

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

State of Ohio

Court of Appeals No. S-09-005

Appellee

Trial Court No. 08CR1140

v.

Gilberto Marez, Jr.

DECISION AND JUDGMENT

Appellant

Decided: December 31, 2009

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney, and
Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Andrew R. Bucher, for appellant.

* * * * *

ABOOD, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas in which appellant was sentenced, following a guilty plea, on one count of felonious assault, a felony of the second degree.

{¶ 2} In support of his appeal, appellant sets forth four assignments of error.

{¶ 3} "I. The defendant-appellant was prejudiced by ineffective assistance of counsel in violation of his right to counsel as guaranteed to him by the Sixth Amendment of the United States Constitution which directly caused an involuntary guilty plea to be entered by appellant.

{¶ 4} "II. Structural error was committed when defendant-appellant was denied his right to counsel when the trial court failed to rule upon contemporaneous [sic] pending motions for new counsel and to withdraw as counsel of record.

{¶ 5} "III. The defendant-appellant entered, the trial court accepted, and sentenced [sic] upon an invalid, involuntary guilty plea in violation of Criminal Rule 11.

{¶ 6} "IV. The sentence imposed upon defendant by the trial court is void due to defects in its imposition by the trial court in violation of ORC 2967.28(B)(2)."

{¶ 7} The facts that are relevant to the issues raised on appeal are as follows. On October 7, 2008, appellant, Gilberto Marez, Jr., was indicted on one count of felonious assault, in violation of R.C. 2903.11(A)(1), and one count of violation of a protection order, in violation of R.C. 2919.27(A)(1) and (B)(4). The charges stemmed from allegations that appellant, while under the influence of alcohol and drugs, had attacked and beaten his former girlfriend. Appellant initially pled not guilty to both charges.

{¶ 8} At a pretrial on October 21, 2008, appellant indicated to the court that he wished to have a new attorney appointed to represent him. In response, appellant's attorney stated that he believed appellant was unhappy with his representation and moved to withdraw as appellant's counsel. The court conducted an inquiry as to appellant's

reasons for requesting new counsel but did not specifically rule on appellant's request or counsel's motion.

{¶ 9} On October 31, 2008, appellant returned to court represented by the same attorney. Pursuant to a plea agreement with the prosecutor, appellant entered a guilty plea to Count 1, felonious assault, and Count 2, violation of a protection order, was dismissed. At the plea hearing, the prosecutor indicated that the victim was found naked and bloody in her residence, with severe body and possible brain injuries. She was first transported to a local Fremont hospital but was later life-flighted to Toledo Hospital. While in the hospital, the girlfriend stated that it was appellant, her former live-in boyfriend, who had inflicted the injuries. The court accepted appellant's guilty plea, ordered a presentence investigation, and continued the case for sentencing.

{¶ 10} On January 7, 2009, the trial court conducted a sentencing hearing. Appellant acknowledged his drug and alcohol abuse problem, and stated that he did not remember the events of the evening that the victim had been beaten. At the hearing, appellant, the victim, and a minister all gave statements and requested that appellant receive drug and alcohol treatment. After considering the presentence investigation report and appellant's criminal history, the court sentenced appellant to a term of seven years in prison and five years of postrelease control.

{¶ 11} Appellant now appeals from that judgment.

I.

{¶ 12} This court first will address the third assignment of error in which appellant argues that his guilty plea was "invalid" and "involuntary" and not in compliance with Crim.R. 11. The basis of appellant's argument is that there was a discrepancy between the written plea agreement and the verbal discussion appellant had with the court at the time the plea was entered regarding the amount of postrelease control time that might be imposed. He contends that this discrepancy caused his plea to be involuntary because he did not understand that he could get a mandatory three years of postrelease control.

{¶ 13} Before accepting a plea of guilty, Crim.R. 11(C)(2) requires that the trial court inform a defendant of the constitutional rights he waives by entering the plea. *State v. Nero* (1990), 56 Ohio St.3d 106, 107. Crim.R. 11(C)(2) provides, in pertinent part, that:

{¶ 14} "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶ 15} "* * *

{¶ 16} "(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."

{¶ 17} A trial court must strictly comply with the constitutional requirements referenced in Crim.R. 11(C)(2)(c) before accepting a guilty plea in a felony case by orally advising the defendant of those rights that he is waiving. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, syllabus. Although strict compliance is necessary, the court is not required to use the exact language contained in Crim.R. 11(C)(2)(c). *Id.* ¶ 27, quoting *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph two of the syllabus. A guilty plea need not be vacated so long as the trial court explains the constitutional rights that a defendant waives by pleading guilty in a manner reasonably intelligible to the defendant. *Ballard*, *supra*.

{¶ 18} The relevant portion of the plea agreement that appellant signed includes the following statement:

{¶ 19} "7. If the judge imposes a prison term, I may also be subjected to a period of Post Release Control for up to 5 years after my release from imprisonment. If I violate Post Release Control, I could be sentenced to an additional term of imprisonment of up to 9 months for each violation up to a maximum of one-half of the original sentence. If the new violation is a felony, I could be required to serve an additional term of imprisonment of the greater of one-year of the time remaining on Post Release Control and that sentence may be run consecutive to the sentence for the new felony."

{¶ 20} At the beginning of its colloquy with appellant, the trial court explained that a guilty plea "is a complete admission of your guilt to that offense, Felonious Assault." The court also discussed appellant's rights under Crim.R. 11(C), including his right to a jury trial, the presumption of innocence, the state's burden to prove him guilty beyond a reasonable doubt at trial, the right to confront and cross-examine witnesses, the right to subpoena and call witnesses, and the right to choose whether to testify himself. Appellant admitted that he had committed the offense while under the influence of "alcohol and liquor and barbiturates and marijuana" and that he was "dependent" on the use of those substances. Appellant stated that he had very little recollection of what had happened on the night of the assault on the victim.

{¶ 21} The transcript of the plea hearing further indicates that the trial court gave the following explanation concerning postrelease control time.

{¶ 22} "THE COURT: If you were to be sentenced to prison, at the conclusion of the prison sentence you would be under a mandatory post release control, or parole supervision term of three years. Post release control is like probation, in that there are certain things you have to do and certain things you can't do. If you would violate terms of post release control you could be sent back to prison. The maximum total period of time that you could be sent back to prison could be no more than one-half of whatever the original prison term had been. Do you understand that?

{¶ 23} "[APPELLANT]: Yes, your Honor.

{¶ 24} "THE COURT: If you are non – Well, you will be on post release control and if, while you were on post release control, you would commit a new felony, the Judge who sentences you for that new felony could sentence you to an additional prison term, which would be at least a year, and the maximum period of time for that additional prison term would be no more than whatever the amount of time you have remaining on your post release control supervision term. Do you understand that?

{¶ 25} "[APPELLANT]: Yes, your Honor."

{¶ 26} The court gave appellant the opportunity to ask his attorney or the court any questions before going forward with the plea and appellant responded that he had none. The court asked appellant if anyone had made any promises or threats to induce him to enter the plea and he responded that no one had. In response to a question from the court, appellant stated that he was not under the influence of any drugs that would impair his ability to understand what was going on in the court proceedings. When the court inquired whether defendant was entering the plea voluntarily, he replied that he was.

{¶ 27} While the written plea agreement did state that appellant could receive up to five years of post release control, he clearly was advised verbally by the court that he would, in fact, receive a mandatory three years of post release control if sentenced to prison time. There is nothing in the record that indicates that appellant did not understand what the court had said or that he was impaired in any way.

{¶ 28} Upon review of the entire record of proceedings in the trial court, this court finds that appellant entered his guilty plea knowingly, intelligently, and voluntarily and his third assignment of error is not well-taken.

II.

{¶ 29} In his second assignment of error, appellant claims that the trial court committed structural error when it failed to rule on his request for new counsel and his attorney's motion to withdraw as his counsel.

{¶ 30} Entering a guilty plea generally waives any non-jurisdictional error committed in the course of the proceedings to that point. *State v. Spates* (1992), 64 Ohio St.3d 269, 271 (deciding that although "the denial of counsel at the preliminary-hearing stage of a criminal proceeding will almost always constitute reversible error, a subsequent guilty plea by the defendant during the criminal proceeding may constitute a waiver of any and all constitutional infirmities that occur prior to the submission of the guilty plea").

{¶ 31} When a request for new counsel is made, the decision as whether to appoint a new attorney for a defendant rests within the discretion of the trial judge. *State v. Murphy*, 91 Ohio St.3d 516, 523. In addition, when a trial court fails to rule on a motion, the motion is considered denied. *State v. McClurkin*, 10th Dist. No. 08AP-781, 2009-Ohio-4545, ¶ 20; *State v. Wojnarowski*, 179 Ohio App.3d 141, 2008-Ohio-5749, ¶ 11.

{¶ 32} In this case, the court conducted an inquiry when appellant requested new counsel. During the inquiry, appellant did not express any specific reasons for wanting

new counsel but stated that, based on an experience he had had 15 years earlier with pleading to criminal charges, he thought he would have several pretrials before going forward with a plea in this case. After a lengthy discussion with the court and counsel on the record, it was revealed that appellant thought his counsel should have been able to get a better plea deal from the prosecutor. The court assured appellant that he did not have to accept the offer and that another pretrial would be scheduled to give appellant the opportunity to confer with family or friends. Appellant responded that he understood the plea offer and felt more comfortable since he would have more time to consider it and consult his family members who were to visit him during the following week.

{¶ 33} At the next pretrial, appellant appeared before the court and indicated his intention to change his plea. At that point, no ruling had been made as to the request for new counsel and no further mention of that request was made by appellant. Appellant then proceeded to enter the guilty plea which this court has found above was knowingly, intelligently, and voluntarily entered. Whether, at the time the plea was entered, the trial court considered the motion for new counsel moot or simply declined to rule on the motion which would thereby be deemed denied, is of no consequence and does not change the fact that by entering the guilty plea appellant waived his right to challenge the trial court's earlier rulings, including the request for a change of appointed counsel.

{¶ 34} Upon consideration of the entire record of proceedings in the trial court and the law, this court finds that appellant has not shown that the trial court committed structural error by denying him his right to counsel when it failed to enter a ruling on

appellant's request for new counsel and his attorney's motion to withdraw as his counsel. Appellant's second assignment of error is not well-taken.

III.

{¶ 35} In this first assignment of error, appellant contends that he did not receive effective assistance of counsel and, as a result thereof, his guilty plea was involuntary. The basis of appellant's argument is his counsel's failure to correct, explain or clarify the incorrect statement in the written plea agreement that, if sentenced to a prison term, he could be subject to a non-mandatory period of post release control of up to five years. Appellant asserts that, when the court imposed the mandatory three year period of post release control, it expanded the sentence by three years and that was not the sentence that he had agreed to.

{¶ 36} In order to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) that counsel's deficient representation was prejudicial to defendant's case. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. See also *Strickland v. Washington* (1984), 466 U.S. 668, 694. A reviewing court must not use hindsight to second-guess trial strategy, and must keep in mind that different trial counsel will often defend the same case in different manners. *Strickland*, supra at 689; *State v. Keenan* (1998), 81 Ohio St.3d 133, 152. Moreover, a guilty plea waives the claim to ineffective assistance of counsel, "unless such errors are shown to have precluded the defendant from voluntarily entering into his or her plea pursuant to

the dictates of Crim.R. 11 * * *." *State v. Kelley* (1991), 57 Ohio St.3d 127, 130. See, also, *State v. Barnett* (1991), 73 Ohio App.3d 244, 248; *State v. Coulon*, 6th Dist. No. WM-07-006, 2007-Ohio-7096, ¶ 29.

{¶ 37} In this case, we have already determined that appellant was fully apprised by the court at the plea change hearing that, if the court imposed a prison sentence, he would also receive three years of post release control. There is nothing in the record that indicates that appellant was not fully aware of that or that he was not voluntarily entering his guilty plea. In response to the court's direct inquiry at the plea change hearing, appellant answered that he was satisfied with his attorney's representation.

{¶ 38} Upon consideration of the entire record of proceedings in the trial court and the law, this court finds that, 1) appellant has failed to establish that he had ineffective assistance of counsel under the *Strickland* test, 2) there is nothing in the record that supports appellant's claim that his plea was not voluntary, and 3) by entering a guilty plea appellant waived his claim of ineffective assistance of counsel on appeal. Appellant's first assignment of error is not well-taken.

IV.

{¶ 39} In his fourth assignment of error, appellant asserts that the trial court erred in sentencing him to five years rather than three years "community control." The state concedes that this was an error in the final sentencing order.

{¶ 40} R.C. 2967.28(B)(2) provides, in pertinent part, that "a period of post-release control required by this division for an offender shall be of one of the following periods:

* * * (2) For a felony of the second degree that is not a felony sex offense, three years;

* * *. "

{¶ 41} Upon consideration thereof, this court finds that the trial court erred in sentencing appellant to five years of post release control and appellant's fourth assignment of error is well-taken.

{¶ 42} The judgment of the Sandusky County Court of Common Pleas is affirmed, in part, and is reversed, in part. This case is remanded to the trial court for the purpose of correcting appellant's sentence in compliance with this decision and judgment. Appellant and appellee are each ordered to pay one-half of the costs this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, 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.

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, 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.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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