

[Cite as *State v. Storck*, 2015-Ohio-2880.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

DANNY STORCK

Defendant-Appellant

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C.A. CASE NO. 2014-CA-130

T.C. NO. 14CR154

(Criminal appeal from
Common Pleas Court)

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OPINION

Rendered on the 17th day of July, 2015.

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DONOVAN, J.

{¶ 1} Defendant-appellant Danny Storck appeals his conviction and sentence for one count of aggravated robbery with a deadly weapon, in violation of R.C. 2911.01(A)(1), a felony of the first degree. Storck filed a motion for leave to file a notice of delayed appeal from the trial court's June 23, 2014, Judgment Entry of Conviction.

The State did not file a response to Storck's motion. On December 22, 2014, this Court sustained Storck's motion for leave to file a delayed appeal. In an entry issued on December 29, 2014, we appointed counsel for the sole purpose of representing Storck in the instant appeal.

{¶ 2} The incident which forms the basis for the instant appeal occurred on February 24, 2014, when Storck entered a Speedway gas station located at 1314 East Main Street in Springfield, Ohio. Brandishing a knife, Storck forced the gas station employee behind the counter and took money from the register. After taking the money, Storck fled the gas station, but was apprehended shortly thereafter by Springfield Police Officer Meredith Freeman. When he was taken into custody, Storck was in possession of a black pocketknife.

{¶ 3} Storck was indicted on one count of aggravated robbery on March 3, 2014. At his arraignment on March 10, 2014, Storck pled not guilty to the charged offense. On June 17, 2014, Storck pled guilty to one count of aggravated robbery, and the trial court imposed an agreed sentence of seven years in prison.

{¶ 4} It is from this judgment that Storck now appeals.

{¶ 5} Storck's sole assignment of error is as follows:

{¶ 6} "THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY COUNSEL, AS PROTECTED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶ 7} In his sole assignment of error, Storck contends that his trial counsel was deficient for failing to inform him of the lesser included offense of robbery before advising

him to plead guilty to aggravated robbery. Therefore, Storck argues that his guilty plea was not made in a knowing, voluntary, and intelligent fashion.

{¶ 8} A claim of ineffective assistance of trial counsel requires both a showing that trial counsel's representation fell below an objective standard of reasonableness, and that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reviewing court "must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The prejudice prong requires a finding that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, with a reasonable probability being "a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see also State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

{¶ 9} A guilty plea waives the right to allege ineffective assistance of counsel, except to the extent that the errors caused the plea to be less than knowing and voluntary. *State v. Spates*, 64 Ohio St.3d 269, 595 N.E.2d 351 (1992); *see State v. Huddleson*, 2d Dist. Montgomery No. 20653, 2005-Ohio-4029, ¶ 9. The reviewing court must therefore determine whether the trial court substantially complied with Crim.R. 11 in accepting the plea. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). If the rule was complied with, the plea was knowing, voluntary, and intelligent. *Id.*

{¶ 10} At the outset of the plea hearing, the following exchange occurred:

The State: Thank you, Your Honor. If the defendant will plead guilty to the count of the indictment aggravated robbery [sic], the State will agree to a seven-year sentence to the State penitentiary.

The Court: All right. Did you want to place the facts on the record?

The State: On or about February 24, 2014, at the Speedway located at 1314 E. Main Street, Springfield, Clark County, Ohio, the defendant, Danny Storck, entered said store, *took the employee at knife point behind the counter and forcibly took money from the register.*

The Court: Is that your understanding of the agreement, [defense counsel]?

Defense Counsel: Your Honor, that's a fair and accurate recitation of the agreement between the State of Ohio and Mr. Storck. Pursuant to that agreement, Your Honor, Danny will change his original plea of not guilty to one of guilty to aggravated robbery, a felony of the first degree.

In consideration for that change of plea, the parties do agree that the Court will impose an agreed sentence of seven years in the Department of Corrections with credit for time spent or served.

The Court: Is that what you want to do this morning, Mr. Storck?

Storck: Yes, Your Honor.

The Court: The nature of the offense to which you are pleading guilty is that on or about February 24, 2014, at Clark County, Ohio, you did in attempting or committing a theft offense have a deadly weapon on or about your person or under your control and you displayed the weapon and used the weapon. Do you understand the nature of your offense?

Storck: Yes, sir.

The Court: By pleading guilty, you would be giving up all of these rights that we have gone over. *Are you telling the Court that you want to give those rights up and plead guilty to aggravated robbery?*

Storck: Yes, *sir*.

{¶ 11} Storck was convicted of aggravated robbery, in violation of R.C. 2911.01(A)(2), which provides that “[n]o person, in attempting or committing a theft offense, ***, or in fleeing immediately after the attempt or offense, shall *** [h]ave a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]”

{¶ 12} Robbery, as defined in R.C. 2911.02(A)(1), is a lesser included offense of aggravated robbery as defined in R.C. 2911.01(A)(1). *State v. Woods*, 2d Dist. Montgomery No. 19005, 2002-Ohio-2355. “The difference between the two crimes is that aggravated robbery also requires that the offender ‘either display the weapon, brandish it, indicate that the offender possesses it, or use it.’ R.C. 2911.01(A)(1).” See *State v. Gooden*, 2d Dist. Montgomery No. 19231, 2003-Ohio-905, ¶ 42.

{¶ 13} In the instant case, Storck claims that his counsel was ineffective for failing to inform him that the lesser included offense of robbery “would have been instructed to the jury.” Storck further argues “that had such information been made available, it would have altered whether or not he took a plea *** [;] defendant therefore did not make a knowledgeable waiver of his right to jury trial[,] and the result would likely have been different.”

{¶ 14} Although not raised by Storck, we initially note that the trial court informed

him of the facts underlying the charge against him, the maximum sentence that he faced, and the constitutional rights that he waived by foregoing a trial. Prior to accepting the plea, the trial court asked Storck whether he understood what he was doing, whether he was acting of his own free will and not as the result of any promises aside from those incorporated in the plea agreement, and whether he wanted the court to accept the plea. Storck responded to all of these questions in the affirmative. Storck acknowledged that he had discussed his case with his attorney, including the elements of the offenses with which he was charged and his potential defenses. Storck stated that his attorney had gone over the plea form with him and that he was satisfied with his attorney's representation. Accordingly, we find that the trial court substantially complied with Crim.R. 11.

{¶ 15} Upon review, we conclude that the record before us is devoid of any facts which establish that Storck's guilty plea was not knowingly, intelligently, and voluntarily made. Prior to entering his plea, Storck was advised of the charges, the possible sentences, and the constitutional and non-constitutional rights he was waiving by pleading guilty. Significantly, Storck acknowledged that he committed aggravated robbery with a deadly weapon, to wit: that he "entered said store, *took the employee at knife point behind the counter* and forcibly took money from the register." At no point did Storck express any confusion regarding any of the information provided by the trial court in its Crim.R. 11 colloquy, nor did he express any displeasure with the performance of his counsel in advising him to plead guilty. By pleading guilty, Storck waived his right to present evidence at trial to refute the State's narrative that he used the knife found in his possession to aid in the commission of the robbery. Simply put, the record is devoid of

any evidence supporting the defendant's ineffective assistance claim because there are no facts in the record which even remotely establish that his trial counsel's *alleged* failure to advise him of the lesser included offense of robbery had any effect on his decision to plead guilty. Significantly, there is no evidence in the record which would support a potential jury instruction on the lesser included offense of robbery. Thus, we find that Storck's assignment alleging that he received ineffective assistance is without merit.

{¶ 16} Nevertheless, Storck does have another potential avenue for relief. On this point, we find our prior holding in *State v. Laster*, 2d Dist. Montgomery No. 19387, 2003-Ohio-1564, to be instructive.

{¶ 17} In *Laster*, the defendant filed a motion to withdraw a guilty plea, arguing that he was "misled into a plea of guilty upon erroneous advice of counsel." *Id.* at ¶ 8. We explained that, if true, this "would possibly render [defendant's] plea less than knowing and voluntary and, therefore, he would be allowed to change his plea". *Id.* However, because there was nothing in the record supporting the defendant's ineffective assistance claim, we found that the trial court correctly overruled the motion to withdraw. In this regard, we stated:

[W]here nothing in the record supports a defendant's claim that his plea was not knowingly and voluntarily made other than his own self-serving affidavit or statement, the record is insufficient to overcome the presumption that the plea was voluntary. An argument grounded on matters outside the record can only be addressed by a post-conviction relief motion. (Citation omitted.)

Id.

{¶ 18} As explained in *Laster*, matters outside the record must be addressed in a

post-conviction relief motion. “[T]he availability of the post relief conviction route removes claims based on matters outside the record from the form of extraordinary circumstances demonstrating a manifest injustice.” *Id.* Similar to the defendant in *Laster*, Storck’s argument that his counsel was ineffective for failing to advise him regarding the lesser included offense of robbery pertains to matters outside the record, and is therefore more suited for a petition for post-conviction relief, if he so chooses to file one.

{¶ 19} Storck’s sole assignment of error is overruled.

{¶ 20} Storck’s sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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FROELICH, P.J. and WELBAUM, J., concur.

Copies mailed to:

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