

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No: 09CA4
	:	
v.	:	
	:	
TRACY J. MCDONALD,	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	File-stamped date: 9-24-09

APPEARANCES:

Michael A. Davenport, Ironton, Ohio, for appellant.

J.B. Collier, Lawrence County Prosecutor, and Jeffrey Smith, Lawrence County Assistant Prosecutor, Ironton, Ohio, for appellee.

Kline, P.J.:

{¶1} Tracy J. McDonald appeals his conviction and sentence for felonious assault.

On appeal, he contends that the trial court erred by not allowing him to withdraw his plea of guilty. We disagree, finding that McDonald decided to withdraw his motion.

McDonald next contends that he was afforded ineffective assistance of counsel because his counsel had a conflict of interest. However, we find McDonald has failed to demonstrate that an actual conflict exists. Accordingly, we affirm the judgment of the trial court.

{¶2} On October 1, 2008, the Lawrence County Grand Jury indicted McDonald for Felonious Assault in violation of R.C. 2903.11(A)(1). McDonald pleaded guilty to the offense, and the trial court set a date for a sentencing hearing.

{¶3} On the date of the sentencing hearing, McDonald's counsel indicated that his client wanted to withdraw his guilty plea. The trial court directly addressed McDonald. Notwithstanding the judge's cautions, McDonald orally stated his reasons for the motion. He said, "I don't feel like I've been represented in this case at all. I mean [my counsel has] talked me into pleading to one to six and now it's five to six and he's affiliated with the witness against me and everything else. I'm just not getting a fair shake. I'm guilty, I'll be honest with you, I'm guilty what's being assumed here today but six years of my time is of my life is a long time. You know and for what happened here, and for what happened in this case it's, I mean, I did hit the guy, I did. But he come up behind me, spun me in a circle, I was arguing with four or five people. I didn't know who it was and then once I realized what I did, I put him in his truck, me and my girlfriend and he drove himself to the hospital. I didn't know he was even hurt at all, but you know now they're wanting to give me six to eight years of my life[.]"

{¶4} The trial court then asked the defendant "how would withdrawing the plea help you in that regard?" The defendant replied, "Well, it'd let everybody know what[] really happened[.]" The court informed McDonald that McDonald would have an opportunity to comment before the imposition of any sentence. McDonald then stated "No, I just, well it's, I might as well just go ahead and plead, I might as well just accept the plea then[.]" The trial court then proceeded to sentence McDonald to six years of incarceration.

{¶15} McDonald appeals the judgment of the trial court and raises the following two assignments of error. I. “The court erred in denying appellant’s motion to withdraw plea.” And, II. “Appellant Received Ineffective Assistance of Counsel.”

II.

{¶16} McDonald contends in his first assignment of error that the trial court erred when it denied his motion to withdraw his plea.

{¶17} Crim.R. 32.1 provides that “[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.” “A defendant does not have an absolute right to withdraw a guilty plea prior to sentencing.” *State v. Xie* (1992), 62 Ohio St.3d 521, paragraph one of the syllabus. But presentence motions to withdraw a plea of guilty ought “to be freely allowed and treated with liberality[.]” *State v. Peterseim* (1980), 68 Ohio App.2d 211, 213, quoting *Barker v. United States* (C.A. 10, 1978), 579 F.2d 1219, 1223.

{¶18} Nonetheless, “[t]he decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court.” *Xie* at paragraph two of the syllabus. An abuse of discretion connotes more than an error of judgment; it implies that the trial court’s attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶19} The trial court asked McDonald why he wanted to withdraw his guilty plea. McDonald indicated he wanted to let everybody know what really happened. He also indicated several times during this discussion that he was in fact guilty. The trial court indicated that McDonald would have an opportunity to offer his version of events prior to

sentencing, and in response McDonald stated he might as well accept the plea. In other words, McDonald withdrew his motion. “By failing to file a motion * * *, a defendant waives any objection[.] * * * Obviously the same result occurs when a motion is filed but later withdrawn.” *State v. Campbell* (1994), 69 Ohio St.3d 38, 44 (internal citations omitted). Notwithstanding McDonald’s arguments on appeal that the trial court abused its discretion by denying the motion, the record shows that the trial court never denied his motion. And because McDonald voluntarily withdrew his motion, he waived any objection.

{¶10} Accordingly, we overrule McDonald’s first assignment of error.

III.

{¶11} McDonald contends in his second assignment of error that he received ineffective assistance of counsel. McDonald asserts that his trial counsel “had previously represented one of the state[’]s key witnesses against the defendant with the result that there was a clear conflict of interest.” McDonald’s brief at 6.

{¶12} “In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel’s ineffectiveness.” *State v. Countryman*, Washington App. No. 08CA12, 2008-Ohio-6700, at ¶20, quoting *State v. Wright*, Washington App. No. 00CA39, 2001-Ohio-2473, unreported; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56, cert. den. *Hamblin v. Ohio* (1988) 488 U.S. 975. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) “that counsel’s performance was deficient * * *” which “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment[;]” and (2) “that the deficient performance prejudiced

the defense * * * [,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. See, also, *Countryman* at ¶20. "Failure to satisfy either prong is fatal as the accused's burden requires proof of both elements." *State v. Hall*, Adams App. No. 07CA837, 2007-Ohio-6091, at ¶11, citing *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, at ¶205.

{¶13} Conflicts of interest arise most often in the context of joint representation. Joint representation is where one attorney represents multiple defendants in the same case or in a connected case. Here, the issue is one of successive representation. McDonald claims that his counsel's prior representation of a party rendered his attorney's assistance ineffective. Ohio courts have generally required defendants claiming a successive conflict of interest to demonstrate an actual conflict. See, e.g., *State v. Jones*, Stark App. Nos. 2007-CA-00041, 2007-CA-00077, 2008-Ohio-1068, at ¶71-78; *State v. McGhee*, Lawrence App. No. 04CA15, 2005-Ohio-1585, at ¶19-24; *State v. Peoples*, Franklin App. No. 02AP-945, 2003-Ohio-4680, at ¶36-41.

{¶14} "A reviewing court cannot presume that the possibility for conflict resulted in ineffective assistance of counsel. The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction." *State v. Manross* (1988), 40 Ohio St.3d 180, 182. Instead, a defendant must "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.*, citing *Cuyler v. Sullivan* (1980), 446 U.S. 335, 348.

{¶15} "The term of art 'actual conflict' refers not to a personality conflict but to a conflict of interest." *State v. Dunn* (Jun. 17, 1998), Pickaway App. No. 97CA26,

unreported, quoting *State v. Henness* (1997), 79 Ohio St.3d 53, 65. “A possible conflict of interest exists where the interests of the [represented parties] may diverge at some point so as to place the attorney under inconsistent duties.” *State v. Gillard* (1997), 78 Ohio St.3d 548, 552 (emphasis in original, internal citations omitted). “[A]n actual conflict of interest exists if, during the course of the representation, the [represented parties’] interests *do* diverge with respect to a material factual or legal issue or to a course of action.” *Id.* at 553 (emphasis in original, internal citations omitted).

“[W]hether an actual conflict of interest existed is a mixed question of law and fact, subject to *de novo* review on appeal.” *Id.* at 552, citing *Cuyler* at 342.

{¶16} As noted above, a defendant must show that his interests diverge with respect to a material factual or legal issue or to a course of action with the other represented party in order to show an actual conflict. However, at the hearing, McDonald merely stated that his counsel was “affiliated” with the state’s witness. And in his brief, McDonald only states that his counsel had “previously represented” the witness. Prior representation of a witness or victim is by itself insufficient to demonstrate an actual conflict of interest. See *State v. Lorraine* (1993), 66 Ohio St.3d 414, 426. Here, at best, McDonald has demonstrated a potential conflict, and he points to no specific legal, factual, or motivational issues that rise to the level of an actual conflict. McDonald has failed to demonstrate that an actual conflict exists.

{¶17} “When a possible conflict of interest exists, a defendant is entitled only to an inquiry by the trial court.” *Gillard* at 552. And perhaps under these circumstances the trial court should have conducted an inquiry into the issue. “The trial court’s failure to conduct the inquiry, however, does not transform a possible conflict into an actual one.

A retrial for failing to inquire into a possible conflict of interest is premature. Rather, reversal is mandated only if an actual conflict is found.” Id. Even if we suppose the trial court erred in failing to conduct an inquiry, nonetheless McDonald has failed to demonstrate that an actual conflict existed.

{¶18} Accordingly, we overrule McDonald’s second assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.