

[Cite as *State v. Seeley*, 2002-Ohio-1545.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 2001 CO 27
PLAINTIFF-APPELLEE,)	
)	
- VS -)	<u>OPINION</u>
)	
VICTOR SEELEY,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Appeal from Columbiana County, Common Pleas Court, Case No. 94 CR 173.

JUDGMENT: Reversed and Remanded.

APPEARANCES:
For Plaintiff-Appellee: Attorney Robert Herron
Prosecuting Attorney
Attorney Tammy Riley Jones
Attorney Nicholas Barborak
Asst. Prosecuting Attorneys
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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: March 20, 2002

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Defendant-Appellant, Victor Seeley (hereinafter "Seeley"), appeals the trial court's decision finding him guilty of violating R.C. 2919.21(A)(2) and sentencing him to serve six months in jail, to pay restitution in the amount of \$24,800, to continue to pay child support as previously ordered, and warning him of possible post-release control. For the following reasons, we conclude Seeley's counsel was ineffective for failing to address an apparent violation of the statute of limitations, and further, that Seeley's plea was ineffective because he did not understand the nature of the offense with which he was charged. Accordingly, we reverse the trial court's decision and remand for further proceedings.

{¶2} On September 29, 1994, Seeley was secretly indicted by the Columbiana County Grand Jury for a violation of R.C. 2919.21(A)(2). This indictment alleged Seeley either abandoned or failed to provide adequate support for his minor child for a period between January 7, 1982, and September 21, 1994. At the time the grand jury issued this indictment it also issued a warrant for Seeley's arrest in accordance with Crim.R. 9.

{¶3} Seeley was arrested pursuant to this warrant six years later on October 3, 2000. At an October 11, 2000 arraignment, Seeley pled not guilty. However, on March 28, 2001, the trial

court held a plea hearing where, pursuant to a plea agreement, Seeley pled guilty to the offense. On June 29, 2001, the trial court proceeded with a sentencing hearing, and on July 2, 2001, Seeley was sentenced to serve six months in jail, ordered to pay restitution in the amount of \$24,800 as well as to continue to pay child support as previously ordered, and warned of possible post-release control.

{¶4} On appeal, Seeley asserts four assignments of error:

{¶5} "The trial court erred in sentencing Appellant to six months in a state correctional facility, ordering restitution and permitting post-release control."

{¶6} "Appellant was denied the effective assistance of trial counsel."

{¶7} "The trial court erred in accepting Appellant's plea of guilty, as such was constitutionally deficient and therefore invalid."

{¶8} "Appellant could be convicted only of a misdemeanor of the first degree, not a felony of the fourth degree, as the indictment lacked the necessary felony specification."

{¶9} We shall address Seeley's assignments of error in reverse order, as our resolution of the last three assigned errors renders the first moot.

{¶10} In his fourth assignment of error, Seeley argues he could not be convicted of a felony as his indictment lacked the necessary felony specification. In particular, he argues he could not be found guilty of a felony violation of R.C. 2919.21(A)(2) since there had not been a prior court finding that he had failed to provide support.

{¶11} R.C. 2919.21 generally provides a violation will be a

misdemeanor in the first degree. However, the statute provides that a violation could become a felony.

{¶12} "If the offender previously has been convicted of * * * a violation of division (A) (2) of this section or if there has been a court finding that the offender has failed to provide support under division (A) (2) of this section for * * * twenty-six weeks out of one hundred four, then a violation of division (A) (2) of this section is a felony of the fourth degree." Former R.C. 2919.21(E).

{¶13} As Seeley concedes in his brief, courts have found there need not be a prior court finding that the defendant failed to provide support in order for the felony specification to accrue. See *State v. Cole* (1994), 94 Ohio App.3d 629, 641 N.E.2d 732; *State v. Lizanich* (1994), 93 Ohio App.3d 706, 639 N.E.2d 855. Consequently, the indictment need merely charge the defendant has failed to provide support for a total period of twenty-six weeks out of one hundred four consecutive weeks. *Id.*

{¶14} Seeley argues a change in the statute after his indictment, but before he was arrested, requires a prior court order as an element of the offense which needs to be in the indictment. It is axiomatic that legislatures may not retroactively alter the definition of a crime. *State v. Webb* (1994), 70 Ohio St.3d 325, 331, 638 N.E.2d 1023, 1030 quoting *Collins v. Youngblood* (1990), 497 U.S. 37, 43, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30, 39. Since Seeley was indicted under the prior version of the statute, it is that version of the statute which defines the offense. Accordingly, the indictment merely needs to allege Seeley failed to provide support for a total period of twenty-six weeks out of one hundred four consecutive weeks. See *Cole, supra*; *Lizanich, supra*.

{¶15} The September 29, 1994 indictment alleges:

{¶16} "On or about January 7, 1982, through September 21, 1994, inclusive, in Columbiana County, Ohio, Victor B. Seeley did, abandon or fail to provide adequate support to his legitimate children under the age of 18, to-wit: Christina Deanna Vincent, DOB: 2-17-78, in violation of Section 2919.21(A)(2) of the Ohio Revised Code, being a felony of the fourth degree." *Id.*

{¶17} This indictment alleges more than twenty-six weeks of non-support. Indeed, it cites more than twelve years of non-support. This indictment is sufficient to charge Seeley with a felony violation of R.C. 2919.21(A)(2). Seeley's fourth assignment of error is meritless.

{¶18} In his third assignment of error, Seeley argues the trial court abused its discretion when it accepted his guilty plea. Essentially, he alleges the trial court committed plain error when it allowed Seeley to plead guilty even though the statute of limitations had elapsed by the time he was served with the indictment and because Seeley expressed his desire for paternity testing. Plain error only exists when it is clear the verdict would have been otherwise but for the error. *State v. Sanders* (2001), 92 Ohio St.3d 245, 263, 750 N.E.2d 90, 115 citing *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804. The defendant bears the burden of demonstrating plain error. *State v. Wade* (1978), 53 Ohio St.2d 182, 188, 7 O.O.3d 362, 365, 373 N.E.2d 1244, 1248.

{¶19} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450, 451.

{¶20} Pursuant to this requirement, the Criminal Rules provide

that when accepting a guilty plea from a defendant charged with a felony, a trial court must address the defendant personally in order to:

{¶21} "(a) Determin[e] 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) [Inform] the defendant of and determin[e] 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) [Inform] the defendant and determin[e] 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." Crim.R. 11(C)(2).

{¶24} The standard for determining whether a trial court properly accepted a plea is whether the court substantially complied with Crim.R. 11. *State v. Stewart* (1977), 51 Ohio St.2d 86, 5 O.O.3d 52, 364 N.E.2d 1163. "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." *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474, 476. "The test is whether the court's error prejudiced the defendant in that he would not have pled guilty had the error not been made." *State v. Gales* (1999), 131 Ohio App.3d 56, 61, 721 N.E.2d 497, 500 citing *Nero* at 108, 564 N.E.2d at 476.

{¶25} Seeley first argues that the colloquy between he and the trial court indicates he did not understand the nature of the

charges against him. There is no exact test to determine whether a defendant subjectively understands the charges against him. *State v. Carter* (1979), 60 Ohio St.2d 34, 38, 14 O.O.3d 199, 201, 396 N.E.2d 757, 760. In order to make sure a defendant does understand those charges, a court must look to all the particular facts and circumstances surrounding the case. *Id.* citing *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466. Even if it is entirely plausible that the defendant understands the nature of the charges against him, the record must demonstrate that understanding. See *State v. Blair* (1998), 128 Ohio App.3d 435, 715 N.E.2d 233.

{¶26} "A defendant's mere affirmative response to the question whether he understands the nature of the charge against him, without more, is insufficient to support the necessary determination that he understands the nature of the charge against him." *Id.* at 438, 715 N.E.2d at 235.

{¶27} Seeley was charged with a violation of R.C. 2919.21(A)(2). Previously, Seeley had been adjudicated the child's father in a paternity action. However, the mere fact that a court had found him to be the father of the child in a paternity action is irrelevant to the disposition of a criminal action based upon R.C. 2919.21(A)(2). See *State v. Parsley* (1994), 93 Ohio App.3d 788, 639 N.E.2d 1234. In order to prove Seeley violated R.C. 2919.21(A)(2), the State must prove the child was his child. Seeley's paternity is an essential element of the State's case. "[A] judgment in a civil action is not admissible in a criminal trial to establish the facts essential to a conviction of the offense charged.'" *Parsley* at 791, 639 N.E.2d at 1235 quoting *State v. Black* (1991), 78 Ohio App.3d 130, 135, 604 N.E.2d 171, 174.

{¶28} During the course of the plea hearing, the court told Seeley he was being charged with failing to support his child and Seeley responded he wished to plead guilty to that charge. However, Seeley expressed doubt that he was the father of the child in question and stated he wished genetic testing had been done to confirm his paternity. The trial court asked Seeley if he "had some serious doubts" about his paternity and Seeley answered in the affirmative. But, Seeley then stated that he understood there was nothing he could do about that for what he was being charged. This indicates Seeley did not understand the State would need to prove he was the child's father and he could challenge his paternity in this criminal action. In other words, Seeley did not understand the true nature of the charges against him. Accordingly, the trial court erred when it accepted Seeley's guilty plea. See *Blair, supra*.

{¶29} Seeley also argues it was plain error for the trial court to accept his guilty plea when the statute of limitations had run.

"The primary purpose of a criminal statute of limitations is to limit exposure to prosecution to a certain fixed period of time following the occurrence of those acts the General Assembly has decided to punish by criminal sanctions." *State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.* (1999), 85 Ohio St.3d 582, 586, 709 N.E.2d 1192, 1195, citing *Toussie v. United States* (1970), 397 U.S. 112, 114-115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156, 161. The state bears the burden of proving an offense was committed within the appropriate statute of limitations. *Id.* at 587, 709 N.E.2d at 1195-1196.

{¶30} The prosecution of a violation of R.C. 2919.21(A)(2) must commence within six years after the offense is committed. R.C.

2901.13(A)(1). A prosecution is commenced on the date an indictment is returned if reasonable diligence is exercised to issue and execute process of that indictment. R.C. 2901.13(E). In the present case, the offense charged ended on September 21, 1994, and an indictment was returned on September 29, 1994. However, Seeley was not arrested until October 3, 2000. Under these facts, unless the State used reasonable diligence to execute the indictment, the action is barred by the statute of limitations. However, we cannot say the trial court plainly erred when it accepted Seeley's guilty plea. The record is silent as to the diligence the State used in executing process of Seeley's indictment. Since it is possible the State did use reasonable diligence in executing process of the indictment, it is not clear that the verdict would have been different had the trial court noticed the potential violation of the statute of limitations.

{¶31} Seeley has failed to demonstrate the trial court plainly erred when it did not take notice of the potential violation of the statute of limitations. However, because Seeley demonstrated that he did not understand the nature of the offense when he entered the guilty plea, the trial court erred when it accepted that plea. Seeley's third assignment of error is meritorious.

{¶32} In his second assignment of error, Seeley argues he was denied the effective assistance of counsel for two reasons: 1) his trial counsel failed to raise the issue of the statute of limitations; and, 2) his trial counsel failed to request DNA testing. However, Seeley pled guilty to a violation of R.C. 2919.21(A)(2). "A guilty plea waives the right to claim ineffective assistance of counsel, except to the extent that the defects complained of caused the plea to be less than knowing and voluntary." *State v. Armstead* (2000), 138 Ohio App.3d 866, 870,

742 N.E.2d 720, 723. Therefore, Seeley must show trial counsel's alleged ineffectiveness prevented a knowing and voluntary plea.

{¶33} To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate counsel's performance was deficient and that deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693. A properly licensed attorney is presumed to execute his duties in an ethical and competent manner.

State v. Smith (1985), 17 Ohio St.3d 98, 17 OBR 219, 477 N.E.2d 1128. Ineffectiveness is demonstrated by showing that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476. To establish prejudice, a defendant must show there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. A reasonable probability must be a probability sufficient to undermine confidence in the outcome of the case. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. The defendant bears the burden of proof in demonstrating ineffective assistance of counsel. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128.

{¶34} As stated above, an indictment for of a violation of R.C. 2919.21(A)(2) must be returned within six years after the offense is committed if reasonable diligence is exercised to issue and execute process of that indictment. R.C. 2901.13. In this case, the offense charged ended on September 21, 1994, and an indictment was returned on September 29, 1994. Seeley was not arrested until October 3, 2000. Defense counsel should have noticed this

possible violation of the statute of limitations and the failure to do so was deficient.

{¶35} Furthermore, Seeley was prejudiced by counsel's deficient performance. As stated above, it is possible that the State did exercise reasonable diligence when executing process of the indictment. The fact that Seeley was arrested on the indictment after the date the statute of limitations presumptively ran creates a reasonable possibility that, had Seeley's counsel raised this defense, the charges would have been dismissed for a violation of the statute of limitations. Therefore, Seeley's counsel was ineffective for failing to raise the statute of limitations as a defense to the charge. See *State v. Tolliver* (Sept. 13, 2001), Cuyahoga App. No. 78786, unreported.

{¶36} It may appear contradictory that in two consecutive assignments of error we have dealt with alleged errors surrounding possible violations of the statute of limitations, and reached two very different results. Accordingly, it is instructive at this point to discuss the differences between the doctrines of ineffective assistance of counsel and plain error.

{¶37} As has been stated, plain error exists only when it is clear the outcome would have been different but for the error. *Sanders, supra*. Appellate courts recognize plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Landrum* (1990), 53 Ohio St.3d 107, 111, 559 N.E.2d 710, 717, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph three of the syllabus. Thus, it is generally an almost insurmountable obstacle to reversal. *State v. Carpenter* (1996), 116 Ohio App.3d 615, 621, 688 N.E.2d 1090, 1094. In contrast, a

defendant is prejudiced by counsel's deficient performance when there is a reasonable probability that the outcome would have been different but for the error. *Strickland, supra*. This is a much more solicitous standard of review than the plain error standard. See *Carpenter* at 622, 688 N.E.2d at 1094.

{¶38} These different standards of review may produce different results in the same or similar fact patterns. See *State v. Pettit* (July 5, 2000), Vinton App. No. 99CA529, unreported; *State v. Jones* (1996), 114 Ohio App.3d 306, 683 N.E.2d 87. As Justice Cook recently wrote, "the standard for prejudice under the plain-error rule differs from the standard for prejudice in an ineffective-assistance-of-counsel claim, and we should studiously avoid mixing the two concepts." *State v. Murphy* (2001), 91 Ohio St.3d 516, 559, 747 N.E.2d 765, 810 (Cook J., concurring). Under the doctrine of ineffective assistance of counsel, an appellant is claiming counsel's performance necessitated the error. The doctrine of plain error arises regardless of counsel's performance. It only applies when the court manifestly errs. In this case, Seeley's counsel was prejudicially deficient in not attempting to address the possible violation of the statute of limitations. However, the trial court did not manifestly err when it did not independently acknowledge that possible violation.

{¶39} Returning to Seeley's ineffective assistance of counsel claim, Seeley also argues counsel was deficient for failing to request DNA testing. The mere fact that a court had found him to be the father of the child in a paternity action is irrelevant to the disposition of a criminal action based upon R.C. 2919.21(A)(2) because Seeley's paternity is an essential element of the State's case. *Parsley, supra*.

{¶40} In a case such as this one, where a defendant is charged with violating R.C. 2919.21(A)(2) and the defendant maintains the child is not his child, the defendant's counsel should request paternity testing. Seeley's counsel's performance was deficient in not recognizing this fact. However, Seeley was not prejudiced by this deficiency. Seeley's statements that he thought he might not be the father are insufficient to establish a reasonable probability that the outcome of the case would have been any different. They are not sufficient to undermine confidence in the outcome of the case. Therefore, Seeley's counsel's failure to request genetic testing was not ineffective.

{¶41} Seeley's counsel was ineffective for failing to address the apparent violation of the statute of limitations. Upon remand, it is within the province of the trial court, as the trier of fact, to resolve the issue of the State's diligence with regard to the statute of limitations. However, counsel's failure to request genetic testing did not render the assistance given to Seeley ineffective. Seeley's second assignment of error is meritorious.

{¶42} For the foregoing reasons, as Seeley's second and third assignments of error are meritorious, we reverse the trial court's decision and remand this cause for further proceedings according to law and consistent with this Court's opinion.

Donofrio, J., concurs.

Waite, J., concurs.