

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-G-3035
GEOFFREY L. BOYLE, II,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 11 C 000071.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Abbey L. King*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Mary Elaine Hall, 645 Leader Building, 526 Superior Avenue, Cleveland, OH 44114 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Geoffrey L. Boyle II, appeals from the judgment of the Geauga County Court of Common Pleas sentencing him to four years imprisonment after accepting his plea of guilty on charges of having weapons while under disability and domestic violence. We affirm.

{¶2} On May 26, 2011, appellant was indicted on one count of felonious assault, in violation of R.C. 2903.11(A)(1), a felony of the second degree; and one count of having weapons while under disability, in violation of R.C. 2923.13(A)(3), a felony of

the third degree. The disability was a result of authorities finding a firearm in appellant's home. The record indicates appellant had previous drug abuse and drug paraphernalia misdemeanor convictions which, under relevant law at the time of the indictment, was a sufficient predicate offense for the disability charge. At his arraignment, he entered pleas of "not guilty" to each count.

{¶3} After plea negotiations, appellant entered a change of plea. Pursuant to a plea agreement, appellant agreed to plead guilty to a stipulated lesser included offense of felonious assault, to wit: domestic violence, a misdemeanor of the first degree; and having weapons under disability, a felony of the third degree. A plea hearing was held, during which the trial court conducted a Crim.R. 11 plea colloquy with appellant. At the conclusion of the hearing, the trial court accepted appellant's guilty plea. The court set the matter for a sentencing hearing and ordered a presentence investigation report.

{¶4} On July 19, 2011, the date of the scheduled sentencing hearing, however, defense counsel requested a continuance of the hearing. Counsel asserted he wished to research an issue brought to his attention on the morning of the hearing; namely, whether a pending amended version of the having weapons while under disability statute would apply retroactively to appellant's case. If so, counsel suggested, the count could be rendered invalid, which would impact appellant's decision to file a motion to withdraw his guilty plea. Although the state indicated its willingness to proceed with sentencing, the court granted the continuance "in the interest of justice."

{¶5} On August 15, 2011, the matter again came on for sentencing. After a discussion, both on and off record, of the potential ramifications of moving to withdraw the plea, appellant concluded he desired to move forward with sentencing on the plea of

guilty. The court subsequently sentenced appellant to a four-year term of imprisonment for having weapons while under disability and 180 days in jail for domestic violence, to run concurrently with the prison term. The court additionally imposed a \$1,000 fine, which it suspended.

{¶6} Appellant now appeals alleging four assignments of error. His first assigned error provides:

{¶7} “The trial court, under the totality of the circumstances, abused its discretion, when it ‘pressured’ the defendant from the bench to accept the plea agreement (Docket No. 20/Appendix 1) and did not allow the public defender to offer his ‘prepared’ presentence motion to withdraw the defendant’s guilty pleas to the court (8/15/2011 Tr. Page 9/ lines 2-22).”

{¶8} Appellant contends that the trial court’s statements and demeanor from the bench functioned to pressure him into accepting a guilty plea unwillingly; he also contends the trial court further prejudiced his rights by not allowing defense counsel to submit his previously written motion to withdraw his plea. We do not agree.

{¶9} We first note that appellant, in his brief, invites this court to apply legal standards that relate to a trial court’s denial of a pre-sentence motion to withdraw his plea. As the issue of appellant withdrawing his plea was not before the court, no judgment was entered denying such a request. Appellant’s substantive argument challenges the conduct of the trial court and, as a result, appears to allege a due process violation. With this acknowledgement, we proceed.

{¶10} At the commencement of the August 2011 sentencing hearing, defense counsel made the following statement on record:

{¶11} Your Honor, subsequent to Mr. Boyle entering his plea, I did receive correspondence from him asking me to look into House Bill 54, which was enacted late June, early July and amends Revised Code Sections 2923.13 and 2923.14 of the Ohio Revised Code.

{¶12} Under the newly enacted statute which was amended subsequently to his plea and significantly well, several months after the offense in this matter, the new 2913.13 [sic] would have rendered his prior misdemeanor offense for drug abuse not to be a disciplining offense under this 2923.13 statute, Weapons Under Disability.

{¶13} Mr. Boyle had requested that I file a motion to withdraw his plea. I have prepared a motion to that effect if he were to insist on going forward.

{¶14} However, as part of the plea agreement, the State agreed to at the time of sentencing to dismiss the second degree felony, felony assault in this matter, irrespective of the merits of that charge, whether there is sufficient evidence to prove that.

{¶15} Technically, the State would not be bound, if he withdrew his plea, to continue to dismiss that charge.

{¶16} I have discussed this matter with Mr. Boyle. I also discussed the matter with the State Public Defender's Office, and the concern I had is the amended version of the 2913.14 [sic] specifically states that it is the intent of the General Assembly in amending Section

2913.14 [sic] of the Revised Code to apply the amendments to that section retroactively.

{¶17} There was no language to that effect with respect to 2913.13 [sic].

{¶18} However, Revised Code 1.58 entitled Reenactment, amendment or repeal of statute on existing conditions does indicate that Under Section A, the reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this action affect the prior operation of the statute or any prior action taken thereunder.

{¶19} And Section B indicates that if the penalty forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed shall be imposed according to the statute as amended.

{¶20} Subsequently, Mr. Boyle's hesitation this morning and the reason it has taken such a great deal of time to discuss this is he has been having a difficult time accepting whether this should have been charged as a Weapons Under Disability.

{¶21} He has made the decision to proceed, but the plea agreement, I would ask the Court to take into consideration the amendment to the statute and impose a something [sic] less severe penalty, certainly than the potential penalty of up to five years with respect to a Weapons Under Disability.

{¶22} Appellant stated on record he agreed with defense counsel's rendition of what had occurred up to that point. When the court attempted to confirm whether

appellant wished to go forward with sentencing, however, appellant stated “[t]hat part I don’t agree with.” After which the court addressed appellant:

{¶23} Well, you have had the time to consider this, though, Mr. Boyle.

What is your choice, Mr. Boyle? Do you want to go forward with the sentencing at this time, or do you want to seek to withdraw your plea and run the risk of the original charges being reasserted and perhaps risking a conviction of something worse than you are pleading to?

{¶24} What’s your choice, because you debated it with Mr. Umholtz all morning or much of it, apparently, and I don’t mean to pressure you, but the time has come to make a decision.

{¶25} Do you want to go forward with your sentencing, or do you want an opportunity to seek to withdraw your plea, and in which case, we will come back at a later date and we will work on that.

{¶26} Appellant responded that he preferred to go forward with sentencing thereby declining the court’s specific offer to allow appellant to file the prepared motion to withdraw his guilty plea.

{¶27} The foregoing demonstrates that the court neither pressured appellant into his decision nor prevented appellant from submitting the motion to withdraw drafted by defense counsel. Appellant was aware that if the court permitted him to withdraw his plea of guilty, the original, more severe charge of felonious assault could be pursued by the state. After being informed of and weighing the relative consequences of

maintaining his existing plea of guilty or moving to withdraw the same, appellant concluded the former option was more favorable.

{¶28} Moreover, contrary to appellant's allegation, the trial court's insistence that appellant make a decision between his two options does not imply it failed to display "patience and concern." Viewing the circumstances in their totality, the record demonstrates the trial court continued sentencing on the guilty plea for the specific purpose of allowing defense counsel to research and consider the implications of the amendment to R.C. 2923.13 and how, if at all, they might affect appellant's case. In doing so, the court afforded the defense nearly an additional month to contemplate whether the better course would be to file a motion to withdraw or proceed with sentencing on the extant guilty plea.

{¶29} Furthermore, the record of the August 15 hearing demonstrates that defense counsel had thoroughly informed appellant of the consequences of each option and, thus, appellant was equipped with all necessary information to make an informed decision on which course to select. The court had given appellant the courtesy of a continuance and made certain appellant was fully apprised of the relative implications of his options. Appellant was not entitled to ruminate on his limited options indefinitely. With these points in mind, we hold the court's demand that appellant make a decision on how to proceed was both fair and reasonable under the circumstances of the case.

{¶30} Moreover, nothing in the record suggests appellant's counsel "pressured" him into moving forward with sentencing in lieu of seeking to withdraw his plea. To the contrary, counsel had drafted a motion to withdraw in the event appellant decided he wished to proceed in that direction. This demonstrates that counsel was prepared to

seriously defend appellant irrespective of his decision on how to proceed. Of course, counsel may have advised appellant that, because the statutory amendment to R.C. 2923.13 would not affect his case, the more propitious more legal option was to keep the plea agreement into which appellant entered with the state. Such advice, however, cannot be reasonably deemed “pressure.” As noted above, withdrawing the guilty plea would likely result in the state pursuing the original charges of felony-two felonious assault and felony-three weapons under disability. Such charges, if fully prosecuted, would expose appellant to a significantly greater penalty than the charges to which he pleaded guilty. If counsel urged appellant to keep his plea, such advice was based upon the foreseeable reality that not doing so could very easily work to appellant’s disadvantage. We therefore conclude neither the trial court, nor defense counsel exerted unreasonable “pressure” on appellant that compelled him to move forward with sentencing on his guilty plea.

{¶31} As an ancillary note, appellant contends the trial court committed plain error in sentencing him to a four-year term of incarceration. In his reply brief, appellant directs this court’s attention to R.C. 1.58, which addresses the effects of statutory reenactments, amendments or appeal. Subsection (B) of that statute states: “If the penalty, forfeiture or punishment for any offense is reduced by a reenactment, or amendment of the statute, the penalty, forfeiture or punishment, if not already imposed, shall be imposed according to the statute as amended.” Appellant contends that the amendment to R.C. 2923.13(A)(3) required the trial court to sentence him to less than the four-year term he received pursuant to R.C. 1.58. We do not agree.

{¶32} First of all, the amendment to R.C. 2923.13(A)(3) changed the type of predicate drug crime that could trigger a disability charge. The post-amendment statute requires a defendant to have a conviction for a *felony offense* involving a drug of abuse, while the pre-amendment version permitted a conviction if a defendant had a conviction for *any offense* involving a drug of abuse. With this in mind, however, the amendment did not change or reduce the potential punishment to which a defendant convicted under the disability statute would be exposed. Under both the pre- and post-amendment versions, having weapons while under a disability was/is a third degree felony. In this respect, R.C. 1.58 is inapplicable to appellant's case.

{¶33} In any event, appellant was sentenced on his guilty plea on August 15, 2011. The amendment to the having weapons under disability statute was not effective until September 20, 2011. R.C. 1.58 is operative only where the penalty is "not already imposed." Thus, even had the amendment reduced the penalty to which a defendant would be subject for a conviction under amended R.C. 2923.13(A)(3), R.C. 1.58 would still not affect appellant's case.

{¶34} With this in mind, appellant pleaded guilty to a third degree felony. While he was sentenced to a four year term of imprisonment, he could have been sentenced to as much as a five-year term. Given the circumstances of the case, the court's sentence was within the fixed statutory range for the felony to which appellant pleaded and there is no evidence that the court acted unreasonably, in light of the record, in selecting the sentence it chose.

{¶35} Appellant's first assignment of error is without merit.

{¶36} For his second assignment of error, appellant alleges:

{¶37} “The trial court committed plain error when he accepted the defendant-appellant’s guilty pleas to domestic violence and having a weapon under disability without expressly informing the defendant regarding his prior felony conviction for attempted failure to comply with order or signal of a police officer – a violation of former R.C. 2921.331 (now R.C. 2921.331) [sic] in Geauga Co. Case No. 00-C-0160 (Pre-Sentence Investigation Report)(6/9/2011)(Tr. Pages 7, 10-13) pursuant to Crim.R. 7 and Crim.R. 11(C)(2)[.]”

{¶38} Under this assignment of error, appellant contends the trial court prejudiced his substantial rights by accepting his plea without expressly noting, on record, that he had been previously convicted of a felony. We do not agree.

{¶39} Crim.R. 7 governs the use of, nature and contents, as well as the manners of amending an indictment or information. Appellant asserts the trial court erred in accepting his plea of guilty without reminding him he was previously convicted of a felony. Appellant fails to clarify how the trial court’s actions in accepting his plea in any way contravened Crim.R. 7. As it is unclear how Crim.R. 7 is implicated under appellant’s second assignment of error, we need not explore this point further.

{¶40} Crim.R. 11(C) governs the process of entering a guilty plea to a felony charge. *State v. Singh*, 141 Ohio App.3d 137, 140 (11th Dist.2000). Generally, a guilty plea is deemed to have been entered knowingly and voluntarily if the record shows that the trial court advised the defendant of: (1) the nature of the charge and the maximum penalty involved; (2) the effect of entering the plea to the charge; and (3) that the defendant will be waiving certain constitutional rights by entering his plea. *State v. Madeline*, 11th Dist. No. 2000-T-0056, 2002 Ohio App. LEXIS 1348, *11, (Mar. 22,

2001), citing *State v. Sopjack*, 11th Dist. No. 930G01826, 1995 Ohio App. LEXIS 5572, *27-*28 (Dec. 15, 1995). The constitutional rights referenced in Crim.R. 11(C)(2)(c) are an accused's rights to a jury trial, to confront witnesses, to have compulsory process for obtaining witnesses, and to require the prosecution to prove, beyond a reasonable doubt, his or her guilt at a trial where he or she cannot be compelled to testify. See e.g. *State v. Dudas*, 11th Dist. No. 2010-L-003, 2010-Ohio-6576, ¶25.

{¶41} Appellant was indicted on one count of felonious assault and having weapons while under disability. The disability charge was premised upon previous misdemeanor convictions for drug abuse and drug paraphernalia. Appellant pleaded guilty to domestic violence and the disability charge. The record demonstrates the trial court thoroughly advised appellant regarding the nature of the charges to which he was pleading and the maximum penalty he could receive; the court properly advised appellant of the effects of pleading pursuant to Crim.R. 11(B); and apprised appellant of the constitutional rights he would be waiving as a result of his plea. There is nothing to indicate the previous felony impacted the nature of the plea offered by the state. Because appellant's prior felony conviction was completely unrelated to the proceedings in this case, the trial court did not err in failing to remind appellant that his record contained a prior felony conviction.

{¶42} Appellant's second assignment of error is without merit.

{¶43} For his third assignment of error, appellant asserts:

{¶44} "The trial court committed plain error, when after viewing the Pre-Sentence Investigation Report, which noted the defendant-appellant's prior felony conviction in Geauga Co. Case No. 00-C-0160, though this prior felony was not

included in the indictment, did not throw out the plea agreement and allow the him [sic] to withdraw his plea but went on to sentence the defendant-appellant to an enhanced penalty of a concurrent four year prison sentence.”

{¶45} As discussed above, the trial court gave appellant the option of filing the motion to withdraw his guilty plea before sentencing. After being advised of the potential consequences of withdrawing the plea, appellant declined to file the motion with the court. Accordingly, appellant was not disallowed the opportunity to file the motion, but, instead, made the informed, voluntary decision to go forward with sentencing in lieu of attempting to withdraw the plea.

{¶46} This point aside, appellant appears to suggest that the trial court was obligated to “throw out” appellant’s plea agreement because it was aware of the prior felony conviction, but that conviction was not included in his indictment. We discern no error.

{¶47} As discussed above, the prior felony conviction had no bearing on the charges he was facing in the underlying matter. At most, therefore, appellant’s criminal history, as detailed in the PSI, was information the trial judge was obligated to consider in fashioning an appropriate and just sentence. See e.g. 2929.12(D) and (E), (listing past criminal activity, or lack thereof, as factors to consider regarding a defendant’s likelihood to commit future crimes).

{¶48} The disability charge was a result of a previous misdemeanor drug conviction. Under the governing law at the time the indictment was issued, misdemeanor drug convictions were sufficient to base a felony charge for having weapons while under disability. Because appellant’s prior felony conviction for

attempted failure to comply had no bearing on the facts upon which the charges in the indictment originated, that conviction was irrelevant to the substantive nature of the charged offenses. We therefore hold the existence of appellant's prior felony conviction was not a basis to "throw out" the voluntary and knowing plea of guilty which it had previously accepted.

{¶49} For his final assignment of error, appellant asserts:

{¶50} "The public defender's failure to (1) move to dismiss the second count of the indictment pursuant to Ohio Crim.R. 12(C)(2) against the defendant-appellant for enhancing the prior misdemeanor from Shaker Heights Municipal Court Case No. 98CRB00787 into a felony having a weapons under disability charge (2) failure to submit his 'prepared' pre-sentence motion to withdraw the defendant-appellant's guilty pleas (3) failure to catch the prior felony conviction contained in the PSI when the public defendant [sic] knew or should have known that the defendant-appellant had basis under Crim.R. 7 to support this motion and (4) the public defender's 'active pressure' upon the defendant-appellant to accept the plea agreement were far below the objective standard of reasonableness. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 8 L.Ed.2d 674 (1984)[.]"

{¶51} Under his final assignment of error, appellant asserts his trial counsel was ineffective for the foregoing reasons. We do not agree.

{¶52} To sustain a claim for ineffective assistance of counsel, a defendant must demonstrate: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors,

the outcome of the proceeding would have been different. See generally *Strickland, supra*.

{¶53} With respect to the first prong, an attorney is entitled to a strong presumption that his or her conduct falls within the ambit of reasonable professional performance. A litigant must therefore overcome the presumption that, under the circumstances, the challenged conduct “might be considered sound trial strategy.” *Id.* at 689. Moreover, to prevail on the second prong, a litigant must demonstrate he was prejudiced by “a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

{¶54} Appellant first asserts defense counsel was ineffective because he failed to file a motion to dismiss the count charging appellant with felony-three having weapons while under disability. Appellant appears to argue defense counsel’s failure to file the motion was unreasonable because, had he done so, the court would have been compelled to dismiss the count and therefore he would not have entered the plea. Appellant’s argument appears to be based upon his belief that the misdemeanor conviction was insufficient to support the felony disability charge. We do not agree.

{¶55} The facts upon which the indicted charges were premised occurred in April of 2011. Appellant was subsequently indicted on May 26, 2011. At the time the charges were filed, R.C. 2923.13(A)(3), the section of the having weapons while under disability statute under which appellant was indicted, required proof that he had been convicted of *any* offense involving, inter alia, the illegal possession of *any* drug of abuse. As previously discussed, appellant had been convicted of misdemeanor

possession of marijuana. Given these circumstances, we perceive no legal flaws in the way in which the case was indicted.

{¶56} Moreover, because appellant was sentenced before R.C. 2923.13(A)(3) was amended, the amended version of the statute was inapplicable to his case. Accordingly, counsel was not ineffective for failing to move to dismiss the charge.

{¶57} Appellant next argues counsel was ineffective for failing to submit the motion to withdraw his guilty plea prepared prior to the August sentencing hearing. As discussed under appellant's first assignment of error, counsel was poised to submit the motion; appellant, however, chose to move forward with sentencing on the guilty plea rather than seek to withdraw the same. The record demonstrates appellant's decision was based upon an informed understanding of the consequences of each option before him. Filing the motion, therefore, would have been contrary to appellant's voluntary decision to be sentenced on the bargain he previously reached with the prosecutor. In short, counsel did not act unreasonably by declining to file a motion that was substantively inconsistent with his client's express wishes.

{¶58} Moreover, counsel cannot be seen as ineffective for failing to urge appellant to withdraw his guilty plea. As the amendment to R.C. 2923.13(A)(3) was not applicable to appellant, the consequences of withdrawing the guilty plea could have resulted in the prosecution reinstating all original charges. If the state chose to move forward on the indictment, therefore, appellant would have been required to defend against a felony-two felonious assault charge *in addition to* the felony-three disability charge. By not exhorting appellant to seek a withdrawal of his guilty plea, counsel

made a reasoned tactical decision that placed appellant in a better legal position than he would have been had he withdrawn his plea

{¶59} Given the circumstances of this case, we discern no deficiencies in counsel's performance and, as a result, we need not embark on the second element of the *Strickland* analysis.

{¶60} Appellant's final assignment of error is therefore without merit.

{¶61} For the reasons discussed in this opinion, the judgment of the Geauga County Court of Common Pleas is hereby affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.