IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Appellee, v. Mynor Armando Ardon-Aguirre, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20050720-CA F I L E D (February 1, 2007) 2007 UT App 27

First District, Logan Department, 051100293
The Honorable Thomas Willmore

Attorneys: Alyson Draper, Syracuse, and Chad B. McKay, Ogden, for Appellant
Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake City, for Appellee

---

Before Judges Bench, McHugh, and Thorne.

THORNE, Judge:

Defendant Mynor Armando Ardon-Aguirre appeals his conviction of manslaughter, a second degree felony. See Utah Code Ann. § 76-5-205 (2003). Defendant claims that his defense counsel rendered ineffective assistance by allowing Defendant to waive the minimum two-day waiting period and proceed with sentencing on the same day Defendant pleaded guilty. Defendant also asserts that his defense counsel was ineffective because he allowed Defendant to make a lengthy and detailed allocution during the sentencing hearing.

To demonstrate ineffective assistance of counsel, Defendant must show that his counsel "rendered deficient performance which fell below an objective standard of reasonable professional judgment, and [that] . . . counsel's deficient performance prejudiced him."[1] State v. Hernandez, 2005 UT App 546,¶17, 128

---

[1]To prove prejudice, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional (continued...)

P.3d 556 (quotations and citation omitted). "Failure to satisfy either prong will result in our concluding that counsel's behavior was not ineffective." State v. Diaz, 2002 UT App 288,¶38, 55 P.3d 1131. Further, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland v. Washington, 466 U.S. 668, 690 (1984).

Defendant first argues that his defense counsel was ineffective because he both encouraged and allowed Defendant to waive the minimum two-day waiting period between pleading guilty and being sentenced. See Utah R. Crim P. 22(a) (stating that the time for imposing a sentence "shall be not less than two [days] . . . after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders"). Defendant claims that by waiving the two-day waiting period he was harmed because this caused the district court to sentence Defendant based upon the emotions elicited during the proceedings of the day. Defendant opines that if the court were given at least two days to "cool off," his sentence may have been less severe. However, Defendant misconstrues rule 22(a) of the Utah Rules of Criminal Procedure and the proceedings below. See id. The two-day waiting period enunciated in rule 22(a) pertains to the time period between the entry of verdict or plea of guilty and the scheduling of the sentencing hearing. See id. The two-day waiting period does not relate to the time period between a defendant's allocution and the court's imposition of sentence. See id. Therefore, even if Defendant had been sentenced sometime after the two-day waiting period, the district court would still have heard Defendant's allocution, as well as the testimony from the victim's family, and directly thereafter announced its sentencing decision. Accordingly, Defendant cannot show that there is a reasonable probability that his sentence would have been different if Defendant had declined to waive the two-day waiting period.

Defendant additionally claims that by waiving the two-day waiting period he was harmed because he was not allowed time to reconsider his options and withdraw his guilty plea. "A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily

---

[1](...continued)
errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). "A reasonable probability is that which is sufficient to undermine the confidence in the reliability of the outcome." State v. Tyler, 850 P.2d 1250, 1258 (Utah 1993).

made." Utah Code Ann. § 77-13-6(2)(a) (Supp. 2006). Defendant alleges that his plea was not voluntarily and knowingly made because a written statement he submitted to Adult Probation and Parole after sentencing establishes that he did not want to enter the plea but did so based on his attorney's advice that it would be in his best interest. Defendant has not demonstrated that his plea was not voluntarily and knowingly made; rather the statement shows only that Defendant ultimately agreed with and followed the advice of his defense counsel. Accordingly, Defendant cannot demonstrate that he was prejudiced by the decision to waive the two-day waiting period and proceed with sentencing.[2]

Defendant next asserts that his defense counsel was ineffective because he allowed Defendant to make a lengthy and detailed allocution during the sentencing hearing. Rule 22(a) of the Utah Rules of Criminal Procedure guarantees a defendant "an opportunity to make a statement and to present any information in mitigation of punishment." Utah R. Crim. P. 22(a); see also State v. Maestas, 2002 UT 123,¶48, 63 P.3d 621 ("Allocution is an 'inseparable part' of the right to appear and defend in person guaranteed by the Utah Constitution." (citation omitted)). Defense counsel's decision to support a full and complete allocution, as is Defendant's right, cannot without more be deemed ineffective assistance of counsel. Moreover, defense counsel's decision to support a full allocution in this instance was a reasonable trial strategy, wherein Defendant was given the opportunity to explain his actions. Because a defendant cannot prevail on a claim of ineffective assistance when the challenged act might reasonably be considered a sound trial strategy, Defendant's claim of ineffectiveness fails. See State v. Pecht, 2002 UT 41,¶41, 48 P.3d 931 (Utah 2002); see also Parsons v. Barnes, 871 P.2d 516, 524 (Utah 1994) ("[W]henever there is a legitimate exercise of professional judgment in the choice of trial strategy, the fact that it did not produce the expected

---

[2]Defendant also asserts that by waiving the two-day waiting period and directly proceeding to sentencing he was denied the opportunity to obtain a presentence investigation report that would provide the district court with information relevant to sentencing. Defendant, however, raised this issue for the first time in his reply brief. "[W]e will not consider matters raised for the first time in the reply brief." Coleman v. Stevens, 2000 UT 98,¶9, 17 P.3d 1122. Accordingly, we decline to review the issue.

result does not constitute ineffectiveness of counsel." (quotations and citations omitted)).

Affirmed.

_____
William A. Thorne Jr., Judge

WE CONCUR:

_____
Russell W. Bench,
Presiding Judge

_____
Carolyn B. McHugh, Judge