[Cite as *State v. Walz*, 2011-Ohio-1270.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 23783
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2009-CR-1959
v.	:	
	:	(Criminal Appeal from
GREGORY L. WALZ	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 18th day of March, 2011.

. . . . . .

MATHIAS H. HECK, JR., by JOHNNA M. SHIA, Atty. Reg. #0067685, 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

ANTHONY S. VANNOY, Atty. Reg. #0067052, 130 West Second Street, Suite 1600, Dayton, Ohio 45402
Attorney for Defendant-Appellant

. . . . . .

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Montgomery County Court of Common Pleas that denied appellant's motion to vacate the guilty pleas he entered to one

count of felonious assault on a police officer, one count of vandalism, and one count of failure to comply with an order or signal of a police officer. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} Appellant sets forth two assignments of error:

{¶ 3} "First assignment of error

{¶ 4} "APPELLANT'S PLEA WAS NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY EXECUTED, AND SHOULD BE VACATED, BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 5} "Second assignment of error

{¶ 6} "THE TRIAL COURT ERRED IN REFUSING TO VACATE APPELLANT'S PLEA."

{¶ 7} On June 25, 2009, appellant was indicted on two counts of felonious assault in violation of R.C. 2903.11(A)(1), one count of vandalism in violation of R.C. 2909.05(B)(1)(a), and one count of failure to comply with an order or signal of a police officer in violation of R.C. 2921.331(B) and (C)(5). On June 30, 2009, appellant entered pleas of not guilty to all counts. On October 23, 2009, appellant changed his pleas to guilty as to all counts; entries of waivers and pleas were filed and a hearing was held that same day. On November 5, 2009, appellant filed a notice of substitution of counsel along with a motion to vacate his plea and a request for a hearing. In the motion to vacate his plea, appellant asserted that he relied on counsel in entering the plea and that counsel failed to fully disclose the consequences of his decision.

{¶ 8} On December 3, 2009, a hearing was held on appellant's motion to vacate his

plea. The matter was continued for further hearing on December 9, 2009 on the issue of whether appellant's belief in his innocence was relevant to his request to withdraw his guilty plea. On December 11, 2009, the trial court overruled appellant's motion to vacate his plea. Also on that date, the trial court sentenced appellant to seven years imprisonment for one of the felonious assault convictions and 12 months for the vandalism conviction, to be served concurrently, as well as 12 months for the failure to comply conviction, to be served consecutively with the first two convictions. The two felonious assault convictions were merged for purposes of sentencing.

{¶ 9} Appellant's two assignments of error will be addressed together. Appellant claims that he entered the plea agreement based solely on his attorneys' assurances that he would be eligible for judicial release after five years. He further asserts that he was denied effective assistance of counsel, which prevented him from entering his plea knowingly, voluntarily and intelligently.

{¶ 10} Our analysis of appellant's claims requires a review of the October 23, 2009 plea agreement hearing and the December 3, 2009 hearing on appellant's motion to withdraw his plea.

{¶ 11} The offenses of felonious assault were based on allegations that a police officer was seriously injured on June 16, 2009, when the officer confronted appellant at a drive-through scrap metal recycling facility after receiving a tip about a man attempting to sell brand new copper tubing. When the officer approached appellant in his car and began to talk, appellant attempted to drive away. The officer, who had reached in the driver's side window to grab appellant, was dragged forward and thrown into a wall. Both of the felonious assault

counts on which appellant was indicted charged that the victim was a peace officer who was assaulted while in the performance of his official duties. R.C. 2903.11(D)(1)(b) provides that if the victim is a peace officer and the victim suffered serious physical harm, felonious assault is a felony of the first degree and the trial court shall impose a mandatory prison term from three to 10 years pursuant to R.C. 2929.14.

{¶ 12} It should be noted that appellant initially hired the firm of Rion, Rion and Rion for his defense. The Rion law firm employs a "team approach" with its clients. At various times, appellant was represented by attorneys Jon Paul Rion, Kevin Lennen and Nicole Rutter-Hirth. When appellant moved to withdraw his guilty plea, he hired new counsel.

{¶ 13} On October 23, 2009, a plea hearing was held. Appellant was represented by attorney Kevin Lennen. At the outset, the trial court informed appellant that if he entered a plea of guilty to all of the indicted charges the court would sentence him to eight years incarceration. The judge asked appellant if his attorneys had given him that information and appellant responded that they had. The judge again stated his "commitment" that appellant would receive eight years and appellant responded that he understood. The judge then referred to a discussion the previous day during which the issue of judicial release was raised. The following colloquy took place:

{¶ 14} "THE COURT: And we looked into that. But given the fact that the sentence that you – the sentence you are facing is a mandatory sentence. What we have discovered is *there's just no way to structure this to make you eligible for judicial release. And I know that your attorneys have also discussed that with you; is that correct*?"

{¶ 15} "THE DEFENDANT: *Yes, sir*.

{¶ 16} "THE COURT: All right. And you understand that?

{¶ 17} "THE DEFENDANT: Yes.

{¶ 18} "THE COURT: All right. *So, you're not entering into this plea with any thought that you will get any judicial release or be released early in any way; is that correct?*

{¶ 19} "THE DEFENDANT: *Yes, sir*." [Emphasis added.]

{¶ 20} Thereafter, the trial court took appellant's plea. The trial court accepted each of appellant's guilty pleas, finding that the pleas were entered knowingly, intelligently and voluntarily. The trial court found that appellant understood the constitutional rights he was waiving, the nature of each charge, the maximum penalties involved and that his prison term would be eight years.

{¶ 21} The matter was set for sentencing, but when appellant filed the motion to vacate his guilty plea a hearing on the motion was set for December 3, 2009. Appellant appeared at the hearing with newly-retained counsel. For purposes of the motion hearing, appellant waived attorney-client privilege as it related to any of the attorneys with the Rion firm ("Rion").

{¶ 22} Appellant presented the testimony of Kevin Lennen, an attorney with Rion. Lennen explained that he worked with appellant primarily with regard to entering the plea and appeared on appellant's behalf at the plea hearing. The attorney acknowledged a discussion he and the prosecutor had with the judge the day before the plea hearing regarding appellant's eligibility for judicial release and stated that the judge informed him at that time that if appellant entered the plea he would serve eight years. That information was given to

appellant. Lennen stated that, on the day of the hearing, he talked with appellant "a good amount" and reviewed "the ramifications of the plea agreement." He told appellant at the final pretrial that the judge was "quite clear" that he did not consider appellant eligible for judicial release. Lennen did not believe appellant was confused about the sentence when the two of them discussed the plea. Lennen testified that he told appellant that if he entered the plea he would serve eight years because he knew appellant was still "holding out" for five years.

{¶ 23} Appellant testified that the day before the final pretrial, attorney Nicole Rutter-Hirth told him that he was not eligible for judicial release and that the matter would be continued until the following day. He stated that, upon hearing that information, he decided he wanted to talk to Jon Paul Rion about going to trial. Appellant testified that Lennen then told him he believed appellant was eligible for judicial release and that if he took the plea Lennen would file the appropriate papers in five years. Appellant stated at the motion hearing that he was confused because "the whole Rion firm" had told him he could get judicial release after five years. He further testified that he did understand when the judge told him he would receive an eight-year sentence with no judicial release, and then stated that he made a mistake when he entered the plea.

{¶ 24} At the motion hearing, appellant agreed that the trial court "went to great lengths" to make sure appellant understood exactly the prison term he was facing. While appellant claimed that his attorney was telling him he was eligible for judicial release, he also admitted he understood at the time of the plea that the very same judge who would make any decision as to early release was in fact telling him that he would serve the full eight years.

{¶ 25} Appellant now asserts that when the trial court informed him at the plea hearing that he would be serving an eight-year sentence, he was confused. However, the transcript of the hearing, as set forth in part above, clearly reflects that the trial court twice told appellant that he was *not* eligible for judicial release; twice, appellant indicated that he understood. At the plea hearing, the trial court gave appellant an opportunity to ask questions; appellant admitted that he did not ask why the judge was telling him he would serve eight years when his attorney had told him something different.

{¶ 26} Generally, a motion to withdraw a guilty plea that is filed prior to sentencing, as in this case, will be freely allowed. *State v. Drake* (1991), 73 Ohio App.3d 640; *State v. Thomas*, Allen Cty. App. No. 1-08-36, 2008-Ohio-6067, ¶ 6. However, this does not mean that a motion to withdraw a guilty plea will be granted automatically. *Drake* at 645. "A defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. A trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *State v. Xie* (1992), 62 Ohio St.3d 521, at paragraph one of the syllabus. It is within the trial court's sound discretion to determine whether there is a legitimate and reasonable basis for the withdrawal of a guilty plea and, absent an abuse of discretion, the trial court's decision on the matter must be affirmed. Id. at 527. An abuse of discretion is more than an error of judgment; it implies that the decision is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 27} Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *McMann v. Richardson* (1970), 397 U.S. 759, 751. The facts of this case fail to show that appellant received ineffective assistance of counsel pursuant

to *Strickland v. Washington* (1984), 466 U.S. 668. *Strickland* requires a defendant to show, first, that counsel's representation fellow below an objective standard of reasonableness and, second, a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. This test is applied in the context of Ohio law that states that a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153.

{¶ 28} We note that in *Padilla v. Kentucky* (2010), __ U.S. __, 130 S.Ct. 1473, the United States Supreme Court held that trial counsel engaged in deficient performance by failing to advise Padilla that his plea of guilty made him subject to automatic deportation. The *Padilla* court held that counsel has a critical obligation to advise a client of the advantages and disadvantages of a plea agreement. *Padilla* at 1485. In the case before us, it is clear appellant's attorneys believed that his best interests would be served by entering a guilty plea. Appellant initially accepted the advice of his attorneys but had a change of heart immediately after entering the plea even though he knew beforehand that he would be sentenced to eight years imprisonment. Based on the evidence against appellant and the fact that the eight-year sentence represented a reduction in the potential sentence appellant could have received had he gone to trial and been found guilty of each count of the indictment, we cannot say that his attorneys acted unreasonably.

{¶ 29} We find based on the record that there was no assurance given that appellant would be eligible for judicial release in five years. Any perceived assurance from counsel flies in the face of the trial court's repeated, emphatic language informing appellant that he would serve the full eight years and would not be eligible for judicial release. The trial court

conducted a thorough plea hearing and addressed appellant at length regarding his understanding of the plea and the rights he was waiving. Appellant's testimony at the plea withdrawal hearing as summarized above confirmed that he understood the plea agreement and the trial court's statement that appellant would serve the full eight years. Appellant's arguments in support of withdrawing his plea are not persuasive.

{¶ 30} Based on the foregoing and our thorough review of the transcripts of the plea hearing and motion hearing, this court finds that appellant's plea was entered knowingly, intelligently and voluntarily and that the trial court did not err by refusing to vacate appellant's plea. Accordingly, appellant's first and second assignments of error are not well-taken.

{¶ 31} On consideration whereof, the judgment of the Montgomery County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

. . . . . .

DONOVAN, J., and FROELICH, J., concur.

(Hon. Thomas J. Osowik, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Mathias H. Heck, Jr.
Johnna M. Shia
Anthony S. VanNoy
Hon. Michael Tucker