

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 16AP-144
	:	(C.P.C. No. 13CR-126)
Brad Fickenworth,	:	
	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 22, 2016

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Laura M. Swisher*, for appellee. **Argued:** *Laura M. Swisher*.

On brief: *W. Joseph Edwards*, for appellant. **Argued:** *W. Joseph Edwards*.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Brad Fickenworth is appealing from the denial of his petition for post-conviction relief. He assigns a single error for our consideration:

THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S CLAIM FOR POST-CONVICTION RELIEF AS HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PLEA-BARGAINING PROCESS THEREBY VIOLATING HIS RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

{¶ 2} Fickenworth was convicted of conspiracy to commit murder at a jury trial conducted in 2013. The verdict was affirmed upon direct appeal.

{¶ 3} While the appeal was pending, Fickenworth filed a petition for post-conviction relief in which he alleged that he had been denied effective assistance of

counsel during the time plea negotiations were being conducted before the trial commenced.

{¶ 4} At the trial, Fickenworth testified that he had never conspired to participate in a murder. Instead, he testified that he only wanted to arrange for the theft of a woman's car, despite a tape-recording of Fickenworth talking to a third party in which Fickenworth suggested that it would be easy to slit the woman's throat.

{¶ 5} The State of Ohio had offered Fickenworth the opportunity to plead to a lesser charge, but the plea offer included a condition that Fickenworth testify against a person the State contended was a co-conspirator. Fickenworth had offered \$12,500 to the co-conspirator to "get rid of" the woman who was married to the person alleged to be providing the money. (Nov. 4, 2013 Tr. Vol. I at 44.)

{¶ 6} Fickenworth refused the State's offer of a plea to reduced charges in return for his cooperation in pursuing the husband who wanted his wife killed. His defense at trial seemed to be a mixed theory that he did not really plan on the woman being killed and that, even if he did at one time try to arrange for the woman to be killed, he abandoned that plan/conspiracy before it was carried out. The jury clearly did not believe Fickenworth, given his recorded statements.

{¶ 7} Fickenworth alleged in his petition for post-conviction relief that it was his attorney's fault that he did not accept the offer of a plea to a reduced charge, contingent on his cooperation with the State of Ohio. Fickenworth made the allegation despite his having told the trial court judge immediately before the trial started that he was thoroughly satisfied with his attorney's work. Fickenworth also stated before the trial court that it was his own decision to proceed to trial. Apparently, Fickenworth changed his mind after the jury found him guilty and the judge sentenced him to 11 years of incarceration.

{¶ 8} After a remand from this appellate court, the trial court conducted an evidentiary hearing on the merits of the petition for post-conviction relief. Trial counsel for Fickenworth testified that no firm offer of a plea bargain was ever made. Complicating the situation was the fact that Fickenworth kept changing his version of the facts. In fact, trial counsel testified Fickenworth changed his version of the facts between opening statement at the trial and Fickenworth's testifying in his own defense. Fickenworth could

not bring himself to state under oath that he had ever been part of a plan to kill the wife despite the picture of the woman he provided to the person who was to be the killer, despite the thousands of dollars he had paid that person, and despite the cellphone he had provided the person so he and the killer-to-be could communicate.

{¶ 9} With the defense of abandonment of a conspiracy to commit murder off the table at trial because Fickenworth alleged that there was no such conspiracy in the first place, the jury verdict was clearly correct.

{¶ 10} Defense counsel at trial could not be considered as rendering ineffective assistance for failing to arrange a plea bargain which was impossible to perform due to Fickenworth's frequently changing stories and Fickenworth's inability to admit that he had been part of a plan to have a woman murdered despite the many things Fickenworth did to further that plan.

{¶ 11} The trial court was correct to overrule the petition for post-conviction relief. We, in turn, overrule Fickenworth's assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

DORRIAN, P.J., and BRUNNER, J., concur.
