[Cite as *State v. Collins*, 2009-Ohio-6346.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio

Appellee

v.

Corey M. Collins

Appellant

Court of Appeals Nos. H-09-001
H-09-005

Trial Court No. CRI 20080554

DECISION AND JUDGMENT

Decided: December 4, 2009

* * * * *

Russell Leffler, Huron County Prosecuting Attorney, and
Richard R. Woodruff, Assistant Prosecuting Attorney, for appellee.

Loretta Riddle, for appellant.

* * * * *

ABOOD, J.

{¶ 1} This is an appeal from a judgment of the Huron County Court of Common Pleas in which appellant, Corey M. Collins, was sentenced on one count of trafficking in cocaine as a fifth degree felony and four counts of trafficking in cocaine as third degree felonies.

{¶ 2} In this consolidated appeal, appellant asserts four assignments of error.

{¶ 3} 1. "The trial court erred by not allowing appellant to withdraw his plea when the trial court finds the defendant 'might have had an opportunity to assert an entrapment defense' to one of the charges in the indictment."

{¶ 4} 2. "The trial court erred by not following [Crim.R. 11] when taking the appellant's plea of guilty, or in the alternative, appellant had ineffective assistance of counsel."

{¶ 5} 3. "The trial court abuses its discretion and a sentence is contrary to law when the court uses an offense that has strict liability, littering, as a basis for recidivism."

{¶ 6} 4. "R.C. 2929.18 does not allow restitution to be awarded to a police department when the police department makes controlled buys and institutes stings against citizens, any award of restitution to a police department when that department is not a victim of the crime is contrary to law and the court abuses its discretion by ordering a defendant to pay restitution to the police [sic]."

{¶ 7} The facts that are relevant to the issues raised on appeal are as follows. On May 23, 2008, appellant was indicted on one count of trafficking in hydrocodone, a felony of the fifth degree; one count of trafficking in cocaine, a felony of the fifth degree; and four counts of trafficking in cocaine, each a felony of the third degree. On August 22, 2008, appellant entered guilty pleas to all five of the trafficking in cocaine charges. The court accepted the pleas, entered findings of guilty thereon, and in accordance with

the plea agreement with the prosecutor, dismissed the trafficking in hydrocodone charge. As part of the negotiated plea, the state also agreed not to oppose concurrent sentences.

{¶ 8} On October 28, 2008, appellant was sentenced to 11 months incarceration for the fifth degree felony and terms of three years incarceration for each of the third degree felonies, all of which was ordered to be served concurrently, for a total of three years incarceration. The court imposed fines of $5,000 for each third degree felony and a one year driver's license suspension as to each count. The court also ordered "restitution in the amount of $5,855 to be paid to the Norwalk Police Department."

{¶ 9} On November 26, 2008, appellant filed a motion to withdraw his plea. In his motion and accompanying affidavit, appellant asserted that his attorney had failed to advise him of, or discuss with him, the affirmative defense of entrapment. On December 19, 2008, without a hearing, the court filed its judgment entry in which it denied appellant's motion to withdraw his plea.

{¶ 10} In his first assignment of error, appellant challenges the trial court's denial of his post-sentence motion to withdraw his guilty plea. In support, he argues that his counsel's failure to inform him of the possible defense of entrapment shows a "manifest injustice" that can only be remedied by allowing him to withdraw his plea. Appellant points to the trial court's statement in its judgment entry denying his motion to withdraw his plea, that appellant may have been able to assert the defense of entrapment to the charge of trafficking in hydrocodone. Appellant argues that, since he was not advised of

the possibility of the existence of an entrapment defense, his plea was not knowingly, intelligently and voluntarily entered.

{¶ 11} Crim.R. 32.1 provides: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." While pre-sentence motions to withdraw a guilty plea are to be liberally granted, *State v. Xie* (1992), 62 Ohio St.3d 521, 527, a defendant who moves to withdraw a plea after sentencing must demonstrate that a "manifest injustice" occurred to prevail.

{¶ 12} "An appellate court reviews the trial court's denial of appellant's motion under an abuse-of-discretion standard, i.e., whether the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Xie*, at 527, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157." *State v. Thompson*, 6th Dist. No. L-08-1052, 2009-Ohio-3193, ¶ 19.

{¶ 13} In its judgment entry denying the motion to withdraw appellant's plea, the trial court stated, "* * * Upon review of the defendant's affidavit there is no reason to believe an entrapment defense would have been appropriate in this case * * * Defendant's affidavit at best suggests that defendant might have had an opportunity to assert an entrapment defense as to the charge of trafficking in hydrocodone which had been prescribed to him; however, that charge was dismissed as part of the plea."

{¶ 14} This court has reviewed the entire record of proceedings in the trial court. Upon consideration thereof, particularly the dialogue that took place between appellant and the court at the time the plea was entered, this court cannot find anything that suggests that appellant's plea was not knowingly, intelligently and voluntarily entered, and there is nothing in the language used by the trial court in its judgment entry, supra, that changes that.

{¶ 15} In accordance with the foregoing, this court finds that appellant has not shown that the failure of the trial court to grant the motion to withdraw his plea resulted in a manifest injustice or that the trial court acted in abuse of its discretion when it denied the motion. Appellant's first assignment of error is not well-taken.

{¶ 16} In support of his second assignment of error, appellant argues that the trial court failed to follow the requirements of Crim.R. 11 in accepting his guilty plea, and, in the alternative, that he had ineffective assistance of counsel in the trial court's proceedings.

{¶ 17} "The trial court must strictly comply with Crim.R. 11(C)(2) regarding federal constitutional rights, but need only substantially comply with the rule regarding non-constitutional rights." *State v. Abuhasish*, 6th Dist. No. WD-07-048, 2008-Ohio-3849, ¶ 32.

{¶ 18} Pursuant to Crim.R. 11(C)(2), before a trial court accepts a plea of guilty, the court must first have addressed the defendant personally for the purpose of:

{¶ 19} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶ 20} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶ 21} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶ 22} Upon review of the record of proceedings at appellant's plea hearing, this court finds that the trial court strictly complied with all of the constitutional notification requirements and the requirements of Crim.R. 11.

{¶ 23} Additionally, the trial court asked appellant about his counsel's representation:

{¶ 24} "THE COURT: Have you had an opportunity to fully discuss this matter with your attorney?

{¶ 25} "THE DEFENDANT: Yes, sir.

{¶ 26} "THE COURT: Have you shared with him all the facts that you know that are relevant to the case?

{¶ 27} "THE DEFENDANT: Yes, sir.

{¶ 28} "THE COURT: Has he shared with you information that he received from the state with regard to what the state intends to prove?

{¶ 29} "THE DEFENDANT: Yes, sir.

{¶ 30} "THE COURT: Have you discussed with him any possible defenses you might have to the charge?

{¶ 31} "THE DEFENDANT: Yes, sir.

{¶ 32} "THE COURT: Are you satisfied with your attorney's advice and his competence?

{¶ 33} "THE DEFENDANT: Yes, sir.

{¶ 34} "THE COURT: Do you understand the plea agreement and by that I mean the written plea agreement that I'm holding here in my hands?

{¶ 35} "THE DEFENDANT: Yes, sir.

{¶ 36} "THE COURT: Have you had an opportunity to review that?

{¶ 37} "THE DEFENDANT: Yes, sir.

{¶ 38} "THE COURT: Have you had an opportunity to review that with your attorney?

{¶ 39} "THE DEFENDANT: Yes.

{¶ 40} "* * *

{¶ 41} "THE COURT: Do you believe it's in your best interest to enter into that plea?

{¶ 42} "THE DEFENDANT: Yes, sir, I believe so."

{¶ 43} Despite the above colloquy, appellant argues that the trial court should have inquired further as to whether his counsel discussed the defense of entrapment with him. Appellant seems to be arguing that, at the time a plea is entered, the court is required to inquire as to whether a defendant has been advised of each and every possible defense that could be available to any criminal defendant. That, however, is simply not the case. There is no constitutional right to discussion of possible defenses. *State v. Reynolds* (1988), 40 Ohio St.3d 334; *State v. Goddard*, 3rd Dist. No. 16-06-05, 2007-Ohio-1229, ¶ 13-14 ("[c]laims of voluntariness have been repeatedly rejected where the only alleged deficiency is that the defendant was not informed of a right or waiver not specified in Crim.R. 11").

{¶ 44} Alternatively, appellant argues that his counsel was ineffective for failing to discuss the defense of entrapment with him before he entered his guilty plea. This precise challenge to a guilty plea was rejected in *State v. Beeler* (Mar. 2, 1993), 4th Dist. No. 1889. Further, claims that a defendant's trial counsel was ineffective for failing to raise the entrapment defense or similar defenses have been consistently rejected as tactical decisions or sound strategy. *State v. Faulkner* (Apr. 22, 1993), 2d Dist. No. 2892; *State v. Graves*, 6th Dist. No. L-02-1053, 2003-Ohio-2359.

{¶ 45} In order to establish a claim for ineffective assistance of counsel, a defendant must demonstrate: (1) that counsel's performance was deficient or unreasonable under the circumstances; and (2) that the deficient performance prejudiced the defendant. *State v. Kole* (2001), 92 Ohio St.3d 303, 306, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687. "To establish prejudice when ineffective assistance of counsel relates to a guilty plea, a defendant 'must show there is a reasonable probability that, but for counsel's deficient or unreasonable performance, the defendant would not have pled guilty.' *State v. Schmidt*, 3d Dist. No. 15-05-18, 2006-Ohio-2948, ¶ 32, citing *State v. Xie*, 62 Ohio St.3d 521, 524." *State v. Worthington*, 3d Dist. No. 9-07-62, 2008-Ohio-3222, ¶ 21.

{¶ 46} Upon consideration of the entire record of proceedings in the trial court, this court finds that appellant has not shown that his counsel in the trial court acted in a manner that amounted to a substantial violation of that counsel's essential duties to appellant. Appellant has also not shown that there is a reasonable probability that, but for unprofessional errors committed by his counsel, that he would not have pled guilty. In accordance with the foregoing, appellant's second assignment of error is not well-taken.

{¶ 47} In support of this third assignment of error, appellant alleges that the trial court abused its discretion by imposing a sentence of three years incarceration for a first offense. Appellant argues that the trial court improperly took into consideration a prior conviction of littering, a "strict liability" offense, as a recidivism factor in determining the sentence. Contrary to his assertions, however, the trial judge noted the prior littering

offense but stated that he did not believe that it would make a repeat offense more likely to occur.

{¶ 48} A trial court considers sentencing factors, including a factor for recidivism, pursuant to the general guidance statues for sentencing, R.C. 2929.11 and 2929.12. Appellate courts review a trial court's consideration and application of R.C. 2929.11 and 2929.12 for an abuse of discretion. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 17. An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Id. at ¶ 19, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 49} Upon consideration of the entire record of proceedings in the trial court, this court finds that appellant has not shown that the trial court acted in abuse of its discretion in determining the sentence to be imposed. Appellant's third assignment of error is not well-taken.

{¶ 50} In his fourth assignment of error, appellant challenges the award of restitution to the Norwalk Police Department in the amount of $5,855.

{¶ 51} R.C. 2929.18(A) governs restitution and how it may be imposed. *State v. Didion*, 173 Ohio App.3d 130, 2007-Ohio-4494, ¶ 28. In relevant part, the statute provides that a court may impose restitution "to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss." The statute does not authorize restitution to third parties. Id. Since orders of restitution to third parties are not authorized by statute, it is contrary to law, and the defendant does not

waive the issue on appeal by failing to object. See *State v. Montgomery*, 4th Dist. No. 07CA858, 2008-Ohio-4753; *State v. Wolf*, 3d Dist. No. 14-06-54, 2008-Ohio-1483, ¶ 38.

{¶ 52} At sentencing, the state indicated that the five counts to which appellant pled guilty were based on appellant's sales of cocaine to a confidential informant. It would appear that the trial court may have awarded the restitution to the police department for its expenses in using a confidential informant and making the buys. Even if that is the case, however, such expenses do not render the police department a "victim" to which restitution is authorized. See *State v. Samuels*, 4th Dist. No. 03CA8, 2003-Ohio-6106, ¶ 5 (construing analogous-predecessor statute; a law-enforcement agency is not a "victim" of a crime when it "voluntarily spent its own funds to pursue a drug buy through an informant"); *State v. Toler*, 174 Ohio App.3d 335, 2007-Ohio-6967, ¶ 11 ("government entities do not constitute 'victims' entitled to restitution for their expenditure of public funds in the pursuit of fighting crime"); *State v. Pietrangelo*, 11th Dist. No. 2003-L-125, 2005-Ohio-1686, ¶ 15 ("[A] government entity voluntarily advancing its own funds to pursue a drug buy through an informant is not one of the scenarios contemplated by R.C. 2929.18(A)(1).")

{¶ 53} In accordance with the foregoing, appellant's fourth assignment of error is well-taken.

{¶ 54} Accordingly, the judgment of the Huron County Court of Common Pleas is reversed as to the order of restitution to the Norwalk Police Department but is affirmed in all other respects. This matter is remanded to the trial court to enter a judgment

consistent with this decision and the applicable law. Appellant and appellee are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED IN PART
AND AFFIRMED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Charles D. Abood, J. _____
CONCUR.
JUDGE

Judge Charles D. Abood, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.