

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-09-031

Appellee

Trial Court No. 2008 CR 0410

v.

Anthony Sheeks

DECISION AND JUDGMENT

Appellant

Decided: January 15, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Gwen Howe-Gebers, Assistant Prosecuting Attorney, for appellee.

Mollie B. Hojnicky, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas that found appellant guilty of seven counts of complicity to burglary, one count of tampering with evidence and one count of engaging in a pattern of corrupt activity, and

imposed an aggregate sentence of 15 years incarceration. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appellant sets forth the following assignments of error:

{¶ 3} "First Assignment of Error:

{¶ 4} "The appellant was denied due process of law as guaranteed by the United States and Ohio Constitutions because his guilty plea was not entered knowingly, intelligently and voluntarily.

{¶ 5} "Second Assignment of Error:

{¶ 6} "The trial court erred when it denied the appellant's motion to withdraw his guilty plea.

{¶ 7} "Third Assignment of Error:

{¶ 8} "The appellant was not afforded effective assistance of counsel as required by the United States and Ohio Constitutions."

{¶ 9} The undisputed facts relevant to the issues raised on appeal are as follows.

On August 7, 2008, the Wood County Grand Jury indicted appellant on nine counts of complicity to burglary in violation of R.C. 2923.03(A)(2) and 2911.12(A)(2); one count of possession of heroin in violation of R.C. 2925.11(C)(6)(a); one count of tampering with evidence in violation of R.C. 2921.12(A)(1), and one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1). Counsel for appellant and the state of Ohio engaged in plea negotiations and, on December 2, 2008, appellant entered a plea of guilty to seven counts of complicity to burglary, one count of tampering with evidence

and one count of engaging in a pattern of corrupt activity. In exchange for appellant's plea of guilty to nine of the charges, the state agreed to request dismissal of the two remaining complicity to burglary charges and the possession of heroin charge and to recommend a total sentence of 15 years. Additionally, the state agreed that it would not oppose a request by appellant for a furlough over the Christmas holiday. Appellant agreed to testify against any co-defendants or others not yet charged if necessary. Finally, the state left open, based on appellant's continued cooperation in those cases, whether or not it would object to a motion for early release after ten years.

{¶ 10} The trial court accepted appellant's plea and set the matter for sentencing. On February 10, 2009, appellant filed a request to withdraw his guilty plea and for new appointed counsel. On February 13, 2009, the court heard arguments on appellant's motion. The trial court denied appellant's request to withdraw his guilty plea and granted his request for new counsel. At the sentencing hearing on March 27, 2009, appellant's new counsel renewed the motion to withdraw the guilty plea and the court again denied the motion. Appellant was sentenced to a total aggregate sentence of 15 years.

{¶ 11} In his first assignment of error, appellant asserts that his guilty plea was not knowing, voluntary and intelligent. In support, appellant argues that the state and the trial court represented to him that he would be eligible for judicial release after serving ten years of the stipulated 15-year sentence. Appellant also refers to the statement of the prosecutor at the December 2, 2008 plea hearing that "after 10 years when defendant becomes eligible for a motion for early release," the state would determine whether or not

it would object to such a motion based on appellant's continued cooperation in the cases against his co-defendants.

{¶ 12} Crim.R. 11(C)(2) requires that in felony cases the court shall not accept a plea of guilty or no contest without first addressing the defendant personally, and determining that he is making the plea voluntarily and understands the nature of the charges against him and the maximum penalty involved. The trial court must also inform the defendant of the effect of the plea and determine that he understands the same, and inform him that the court, upon acceptance of the plea, may proceed with judgment and sentence. Finally, the court must inform the defendant of, and determine that he understands, the constitutional rights he is waiving by the plea.

{¶ 13} Appellant entered his plea on December 2, 2008. At that time, as part of the plea agreement, appellant was granted furlough to spend two days with his family over the Christmas holiday. The record reflects that appellant took advantage of the furlough but failed to return to custody when required, which resulted in an escape charge. It was only after appellant had received the benefit of the furlough that he asked to withdraw his guilty plea by motion filed February 10, 2009. At the hearing held on February 13, 2009, in explaining why he wanted to withdraw his plea and have new counsel appointed, appellant told the court that he had learned "numerous things" from the law library that would "help him." Appellant did not specify what those "numerous things" were or refer to any misrepresentation as to the issue of judicial release as a reason for wishing to withdraw his plea.

{¶ 14} This court has thoroughly reviewed the transcript of appellant's initial plea hearing. It is clear that the trial court addressed appellant personally and meticulously followed the dictates of Crim.R. 11(C)(2) in all respects. Appellant indicated that he had reviewed the written plea forms with his attorney, that he had read the forms and understood them, and that his attorney had answered any questions he had. At the hearing, appellant did not ask any questions about judicial release that would have indicated that the possibility of early release was a significant factor in his decision to plead guilty.

{¶ 15} One of the two authorities appellant cites in support of his claim is *State v. Trainer*, 2d Dist. No. 2006 CA 23, 2007-Ohio-6698, in which the Second Appellate District found that Trainer's guilty plea was not knowing or intelligent because he was told he would be eligible to file for judicial release before the trial court imposed a prison term in excess of ten years, which rendered him ineligible to file for early release. Appellant also cites *State v. Johnson*, 182 Ohio App.3d 628, 2009-Ohio-1871, in which the appeals court held that a plea agreement must not be allowed to stand "when it was obtained on the basis of a misrepresentation to the accused that he would be released from prison earlier than what the law permits." In *Johnson*, the trial court record reflected that the state had indicated it would not object to judicial release after the defendant had served a portion of his sentence. Further, in *Johnson*, the Fourth Appellate District noted that the trial court "*represented to appellant that it 'anticipated' that he would be given judicial release within that time frame.*" (Emphasis added.) *Johnson* at ¶

13. At appellant's plea hearing in this case, the prosecutor reviewed the elements of the plea agreement and stated that the state would "leave open" whether or not it would object when appellant "becomes eligible for a motion for early release." In contrast to *Johnson*, the trial court in the case before us made no representation to appellant regarding the possibility or probability of judicial release.

{¶ 16} Ohio courts have held that when a defendant is induced to enter a guilty plea by erroneous representations as to the applicable law, the plea has not been entered knowingly and intelligently. *State v. Mitchell*, 11th Dist. No. 2004-T-0139, 2006-Ohio-618, ¶ 15, citing *State v. Engle* (1996), 74 Ohio St.3d 525, 527. However, several Ohio courts have concluded that trial counsel's erroneous representations regarding judicial release eligibility does not invalidate a defendant's guilty plea if the trial court has complied with Crim.R. 11 and if there is no evidence that the defendant would have pled differently had he been told he was ineligible for judicial release. There is no evidence in the record before us to suggest, first, that appellant had a belief that he would be eligible for judicial release and, second, that such a belief induced his guilty plea.

{¶ 17} While *Trainer* and *Johnson* may appear to support appellant's argument, those cases are not binding on this court and are not in accordance with the decisions from other Ohio appellate districts that have considered this issue. See *State v. Simpson*, 10th Dist. No. 07AP-929, 2008-Ohio-2460 (trial counsel's erroneous representations regarding judicial release eligibility did not invalidate guilty plea where appellant gave no indication that he was pleading guilty based on the possibility of judicial release); *State v.*

Mitchell, supra (the trial court's and trial counsel's erroneous misrepresentations regarding judicial release eligibility did not invalidate a guilty plea where the trial court complied with Crim.R. 11); *State v. Cvijetinovic*, 8th Dist. No. 81534, 2003-Ohio-563 (guilty plea upheld where the record failed to demonstrate that defendant relied upon the trial court's misstatements about judicial release); *State v. Taylor*, 12th Dist. No. 2003-07-025, 2004-Ohio-3171 (guilty plea upheld where record did not reflect that the decision to plead guilty was influenced by the trial court's erroneous information regarding his eligibility for judicial release).

{¶ 18} Appellant insists that his plea was entered based on a representation by the state and the trial court that he would be eligible for judicial release after ten years of his stipulated 15-year sentence. As we have noted, however, there is no evidence in the transcript of appellant's original plea hearing that he would have pled differently if he had been told he was ineligible for judicial release. In exchange for his plea, appellant received several benefits. By entering into the plea agreement, appellant would not be prosecuted for similar crimes in Henry and Putnam counties. Additionally, the state agreed to request dismissal at sentencing of two remaining complicity to burglary charges and one charge of possession of heroin, and agreed to recommend a total sentence of 15 years. Further, the state agreed not to oppose appellant's request for a 48-hour furlough over the Christmas holiday.

{¶ 19} Based on the foregoing, we cannot find that appellant entered his plea based on a belief that he would be given early release. Accordingly, we find that

appellant's plea was entered knowingly, intelligently and voluntarily, and his first assignment of error is not well-taken.

{¶ 20} In his second assignment of error, appellant asserts that the trial court erred when it did not allow him to withdraw his guilty plea prior to sentencing. Crim.R. 32.1 allows a defendant to file a motion to withdraw a guilty plea prior to sentencing.

Generally, such a motion is to be "treated with liberality." *State v. Xie* (1992), 62 Ohio St.2d 521, 526, quoting *Barker v. United States* (C.A. 10, 1978), 579 F.2d 1219, 1223.

However, the right to withdraw a guilty plea is not absolute, and this court will not reverse a trial court's denial of such a motion absent an abuse of discretion. *Xie*, supra, at 527. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 21} It is well-established that in reviewing a trial court's decision regarding a defendant's presentence motion to withdraw a guilty plea, we are required to weigh a number of non-exhaustive factors. *State v. Eversole*, 6th Dist. Nos. E-05-073, E-05-076, E-05-074, E-05-075, 2006-Ohio-3988, ¶ 13. (Citation omitted.) These factors include: (1) whether the prosecution would be prejudiced if the plea were vacated; (2) whether the offender was represented by highly competent counsel; (3) the extent of the Crim.R. 11 hearing; (4) whether there was a full hearing on the motion to withdraw the offender's guilty plea; (5) whether the trial court gave full and fair consideration to the motion; (6) whether the motion was made within a reasonable time; (7) whether the motion set forth specific reasons for the withdrawal; (8) whether the accused understood the nature of the

charges and possible penalties and (9) whether the accused was perhaps not guilty or had a complete defense to the crime. *State v. Fish* (1995), 104 Ohio App. 3d 236, 240.

{¶ 22} Reviewing the pertinent factors as applied to this case, we find that only two of the factors arguably weigh in favor of granting appellant's motion to withdraw. The state may not have been prejudiced if appellant had been permitted to withdraw his guilty plea beyond the ordinary impact of any defendant's subsequent withdrawal of a guilty plea, and appellant's original motion arguably was made in a timely manner. However, the remaining seven factors weigh in favor of a finding that the trial court did not abuse its discretion when it denied appellant's motion to withdraw his guilty plea.

{¶ 23} There is no indication in the record that appellant was not represented by competent counsel at all phases of these proceedings. Additionally, as we found above, the trial court conducted a thorough Crim.R. 11 plea hearing. Further, the record reflects that the trial court held a thorough hearing on appellant's motion to withdraw and gave full and fair consideration to the request. When addressed by the trial court at the December 2, 2008 plea hearing, appellant indicated that he understood that nature of the charges and the potential sentences. As to the reasons for the motion, we have already addressed those arguments in considering appellant's first assignment of error and found those arguments without merit. Finally, we note that there is nothing in the record before us to indicate that appellant was perhaps not guilty or had a complete defense to the charges. Following the prosecutor's statement at the plea hearing as to the evidence that

would have been presented at trial on each of the charges, trial counsel indicated that appellant did not contest those facts.

{¶ 24} After weighing all of the above factors, we cannot find that the trial court abused its discretion in denying appellant's motion to withdraw his guilty plea. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 25} In his third assignment of error, appellant asserts that he did not receive effective assistance of counsel. Appellant argues that defense counsel failed to have a basic understanding of the law regarding judicial release. He further argues that, had counsel properly informed him that he would not be eligible for judicial release, the result would have been different.

{¶ 26} It is well-established that in order to prevail on a claim of ineffective assistance of counsel, appellant must demonstrate that trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. *Strickland v. Washington* (1984), 466 U.S. 668, 686. The standard of proof requires appellant to satisfy a two-pronged test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show by a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Id.* Further, in Ohio, a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 156.

{¶ 27} We have carefully reviewed the record for any objective or compelling indicia that, but for the perceived errors of counsel, the outcome would have been different. There simply is no such evidence in the record. Although appellant insists that had he known on December 2, 2008 that he would not be eligible for judicial release he would not have entered a guilty plea, there is no evidence of this in the record. At the initial hearing on his motion to withdraw his plea, appellant referred to a letter he had recently written the court indicating his desire to withdraw his plea. In the letter, appellant had stated that he was misled "in numerous ways" and was "basically forced to sign a plea agreement." As we noted above, however, at the plea hearing on December 2, 2008, appellant stated that he understood the rights he was waiving by entering the plea and that he was satisfied with his attorney's representation. Appellant did not raise the issue of judicial release in his letter or during his initial hearing on the motion to withdraw his plea. Based on the foregoing, appellant has not shown a reasonable probability that but for counsel's perceived unprofessional errors, the result of his proceeding would have been different. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 28} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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