

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Nos. 05AP-192
	:	& 05AP-245
v.	:	(C.P.C. No. 04CR-05-3061)
	:	
Shawn M. Alexander,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on March 21, 2006

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for
appellee.

Beverly J. Corner, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Shawn M. Alexander, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to a guilty plea, of three counts of rape in violation of R.C. 2907.02, felonies of the first degree. Because the trial court properly refused to appoint new counsel to defendant, we affirm that aspect of the trial court's judgment, but because the trial court erred in the sentencing phase, we reverse in part and remand for resentencing.

{¶2} By indictment filed May 7, 2004, defendant was charged with seven counts of rape. The indictment alleged that between October 1, 1999 and November 30, 1999, defendant digitally and vaginally raped his two stepdaughters and his biological daughter, ages two, four or five, and six at the time of the offenses. The indictment further charged defendant vaginally raped one of the girls, then three years of age, on March 16 or 17, 2001. Defendant entered a not guilty plea on May 12, 2004; the same day, the trial court appointed private counsel to represent defendant.

{¶3} Although the trial originally was scheduled for June 24, 2004, it was continued first to September 20, 2004, then to November 4, 2004, and finally to December 13, 2004. On the morning of trial, defendant requested that the trial court appoint new counsel to represent him. After questioning defendant about the nature of his complaint, the trial court overruled the motion.

{¶4} According to the record, a jury was partially impaneled, and a recess was taken. When the court resumed that afternoon, defendant indicated he would plead guilty to the three counts alleging digital penetration in exchange for the state's entering a nolle prosequi to the remaining four counts. After inquiring pursuant to Crim.R. 11, the trial court accepted defendant's plea and set sentencing for January 21, 2005.

{¶5} At the sentencing hearing, defendant advised that he had filed a complaint with the Columbus Bar Association claiming his attorney was negligent, and a complaint with the Ohio State Bar Association claiming the court was prejudiced. Defense counsel informed the court that, as a result of defendant's complaint, he felt some problems may exist in counsel's continuing to represent defendant. The trial court responded that it

would proceed with sentencing that day. The trial court sentenced defendant to eight years on the first count, seven years on the next, and seven years on the last, all to be served consecutively. In addition, the court determined defendant to be a sexual predator. The trial court journalized its sentence by judgment entry filed January 26, 2005, assessing costs against defendant.

{¶6} Defendant timely appeals, assigning the following errors:

[I.] THE TRIAL COURT ERRED, AS A MATTER OF LAW, TO THE PREJUDICE OF THE DEFENDANT-APPELLANT IN FAILING TO APPOINT NEW COUNSEL AND THEREFORE DENYING DEFENDANT-APPELLANT HIS SIXTH AMENDMENT [sic] CONSTITUTIONAL RIGHT, DURING THE ENTIRE CRIMINAL PROCEEDING.

[II.] THE TRIAL COURT ERRED, AS A MATTER OF LAW, TO THE PREJUDICE OF THE DEFENDANT-APPELLANT, IN PROCEEDING FORWARD WITH A FINAL HEARING WHEN THE DEFENDANT-APPELLANT COMPLAINED ON MANY OCCASIONS DURING THE PENDENCY OF THE CRIMINAL CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

[III.] THE TRIAL COURT ERRED, AS A MATTER OF LAW, TO THE PREJUDICE OF THE DEFENDANT-APPELLANT, APPLYING R.C. §2929.18 (5)(a)(ii) IN RENDERING JUDGMENT FOR COURT COSTS IN THE AMOUNT OF \$763.00 WITHOUT A HEARING ON THE MATTER AS TO DEFENDANT-APPELLANT'S ABILITY TO PAY.

[IV.] THE TRIAL COURT ERRED, AS A MATTER OF LAW, TO THE PREJUDICE OF THE DEFENDANT-APPELLANT, BY SENTENCING HIM CONSECUTIVELY IN VIOLATION OF OHIO REVISED CODE SECTION 2929.14(B).

{¶7} Defendant's first and second assignments of error are interrelated, and we address them jointly. Together they assert the trial court erred as a matter of law in failing to appoint new counsel to replace defendant's appointed counsel.

{¶8} Defendant raised the issue for the first time on the morning of trial, following three continuances of the trial date. At that time, defendant stated that "[s]ince the beginning of the case, I haven't had any true information from my lawyer except the good and the bad. He hasn't told me how he's going to represent my case and also how he's going to represent my case to the jury. Also, I believe he has a conflict of interest because he knows the Big Sister of one my accusers. He personally knows them. So I believe he would be biased in my case anyway." (Tr. 2.) The court inquired whether defendant had anything else; defendant replied that he did not, but by name requested another attorney to represent him.

{¶9} In response, the court noted the case had been pending for a long time. The court advised that "[defense counsel] has worked very hard in this case. I've talked to him many, many times and seen him work for hours and hours going through files and other things dealing with this case. And I can assure you that he has your best interest in mind with respect to the matters." (Tr. 3.) Acknowledging defendant's concerns about the outcome of the case, the trial court stated, "I don't know what you're expecting him to tell you with respect to the outcome of this case because nobody can predict or say what would happen." Id.

{¶10} The trial court then asked defendant's counsel to place on the record information concerning his relation to the Big Sister of one of the alleged victims. In response, counsel advised that while for three days he was going through Children Services records, he noticed that Eleanor Haynes, a local tax and business attorney, had acted as a Big Sister for one of defendant's daughters, an accuser in the case. Counsel

acknowledged he had known Ms. Haynes for probably 20 or 25 years and also knew her husband, Douglas Haynes. Counsel advised that he spoke to Mr. Haynes about Ms. Haynes' role with one of the alleged victims, leading to a discussion of the child and how she was involved with their family during the time Ms. Haynes served as her Big Sister.

{¶11} With that explanation, the trial court inquired of defense counsel whether his relationship to the Haynes would affect either his ability to be fair and impartial with respect to the case or his ability to vigorously represent his client; counsel replied that it would not. When the court inquired whether defendant had anything else, defendant replied, "No, sir." (Tr. 4.) The court then advised that the case had been continued many times, and, due to the nature of all the records that defense counsel had perused, the trial court would keep defense counsel on the case.

{¶12} Defendant contends the trial court erred in not appointing new counsel, or at the very least in not inquiring further about defendant's reasons for wanting different counsel. We preliminarily note that defendant's entering a guilty plea in this matter arguably waived any non-jurisdictional error committed in the course of the proceedings to that point. *State v. Spates* (1992), 64 Ohio St.3d 269, 271 (deciding that although "the denial of counsel at the preliminary-hearing stage of a criminal proceeding will almost always constitute reversible error, a subsequent guilty plea by the defendant during the criminal proceeding may constitute a waiver of any and all constitutional infirmities that occur prior to the submission of the guilty plea"); *State v. Jones* (Sept. 9, 1992), Summit App. No. 15075 (concluding the defendant waived ineffective assistance of counsel arising from counsel's alleged failure to investigate a possible mistaken identity when the

defendant changed his not guilty plea and entered a plea of guilty); *State v. Smith* (Dec. 29, 1998), Lawrence App. No. 98CA12 (determining that, except for errors which precluded the defendant from knowingly, intelligently, and voluntarily entering a plea, defendant's guilty plea waive[d] all appealable errors, including defendant's claim that the court denied him effective assistance of counsel by not conducting a hearing after defendant stated he lacked confidence in his attorney).

{¶13} In *Spates*, the court determined that because the defendant's guilty plea waived all constitutional infirmities that occurred prior to the guilty plea, the "crucial inquiry * * * becomes whether defendant's plea of guilty constituted a knowing, intelligent and voluntary waiver of his right to counsel * * *" during the preliminary hearing. *Id.* at 272. To answer that inquiry, the court examined the trial court's compliance with Crim.R. 11. Finding the trial court fully complied with Crim.R. 11, the Supreme Court concluded the defendant knowingly, intelligently and voluntarily entered his guilty plea and thus waived any error during the preliminary hearing.

{¶14} Here, defendant points to no error in the trial court's Crim.R. 11 colloquy with him. Indeed, the trial court meticulously applied the elements of Crim.R. 11 to determine defendant understood the nature of the charges and potential penalties and was knowingly, intelligently, and voluntarily surrendering his rights. The court further inquired whether defendant had any questions, and defendant responded in the negative; the court asked if anyone had made any promises or threats to defendant regarding his entering the plea, and defendant responded that no one had. When the court inquired whether defendant was entering the plea voluntarily, he replied that he was. On this

record, defendant knowingly, intelligently, and voluntarily entered his guilty plea and thus arguably waived his right to challenge the trial court's earlier decision, in this case a decision to deny defendant's request for a change of appointed counsel. *Spates*, at 273.

{¶15} More significant to our resolution of defendant's first assignment of error, the trial court did not abuse its discretion in overruling his motion to dismiss court-appointed counsel and to appoint new counsel. "An indigent defendant's right to counsel does not extend to counsel of the defendant's choice." *Smith*, supra, citing *Thurston v. Maxwell* (1965), 3 Ohio St.2d 92, 93. Rather, "[t]o discharge a court-appointed attorney, the defendant must show 'a breakdown in the attorney-client relationship of such magnitude as to jeopardize a defendant's right to effective assistance of counsel.'" *State v. Coleman* (1988), 37 Ohio St.3d 286, 292, quoting *People v. Robles* (1970), 2 Cal.3d 205, 215. Simple "[d]isagreement between the attorney and client over trial tactics and strategy does not warrant a substitution of counsel. Moreover, mere hostility, tension and personal conflicts between attorney and client do not constitute a total breakdown in communication if those problems do not interfere with the preparation and presentation of a defense." *State v. Furlow*, Clark App. No. 03CA0058, 2004-Ohio-5279, at ¶12. (Citations omitted.)

{¶16} Instead, to warrant discharge of court-appointed counsel, a defendant is required to show "good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which leads to an apparently unjust result." *Smith*, supra, quoting *State v. Blankenship* (1995), 102 Ohio App.3d 534, 558. Defendant bears the burden of presenting evidence that demonstrates grounds for the appointment

of new counsel. If a "defendant alleges facts, which, if true, would require relief, the trial court must inquire into the defendant's complaint and make the inquiry part of the record." *Smith*, supra, citing *State v. Deal* (1969), 17 Ohio St.2d 17, 20. Although the inquiry may be brief and minimal, the inquiry must be made. *State v. King* (1995), 104 Ohio App.3d 434, 437; *Smith*, supra. "Even that limited judicial duty arises only if the allegations are sufficiently specific; vague or general objections do not trigger the duty to investigate further." *Smith*, supra, citing *Deal*, supra.

{¶17} Once a defendant makes the requisite showing, the trial court's failure to appoint new counsel "amounts to a denial of effective assistance of counsel." *Smith*, supra, quoting *State v. Pruitt* (1984), 18 Ohio App.3d 50, 57. "The decision whether or not to remove court appointed counsel and allow substitution of new counsel is addressed to the sound discretion of the trial court, and its decision will not be reversed on appeal absent an abuse of discretion." *Furlow*, at ¶13.

{¶18} Here, defendant set forth little as grounds for appointment of new counsel. Defendant complained that he had no true information from his lawyer "except the good and bad." Rather than show a total breakdown in communications, defendant's statement suggests continuing communication between defendant and his attorney. While counsel apparently was unable to communicate information defendant wanted to hear, that fact does not suggest a total breakdown in communications between defendant and his attorney.

{¶19} Defendant also complained that his attorney failed to explain how he would "represent" defendant's case to the jury. (Tr. 2.) Defendant's complaint is vague, but to

the extent he again complains about a lack of communication, his previous comment already acknowledged to the trial court his continuing communication with his attorney. Moreover, to the extent his comment suggests counsel should predict the outcome of the case, the trial court properly noted that "nobody can predict or say what would happen." (Tr. 3.)

{¶20} Defendant also complained defense counsel had a conflict of interest arising from counsel's association with the Big Sister of one of defendant's accusers. In order to satisfy a Sixth Amendment claim of ineffective assistance of counsel based on a conflict of interest, defendant must demonstrate that an actual conflict of interest adversely affected his counsel's performance. *State v. Keith* (1997), 79 Ohio St.3d 514, 535, citing *Cuyler v. Sullivan* (1980), 446 U.S. 335, 348, 100 S.Ct. 1708; *State v. Manross* (1988), 40 Ohio St.3d 180, 182; *State v. Gillard* (1997), 78 Ohio St.3d 548, 553 (noting that "a lawyer represents conflicting interest 'when, on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose' ").

{¶21} Here, defendant did not make a specific showing either of an actual conflict or an adverse effect in counsel's continuing to represent defendant. To the contrary, defense counsel made clear on the record that this relationship with the Haynes would not affect his ability to be fair and impartial and to vigorously represent his client. Indeed, defense counsel's response to the trial court's inquiry suggested counsel's relationship with the Haynes did not adversely affect his representation, but instead may have apprised him of additional information beneficial to defendant. Moreover, the record does not indicate that either of the Haynes would be called as witnesses for the state, and

counsel's speaking with them in an effort to discover possibly favorable information, in itself, is not improper.

{¶22} Lastly, defendant relies on the complaint he allegedly filed against his attorney. The record, however, does not disclose any basis for the complaint, apart from those matters already addressed and determined to be lacking. As a result, the complaint, if filed, is not a basis for discharging counsel in this case. Under the circumstances of this case, we cannot say the trial court abused its discretion in refusing defendant's request to change counsel on the day of trial. Defendant's first and second assignments of error are overruled.

{¶23} Defendant's third assignment of error contends the trial court erred in assessing costs against him without inquiring into defendant's ability to pay. The Supreme Court recently addressed defendant's contentions, stating that "R.C. 2947.23 requires a judge to assess costs against all convicted criminal defendants, and waiver of costs is permitted—but not required—if the defendant is indigent." *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, at ¶14; see, also, *State v. Powell*, Montgomery App. No. 20857, 2006-Ohio-263, at ¶14 (stating that "R.C. § 2743.23 confers no discretion upon the trial court with respect to the imposition of the costs of prosecution, even if the defendant is indigent"). Because the trial court may assess costs against an indigent defendant, the court is not required to hold a hearing to determine defendant's ability to pay. *State v. Robinson*, Lucas App. No. L-03-1307, 2005-Ohio-5266, at ¶62.

{¶24} To the extent defendant relies on R.C. 2929.18(A)(5)(a)(ii), his reliance is misplaced. As R.C. 2929.18(A) states, "[e]xcept as otherwise provided in this division and

in addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section." (Emphasis added.) R.C. 2929.18(A)(5) in particular relates to "[r]eimbursement by the offender of any or all of the costs of the sanctions incurred by the government, including * * * costs of confinement." Here, the trial court did not fine defendant to reimburse for the costs of confinement or other sanctions, but imposed court costs arising from the case as the court must do under R.C. 2947.23.

{¶25} Defendant's third assignment of error is overruled.

{¶26} Defendant's fourth assignment of error contends the trial court erred in imposing consecutive sentences. The state concedes error in the trial court's making the statutorily required findings and reasons outside the presence of defendant and counsel for the parties.

{¶27} Since the parties briefed this issue, the Supreme Court determined R.C. 2929.14(E), insofar as is pertinent here, is unconstitutional under the United States Supreme Court's decision in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531. *State v. Foster* __ Ohio St.3d __, 2006-Ohio-856 (severing as unconstitutional the provisions of R.C. 2929.14[E] that require findings not made by a jury). In that context, the issue defendant raises is whether the trial court erred in failing to place on the record the findings and reasons no longer required under the severed provisions of R.C. 2929.14(E). Had the trial court placed its findings and reasons on the record, the matter nonetheless would have to be returned to the trial court for resentencing in accordance with *Foster*.

We see no reason to reach a different result here, where the trial court failed to place its findings on the record. Accordingly, we sustain defendant's fourth assignment of error.

{¶28} Having overruled defendant's first, second, and third assignments of error, but having sustained his fourth assignment of error, we affirm that aspect of the trial court's decision finding defendant guilty of the offenses to which he entered a guilty plea, but we reverse the trial court's sentence and remand for resentencing only.

*Judgment affirmed in part and reversed
in part; case remanded for resentencing.*

PETREE and McGRATH, JJ., concur.
