

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

State of Ohio

Court of Appeals No. E-10-049

Appellee

Trial Court No. 2009-CR-388

v.

Andre D. Thomas, Sr.

DECISION AND JUDGMENT

Appellant

Decided: August 19, 2011

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Brad F. Hubbell, for appellant.

Andre D. Thomas, Sr., pro se

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Andre Dewon Thomas, Sr., appeals from a dismissal of a motion for postconviction relief, which was entered by the Erie County Court of Common Pleas

on September 15, 2010. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On October 16, 2009, an indictment was issued against appellant, charging him with four counts of rape and one count of attempted rape. The allegations underlying the indictment were that between June 2008 and September 2009, appellant committed rape with his girlfriend's then 12-year old daughter on numerous occasions and committed attempted rape with her on at least one occasion. Appellant signed a written waiver of his Miranda rights and offered a videotaped confession to law enforcement. The victim in this case, who had become pregnant, subsequently had an abortion. The fetal tissue matched Thomas's DNA.

{¶ 3} Appellant faced a maximum of 28 years in prison if he lost on all counts at trial. Following multiple pretrial negotiations, a plea agreement was reached in this case.

{¶ 4} On January 22, 2010, appellant pleaded guilty, under a plea agreement, to two counts of rape and one count of attempted rape, with an agreed total sentence of 15 years. The state, for its part, agreed to dismiss the remaining two counts of rape. In addition, the state agreed not to prosecute appellant on an unrelated possession charge. Further, the parties agreed that, as a result of the plea, appellant would automatically be classified as a Tier III sexual offender.

{¶ 5} During the January 22, 2010 plea hearing, the trial court questioned appellant concerning the knowing, intelligent, and voluntary nature of his guilty plea. The court asked appellant if he had had enough time to discuss matters with his lawyer

and whether he was satisfied with his lawyer's advice and counsel. Appellant answered yes to both questions. The court asked appellant if any threats or promises, other than the plea agreement, had been made to cause him to enter his plea. Appellant answered no. The court asked appellant whether he was under the influence of alcohol, drugs, or medication that would interfere with his ability to understand the proceedings. Again, appellant answered no.

{¶ 6} The court asked appellant if he understood that upon his release from prison he would have five years of postrelease control. Appellant answered in the affirmative. The court asked appellant if he understood that his entry of a guilty plea constituted a complete admission of his guilt to the relevant offenses. Appellant answered that he did.

{¶ 7} The court asked appellant if he was aware that by entering a plea of guilty he was giving up his right to trial by jury, his right to confront and cross-examine witnesses, and his right to compulsory process. The court further explained that in giving up the right to compulsory process, appellant would be giving up the right to have defense counsel subpoena witnesses to testify on his behalf. Appellant indicated that he understood.

{¶ 8} At the end of the colloquy, and just prior to making a decision on the plea, the trial court asked appellant if there was anything that appellant did not understand about the agreement or proceedings. Appellant replied, "No, sir." Thereafter, the court found that appellant had been advised of his constitutional rights and that he had made a knowing, intelligent and voluntary waiver of those rights. The court accepted the plea,

made a finding of guilt as to the relevant counts, and stated that it would enter a nolle prosequi as to the remaining counts.

{¶ 9} The state outlined appellant's rights and obligations as a Tier III sex offender. Just prior to the sentence being rendered, the court asked appellant if there was anything he would like to say. Appellant indicated that there was not and that his attorney had probably said it all. The court then imposed a fifteen year sentence consistent with the negotiated plea agreement.

{¶ 10} Appellant did not file a direct appeal from the entry of judgment on his guilty plea. At some point after the time for a direct appeal elapsed, appellant filed an application for delayed appeal. The application was ultimately denied by this court.

{¶ 11} On August 12, 2010, appellant filed, pro se, a petition for postconviction relief, alleging ineffective assistance of counsel. The trial court, concluding that appellant's petition was untimely filed, dismissed appellant's petition on September 15, 2010.

{¶ 12} Appellant timely appealed the trial court's September 15, 2010 decision. On November 22, 2010, the trial court appointed counsel for appellant's appeal. Appellant's appointed counsel advised this court that he reviewed the record, can discern no meritorious claims for appeal, and, pursuant to *Anders v. California* (1967), 386 U.S. 738, requested to withdraw from this case.

{¶ 13} Appellant's counsel did, however, raise two potential issues for this court to consider. First, appellant asserts, through counsel, that his plea was involuntary in nature,

because: (1) he was coerced into pleading guilty; (2) he did not understand compulsory process; (3) the trial court failed to inform him that he was subject to five years of postrelease control; and (4) the trial court failed to inform him of his Tier III sex offender classification. Second, appellant contends -- again through counsel -- that he was provided ineffective assistance by his trial counsel, because his trial counsel: (1) failed to advise appellant that he could receive less time if he went to trial; (2) failed to attempt to secure a lesser plea agreement; and (3) coerced appellant to enter a plea to the indictment.

{¶ 14} In a separate brief, filed pro se, appellant provides additional argument in support of his claim that he received ineffective assistance of counsel. Specifically, he states that his trial counsel was ineffective in that trial counsel: (1) failed to adequately investigate appellant's alibi defense and failed to file a notice of alibi; and (2) coerced appellant to plead guilty to a crime that he did not commit, to wit, the crime of attempted rape. Appellant also argues that he was not adequately advised of his constitutional right to compulsory process.

{¶ 15} We begin by noting that the trial court's determination that appellant's petition was untimely was erroneous. R.C. 2953.21(A)(2) requires that a petition for postconviction relief be filed within 180 days of the expiration of the time for filing an appeal, if no appeal is taken. Appellant was denied leave to file a late appeal; therefore, no direct appeal occurred. Appellant was sentenced on January 28, 2010. Pursuant to App.R. 4(A), appellant's right of appeal expired thirty days subsequent to sentencing.

The postconviction petition filed on August 12, 2010 was filed within the 180 day period as defined in R.C. 2953.21 and was, therefore, timely.

{¶ 16} As indicated above, appellate counsel has filed a brief pursuant to *Anders*, supra. The United States Supreme Court in *Anders*, supra, held that if, after a conscientious examination of the record, a defendant's counsel concludes that the case is wholly frivolous, he should so advise the court and request permission to withdraw. See *Anders*, supra, at 744. In addition, counsel must accompany his request with a brief identifying anything in the record that could arguably support his client's appeal. *Id.* Further, counsel must: (1) furnish the defendant with a copy of the brief and request to withdraw; and (2) allow the defendant sufficient time to raise any matters that the defendant chooses. *Id.*

{¶ 17} Once these requirements are satisfied, the appellate court must fully examine the proceedings below to determine if a meritorious issue exists. *Id.* If the appellate court also determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements. *Id.*

{¶ 18} Accordingly, we must examine counsel's and appellant's (sometimes overlapping) issues and the entire record below to determine whether appellant's appeal has any merit.

{¶ 19} We begin with appellant's claim that his plea was involuntary in nature. Crim.R. 11(C)(2) provides that a trial court, before accepting a guilty plea, must inform a

defendant of the constitutional rights he waives by entering the plea. Specifically, the rule provides:

{¶ 20} "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:

{¶ 21} "(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.

{¶ 22} "(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.

{¶ 23} "(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."

{¶ 24} Upon appellate review, the trial court's acceptance of a guilty or no contest plea will be considered knowing, intelligent and voluntary so long as, prior to accepting the plea, the trial court substantially complies with the procedure set forth in Crim.R.

11(C). *State v. Adams*, 6th Dist. No. L-09-1196, 2010-Ohio-1196, ¶ 17, citing *State v. Nero* (1990), 56 Ohio St.3d 106, 108. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Nero*, supra.

{¶ 25} In the instant case, the trial court engaged in a full and fair Crim.R. 11 colloquy with appellant. During the colloquy, the trial court ascertained that appellant was not under the influence of any substance that would interfere with his ability to understand the proceedings. The trial court further ascertained that appellant was satisfied with his counsel and that he was not threatened or promised anything in exchange for his plea. In addition, the court determined, following a detailed inquiry, that appellant understood what his maximum sentence could be under the law.

{¶ 26} Further, the trial court strictly complied with Crim.R. 11(C) when it informed appellant that, by entering the guilty plea, he was giving up certain constitutional rights-- including the right to trial by jury, the right to confront witnesses, and the right to subpoena witnesses -- and subsequently determined that appellant understood this waiver of his rights.

{¶ 27} Appellant's claim that his counsel pressured him into accepting the guilty plea with the threat that he would "surely receive[] the equivalent of life in prison" if he did not accept the plea is supported only by appellant's self-serving affidavit, and is refuted by appellant's own responses during the Crim.R. 11 colloquy. The law is clear that such self-serving testimony as was provided by appellant may be properly

discredited. See *State v. Calhoun* (Sept. 1, 1999), 86 Ohio St.3d 279, 284-285; see, also, *State v. Wooten*, 6th Dist. No. L-01-1501, 2002-Ohio-4949, ¶ 8.

{¶ 28} Based upon all of the foregoing, we find that the trial court substantially complied with Crim.R. 11(C) in accepting appellant's guilty plea and, further, that appellant entered his plea knowingly, intelligently, and voluntarily. Accordingly, appellant's first proposed issue for review is found not well-taken.

{¶ 29} In his second proposed error, appellant argues that his trial counsel's representation constituted ineffective assistance of counsel. To establish a claim for ineffective assistance of counsel, a defendant must demonstrate the following: (1) that counsel's performance was deficient; that is, that counsel committed errors so serious that he or she was not, in effect, functioning as counsel; and (2) that such deficient performance prejudiced the defendant's defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687. To prove that counsel's deficient performance prejudiced a defendant's defense, the defendant must show that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 143.

{¶ 30} In examining this proposed issue, we are mindful that appellate courts must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance. See *Strickland*, *supra*, at 689.

{¶ 31} The essence of appellant's argument that he received ineffective assistance of counsel is that counsel was deficient in failing to take appellant's case to trial and

present appellant's alibi that he was at work when the attempted rape occurred. Appellant also argues that his counsel was deficient in convincing him that unless he pleaded guilty, he would receive a lengthier jail sentence than that which was negotiated.

{¶ 32} As indicated above, appellant cooperated with police, gave the police a full and detailed confession, as well as consented to providing a DNA sample. Despite this plethora of evidence against him, appellant, with the assistance of his counsel, was able to enter into a negotiated plea agreement that significantly lowered the amount of jail time that he could have received without the plea agreement. Accordingly, we do not find that counsel's performance was deficient in this case.

{¶ 33} Moreover, even assuming deficiencies on the part of appellant's counsel – and we specifically find that there were none -- it is our conclusion that a reasonable probability does not exist that, had appellant's case gone to trial, a trier of fact would have believed appellant's alibi defense in the face of appellant's confession to police and conclusive DNA test evidence that matched the victim's fetal tissue to appellant's DNA.

{¶ 34} On the basis of the foregoing, we find that trial counsel's representation was neither deficient nor prejudicial to appellant's defense. Accordingly, appellant's second proposed issue for review is found not well-taken.

{¶ 35} Upon our independent review of the record, we conclude that appellant's counsel has provided his client with a diligent and thorough search of the record and has appropriately concluded, as we do, that a meritorious claim does not exist upon which to base an appeal. Accordingly, we find this appeal to be wholly frivolous.

{¶ 36} For all of the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. In addition, attorney Hubbell's motion to withdraw as counsel of record is hereby granted. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

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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