[Cite as *State v. Kiss*, 2010-Ohio-940.]

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

State of Ohio — Court of Appeals No. L-08-1379

Appellee — Trial Court No. CR0200802623

v.

John L. Kiss — **DECISION AND JUDGMENT**

Appellant — Decided: March 12, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, John Kiss, appeals the September 25, 2008 judgment of the Lucas County Court of Common Pleas. He seeks to withdraw his guilty plea to rape, pursuant to R.C. 2907.02(A)(1)(b) and (B), alleging he was deprived of his Sixth

Amendment right to effective assistance of counsel. For the reasons set forth below, we affirm the trial court's judgment.

{¶ 2} The facts of this case, as established during the September 12, 2008 suppression hearing, are as follows. On April 19, 2008, Toledo Police Detective Bonnie Weis sent appellant a letter, which stated that it had "become necessary for [appellant] to be interviewed in connection with an ongoing criminal investigation." The letter notified him that an appointment had already been scheduled "to avoid any unnecessary embarrassment." It further advised that, if he could not make the scheduled appointment, "the investigation will continue and may result in criminal charges being filed." Having been before a judge earlier that month for a civil protection order hearing arising from the same incident, appellant was aware of the allegations when he received the letter.

{¶ 3} On April 29, 2008, appellant was driven by a friend to the police station for the scheduled interview with Detective Weis. Once the two entered the conference room, Detective Weis explained to appellant how the track door worked. She left open a finger-width crack of the door, explaining to appellant that it was so he could leave the room if necessary. Next, the detective took measures to ensure he was present on his free will and to notify him that he did not have to speak to her if he chose not to. A 50-minute interview ensued in which the detective made no threats to appellant and neither deprived him of essentials such as food or water nor restricted his physical freedom. Appellant was not read his *Miranda* rights and, during that time, he made inculpatory statements. He thereafter left on his own free will with his friend.

{¶ 4} Appellant filed a motion to suppress the statements he made to Detective Weis. On the second day of the suppression hearing, the state notified the court that it had made a "limited" plea offer. The state indicated that it would revoke its offer on Thursday, September 18, before the court rendered its decision on the suppression issue. Counsel took a moment off the record to discuss the offer with appellant in greater detail.

{¶ 5} That day, the court took time to ensure that any plea appellant might thereafter enter would be knowing and voluntary. The court swore in appellant and engaged him in a Crim.R. 11 colloquy. Specifically, the court informed him that it had yet to rule on the motion to suppress and it "knows nothing of the quality of the evidence against him." Lastly, the court explained the limited nature of the state's offer, stating that the decision is "personal to [appellant]" and is his to make "after conferring with [his] lawyers concerning this matter."

{¶ 6} On September 18, 2008, before the court had ruled on the merits of his motion to suppress, appellant accepted the state's offer, pleading guilty to rape of a person under thirteen years of age in violation of R.C. 2907.02(A)(1)(b) and (B). In return, the state dropped the charge of gross sexual imposition. On September 25, 2008, appellant was sentenced to life in prison with parole eligibility after ten years. This appeal followed.

{¶ 7} On appeal, appellant raises the following assignment of error:

{¶ 8} "Kiss was denied his right to effective assistance of counsel. Given the strength of the suppression issue, and the weak plea offer, counsel should have at least

insisted that the trial court rule on the suppression issue and preserve Kiss' right to appeal if it was denied."

{¶ 9} Therefore, the issue on appeal is whether appellant received ineffective assistance of counsel in formulating his plea. In *Strickland v. Washington* (1984), 466 U.S. 668, 687, the United States Supreme Court set forth a two-part test to determine whether counsel's assistance falls below Sixth Amendment standards. First, a defendant must show that trial counsel's representation was deficient, falling below an objective standard of reasonableness. Id. Second, the defendant must show that counsel's deficient performance was prejudicial, thereby creating a reasonable probability that, but for counsel's errors, the result of the trial court would have been different. Id. The court has since extended the two-part *Strickland* test to challenges to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockhart* (1985), 474 U.S. 52, 58; accord *State v. Bird*, 81 Ohio St.3d 582, 585, 1998-Ohio-606. The second facet of the test is then satisfied if a reasonable probability exists that, but for counsel's errors, defendant would not have entered his plea. *Bird* at 585.

{¶ 10} A guilty plea represents a "break in the chain of events which has preceded it in the criminal process." *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130, quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267. For this reason, a defendant who pleads guilty "waives ineffective assistance of counsel claims except to the extent that counsel's performance causes the waiver of Defendant's trial rights and the entry of his plea to be less than knowing and voluntary." *State v. Kidd*, 168 Ohio App.3d 382,

2006-Ohio-4008, ¶ 13. Once he admits his guilt in open court, a defendant "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Spates* at 272. So, the issue of whether a defendant's plea has been entered knowingly and voluntarily is a threshold inquiry into the constitutional viability of counsel's assistance in a defendant's guilty plea. To determine the constitutionality of the assistance, we look to the standards set forth in *McMann v. Richardson* (1970), 397 U.S. 759.

{¶ 11} In *McMann*, the Supreme Court held that a defendant's plea of guilt based on reasonably competent advice is "an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." Id. at 770. Any advice given by the defense counsel is assessed by asking whether that advice was within the range of competence demanded of attorneys in criminal cases. Id. In this regard, counsel is given broad latitude because accepting a plea bargain entails "the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken." Id. The mere chance that a court might have suppressed the defendant's confession hardly justifies the conclusion that the defendant's attorney was incompetent, especially when he thought the admissibility was sufficiently probable to advise a plea of guilty. Id.

{¶ 12} Given that a properly licensed attorney is presumed competent, the defendant bears the burden on appeal. See *State v. Robinson*, 6th Dist. No. L-03-1307, 2005-Ohio-5266, ¶ 17. To prevail, appellant must show that the advice he received from

counsel was outside counsel's range of competence and that his reliance on that advice rendered his plea less than knowing and voluntary.

{¶ 13} Here, the advice given to appellant by counsel was well within his range of competence. After hearing a full day and a half of testimony at the suppression hearing, counsel assessed his client's probability of success and advised that he take the state's offer. Notably, the circumstances surrounding appellant's confession give further support to counsel's presumption of competence.

{¶ 14} Closely resembling the facts at issue in the suppression hearing is our decision in *State v. Boerio*, 6th Dist. No. L-08-1182, 2009-Ohio-5181. There, the sheriff's department contacted Boerio and asked him to come to the police station for questioning. Id. at ¶ 30. He did not have a ride, so the sheriff's department arranged for his transportation. Id. at ¶ 31. When the sergeant arrived, he waited for Boerio to get dressed and neither searched the suspect's person nor handcuffed him. Id. Boerio was not read his *Miranda* rights. Id. Boerio was brought to an interview room and, behind a closed door, eventually made inculpatory statements to the investigating officer. Id. at ¶ 32. This court found that a reasonable man in Boerio's position would have understood that no formal arrest or restraint on his freedom had taken place. Id. at ¶ 36. Accordingly, we concluded that he was not subjected to custodial interrogation. Id.

{¶ 15} The facts in *Boerio* cannot be distinguished to any significant degree from those in the present matter. Perhaps counsel was familiar with this court's holding in *Boerio* or, at minimum, was familiar with the law upon which it was based. But in

hindsight, we can hardly say that appellant was given incompetent advice that affected his decision to plead guilty.

{¶ 16} Appellant alluded on the record to his complaints about his counsel's assistance. Each time, through impartial questioning by the court, he rescinded his complaints. Initially, the court asked him about a letter it had received from appellant, in which he stated he was not receiving legal assistance "like he was getting back in '99," referring to another, unrelated matter. Appellant eventually conceded that he thought his attorney was "a good lawyer" and stated twice that it was "not necessary" to have his attorney removed. He was asked a third time if he wished for the court to remove his counsel, to which he replied "no." At the plea hearing, appellant once again responded affirmatively when asked if he felt his attorney had represented him well in this case.

{¶ 17} Upon review, we find that appellant received reasonably effective assistance of counsel. The record is void of any suggestion that appellant's plea was less than knowing and voluntary. The few allegations of ineffective assistance that appear on the record are likewise insufficient to establish that counsel's advice regarding the state's offer fell below the standard of reasonable competence. The testimony had been heard by counsel and it seems entirely reasonable that, given the evidence against appellant, counsel would advise him to accept the state's offer. Accordingly, appellant's assignment of error is not well-taken.

{¶ 18} On consideration whereof, we find that appellant was not denied a fair proceeding and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE