The Supreme Court of Ohio

CASE ANNOUNCEMENTS

January 27, 2021

[Cite as *01/27/2021 Case Announcements #2*, 2021-Ohio-181.]

APPEALS NOT ACCEPTED FOR REVIEW

2020-1287. State v. Dunlap.
Licking App. No. 2020 CA 00029, 2020-Ohio-4375.
Donnelly, J., dissents, with an opinion joined by Stewart, J.
Brunner, J., dissents.

DONNELLY, J., dissenting.

{¶ 1} Kyle Dunlap pleaded guilty to all three of the second-degree-felony drug offenses he was facing in exchange for the state of Ohio's promise not to argue to the sentencing court that there is a statutory presumption in favor of a prison term. Quite a bargain for the state, since it did not dismiss or reduce any charges, and particularly since the judge already knew full well what the sentencing statutes state and when a presumption in favor of prison should be applied. Why would a defendant enter a plea "bargain" like this if, on its face, he is receiving no benefit? For the same reason countless criminal defendants across Ohio enter pleas: because they have been led to believe that they will get a more lenient sentence in exchange for pleading guilty. That benefit is not on the face of the plea bargain because it is off the record, uttered in back rooms or whispered in hallways or holding cells. Our justice system ensures that the defendant's expected benefit remains off the record by tolerating the practice of instructing the defendant to state on the record the most frequently repeated lie in Ohio criminal proceedings: "No, I did not receive any threats, promises, or representations about the sentence I will receive if I enter this plea."

{¶ 2} According to the Fifth District's opinion, Dunlap's attorney told him that he had a 99 percent likelihood of being placed on community control and that if the trial court imposed any

term of confinement, it would be a 60-day jail term at the most. Dunlap's attorney also said that he had spoken with the trial court, and that the trial court "remarked that * * * counsel must have been pleased that the case was resolving in the manner he hoped it would." 2020-Ohio-4375, ¶ 7. With the prospect of being placed on community control and the possibility of receiving an outlier sentence of 60 days in jail, Dunlap's plea makes a lot more sense. Although Dunlap was led to believe that the trial court was going to impose defense counsel's desired sentence, the trial court imposed an eight-year prison term.

{¶ 3} Dunlap included all the above details in an affidavit supporting a motion to withdraw his guilty plea that he filed in accordance with Crim.R. 32.1. Dunlap argued that his plea was entered involuntarily and that it was based on his reasonable reliance on his attorney's assurances that a guilty plea would result in a more lenient sentence than the one that was ultimately imposed. Dunlap even provided a recording of a telephone conversation between his attorney and one of Dunlap's acquaintances as additional evidence to corroborate his claims. But the trial court and the Fifth District dismissed Dunlap's claims out of hand and concluded that no evidentiary hearing was required, refusing to consider the recording because it was not authenticated pursuant to Evid.R. 901, and characterizing Dunlap's other support as a mere "self-serving affidavit," 2020-Ohio-4375 at ¶ 39.

{¶ 4} This case is a glaring example of sentencing by ambush. Maybe Dunlap fully deserved an eight-year prison term. But if Dunlap's claims are accurate, he did not deserve to receive it this way, through misinformation that led to an involuntary decision to plead guilty. Ohio's appellate courts generally agree that misinforming a defendant about the circumstances of his guilty plea constitutes a "manifest injustice" and a violation of due process that entitles a defendant to withdraw his guilty plea pursuant to Crim.R. 32.1. *See State v. Walker*, 1st Dist. Hamilton Nos. C-160863 and C-160764, 2017-Ohio-7493, ¶ 8; *State v. Brown*, 2d Dist. Montgomery Nos. 24520 and 24705, 2012-Ohio-199, ¶ 13; *State v. Riley*, 4th Dist. Washington No. 16CA29, 2017-Ohio-5819, ¶ 18; *State v. Fry*, 7th Dist. Mahoning No. 12 MA 156, 2013-Ohio-5865, ¶ 12; *State v. Norris*, 8th Dist. Cuyahoga No. 107894, 2019-Ohio-3768, ¶ 30; *State v. Brown*, 10th Dist. Franklin No. 18AP-112, 2018-Ohio-4984, ¶ 8. If Dunlap's factual assertions are true, then due process demands that Dunlap be permitted to withdraw his guilty plea.

{¶ 5} It is, of course, possible that Dunlap's claims would not have been borne out by the facts established during an evidentiary hearing. But he does not deserve to have his claims

dismissed out of hand with the usual bromides about relying on a "self-serving affidavit." A defendant in this scenario is rarely ever going to have anything to back up a plea-withdrawal motion other than his own claims about what happened. And only an evidentiary hearing will establish whether those claims are true. As I stated in my dissenting opinion in *State v. Bozso*, __ Ohio St.3d __, 2020-Ohio-3779, __ N.E.3d __, "a defendant cannot be expected to make a record of the fact that he has been misinformed about a crucial issue at the time he is operating under that misinformation." *Id*. at ¶ 44 (Donnelly, J., dissenting). To say that a defendant's claims in support of withdrawing his plea do not warrant an evidentiary hearing because they are not already backed up by solid, admissible evidence puts the defendant in an impossible position and ensures that an evidentiary hearing is never warranted no matter how specific and convincing a defendant's claims might be.

{¶ 6} Postsentence motions to withdraw guilty pleas are rarely entertained in a serious manner because they often involve an obvious change of heart or disappointment about the sentence that the defendant received. But that does not mean that all such motions should be cast aside. The standards currently employed by Ohio's courts do not adequately differentiate between postsentence plea-withdrawal motions that merit closer review and those that do not. Trial and appellate courts across the state would benefit greatly from this court's review of the issue.

{¶ 7} Because I would accept Dunlap's jurisdictional appeal, I dissent.

STEWART, J., concurs in the foregoing opinion.