[Cite as *State v. Devine*, 2009-Ohio-5825.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92590

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARREN DEVINE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515442-B

BEFORE: Rocco, P.J., Sweeney, J., and Jones, J.

RELEASED: November 5, 2009

JOURNALIZED:

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KENNETH A. ROCCO, P.J.:

{¶ 1} After entering a guilty plea to one count of murder, defendant-appellant Darren Devine appeals, asserting the trial court erred in accepting his plea.

{¶ 2} Devine presents one assignment of error. He argues that the trial court failed to fulfil its duty to ascertain whether his plea was knowingly, voluntarily made, because the court did not specifically inquire into Devine's complaint that his defense attorneys were pressuring him to enter it.

{¶ 3} Upon a review of the record, this court finds no fault with the trial court's actions. Devine's assignment of error, therefore, is overruled, and his conviction is affirmed.

{¶ 4} On September 10, 2008, the Cuyahoga County Grand Jury indicted Devine along with his brother; two of the counts pertained to Devine, and charged him with aggravated murder and attempted aggravated murder. Each count referred to a different victim. The victim named in count one was Devine's cousin. Devine pleaded not guilty to the charges at his arraignment, and two defense attorneys were appointed to his case.

{¶ 5} The record reflects Devine's trial counsel began seeking discovery from the state within days of their assignment. Within two weeks, they filed

motions requesting the trial court to appoint both an investigator and an expert to aid in Devine's defense. They also requested an oral hearing on these motions.

{¶ 6} On October 9, 2008, less than a month after Devine's indictment, the trial court conducted the hearing and granted both motions. The prosecutor additionally stated for the record that he had provided to the defense attorneys "a full and open reading of the file." The prosecutor "read all the material witness statements" concerning the incident to them. One of Devine's attorneys concurred in this assessment.

{¶ 7} The court set the case for trial to be held on November 24, 2008. In this interim, the state filed its formal responses to the defense discovery requests. These indicated that after his arrest, Devine provided both an oral and a written statement to the investigating detective.

{¶ 8} In his written statement, Devine admitted that he had "maybe twelve or thirteen beers" with several people at his house, including his cousin and his cousin's brother-in-law. Devine found out that his car window had been "broke[n] out." He "got in the car to go find out what happened," and, while driving down the next street, hit one of the victims with his car. He then returned to his home, where his brother disposed of Devine's car.

{¶ 9} The court conducted the final pretrial hearing on Friday, November 21, 2008. The prosecutor stated for the record that, in exchange for a guilty

plea, the state would amend count one to a charge of murder, dismiss count two, and recommend a sentence of life with the possibility of parole in 15 years.

{¶ 10} The trial court requested the prosecutor to "remind" it of the statutory maximum penalties involved with the indictment, and, then, to describe the evidence he expected to present at trial. According to the prosecutor, Devine had argued with his cousin, and an "independent eyewitness" subsequently saw Devine in his car as he "steered directly towards" his cousin and the other victim, "hitting [his cousin], throwing [him] 123 feet and killing him."

{¶ 11} Defense counsel stated that he and his co-counsel had "very lengthy discussions" about the state's plea offer with their client both the previous afternoon and prior to the hearing, and believed Devine required more time to consider it. In order to ascertain Devine's position, the trial court addressed him, reminded him he was "presumed innocent," and asked him if he "understood everything that has been said" up to that point.

{¶ 12} Devine responded that there were a "couple things" he wasn't "really clear on yet." The court asked if it was "something [he] discussed with [his] lawyers," and Devine answered, "Yeah, something [he] discussed with the lawyers earlier." The court indicated the matter would be addressed, then proceeded to conduct a plea colloquy.

{¶ 13} The trial court began by asking if, other than the plea offer, any threats or promises been made to get him to change his plea. Devine

responded, "No." The court then reminded Devine of each of his constitutional rights, informed him of the amended charge, and informed him, in detail, of the maximum penalties involved with a guilty plea to the amended charge. The court proceeded to describe the maximum penalties if he should be convicted of the offenses.

{¶ 14} Finally, the court asked Devine if there were anything else he needed clarified before he decided whether or not to accept the state's offer. Devine responded, "If I can just talk to the lawyers for a couple minutes, that would be fine." The trial court permitted the matter to be continued over the weekend.

{¶ 15} When the case was called for trial the following Monday, the prosecutor again outlined the offer made to Devine with the recommended sentence, informed the court that defense counsel had "been given full discovery," and noted the defense had taken advantage of the opportunity of an independent mechanical examination of Devine's automobile. The court then asked one of Devine's attorneys if the prosecutor had accurately described how matters stood.

{¶ 16} At that point, Devine spoke up and said, "No. I would like to request to get new counsel, Your Honor." The court requested of Devine why, and he answered, "Because they are back in the room telling me I'm guilty, I'm guilty; I stand no chance. And I don't feel like I'm guilty. Plus, they promised me this

investigator would come and interview me. He never did. They spent zero time interviewing any witnesses of mine, none." Devine further claimed he had "spent probably a total of a half hour with" his attorneys, and indicated he did not feel like "let[ting] them decide my life in a half hour."

{¶ 17} When the trial court inquired if what he was saying were true, however, Devine allowed it was perhaps not "word-for-word." The court reminded him his case was scheduled for trial that day, informed him his attorneys were experienced and prepared, and commented that counsel had negotiated a "more than adequate plea bargain." The court then asked him if there was any further point in discussing a possible plea.

{¶ 18} Devine answered, "Sir, we could talk. Yeah, we could talk." Upon further discussion with the court, Devine indicated he would like to confer with his sister. The court permitted him to do so privately, and left it up to Devine to also confer with his attorneys. The court called a recess until the afternoon.

{¶ 19} By that time, Devine informed the court he had spoken with his sister and his attorneys and stated he would "take a plea." For the second time, the trial court conducted a thorough Crim.R. 11(C)(2) colloquy.[1]

{¶ 20} Each time the court asked Devine if he understood his rights, the nature of the charge, and the penalties involved, he responded, "Yes." When the

[1]The trial court omitted only to inform Devine, who already had appointed counsel, that he had a right to appointed counsel to represent him.

court asked him if, besides what had been stated on the record, any threats or promises had been made to him, Devine answered, "No." The court then asked him again if entering a guilty plea of his "own free choice"; Devine assured, "Yes."

{¶ 21} Thus, when Devine answered that he pleaded, "Guilty" to amended count one, the trial court accepted his plea, dismissed count two, pronounced him guilty, and ultimately imposed a sentence of life imprisonment with the possibility of parole after 15 years.

{¶ 22} Devine appeals from his conviction with the following assignment of error:

> **"I. The trial court abused its discretion by accepting the appellant's guilty plea without ensuring that the appellant had been afforded the effective assistance of trial counsel."**

{¶ 23} Devine asserts that, because he expressed displeasure with his attorneys at the final pretrial, the trial court should have conducted an evidentiary hearing on the issue of defense counsels' efforts on his behalf before proceeding to the plea hearing. He claims that, under the circumstances, the record otherwise is inadequate to show his plea was knowingly, voluntarily and intelligently made. This court does not agree.

{¶ 24} Crim.R. 11(C) provides in relevant part:

> **"RULE 11. Pleas, Rights Upon Plea**
>
> "* * *

"(C) Pleas of guilty and no contest in felony cases

**"* * *

{¶ 25} "(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 a plea of no contest without first addressing the defendant personally and doing all of the following:

{¶ 26} "(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.

{¶ 27} "(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.

{¶ 28} "(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." (Emphasis added.)

{¶ 29} Regarding an argument such as Devine makes in this case, the court in *State v. Barnett* (1991), 73 Ohio App.3d 244, 248-49 made the following observations:

{¶ 30} "In determining whether counsel was constitutionally ineffective, the central issue in any case is whether an accused had a fair trial and substantial justice was done. *State v. Hester* (1976), 45 Ohio St.2d 71, 74 O.O.2d 156, 341 N.E.2d 304. An accused is denied his right to a fair trial if his counsel fails to play the role necessary to ensure that the accused enjoys the benefits of the adversarial process which the law affords him for testing the charges brought by the state. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 31} "A plea of guilty constitutes a complete admission of guilt. Crim.R. 11(B)(1). 'By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.' *United State* [sic] *v. Broce* (1989), 488 U.S. 563, 570, 109 S.Ct. 757, 762, 102 L.Ed.2d 927, 936. The plea renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt. *Menna v. New York* (1975), 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195.

{¶ 32} "When a defendant enters a plea of guilty as a part of a plea bargain he waives all appealable errors which may have occurred at trial, unless such errors are shown to have precluded the defendant from entering a knowing and voluntary plea. *State v. Kelley* (1991), 57 Ohio St.3d 127, 566 N.E.2d 658. 'A failure by counsel to provide advice [that impairs the knowing and voluntary

nature of the plea] may form the basis of a claim of ineffective assistance of counsel, but absent such a claim it cannot serve the predicate for setting aside a valid plea.' *United States v. Broce*, supra, 488 U.S. at 574, 109 S.Ct. at 765, 102 L.Ed.2d at 939.

{¶ 33} "On the basis of the foregoing, it is clear that a plea of guilty waives the right to claim that the accused was prejudiced by constitutionally ineffective counsel, except to the extent the defects complained of caused the plea to be less than knowing and voluntary.

{¶ 34} "Appellant's argument that he was forced to plead guilty because his counsel failed to prepare for trial raises an issue concerning the voluntariness of his plea. However, determination of that issue necessarily depends on matters not in the record before us. We decline to accept appellant's statement of them * * *."

{¶ 35} The supreme court came to a similar conclusion in *State v. Spates* (1992), 64 Ohio St.3d 269.

{¶ 36} In this case, although Devine argues his counsel provided inadequate assistance, nothing in the record supports this argument. The record instead reflects that counsel's efforts during the discovery process disclosed evidence that established proof of his guilt of the crimes. Nevertheless, counsel negotiated an advantageous plea agreement. Counsel also gave every indication of being fully prepared to take the case to trial, should their efforts to

persuade Devine to accept the state's offer prove unavailing. *State v. Melton*, Cuyahoga App. No. 89568, 2008-Ohio-925; see, also, *State v. Knott*, Athens App. No. 03CA6, 2004-Ohio-510.

{¶ 37} The trial court provided Devine with every opportunity to resolve his differences with counsels' approach to his case and to fully consider their opinions about his options. Only thereafter did the trial court proceed with a plea hearing. Under these circumstances, the trial court did not err in accepting Devine's guilty plea.[2]

{¶ 38} Since Devine cannot demonstrate counsels' actions caused his plea to be less than either knowing or voluntary, his assignment of error is overruled. *State v. Wenson* (July 19, 2001), Cuyahoga App. No. 78522; *State v. McDonall* (Dec. 16, 1999), Cuyahoga App. No. 75245, unreported; *State v. Barnett*, supra.

{¶ 39} Devine's conviction is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's

[2] Under such circumstances, the trial court would have been justified in denying a subsequent motion to withdraw the plea. *State v. Lavender* (Dec. 21, 2001), Lake App. No. 2000-L-049.

conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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KENNETH A. ROCCO, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
LARRY A. JONES, J., CONCUR