[Cite as *State v. Fickenworth*, 2015-Ohio-1556.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 14AP-542
v.	:	(C.P.C. No. 13CR-126)
Brad Fickenworth,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 23, 2015

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BROGAN, J.

{¶1} Defendant-appellant, Brad Fickenworth, appeals from the denial of his petition for post-conviction relief relating to his convictions in the Franklin County Court of Common Pleas of conspiracy to commit murder in violation of R.C. 2903.01 and 2903.02, a felony of the first degree. The facts underlying Fickenworth's conviction are set out in this court's opinion in *State v. Fickenworth*, 10th Dist. No. 13AP-826, 2014-Ohio-2502, affirming Fickenworth's conviction. Those facts are as follows:

> The state presented evidence to establish that appellant hired Terry Webb to kill Tammy Lytle at the request of her estranged husband, Dan Lytle. Mr. Lytle did not want Ms. Lytle to appear at an upcoming court hearing. Appellant gave Webb $3,500 of Mr. Lytle's money, a burner cell phone, and photographs of Ms. Lytle. Appellant made numerous phone calls, sent text messages, and engaged in various other acts to

promote and facilitate the murder. Pertinent phone calls and text messages were supported by cell phone records at trial.

Webb reported the plot to the Columbus Police Department and cooperated with their investigation of appellant. The police oversaw and recorded phone conversations between appellant and Webb, which were played during trial. Webb described the endeavor as a "big job" during a recorded conversation, to which appellant responded: "How is it a big job? Walk up, slit [her] throat and leave." (Tr. Vol.I, 77–78.) Webb repeatedly asked for more money before he did the job, and appellant stated: "Business is over." (Tr. Vol.I, 88.) "Once [Mr. Lytle] makes it home and this job ain't done, me and his contract's over. He done told me that. So I might as well take care of [it] myself." (Tr. Vol.I, 88.) Webb testified that appellant called him two days later and cancelled the deal between them. According to Webb, appellant wanted the money back because he was going to get somebody else to do the job.

Appellant testified on his own behalf. He denied being part of a conspiracy to murder Ms. Lytle. According to appellant, he participated in a plan to steal Ms. Lytle's car and hide it on the morning of a court date so that she would not appear. He acted as a middleman by hiring Webb to steal the car at Mr. Lytle's request. He claimed Mr. Lytle and Webb changed the plan to killing Ms. Lytle without his knowledge. When he found out, he attempted to leave or end the conspiracy.

Appellant explained, when he said "business is over" to Webb during the recorded phone call, he meant he was done with the conspiracy. (Tr. Vol.III, 510.) He later contacted Webb about returning the money with the intention "[t]o end the contract, the business agreement that everybody was on." (Tr. Vol.III, 524.) Appellant testified that he visited Mr. Lytle in person and "told him that everything got out of hand pretty much. I said that it was—we needed to talk about ending this and getting his money back. And I was showing him the text messages that me and Mr. Webb * * * was having and [Mr. Lytle] agreed." (Tr. Vol.III, 525.) Appellant then attempted to meet Webb to retrieve the money, but he was arrested on the way. Appellant believed he needed to have an additional conversation with Webb to make it clear the conspiracy was over. Appellant was asked: "You never informed Terry Webb of cancelling whatever plan you [are] testifying you were a part of, correct?" (Tr. Vol.III, 587.) He responded, "I never got

> the chance to, ma'am. I got hit by SWAT leaving my driveway." (Tr. Vol.III, 587.) When asked about his comment regarding slitting Ms. Lytle's throat, appellant said, "I was more mad than anything. I just said something I shouldn't have said." (Tr. Vol.III, 552.)
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> After the close of evidence, outside the presence of the jury, the trial court consulted with appellant's trial counsel and the assistant prosecutor regarding jury instructions. Appellant's counsel requested an instruction on the affirmative defense of abandonment. The trial court denied the request because appellant did not acknowledge he conspired to commit murder before asserting he abandoned the conspiracy. The court stated, "you cannot abandon that which was never entered into." (Tr. Vol.IV, 623.) Relying in part on State v. Jewell, 5th Dist. No. 99 CA 1 (Nov. 17, 1999), the trial court determined the instruction would not be given.
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> The jury returned a verdict finding appellant guilty of conspiracy to commit murder. Appellant was then sentenced accordingly, and this timely appeal followed.

Id. at ¶ 5-10.

{¶2} In his direct appeal, Fickenworth asserted that he was denied the effective assistance during plea bargaining and during the trial. He also claimed that the trial court erred in refusing to give an instruction on abandonment.

{¶3} In affirming the trial court's refusal to give the abandonment instruction, Judge O'Grady wrote as follows:

> Appellant's argument ignores that he unequivocally denied being involved in a conspiracy to commit murder at trial. He claimed he was involved in a plot to steal Ms. Lytle's car. "Under Ohio law, an affirmative defense is justification for admitted conduct, which does not 'seek to negate any of the elements of the offense which the state is required to prove.' " *Gahanna v. Cameron*, 10th Dist. No. 02AP-255, 2002-Ohio-6959, ¶ 28, quoting *State v. Martin*, 21 Ohio St.3d 91, 94 (1986). As the trial court noted, appellant did not acknowledge he conspired to commit murder - the sole offense for which he was charged - and argue [sic] he abandoned the conspiracy. Appellant's position at trial was an attempt to negate the elements of the state's case. He did not put forth an affirmative defense. He denied the conduct.

> Accordingly, the trial court did not abuse its discretion by declining to instruct the jury on abandonment.
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> Additionally, we find *Jewell*, which the trial court relied on, instructive. The Fifth District Court of Appeals wrote:
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> Defense counsel requested the trial court to instruct the jury on the affirmative defense of abandonment. The trial court denied defense counsel's request finding appellant's denial of a conspiracy to murder precluded an instruction on abandonment. * * * Appellant argues the taped conversations he had with the informant and Keeton's girlfriend establishes his intent to abandon the conspiracy.
>
> The record indicates, at trial, appellant denied the existence of a conspiracy to murder. An accused is not entitled to an instruction on voluntary abandonment unless such was the defense at trial. The trial court correctly determined not to instruct on the affirmative defense of abandonment on the basis that, at trial, appellant denied the existence of a conspiracy to murder.

Id. at ¶ 15-16.

{¶4} In addressing the ineffectiveness assignments, Judge O'Grady noted there was nothing in the record to establish that Fickenworth's attorney did not understand the defense of abandonment. Judge O'Grady noted also that Fickenworth's denial that he ever engaged in a conspiracy to commit murder eliminated abandonment as a defense. The court also noted there was nothing in the record to support a claim of the defense attorney's ineffectiveness in plea bargaining.

{¶5} While his appeal to this court was pending, Fickenworth filed a post-conviction relief petition claiming that his trial counsel was ineffective in advising him to reject a plea to a reduced charge upon the advice that his defense of abandonment was solid. In denying defendant's petition, the trial court noted that this court's decision on the direct appeal rejected defendant's claim that he was denied effective counsel in both the plea and the trial. The trial court went on to find that the decision was binding on the trial court and found that the petition was moot and required dismissal.

{¶6} In a single assignment of error, Fickenworth contends the trial court erred in dismissing his petition without making findings of fact and conclusions of law as

required by R.C. 2953.21 and seemingly determined that this court's decision on his appeal barred review of his petition on res judicata grounds. Fickenworth says he has raised an established claim which is "dehors" the appellate record and can only be raised under R.C. 2953.21.

{¶7} The state, for its part, notes that the record reflects that it offered to reduce the charge against Fickenworth if he proffered what his testimony would be and agreed to testify against his co-defendant. Before seating the jury, the trial court inquired of defendant about his choice to proceed with a jury trial and whether he understood the plea process and offer. (Tr. 3-8.) The prosecutor indicated that any offer was dependent on defendant proffering and cooperating against his co-defendant, Dan Lytle, and if defendant was truthful, they would negotiate a plea to a felony. (Tr. 5.) Defendant indicated that he understood the state's position on plea negotiations. (Tr. 6.)

{¶8} The state argues that Fickenworth's post-conviction claim is specious given his testimony at trial denying that he was ever a party to a conspiracy to commit murder, claiming only to agree to hide Tammy Lytle's car. The state notes that Fickenworth's denial of culpability in the murder plot was the reason the trial court denied the defense request to give the abandonment instruction. The state argues that while the trial court did not label its reasons as findings of fact and conclusions of law, its decision adequately apprised Fickenworth of the grounds for its judgment to enable appellate review. *State v. Calhoun*, 86 Ohio St.3d 279, 292 (1999).

{¶9} The United States Supreme Court has recognized that defense counsel can render deficient performance by giving unreasonable advice to the defendant about whether to accept a plea offer. *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012).

{¶10} We agree with appellant that Fickenworth's post-conviction relief is not barred by the defense of res judicata. The advice provided Fickenworth by his trial counsel is not part of the trial record. Fickenworth claims that his trial counsel told him that he could raise the defense of abandonment at his trial and this seems corroborated by his counsel's request for the abandonment instruction at trial. The issue is not whether Fickenworth was in fact entitled to the defense of abandonment but whether he could reasonably rely on his counsel's advice that he had that defense.

{¶11} The United States Supreme Court recently held that defendants have a right to counsel during plea bargaining. *Lafler; Missouri v. Frye,* 132 S.Ct. 1399, 1386-87 (2012). Counsel can render deficient performance during plea bargaining either by failing to convey to the defendant a formal offer from the prosecution to accept a favorable plea deal (such as in *Frye*) or by giving unreasonable advice to the defendant about whether to accept the plea offer (such as in *Lafler*).

{¶12} To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, a defendant must demonstrate a reasonable probability that (1) he would have accepted the earlier plea had he been afforded effective assistance of counsel, (2) the prosecutor would not have canceled the plea, and (3) the trial court would have accepted the plea. *Frye* at 1409. "To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.*; *see also Lafler* at 1385.

{¶13} The state contends that Fickenworth attached no affidavit to his post-conviction relief petition that he rejected the state's plea offer based on advice from his counsel that he had a "solid" defense of abandonment. The state also contends that even if he did attach an affidavit, this court is free to discount self-serving affidavits from the petitioner, citing *State v. Jones*, 10th Dist. No. 06AP-62, 2006-Ohio-5953.

{¶14} A week after Fickenworth's counsel filed his post-conviction petition, counsel filed Fickenworth's affidavit. In it, Fickenworth states his trial attorney, Sally Dennison, told him that the evidence indicated that he had abandoned the conspiracy. He stated she told him that was especially true because of the tape recorded telephone call he made with the detective after his arrest. He stated in his affidavit that she told him that they could prove the abandonment defense and the state would have trouble proving its case. He stated that the state made him an offer to plead guilty to a reduced felony and he needed to cooperate and testify against Dan Lytle. He stated further in his affidavit that his attorney told him not to take the state's offer because he had a great defense that he had terminated and abandoned the conspiracy. Fickenworth stated that if he knew what the law was and that abandonment was not a good defense, he would have accepted the plea offer the state made to him.

{¶15} The state argues that in order to satisfy the state for a reduced plea, Fickenworth would have been required to proffer and give testimony against Dan Lytle. The state argues that Fickenworth's sworn denial at trial that he was unaware of a conspiracy to commit murder demonstrates that he would not have been able to satisfy the requirements of the plea offer from the state. The state argues that any claim now that Fickenworth would have satisfied the requirements for the plea necessarily means that Fickenworth lied under oath during his testimony at trial.

{¶16} The prosecutor claims the state would have cancelled the plea. The trial court is in the best position to determine whether this is true and Fickenworth could satisfy the test enunciated in *Lafler*. Accordingly, we sustain appellant's assignment of error and reverse the trial court's judgment and remand for a hearing on Fickenworth's petition.

Judgment reversed; case remanded.

DORRIAN and LUPER SCHUSTER, JJ., concur.

BROGAN, J., retired, of the Second Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).
