

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-P-0027
MICHAEL A. CASTO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Kent Division, Case No. 2009 TRC 576 K.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 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).

MARY JANE TRAPP, P.J.

{¶1} Mr. Michael Casto appeals from the judgment of the Portage County Municipal Court, Kent Division, which sentenced him for operating a motor vehicle while under the influence of alcohol (“OVI”). Mr. Casto contends that the trial court induced him to enter a guilty plea by promising a particular sentence and then later, during the sentencing hearing, reneged by varying the purported agreed sentence. He also contends his counsel was ineffective in failing to object to the sentence imposed or advise the court of the discrepancy between the alleged negotiated sentence and the sentence that was imposed.

{¶2} A review of the record reveals that Mr. Casto was not coerced or induced to enter a plea by the court nor promised a specific sentence. Thus, we cannot say the trial court abused its discretion in sentencing Mr. Casto, or that his counsel was ineffective during the plea negotiations or at the sentencing hearing. Therefore, we affirm.

{¶3} **Substantive and Procedural Facts**

{¶4} On February 8, 2009, Mr. Casto was charged with one count of operating a motor vehicle while under the influence of alcohol, in violation of R.C. 4311.19(A)(1)(a); one count of operating a motor vehicle while under the influence for a .094 reading on a breathalyzer test, in violation of R.C. 4311.19(A)(1)(d); and one count of failure to stay inside marked lines, in violation of R.C. 4511.33.

{¶5} On March 26, 2009, a suppression hearing was scheduled. The arresting officer, however, did not appear, and the judge discussed with defense counsel both a continuance and the lowest minimum jail or confinement term that was possible in light of this being Mr. Casto's second OVI offense if Mr. Casto would change his plea. Specifically, the court discussed with defense counsel that the minimum confinement period available was a five-day jail sentence as well as 18 days of house arrest, with the condition that Mr. Casto be monitored on SCRAM for an unspecified period of time. The hearing was continued so that defense counsel could discuss with Mr. Casto the options of a plea bargain or pursuing the motion to suppress.

{¶6} On March 30, 2009, after being informed of his rights, Mr. Casto pled guilty to one count of OVI in violation of R.C. 4511.19(A)(1)(a), and accordingly was immediately sentenced to the following: (1) 180 days in jail, with 174 days suspended, of which Mr. Casto was given three days credit; (2) completion of a 72-hour driving

under the influence program within 90 days; (3) a condition that he commit no alcohol-related offenses for three years; (4) limited driving privileges; (5) 48 hours of community service; (6) completion of a drug and alcohol evaluation and weekly attendance at Alcoholics Anonymous meetings; (7) 90 days of alcohol monitoring by SCRAM; (8) random drug and alcohol testing for 18 months at the discretion of the court and probation department; (9) payment of all supervision fees for probation in a timely manner; (10) a \$1,075 fine, with \$600 of the fine suspended, in addition to court costs; and (11) restricted plates to be displayed on his vehicle. On the prosecutor's motion, the remaining charges were dismissed and the court accepted Mr. Casto's plea.

{¶7} Mr. Casto moved this court for a stay of the probation conditions pending appeal. We overruled his motion, determining that because the materials before us indicated this was Mr. Casto's second OVI offense, the protection of society from additional offenses was entitled to greater weight than the fact that he was likely to complete some of the probation conditions prior to the release of our final opinion in the matter. Thus, we overruled his motion with the exception of granting a stay of the "community service" portion of his sentence.

{¶8} Mr. Casto now timely raises two assignments of error for our review:

{¶9} "[1.] The trial court abused its discretion when it induced Mr. Casto to enter a guilty plea by promising a particular sentence, and then after the plea, the court failed to impose those terms.

{¶10} "[2.] Trial Counsel's performance was ineffective as Counsel failed to advise the court at the sentencing the discrepancy between the negotiated plea and the sentence imposed."

{¶11} **Judicial Participation in Plea Negotiations**

{¶12} In his first assignment of error, Mr. Casto contends the trial court induced him to plead guilty by promising a particular sentence, which it did not then impose. Specifically, Mr. Casto argues the trial court promised him that, even though this was his second OVI offense, it would be treated as a first-time offense; and he would be sentenced to: serve only 5 days in jail, with an additional 18 days of electronic monitoring; a \$350 fine; a one-year license suspension and mandatory treatment if he was found dependent; in addition to continued SCRAM monitoring for an unspecified period of time.

{¶13} A review of the transcripts reveals that although the trial court clearly initiated plea negotiations and made an offer regarding jail time, Mr. Casto has not established a breach of any purported agreement or an abuse of discretion in his sentence. The court had a brief discussion as to the minimum confinement that could be imposed in Mr. Casto's case before the suppression hearing. The court, in fact, only noted that "[b]est I can do would be, second offense minimum is I could do the, let's see, we do the five day jail [sic] and 18 house arrest." The hearing was then continued for defense counsel to review the options with Mr. Casto. None of the sentencing terms and conditions Mr. Casto cites as having been promised by the trial judge appear in the record. Rather, our review reveals this was a brief, cursory discussion of options of a continuance of the hearing on the motion to suppress or the range of jail time or confinement the court could consider if a change of plea was entered because this was Mr. Casto's second OVI offense.

{¶14} At the outset, it should be made clear that "trial judges in Ohio are permitted to participate to some undetermined extent in plea negotiations, but such participation must be carefully scrutinized to determine if the judge's intervention

adversely affected the voluntariness of the defendant's plea." *State v. Filchock* (1996), 116 Ohio App.3d 572, 576-577, citing *State v. Byrd* (1980), 63 Ohio St.2d 288, 293. "Whatever participation may be considered permissible under our approach, it is highly irregular for the court itself to propose a plea bargain. Normally, the prosecutor has sole discretion in deciding whether or not to pursue a certain charge, or to offer the accused an opportunity to plead guilty in exchange for a declaration of nolle prosequi for other pending charges, a recommendation of a lenient sentence, or some other form of consideration." *Id.* at 577, citing *State v. Cray* (Dec. 18, 1986), 8th Dist. No. 51534, 1986 Ohio App. LEXIS 9344; see, also, *State v. Rothman* (Mar. 14, 1985), 8th Dist. No. 48608, 1985 Ohio App. LEXIS 6178.

{¶15} As the Supreme Court of Ohio explained in *Byrd*: "[a] judge's participation in negotiations affects a guilty plea when: the judge conveys a message to the defendant that going to trial would be futile; the judge implies that sentencing after a trial would be greater than sentencing if the defendant pleads guilty; or the judge goes to great lengths to intimidate a defendant into accepting a guilty plea." *State v. Lutchey*, 6th Dist. No. WD-03-094, 2004-Ohio-4847, ¶11, citing *Byrd* at 292-293.

{¶16} At the suppression hearing, the following colloquy occurred between defense counsel and the court, which Mr. Casto alleges is evidence of a plea bargain and negotiated sentence offered by the court:

{¶17} "Defense Counsel: Judge, we have this matter set for a motion to suppress this morning. The Prosecutor tells me that the arresting officer is no longer with that Department.

{¶18} "Court: Oh, yeah. I think we can subpoena him. I don't know if they have or not. I don't know what is going on.

{¶19} “Defense Counsel: She had not.

{¶20} “Court: I gave her one continuance on another one. What is the charge?

{¶21} “Defense Counsel: It was [a] [sic] 094 OVI.

{¶22} “Court: Second lifetime offense?

{¶23} “Defense Counsel: Yeah, I think there was one in '90.

{¶24} “Court: Best I can do would be, second offense minimums I could do the, let's see, we could do the five day jail [sic] and 18 house arrest. He's going to have to stay on SCRAM for awhile, though. That would be the lowest I could go.

{¶25} “***

{¶26} “Defense Counsel: Okay. We'll, I'll speak to my client and then --

{¶27} “Court: Okay, see what he wants to do. That's a pretty good offer.

{¶28} “Defense Counsel: Okay.

{¶29} “Court: Okay?

{¶30} “Defense Counsel: That was five and then 18?

{¶31} “Court: 18 days house arrest and he has to stay on his SCRAM for awhile, because it's a second offense.”

{¶32} The discussion indicates the court did indeed initiate and participate in negotiations. The court was discussing the minimum jail sentence or confinement that could be imposed in this case. None of the other elements of the sentence Mr. Casto argues he was promised were discussed; nor were all the terms and conditions associated with OVI sentences discussed. At sentencing, Mr. Casto actually received a lesser sentence than discussed at the suppression hearing -- 3 days in jail and 3 days DIP versus the 5 days in jail followed by 18 days of house arrest. There was no agreement as to the other elements of the sentence.

{¶33} Quite simply, the record does not support Mr. Casto's assertion that the trial court "breached the agreement by imposing sanctions which were not the minimum requirements, but purely optional" because there was no discussion, and thus, no agreement as to the other elements of an OVI sentence.

{¶34} This is not a case where the court induced Mr. Casto to plead guilty by either promises or threats. Nor is this a case where the judge's conduct could have led Mr. Casto to believe he would not get a fair trial because the judge thought or implied that a trial would be a futile exercise, or that he would be biased against Mr. Casto at trial. See *State v. Stinard* (Feb. 19, 2002), 5th Dist. No. 2001CA00257, 2002 Ohio App. LEXIS 852, 6-7 ("[t]he court's involvement in the plea process went solely to the issue of sentencing, and the court did nothing to indicate that appellant would not get a fair trial if he elected to withdraw his plea. Nothing in the court's comments indicated that the trial would be futile exercise, or that she would be biased against him at trial.").

{¶35} Thus, we find no abuse of discretion in the trial court's actions as it is clear there was discussion only as to jail time or confinement and no other OVI sentencing elements. At best, Mr. Casto had an agreement as to jail time and one cannot say that agreement was breached by the imposition of less jail time.

{¶36} Mr. Casto's first assignment of error is without merit.

{¶37} **Ineffective Assistance of Counsel**

{¶38} In his second assignment of error, Mr. Casto contends his counsel was ineffective because he failed to advise the court of the discrepancy between the plea "negotiations" and the imposed sentence or to enter an objection to the sentence.

{¶39} Mr. Casto's contention is without merit, because as addressed in his first assignment of error, he was not coerced or induced to change his plea, or even

promised a certain sentence. Rather, the transcript reveals that the court discussed the minimum term of confinement that could possibly be imposed, which dealt solely with jail time and SCRAM monitoring.

{¶40} “The standard of review for ineffective assistance of counsel is whether the representation of trial counsel fell below an objective standard of reasonableness and whether the defendant was prejudiced as a result of the deficient performance. The defendant must show that counsel’s performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial.” *State v. Barnett*, 11th Dist. No. 2006-P-0117, 2007-Ohio-4954, ¶50, citing *Strickland v. Washington* (1984), 466 U.S. 668.

{¶41} “In any case presenting an ineffectiveness claim, the performance inquiry must be whether trial counsel’s performance was reasonable considering all the circumstances. *** Judicial scrutiny of counsel’s performance must be highly deferential. *** A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.* at ¶51, quoting *Strickland* at 688-689. Furthermore, “[t]here is a strong presumption that the attorney’s performance was reasonable. *Id.* In the context of a guilty plea, the defendant must demonstrate that there is a reasonable probability that, but for his counsel’s error, he would not have pleaded guilty and would have insisted on going to trial.” *Id.*, citing *Hill v. Lockhart* (1985), 474 U.S. 52, 58-59; see, also, *State v. Curd*, 11th Dist. No. 2003-L-030, 2004-Ohio-7222, ¶110.

{¶42} “A plea of guilty or no contest waives any prejudice a defendant suffers arising out of his counsel’s alleged ineffective assistance, except with respect to a claim

that the particular failure alleged impaired the defendant's knowing and intelligent waiver of his right to a trial." Id. at ¶55, quoting *State v. Winterbotham*, 2d Dist. No. 05CA100, 2006-Ohio-3989, ¶40.

{¶43} Moreover, "[a] claim that a guilty or no contest plea was induced by ineffective assistance of counsel must be supported by evidence where the record of the guilty plea shows it was voluntarily made." Id. at ¶56, citing *State v. Malesky* (Aug. 27, 1992), 8th Dist. No. 61290, 1992 Ohio App. LEXIS 4378; see, also, *State v. Kapper* (1983), 5 Ohio St.3d 36.

{¶44} In other words, "**** an allegation of a coerced guilty plea involves actions over which the State has no control. Therefore, the defendant must bear the initial burden of submitting affidavits or other supporting materials to indicate that he is entitled to relief. Defendant's own self-serving declarations or affidavits alleging a coerced guilty plea are insufficient to rebut the record on review which shows that his plea was voluntary. ****" Id. at ¶57, quoting *Kapper* at 38. See, also, *State v. Smith*, 11th Dist. No. 2007-T-0076, 2008-Ohio-1501, ¶25-33.

{¶45} A review of the record below and the brief discussion on the record between the trial court and Mr. Casto's defense counsel demonstrates that Mr. Casto was not coerced or induced to plead guilty in any fashion. Further, Mr. Casto was fully informed of his rights and the maximum sentence that could be imposed before sentencing. Mr. Casto stated in open court that he was not coerced or promised anything in exchange for his change of plea; that he was entering a guilty plea of his own free will -- knowingly, intelligently, and voluntarily; and that he was satisfied with the representation of his counsel.

{¶46} Mr. Casto introduced no evidence -- not even a self-serving affidavit which would have been insufficient in any case -- of prejudice. Because Mr. Casto cannot demonstrate that but for his defense counsel's actions, he would not have pled guilty, Mr. Casto's second assignment of error is without merit.

{¶47} The judgment of the Portage County Municipal Court, Kent Division, is affirmed.

DIANE V. GRENDALL, J.,

TIMOTHY P. CANNON, J.,

concur.