

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

State of Ohio

Court of Appeals No. L-10-1327

Appellee

Trial Court No. CR0201002321

v.

Rodolfo Rubio

DECISION AND JUDGMENT

Appellant

Decided: November 16, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Kathryn J. T. Sandretto, Assistant Prosecuting Attorney, for appellee.

Kurt W. Bruderly, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Rodolfo Rubio, appeals the November 5, 2010 judgment of the Lucas County Court of Common Pleas which, after denying his presentence motion to withdraw his no contest plea, sentenced him to four years of

imprisonment. Because we find that the trial court did not abuse its discretion when it denied appellant's motion, we affirm.

{¶ 2} The relevant facts of this case are as follows. On July 27, 2010, appellant was indicted on one count of failure to notify of a change of residence address, a violation of R.C. 2950.05(F)(1) and 2950.99(A)(1), a second degree felony. Appellant entered a not guilty plea to the charge. On September 8, 2010, appellant withdrew his plea and entered a plea of no contest.

{¶ 3} On September 20, 2010, appellant filed a motion to withdraw his no contest plea and to dismiss the case against him. The state filed a memorandum in opposition and supplemental filings. At the center of the dispute was appellant's 1994 conviction in Michigan for gross indecency between a male and female. Appellant was sentenced to five years in prison and, upon release, he registered as a sex offender with the Michigan State Police. Appellant was also convicted of sexually oriented offenses in 1990 and 1992.

{¶ 4} In his motion, appellant argued that no Michigan court order exists requiring him to register as a sex offender for life. Appellant stated that the fact that he registered as a sex offender after being released from prison is meaningless and is not enforceable. Finally, appellant argued that the separation of powers doctrine was violated by the police department's usurpation of the judiciary's role of classifying sex offenders.

{¶ 5} The state responded by arguing that because appellant was subject to Ohio's jurisdiction, he needed to go to Michigan to address the registration issues. The state

then analyzed appellant's Michigan sex offense convictions and determined that the offenses, had they been committed in Ohio, would have required lifetime registration.

{¶ 6} A hearing on the motion was held on November 4, 2010. Appellant testified that in 1994, he did not sign any paperwork indicating that he would be a sex offender upon his release from prison. Appellant admitted that he completed a sex offender class while in prison. Appellant stated that when he was released from prison he was told to report to the Adrian Police Department which registered him as a sex offender.

{¶ 7} During cross-examination, appellant admitted convictions for three separate sex offenses. Appellant was also questioned regarding a 2005 sex offender duties registration form he filled out in 2005 while living in Michigan. Thereafter, in 2006 appellant moved to Missouri where he registered with authorities. On the registration form, appellant initialed that he understood the various registration requirements. Appellant testified that in 2008, he moved to Toledo but did not register as a sex offender because he "thought [his] ten years were done."

{¶ 8} At the close of the hearing, the trial court denied appellant's motion finding, under R.C. 2950.04(A)(2), that because appellant was an out-of-state sex offender he was required to register in Ohio. Appellant was then sentenced to four years in prison. This appeal followed.

{¶ 9} Appellant now raises two assignments of error for our consideration:

I. The trial court abused its discretion in denying appellant's presentence motion to withdraw plea.

II. Trial counsel prejudiced appellant by failing to provide him with reasonable professional assistance as guaranteed by the Sixth Amendment.

{¶ 10} In appellant's first assignment of error he contends that the court should have granted his presentence motion to withdraw his guilty plea. A presentence motion to withdraw a guilty or no contest plea is to be freely and liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992). The *Xie* court further indicated that a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *Id.* at paragraph one of the syllabus. Rather, the court must conduct a hearing on the motion to determine "whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Id.* The court further held that "[t]he decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court." *Id.* at paragraph two of the syllabus. Accordingly, in order to find that the trial court abused its discretion, a reviewing court must find that the court's ruling was "unreasonable, arbitrary or unconscionable." *Id.* at 527.

{¶ 11} Reviewing whether a presentence motion to withdraw a plea should have been granted, an appellate court should consider:

(1) [W]hether the prosecution would be prejudiced if the plea was vacated; (2) whether the accused was represented by highly competent counsel; (3) whether the accused was given a full Crim.R. 11 hearing; (4) whether a full hearing was held on the motion; (5) whether the trial court gave full and fair consideration to the motion; (6) whether the motion

was made within a reasonable time; (7) whether the motion set forth specific reasons for the withdrawal; (8) whether the accused understood the nature of the charges and possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense to the crime. *State v. Eversole*, 6th Dist. Nos. E-05-073, E-05-076, E-05-074, E-05-075, 2006-Ohio-3988, ¶ 13, citing *State v. Fish*, 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1st Dist.1995).

{¶ 12} Examining the above factors, we note that the motion was timely made and set forth specific reasons for the withdrawal. Although not a part of the record, we will presume that appellant was given a full Crim.R. 11 hearing as required by law and understood the nature of the charges. As will be discussed in appellant's second assignment of error, appellant was represented by competent counsel. The trial court conducted a hearing on the motion and gave it full and fair consideration.

{¶ 13} The chief disputed issue is whether appellant was not guilty or had a defense to the crime. Appellant argued in the trial court that because the Michigan trial judge failed to classify appellant as a sex offender, any subsequent classification was void. We disagree. Michigan's Sex Offender Registration Act ("SORN") became effective in 1995, after appellant's conviction and incarceration. The 1995 version of MCL 28.724 provided, in relevant part:

(1) Registration of an individual under this Act shall proceed as provided in this section.

(2) For an individual convicted of a listed offense on or before October 1, 1995 who on or before October 1, 1995, is sentenced for that offense, has a disposition entered for that offense, or is assigned to a youthful trainee status for that offense, the following shall register the individual by December 31, 1995:

* * *

(c) If the individual is under the jurisdiction of the department of corrections for the listed offense, the department of corrections.

{¶ 14} Listed offenses included three convictions of various sex offenses including criminal sexual conduct for which appellant was convicted in 1990 and 1992. The list further includes a “catchall” provision which includes any “offense[s] substantially similar to an offense described in subparagraphs (i) to (iv) under a law of the United States, any state, or any country.”

{¶ 15} In June 1994, appellant entered a guilty plea to one count of gross indecency between a male and a female. The charge of criminal sexual conduct with a child under 13 was dismissed. In the state’s motion to dismiss the count it indicated that the indecency charge arose from the same facts as the criminal sexual conduct and that the court “will take into consideration Count I and Sexually Delinquent person hereof.” The court then sentenced appellant to the maximum of five years of imprisonment.

{¶ 16} At the November 4, 2010 hearing on the motion to withdraw his plea, appellant testified that while in prison he completed a sex offender class. Appellant

stated that at the conclusion of the class they took a DNA sample and had him sign “papers.” Appellant stated that when he was released from prison he was told to take paperwork to the Adrian Police Department to register. Appellant reported to the Adrian Police Department and filled out the registration forms.

{¶ 17} Appellant testified that he registered in Missouri upon moving into the state. Appellant moved to Ohio in 2008, but testified that he did not register because he believed that his “ten years were done.”

{¶ 18} Based on the foregoing, we cannot say that the trial court abused its discretion in denying appellant’s motion to withdraw his plea. Appellant’s first assignment of error is not well-taken.

{¶ 19} Appellant’s second assignment of error asserts that he was denied the effective assistance of trial counsel. The standard for determining whether a trial attorney was ineffective requires an appellant to show (1) that the trial attorney made errors so egregious that the trial attorney was not functioning as the “counsel” guaranteed under the Sixth Amendment, and (2) that the deficient performance prejudiced appellant’s defense. *Strickland v. Washington*, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 20} Furthermore, a court must be “highly deferential” and “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” in reviewing a claim of ineffective assistance of counsel. *Id.* at 689. A properly licensed attorney in Ohio is presumed to execute his or her duties in an ethical

and competent manner. *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988). Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995).

{¶ 21} Appellant argues that counsel was ineffective by failing to uncover the possible registration irregularities until after appellant entered his no contest plea. Based on the paperwork signed by appellant, including sex offender registration forms from Michigan and Missouri, and the fact that appellant admitted that he did not register solely because he believed his ten-year period had expired, we cannot say that trial counsel was ineffective in failing to uncover any potential issues prior to appellant's plea. Once discovered, appellant's trial counsel promptly filed the motion, participated fully in the hearing, and strongly advocated for his client. Appellant's second assignment of error is not well-taken.

{¶ 22} On consideration whereof, we find that appellant was not prejudiced or prevented from having 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.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

CONCUR.

JUDGE

<p>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: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
