[Cite as *State v. Dansby* , 2010-Ohio-4538.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DWAYNE C. DANSBY

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. Patricia A. Delaney, J.

Case No. 2009AP120065;
2009AP120066

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from Tuscarawas County Court of Common Pleas, Case No. 2007 CR 05 0174 and 2007 CR 08 0290

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 23, 2010

APPEARANCES:

For Plaintiff-Appellee

RYAN D. STYER
Prosecuting Attorney,
Tuscarawas County

BY: MICHAEL J. ERNEST
Assistant Prosecuting Attorney
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For Defendant-Appellant

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Schnars, Baca & Infantino, LLC
610 Market Avenue North
Canton, Ohio 44702

Hoffman, P.J.

{¶1} Defendant-appellant Dwayne C. Dansby appeals the November 3, 2009 Judgment Entry entered by the Tuscarawas County Court of Common Pleas overruling his motion to withdraw his guilty plea. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} Appellant was indicted by the Tuscarawas County Grand Jury on one count of domestic violence, in violation of R.C. 2919.25, a fourth degree felony (Case Number 2007 CR 05 0174) and one count of menacing by stalking, in violation of R.C. 2903.211, a fourth degree felony (Case Number 2007 CR 08 0290). On May 1, 2008, Appellant, represented by counsel, pleaded guilty to both counts. The trial court deferred sentencing for the completion of a pre-sentence investigation report.

{¶3} On June 4, 2008, the matter came before the court for sentencing. As memorialized in a Judgment Entry filed on June 6, 2008, Appellant was sentenced to fourteen months in prison on each count, to run consecutively to each other and consecutively to Appellant's pending sentence in Coshocton County. Appellant was also ordered to pay court costs.

{¶4} Subsequently, Appellant was notified in writing that in each case a certain amount could be garnished from inmate funds for court costs, those amounts being $496.90 (Case Number 2007 CR 05 0174) and $295.58 (Case Number 2007 CR 08 0290).

{¶5} Via Judgment Entry of June 19, 2009, this Court remanded the matter to the trial court for resentencing finding the trial court erred by failing to notify Appellant failure to pay court costs could result in the imposition of community service.

{¶6} The trial court scheduled a hearing for resentencing on September 1, 2009. Prior to the hearing, Appellant filed a motion to withdraw his guilty plea.

{¶7} The trial court conducted a hearing on the motion to withdraw plea on October 26, 2009. Following the hearing, the trial court denied the motion. Appellant was then ordered to serve fourteen months in the Ohio Department of Corrections on each charge, with the sentences to be served consecutively.

{¶8} Appellant again filed a motion to withdraw guilty plea, which was denied by the trial court on December 9, 2009 without hearing.

{¶9} Appellant filed two notices of appeal, assigning as error:

{¶10} "I. DEFENSE COUNSEL'S INEFFECTIVE ASSISTANCE RESULTED IN A LESS THAN KNOWING GUILTY PLEA."

{¶11} When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450. To that end, Crim.R. 11 requires the trial court to follow a certain procedure for accepting guilty pleas in felony cases. Before the court can accept a guilty plea to a felony charge, it must conduct a colloquy with the defendant to determine the defendant understands the plea being entered and the rights being voluntarily waived. Crim.R. 11(C)(2).

{¶12} Crim.R. 32.1, which governs the withdrawal of a guilty plea, provides: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the

judgment of conviction and permit the defendant to withdraw his or her plea." This rule establishes a fairly strict standard for deciding a post-sentence motion to withdraw a guilty plea but provides no guidelines for deciding a presentence motion. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715.

{¶13} Generally, a decision on a presentence plea withdrawal motion is within the trial court's sound discretion. *Id.* at 526, 584 N.E.2d 715. However, the Ohio Supreme Court has stated it should be "freely and liberally" granted. *Id.* at 527, 584 N.E.2d 715. The trial court must conduct a hearing on the motion to decide if there is a reasonable and legitimate basis for it and the appellate court, although not reviewing de novo, can reverse if the trial court's decision is unfair or unjust. *Id.*

{¶14} Though Appellant's motion to withdraw was made before his resentencing as ordered by this Court, because it was made after the original sentence was imposed, we find the motion is to be treated as being made after sentence and requires a showing of manifest injustice.

{¶15} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley* at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining

whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*

{¶16} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. “Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel.” *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965, citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370, 113 S.Ct. 838, 122 L.Ed.2d 180.

{¶17} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court “need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Bradley* at 143, 538 N.E.2d 373, quoting *Strickland* at 697.

{¶18} Counsel's effectiveness is “not defined in terms of the best available practice, but rather should be viewed in terms of the choices made by counsel.” *State v. Wilkins* (1980), 64 Ohio St.2d 382, 390, 18 O.O.3d 528, 415 N.E.2d 303. The reasonableness of the attorney's decisions must be assessed at the time the decisions are made, and not at the time of a court's assessment. *Id.*

{¶19} “The mere fact that, if not for the alleged ineffective assistance of counsel, the defendant would not have entered a guilty plea is not sufficient to establish the requisite connection between the guilty plea and the ineffective assistance. Rather, ineffective assistance of trial counsel is found to have affected the validity of a guilty plea when it precluded a defendant from entering his plea knowingly and voluntarily.”

State v. Madeline, 11th Dist. No.2000-T-0156, 2002-Ohio-1332. (Internal Citations Omitted). See, also, *State v. Mays,* 174 Ohio App.3d 681, 685, 884 N.E.2d 607, 2008-Ohio-128, at ¶ 9 (Eighth Appellate District adopting Eleventh Appellate District's rationale).

{¶20} A review of the record indicates Appellant's initial motion to withdraw his plea occurred prior to his resentencing. The second oral motion occurred post-sentence.

{¶21} Appellant maintains his guilty plea was not made knowingly and voluntarily as he did not know the prosecutor would not be recommending probation.

{¶22} The following colloquy occurred on the record at the April 28, 2008 plea hearing:

{¶23} "Mr. Mastin [prosecutor]: Yes, your Honor. We've prepared a change of plea on both these cases. It's my understanding that Mr. Dansby is desirous of getting these matters behind him and entering a plea to both cases. The state has indicated through counsel that basically the state will take into consideration the period of incarceration he currently is, has imposed upon him, how he's doing in the facility as well as all other statutory factors and any problems or lack of problems (inaudible) go with the victim prior to making any recommendations at the time of sentencing.

{¶24} "The Court: Mr. Lowery?

{¶25} "Mr. Lowery [defense attorney]: That is my understanding, your Honor. My client and I have corresponded through letter and this past Friday, have been able to meet face to face and I have talked, he does understand that there is no contact, would adhere by that and fully understands that his compliance with that court order as the

(inaudible) being a dire or positive consequence with respect to the sentencing here. He abides by that, obviously he could be positive. If he fails to, obviously that would be a very negative matter.

{¶26} "The Court: Mr. Dansby, have you had the opportunity to review the acknowledgement forms, either on your own or with counsel?

{¶27} "Mr. Dansby: Yes, I have.

{¶28} "The Court: And for each of these, a plea of guilty to the charge in the indictment would result in you being found guilty of the offense without further proof being offered and you would be subject to the range of punishment available for each of the offenses.

{¶29} "* * *

{¶30} "The Court: And your plea of guilty is based upon the state's recommendation—

{¶31} "Mr. Mastin: We basically don't have a recommendation at this time, your Honor. We're going to try to—

{¶32} "The Court: There's none written—

{¶33} "Mr. Mastin: -review—

{¶34} "The Court: -in the colloquy, I guess I was thinking I didn't hear that in the courtroom, but–

{¶35} "Mr. Lowery: We had corresponded about an offer of recent events in a filing filed by the state.

{¶36} "Mr. Mastin: We're going to review the fact that he's currently incarcerated and review whatever his PSI shows, review comments from the victim who is in the

courtroom today and also his conduct while down there before making a recommendation. So at the present time, there isn't going to be a recommendation but it will be based upon those factors at the appropriate time in this case.

{¶37} "The Court: Okay. So there's no recommendation today?

{¶38} "Mr. Mastin: No, not one way or the other at this point in time. Just some things we need to see—

{¶39} "The Court: Okay.

{¶40} "Mr. Mastin: -before we come back with this.

{¶41} "The Court: So, I cross this off—

{¶42} "Mr. Mastin: Yes.

{¶43} "The Court: -and have Mr. Dansby initial it.

{¶44} "Mr. Mastin: Yes.

{¶45} "The Court: Do you have any questions about that, Mr. Dansby, that there's actually no recommendation being made at this time in exchange for your plea?

{¶46} "Mr. Dansby: No.

{¶47} "The Court: There's not or—

{¶48} "Mr. Dansby: No, there's no questions.

{¶49} "The Court: Okay, all right. That was a bad question on my part. I'll mark these and then we'll get them to you.

{¶50} "Do you believe that the state has promised you anything else in exchange for your plea?

{¶51} "Mr. Dansby: No.

{¶52} "The Court: And do you understand that I have not promised any particular sentence in exchange for your plea?

{¶53} "Mr. Dansby: Yes."

{¶54} Tr. at 2-3; 7-9.

{¶55} Appellant acknowledges the prosecutor indicated at the initial change of plea hearing he would not be making a recommendation, and would be waiting to see how Appellant did between the hearing and the sentencing hearing before making any recommendation as to sentencing. As set forth above, the trial court reviewed the State's withdrawal of a sentencing recommendation with Appellant, and Appellant acknowledged the same.

{¶56} On May 1, 2008, Appellant executed an acknowledgment of guilty plea, initialing the change indicating the prosecutor would not be making a sentencing recommendation.

{¶57} Accordingly, the record demonstrates Appellant entered his plea knowingly and voluntarily.

{¶58} The judgment of the Tuscarawas County Court of Common Pleas denying Appellant's motion to withdraw plea is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

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FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
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	:	
-vs-	:	JUDGMENT ENTRY
	:	
DWAYNE C. DANSBY	:	
	:	
Defendant-Appellant	:	Case No. 2009AP120065

For the reasons stated in our accompanying Opinion, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
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