibi defense was used. The court stated "in the circumstances of this case, it was the duty of the trial court to see that the record contained an adequate investigation of appellant's complaint." Id. at 19. The Court stated that such a record could be made by asking Deal's counsel why he had not filed a notice of alibi or subpoenaed Deal's witnesses. The court expounded:

{¶34} "Having 'discharged' his counsel, appellant had no legal advice when he most needed it to assure that the record would show something indicative of incompetence beyond the mere fact that a defense had not been used. In these circumstances, we think it was the trial court's duty to put its own investigation of such an objection into the record, and thus prevent appellant from being deprived of review on the matter. In other words, before continuing with the trial the court should have

made it clear in the record whether the appellant's action was an arbitrary failure to go forward or a legitimate claim of inadequate representation." Id. at 19-20.

{¶35} The Court reversed Deal's conviction and remanded the matter for a reinvestigation on the record of Deal's claims with instructions that if the claim were unfounded, the court could re-enter the judgment of conviction.

{¶36} While *Deal* does establish a duty to inquire, the holding was premised upon particularized allegations of ineffectiveness which arose in a trial setting. Here, appellant made no specific *allegation* that defense counsel was inadequate or ineffective. Appellant, at a pretrial hearing and through defense counsel, stated she wished to have a new attorney appointed. Such a statement is not tantamount to an allegation of inadequacy, but an expression of preference. While the constitution affords an indigent defendant a right to competent counsel, a defendant is not entitled to the advocate of her choice or one with whom she can share a meaningful relationship. See *Morris v. Slappy* (1983), 461 U.S. 1, 13.

{¶37} With this in mind, the only record discussion of counsel's effectiveness occurred when defense counsel sought to withdraw. Counsel asked the court permission to withdraw because he did not believe he could effectively represent appellant in light of purported communication problems they were experiencing. An allegation of ineffectiveness requires actual deficiencies in performance and some resulting prejudice. Counsel's assertions are expressive of doubts he had as to his future abilities to represent appellant effectively given their so-called communication problems. Without a true allegation into counsel's inadequacy, no *Deal* inquiry is triggered.

{¶38} The duty to inquire established in *Deal* is not absolute and does not exist in a vacuum. Under the circumstances, I do not see how an inquiry by the court would have had any impact upon appellant's knowing and voluntary decision to plea. I fail to see the connection between the court's failure to specifically consult appellant as to why she wanted new counsel and the volitional components legally necessary to meaningfully accept a plea offer. After it was made clear in open court that the prosecutor intended to file additional charges as well as retract the plea offer unless appellant accepted it that morning, appellant accepted the offer. Once appellant knowingly and voluntarily accepted the plea, her alleged concerns were of no consequence. In short, I believe *Deal* simply does not apply to the facts before this court.

{¶39} Finally, because the majority opinion *requires* a trial court to indulge a criminal defendant whenever or wherever she desires to speak, the accused now possesses the carte blanche to control the flow of the proceedings whenever he or she wishes. It goes without saying that such a result will create significant mischief in the effective administration of criminal justice. While a criminal defendant is entitled to address the court, he or she should be required to do so within the structure of the procedures the law provides. Under the majority's ruling, if a criminal defendant wants to talk on record, regardless of the forum or the nature of the proceedings, the trial court better listen.

{¶40} I believe the foundation upon which the majority opinion rests is faulty and numerous problems, both practical and theoretical, will likely result from its implementation. I therefore dissent.