

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
TERRY J. BURNETT, JR.	:	Case No. 10CA000015
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 09CR000164

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: October 12, 2010

APPEARANCES:

For Plaintiff-Appellee

DANIEL G. PADDEN
139 West 8th Street
P.O. Box 640
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For Defendant-Appellant

LINDSEY K. DONEHUE
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Farmer, J.

{¶1} On October 27, 2009, the Guernsey County Grand Jury indicted appellant, Terry Burnett, Jr., on two counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322, five counts of illegal use of a minor in a nudity oriented material or performance in violation of R.C. 2907.323(A), and one count of unlawful sexual conduct with a minor in violation of R.C. 2907.04.

{¶2} On February 23, 2010, the trial court pled no contest to all the counts save the two on pandering sexually oriented matter involving a minor. By judgment entry of sentence filed March 25, 2010, the trial court sentenced appellant to an aggregate term of seven years and five months in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶4} "APPELLANT WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN THAT DEFENSE COUNSEL DID NOT RESPOND TO APPELLANT'S ATTEMPTS TO CONTACT COUNSEL, AND DID NOT PROVIDE DISCOVERY MATERIALS TO APPELLANT TO REVIEW."

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{¶5} Appellant claims he was denied effective assistance of trial counsel as his counsel did not contact him and there was a lack of communication, and failed to provide discovery for appellant to review. We disagree.

{¶6} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶7} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶8} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶9} On the morning of his scheduled jury trial, appellant pled no contest to all the counts in the indictment save the counts on pandering sexually oriented matter involving a minor. During his Crim.R. 11 colloquy with the trial court, appellant indicated he was satisfied with his trial counsel:

{¶10} "THE COURT: Have you had adequate time to confer with your attorney, Lewis Tingle?

{¶11} "MR. BURNETT: Yes.

{¶12} "THE COURT: And are you satisfied with the legal representation he has provided you in this matter?

{¶13} "MR. BURNETT: Yes.

{¶14} "THE COURT: Is this how you want to proceed Mr. Burnett?

{¶15} "MR. BURNETT: Yes I do." T. at 11-12.

{¶16} Within his plea agreement filed February 23, 2010, appellant agreed that "I am satisfied with my attorney's advice and competence."

{¶17} We note defense counsel request discovery on December 1, 2009, and a judgment entry filed by the trial court on February 4, 2010 indicated "[t]he Court was advised that the discovery in this case has been completed."

{¶18} The record in this case does not demonstrate that there was a lack of discovery or communication between appellant and his trial counsel.

{¶19} On page 1 of his appellate brief, appellant couches his assignment of error as challenging the fact that the prosecuting attorney provided a narrative to fulfill the requirement of a "no contest" plea.

{¶20} Pursuant to R.C. 2937.07, "[a] plea to a misdemeanor offense of 'no contest' or words of similar import shall constitute an admission of the truth of the facts alleged in the complaint and that the judge or magistrate may make a finding of guilty or not guilty from the explanation of the circumstances of the offense." We note there is no similar statutory requirement for a no contest plea involving a felony. Nevertheless, we will review the "explanation of the circumstances of the offense" sub judice.

{¶21} The explanation of the circumstances of the offense was essentially a recitation of the indictment:

{¶22} "MRS. MITCHELL: Thank you your Honor. The Counts or the charges alleged in Counts Three, Four, Five, Six, and Seven are identical your Honor as terminology and offense charged as well as the dates, the time frame of the offense. So if it please the Court I will read one of those which will be the same for each of the five

counts. On a date certain between the 1st day of March, 2009 and the 23rd day of August, 2009, the Defendant did photograph a minor, who is not the Defendant's child or ward in a state of nudity or create, direct, produce or transfer any material performance that shows a minor in a state of a nudity in violation of Ohio Revised Code Section 2907.323(A) entitled 'Illegal Use of a Minor in a Nudity Orientated Material or Performance' a Felony of the Second Degree. Count Eight then alleges that on a date certain between the first day of March, 2009 and the 23rd day of August, 2009, the Defendant being eighteen years of age or older engage[d] in sexual conduct with J.D. whose date of birth is 10/23/95, knowing the said victim to be over thirteen years of age or older but less than sixteen years of age to wit thirteen year of age being reckless in that regard in violation of Ohio Revised Code Section 2907.04, entitled 'Unlawful Sexual Conduct with a Minor' a Felony of the Fourth Degree. Thank you your Honor." T. at 13-14.

{¶23} We find this recitation to be sufficient.

{¶24} Upon review, we find the record does not demonstrate any deficiencies in defense counsel's representation of appellant.

{¶25} The sole assignment of error is denied.

{¶26} The judgment of the Court of Common Pleas of Guernsey County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES

SGF/sg 920

