[Cite as *State v. Satterwhite*, 2009-Ohio-6593.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23142
Plaintiff-Appellee	:	
	:	Trial Court Case Nos. 2008-CR-2114
v.	:	2008-CR-1883
	:	
ARNOLD L. SATTERWHITE, SR.	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 11th day of December, 2009.

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MATHIAS H. HECK, JR., by CARLEY. J. INGRAM, Atty. Reg. #00200804, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

LUCAS W. WILDER, Atty. Reg. #0074057, 120 West Second Street, Suite 400, Dayton, Ohio 45402
Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Arnold L. Satterwhite appeals from his conviction and sentence, following a negotiated plea of guilty, upon four counts of Aggravated Robbery, felonies of the first degree, each with a three-year firearm specification, and one count of Possession of Drugs, a felony of the fourth degree. Satterwhite

contends that the trial court erred in overruling his request for substitution of trial counsel, made the day of, and at the time scheduled for the commencement of, his trial. Satterwhite further contends that his guilty plea was not knowing and voluntary, because he did not understand that by pleading guilty he would be forfeiting the opportunity to assign as error, on appeal, the overruling of his pre-trial motion to suppress evidence.

{¶ 2} We conclude that the trial court did not abuse its discretion in overruling Satterwhite's last-minute request for the substitution of trial counsel, which was supported only by his complaining that his counsel had only met with him three times in preparation for trial, and that his counsel did not have his best interests in mind, without, however, explaining in what way his counsel had failed to act in his best interests. However, we also conclude, from our review of the record, that the trial court, in a colloquy with Satterwhite, contributed, inadvertently, to a misunderstanding that Satterwhite appears to have had that by pleading guilty he would be preserving, for appellate review, his claims of error in the trial court's overruling of his pre-trial motion to suppress. We do not go so far as to require that a trial court must, in every case where a criminal defendant is pleading guilty, explain the difference between guilty pleas and no-contest pleas in this regard, although it would be good practice to do so. Nevertheless, where, as here, it appears from the record that the trial court, in a colloquy with the defendant, contributed, inadvertently, to the defendant's having misunderstood that alleged errors in pre-trial rulings would be preserved for appellate review despite a plea of guilty, we conclude that the trial court has failed in its duty to ascertain that a defendant is pleading guilty knowingly

and voluntarily.

{¶ 3} Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I

{¶ 4} Satterwhite was charged in one indictment with one count of Possession of Criminal Tools, and one count of Possession of Drugs. That case is No. 2008 CR 1883 in the trial court. Satterwhite was charged in a second indictment, Case No. 2008 CR 2114 in the trial court, with four counts of Aggravated Robbery, three counts of Kidnapping, two counts of Having a Weapon While Under a Disability, and two counts of Aggravated Burglary. There were firearm specifications, as well. Of relevance to this appeal, all of the Aggravated Robbery counts contained firearm specifications.

{¶ 5} Satterwhite moved to suppress evidence and his own statements in Case No. 2008 CR 1883, and to suppress evidence, pre-trial identifications (as being unduly suggestive) and his own statements in Case No. 2008 CR 2114. Following a hearing, Satterwhite's motion to suppress was overruled.

{¶ 6} A jury trial was scheduled to begin on the morning of November 17, 2008. Upon appearing that morning for the selection of a jury, Satterwhite requested a substitution of his assigned counsel. The trial court listened in chambers to Satterwhite's complaints concerning his assigned counsel. Satterwhite complained that his counsel was not involved with his case, having met with Satterwhite only three times to prepare for trial, that counsel was not pursuing his

best interests, and that counsel's advice that if he planned to testify he should elect a bench trial (Satterwhite having had a significant prior criminal record) made no sense to him. Satterwhite was also upset with his counsel's advice that because of his lengthy prior criminal record, neither the trial court nor the prosecutor was likely to "allow any leeway in my case."

{¶ 7} During the course of discussing Satterwhite's last-minute request for a change of counsel, the trial court inquired concerning a plea offer that counsel had recommended Satterwhite accept, but which Satterwhite had declined.

{¶ 8} After listening to Satterwhite's complaints concerning his assigned counsel, the trial court noted that the trial date had been set, and defense counsel had been actively involved, for four months, and declined to substitute counsel ten minutes before starting the trial. The trial court then informed Satterwhite that jury selection would commence, as scheduled, in ten minutes.

{¶ 9} During this break, the parties negotiated a plea agreement that Satterwhite decided to accept. It called for Satterwhite to plead guilty to the four Aggravated Robbery counts, with the firearm specifications on each count, and to the one count of fourth-degree felony Drug Possession. All other charges would be dismissed. Satterwhite and the State agreed to a sentence of four years on each of the Aggravated Robbery convictions, with a single three-year sentence for the four merged firearm specifications, and a sentence of eighteen months on the Drug Possession conviction, with all sentences except the firearm specification sentence to be served concurrently, for an aggregate sentence of seven years. It was further agreed that this sentence would be ordered to be served concurrently with a

sentence that had not yet been imposed in federal court for some federal offenses. Because Satterwhite was indigent, there would be no fine.

{¶ 10} The trial court conducted a plea colloquy in which Satterwhite tendered his plea, the trial court determined that it was knowing and voluntary, and the trial court accepted the plea. At the sentencing hearing, sentence was imposed consistently with the plea agreement.

{¶ 11} From his conviction and sentence, Satterwhite appeals.

II

{¶ 12} As a preliminary matter, we note that the State is alleging that the written transcript prepared in accordance with App. R. 9(A) for the convenience of this court is at variance with the video recording of the proceedings, which constitutes the transcript of the proceedings for purposes of the record on appeal. We have played the CD-ROM that constitutes the official transcript of the proceedings, and we agree with the State. In so stating, however, we find no fault with defense counsel. The written transcript was prepared in accordance with the rules and procedures of the Montgomery County Common Pleas Court, and defense counsel had no control over the manner in which it was prepared, or otherwise concerning the quality of the written transcript.

{¶ 13} The first discrepancy appears at p. 110 of the written transcript, which, as filed, contains the following colloquy, which occurred just after the terms of the plea bargain had been recited and discussed:

{¶ 14} “THE COURT: Okay. Mr. Satterwhite, as you probably know, I am

required by law to go through and review with you your constitutional rights before you enter your plea[.]

{¶ 15} "MR. SATTERWHITE: Can I ask a question?

{¶ 16} "THE COURT: Go ahead.

{¶ 17} "MR. SATTERWHITE: Can I not appeal (unintelligible)?

{¶ 18} "MS. LEISTNER [representing the State]: That is not up to me.

{¶ 19} "That is up to the parole authorities and it is mandatory just by law.

{¶ 20} "It is mandatory five years.

{¶ 21} "I cannot change it and we cannot agree to reduce it and neither can the court.

{¶ 22} "It is on the record.

{¶ 23} "MR. SATTERWHITE: But you can recommend that I not do it?

{¶ 24} "MS. LEISTNER: It is mandatory five."

{¶ 25} From our review of the CD-ROM, first of all it is clear that Satterwhite turned to the prosecutor when he said, "Can I ask a question," so that it is clear that the question was being addressed to her. Secondly, it is clear that in the next question, Satterwhite did not use the word "appeal." Our best parsing of what he actually said is: "Can I not add the PRC." The meaning of this is not altogether clear, but from the discussion that follows, we are satisfied that Satterwhite was proposing that the elimination of any post-release control time be added to the terms of the plea bargain. The State responded by indicating that it was not possible to do that, since post-release control is mandated by law.

{¶ 26} The second discrepancy involves a colloquy immediately following the

trial court's having recited, and having explained, the various rights, listed in Crim. R. 11(C)(2)(c) that Satterwhite would be giving up by pleading guilty. (The giving up of the ability to assign as error on appeal any adverse rulings occurring before the guilty plea was *not* among the list of rights recited and explained to Satterwhite.) The ensuing colloquy is reflected in the written transcript as follows:

{¶ 27} "[THE COURT]: Do you understand all those rights?

{¶ 28} "MR. SATTERWHITE: Yes.

{¶ 29} "THE COURT: Do you understand that you are giving up all those rights if you plead to these charges here this morning?

{¶ 30} "MR. SATTERWHITE: Yes I am not giving them up on appeal.

{¶ 31} "THE COURT: You can appeal anything you want to but I want you to understand that I want to know what you are doing here.

{¶ 32} "You are doing this voluntarily.

{¶ 33} "You are entering pleas of guilty voluntarily.

{¶ 34} "MR. SATTERWHITE: Right."

{¶ 35} From our review of the CD-ROM, we conclude that Mr. Satterwhite, in his second statement quoted above, actually said: "Yes. I'm not giving up my appeal." Although Satterwhite's statement: "I'm not giving up my appeal," occurred immediately after his initial "Yes," with no more than a split-second's pause in between, we are satisfied that it was an independent afterthought, as though Satterwhite were seeking assurance that his right to appeal would not be among the rights that he would be giving up by pleading guilty.

{¶ 36} In the course of reviewing the CD-ROM to resolve these alleged

discrepancies, we noticed numerous other inaccuracies, usually minor, in the written transcript, none of which appear to be material to this appeal.

III

{¶ 37} Satterwhite's First Assignment of Error is as follows:

{¶ 38} "THE TRIAL COURT'S DENIAL OF DEFENDANT'S REQUEST FOR NEW COUNSEL WAS ERROR."

{¶ 39} Satterwhite cites *State v. Blankenship* (1995), 102 Ohio App.3d 534, 558, for the proposition that in order to justify substitution of court-appointed counsel, an indigent criminal defendant must show good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict leading to an apparently unjust result. Satterwhite cites *State v. King* (1995), 104 Ohio App.3d 434, 437, for the proposition that when an indigent criminal defendant questions the effectiveness of assigned counsel, the trial court must inquire into the complaint and make the inquiry part of the record. Even though Satterwhite's complaint concerning his assigned counsel occurred literally minutes before the time scheduled for the commencement of his trial, the trial court conducted an inquiry on the record, and allowed Satterwhite to make his case for the substitution of new assigned counsel at that late date.

{¶ 40} A determination of whether an indigent criminal defendant has shown good cause for the substitution of counsel necessarily involves the exercise of some discretion. Only in the most extreme circumstances should appointed counsel be substituted. *State v. Glasure* (1999), 132 Ohio App.3d 227, 239. An indigent

criminal defendant is entitled to the effective assistance of counsel, but not to his first choice of counsel. Neither is an indigent criminal defendant entitled to a review of all criminal defense lawyers practicing in the jurisdiction of the court with a view to determining which lawyer's personality best meshes with the defendant's personality.

{¶ 41} Satterwhite's generalized complaints concerning his assigned counsel largely boiled down to a perceived lack of empathy on his assigned counsel's part. This is an occupational risk of a career criminal. The right to the effective assistance of counsel does not require that a criminal defendant must develop and share a "meaningful relationship" with his attorney. *Morris v. Slappy* (1983), 461 U.S. 1, 13, 103 S. Ct. 1610, 1617, 75 L.Ed.2d 610.

{¶ 42} Finally, a motion to substitute counsel, made on the day of trial, suggests that the motion was made in bad faith for purposes of delay, especially when the trial date had been set for some time. *State v. Haberek* (1988), 47 Ohio App.3d 35, 41. Therefore, a motion to substitute counsel, made on the day of a trial that has been set for some time, requires a strong showing of good cause to overcome the implication of bad faith resulting from the timing of the motion.

{¶ 43} In the case before us, we are satisfied that the trial court conducted an appropriate inquiry into Satterwhite's contention that his assigned counsel was ineffective, and did not abuse its discretion in overruling his last-minute request for substitution of counsel. Satterwhite's First Assignment of Error is overruled.

IV

{¶ 44} Satterwhite's Second Assignment of Error is as follows:

{¶ 45} "DEFENDANT'S PLEA WAS NOT KNOWINGLY AND INTELLIGENTLY MADE BECAUSE THE TRIAL COURT FAILED TO COMPLY WITH CRIMINAL RULE 11."

{¶ 46} Satterwhite predicates this assignment of error upon his failure to have understood that by pleading guilty to the charges (as opposed to pleading no contest), he would be forfeiting his opportunity to assign as error on appeal the trial court's having overruled his motion to suppress.

{¶ 47} The State contends that a trial court is neither required, in accepting a guilty plea, to inform a criminal defendant that the guilty plea will forfeit the defendant's ability to assign as error any claimed errors in pre-trial rulings, nor to ascertain that the defendant so understands. The State cites *State v. Hiatt* (July 15, 1996), Adams App. No. 94 CA 578; and *State v. Burgin* (October 15, 1993), Ross App. No. 1949, in support of this proposition. We agree with this proposition, although we note that it is good practice, in accepting a guilty plea, to ascertain that the defendant understands this key distinction between guilty and no-contest pleas.

{¶ 48} Nevertheless, Crim. R. 11(C)(2)(b) imposes upon the trial court the duty of determining that a defendant tendering a plea "understands the effect of the plea of guilty or no contest." We agree that this Rule does not require the trial court to conduct specific inquiry into the defendant's understanding of the effect of a guilty plea on the appealability of adverse pre-trial rulings, where a defendant's misunderstanding of that effect is not apparent from the record. But we conclude that a trial court has not substantially complied with this Rule when it says something during the plea colloquy, even inadvertently, that is likely to cause the defendant to

misunderstand this specific effect of a guilty plea, or to contribute significantly to a defendant's misunderstanding in that regard.

{¶ 49} Practical considerations militate against imposing upon a trial court the duty of ascertaining that a criminal defendant tendering a guilty plea understands every conceivable effect of that plea. But where the record affirmatively demonstrates that a criminal defendant tendering a guilty plea is under a misapprehension concerning the effect of that plea, a trial court cannot be said to have complied with its duty of determining that the defendant understands the effect of the plea, without addressing and clearing up the defendant's misunderstanding. Similarly, a trial court cannot be said to have complied with its duty where it says or does something that would likely cause, or contribute to, a defendant's misunderstanding of the effect of his or her plea. Here, too, the record affirmatively demonstrates a lack of understanding.

{¶ 50} In the case before us, Satterwhite, in responding to the trial court's question whether he understood the litany of rights he would be giving up by his guilty plea, which had just been recited and explained to him, said: "Yes. I am not giving up my appeal." Because the trial judge taking the plea was a visiting judge, who was not the same judge who had presided over the suppression hearing, he may unfortunately not have been cognizant of the likely significance of the pre-trial suppression rulings in any appeal contemplated by Satterwhite. The judge was likely, and understandably, focused on the immediate task at hand, which was explaining the rights listed in Crim. R. 11(C)(2)(c) that Satterwhite would be giving up by pleading guilty. Perhaps because of these facts, the trial court responded to

Satterwhite's assertion: "I am not giving up my appeal," by saying: "You can appeal anything you want to but [redirecting Satterwhite to the task uppermost in the judge's mind] I want you to understand that I want to know what you are doing here. You are doing this voluntarily."

{¶ 51} The unfortunate likely effect of the trial court's response was to give Satterwhite the misimpression that he could still raise on appeal asserted error in the overruling of his motion to suppress, despite his guilty plea. We are sure that this was inadvertent on the part of the trial court, a retired trial judge with considerable experience. But we conclude that this constitutes an affirmative demonstration, in the record, that Satterwhite was likely operating under a misapprehension concerning the effect of his guilty plea, to which the trial court's unfortunate response contributed, which was not subsequently cleared up at the plea hearing. Under these circumstances, we conclude that the trial court failed in its duty, under Crim. R. 11(C)(2)(b), to determine that Satterwhite understood the effect of his guilty plea.

{¶ 52} Satterwhite's Second Assignment of Error is sustained.

V

{¶ 53} Satterwhite's First Assignment of Error having been overruled, and his Second Assignment of Error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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BROGAN and FROELICH, JJ., concur.

Copies mailed to:

Mathias H. Heck
Carley J. Ingram
Lucas W. Wilder
Hon. Michael T. Hall