

[Cite as *State v. Character*, 2010-Ohio-4128.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93765

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEA CHARACTER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516633-A

BEFORE: Celebrezze, J., Boyle, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: September 2, 2010
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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Dea Character, appeals her conviction and sentence. Based on our review of the record and pertinent case law, we affirm.

{¶ 2} Appellant was indicted in a 56-count indictment on two counts of engaging in a pattern of corrupt activity, five counts of theft by deception, seven counts of securing records by deception, seven counts of falsification, seven counts of telecommunications fraud, 14 counts of forgery, seven counts of receiving stolen property, and seven counts of money laundering.

{¶ 3} Appellant sought several continuances throughout the course of the lower court proceedings. She requested a continuance of her arraignment because her attorney was scheduled to be at a different trial and appellant, who was also an attorney, was scheduled to work as a Voter Protection Attorney and was scheduled to attend a final pretrial for a client in Toledo. Appellant also sought continuances of pretrials and the actual trial date. Trial was originally scheduled for February 23, 2009, but the final trial date was set for June 8, 2009.

{¶ 4} On December 8, 2008, which was after appellant was arraigned, her retained counsel withdrew from the case because appellant had failed to comply with her attorney fee arrangement. Counsel was then appointed to the case and several pretrials were held. On June 1, 2009, another attorney filed an appearance as co-counsel in the case and filed a motion to continue the June 8, 2009 trial date. Similarly, on June 2, 2009, yet another attorney, who was also appellant's father, filed an appearance as co-counsel in the case and filed a supplement to the June 1 motion to continue. In this motion to continue, counsel argued that they needed additional time to review the voluminous documents that were provided during discovery. This motion was denied.

{¶ 5} On June 4, 2009, appellant pled guilty to one count of engaging in a pattern of corrupt activity,¹ five counts of theft by deception,² and five counts of money laundering.³ The trial court ordered a presentence investigation report and sentencing was scheduled for June 30, 2009. The original sentencing date was continued until July 14, 2009 at the request of appellant so that her counsel could obtain financial records and documentation to help mitigate her sentence. Appellant filed a second motion to continue the sentencing date, which was denied. Appellant was sentenced to 17 months for the fourth-degree felony and four years on the remaining counts. The terms imposed were to run concurrently to one another for an aggregate sentence of 4 years. Appellant was also ordered to pay \$318,000 in restitution jointly and severally with her codefendants, and she was informed that, upon her release from incarceration, she would face a mandatory five-year period of postrelease control. This appeal followed.

{¶ 6} Appellant presents three assignments of error for our review. She argues that the trial court abused its discretion in denying the June 1, 2009 motion to continue the trial date and her second motion to continue the

¹R.C. 2923.32, a first-degree felony.

²R.C. 2913.02(A)(3), three of the counts were third-degree felonies, one was a fourth-degree felony, and one was a second-degree felony.

³R.C. 1315.55, third-degree felonies.

sentencing date. She next argues that her appointed counsel was ineffective in failing to investigate the circumstances surrounding her case. Finally, she argues that her plea was unknowing and involuntary and should be vacated.

Law and Analysis

{¶ 7} For ease of discussion, appellant's arguments will be addressed in an order different from that in which they were presented.

Guilty Plea

{¶ 8} Appellant argues that the trial court's denial of her June 1, 2009 motion to continue left her with no choice but to enter a guilty plea because she knew that her appointed counsel was unprepared to proceed to trial and her newly retained counsel did not have sufficient time to prepare. Because a criminal defendant gives up certain constitutional rights when pleading guilty to a crime, a guilty plea cannot be accepted "unless the defendant is fully informed of the consequences of his or her plea." *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶25. A plea is invalid unless it was knowingly, intelligently, and voluntarily made. *Id.*, citing *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450.

{¶ 9} To ensure compliance with these fundamental protections, a trial judge must engage the defendant in a plea colloquy before accepting the plea. *Id.* at ¶26, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one of syllabus; Crim.R. 11(C), (D), and (E). "It follows that, in

conducting this colloquy, the trial judge must convey accurate information to the defendant so that the defendant can understand the consequences of his or her decision and enter a valid plea.” Id.

{¶ 10} Before accepting appellant’s plea, the trial judge was obligated to comply with the mandates of Crim.R. 11(C)(2). Pursuant to this rule, a trial judge may not accept a defendant’s guilty plea unless he (1) determines that the defendant is voluntarily entering the plea and understands the nature of the charges and the maximum penalty he faces, (2) informs the defendant of the effect of accepting the plea and that the court may proceed with judgment and sentencing once it is accepted, and (3) informs the defendant that he is waiving his constitutional right to a jury trial, confrontation of witnesses, compulsory process, and the state’s burden of proof beyond a reasonable doubt. Id. at ¶27.

{¶ 11} Appellant entered a guilty plea in light of the significant evidence against her. The record reflects that this plea was recommended not only by appellant’s appointed counsel, but also by one of her newly retained attorneys. The plea deal resulted in appellant being convicted of 11 charges and the remaining 45 counts were nolle. In addition, the state assured appellant that she would not be indicted on additional charges that arose out of the same facts as the current case against her.

{¶ 12} A review of the plea hearing shows that the trial court complied with the mandates of Crim.R. 11. The court informed appellant of the penalties she could face by entering a guilty plea, including reporting the conviction to the Ohio State Bar Association. When asked if she wished to take the plea agreement, appellant responded, “Yes, your Honor, I do.” She also indicated that she was satisfied with the representation provided by her attorneys.

{¶ 13} The trial judge outlined each of appellant’s constitutional rights, including the right to a trial by jury. Appellant acknowledged that she understood these rights and would be waiving them if she entered a guilty plea. Appellant pled guilty and the judge noted that this plea was knowingly and voluntarily entered. Appellant’s attorneys indicated that they felt Crim.R. 11 had been complied with.

{¶ 14} There is nothing in the record to suggest appellant’s guilty plea was anything less than knowingly, intelligently, and voluntarily entered. This is especially true in light of the fact that appellant was an attorney with knowledge of the Constitution and the protections it affords. Appellant even indicated at sentencing, “Your Honor, I did not want to try to counter any of those things that the people said because I chose not to go to trial. I chose to take the plea.” Based on our review of the record, appellant’s plea was

knowing, intelligent, and voluntary, and her third assignment of error is overruled.

Motion to Continue

{¶ 15} Appellant argues that the trial court erred in denying her motion to continue the trial date as well as her motion to continue sentencing. Appellant's guilty plea waived any error with regard to the trial court's denial of her motion to continue the trial date, and thus we will only review the trial court's denial of her motion to continue sentencing. *State v. Lane*, Greene App. No. 2001-CA-91, 2002-Ohio-1898 ("Finally, Lane's guilty plea waived any error in the trial court's having denied her motion to continue her trial date.").

{¶ 16} Whether to grant or deny a continuance is within the discretion of the trial judge and such a decision will not be disturbed absent an abuse of discretion. *First Natl. Bank v. Garwood* (1985), Williams App. No. WMS-85-5, citing *Kidd v. Cincinnati Transit Co.* (1970), 24 Ohio App.2d 101, 265 N.E.2d 297; *Cherry v. B. & O. Rd.* (1972), 29 Ohio St.2d 158, 280 N.E.2d 380; *State ex rel. Buck v. McCabe* (1942), 140 Ohio St. 535, 45 N.E.2d 763. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations." *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d

264, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W.2d 810. In order to have an abuse of that choice, the result must be “so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias.” *Id.*

{¶ 17} Appellant argues that her counsel was not given sufficient time to obtain financial records and other documentation that could be used in mitigation at sentencing. The crux of appellant’s argument is that her case involved a 56-count indictment and voluminous discovery. She argues that her appointed counsel was too busy to properly investigate the charges against her and that her retained co-counsel needed the continuance in order to effectively locate and obtain evidence in mitigation of sentencing.

{¶ 18} “There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 423 N.E.2d 1078, quoting *Unger v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921. A trial court should consider certain factors when deciding whether to grant a criminal defendant’s motion for a continuance: 1) the length of the requested delay; 2) whether the defendant has requested and received other continuances; 3) the

inconvenience to each of the parties and their attorneys, witnesses, or the court; 4) the legitimacy of the request or whether it is simply a dilatory tactic; 5) whether the requesting party's actions created the need for the delay; and 6) any other relevant factors based on the facts of the case. Id.

{¶ 19} While we recognize that appellant's retained attorneys did not enter appearances in this case until June 1 and June 2, 2009, her appointed counsel had six months to prepare for trial and sentencing. To the extent that appellant waited until the week before trial to retain additional counsel, the circumstances necessitating the continuance were the result of appellant's actions.⁴ The record shows that appellant sought several continuances while her case was pending at the trial court level. In fact, she sought to continue her arraignment date and several pretrials. The trial judge had expressed her concern with appellant's dilatory tactics and noted on the record that all delays in this case were caused solely by appellant.

{¶ 20} The record reveals that the trial court had already continued the original sentencing date at appellant's request. Sentencing was originally scheduled for June 30, 2009 and was then continued until July 14, 2009. Since appellant's counsel had already requested and received additional time to prepare for sentencing, the record is devoid of any evidence that the trial

⁴Appellant indicates in her appellate brief that she moved the court to appoint new or additional counsel on several occasions. No such request is reflected in the lower court record or in the transcript of proceedings provided on appeal.

court abused its discretion in denying appellant's second requested continuance of her sentencing date.

Ineffective Assistance of Counsel

{¶ 21} Appellant argues that the trial court's refusal to grant her requested continuances deprived her of her right to effective assistance of counsel when she entered her guilty plea and when she was sentenced. She also argues that her appointed counsel was ineffective in failing to investigate the circumstances surrounding her case and in failing to present evidence in mitigation of her sentence. "[A] claim for ineffective assistance of counsel is waived by a guilty plea, unless the ineffective assistance caused the guilty plea to be involuntary." *State v. Bishop*, Cuyahoga App. No. 91885, 2009-Ohio-1797, ¶10, quoting *State v. Hicks*, Cuyahoga App. No. 90804, 2008-Ohio-6284, ¶24. Because we previously held that appellant's guilty plea was knowingly, intelligently, and voluntarily entered, she waived any argument that her counsel was ineffective prior to her guilty plea. Accordingly, we will only analyze her ineffective assistance argument as it relates to sentencing.

{¶ 22} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) the result of appellant's trial or legal proceeding would have been different had defense

counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 23} In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 24} The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, that, “[w]hen considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel’s essential duties to his client. Next, and analytically separate from the question of whether the defendant’s Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel’s ineffectiveness.’ *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 2 O.O.3d 495, 498, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668 * * *.

{¶ 25} “Even assuming that counsel’s performance was ineffective, this is not sufficient to warrant reversal of a conviction. ‘An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365 [101 S.Ct. 665, 667-68, 66 L.Ed.2d 564] (1981).’ *Strickland*, supra, 466 U.S. at 691, 104 S.Ct. at 2066. To warrant reversal, ‘[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ *Strickland*, supra, at 694, 104 S.Ct. at 2068. In adopting this standard, it is important to note that the court specifically rejected lesser standards for demonstrating prejudice.” *Bradley* at 142.

{¶ 26} “Accordingly, to show that a defendant has been prejudiced by counsel’s deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel’s errors, the result of the trial would have been different.” *Id.* at 143.

{¶ 27} Appellant has made no showing that her appointed counsel was ineffective in his investigation of or preparation for appellant’s case. She merely makes generalized statements that her appointed counsel had several large trials during the pendency of her case and that he did not have time to

meet with her or prepare for trial. She also argues that she possessed information that, if investigated, would have led to her acquittal. Despite these contentions, there is nothing in the record to suggest that appointed counsel was ineffective in preparing for sentencing.

{¶ 28} Even if appellant was able to prove that her appointed counsel was ineffective in his preparation, she has pointed to no specific evidence to show that she would have been acquitted, received a more favorable plea deal, or received a lesser sentence had her counsel had more time to prepare. Since appellant has failed to show that her counsel was ineffective or that her sentence would have been different had he been provided additional time to secure certain financial documentation, she has failed to prove that she was denied the effective assistance of counsel.

{¶ 29} We also recognize that appellant made a blanket argument that the trial court's decision to deny her motions to continue effectively deprived her of her right to the effective assistance of counsel. The trial judge did not abuse her discretion in denying appellant's motions to continue in light of the fact that she had requested continuances on various occasions and the judge noted that she did not condone appellant's dilatory tactics. Since we found no error with the trial court's denial of appellant's motions to continue, we cannot hold that these denials deprived appellant of her constitutional right to the effective assistance of counsel.

Conclusion

{¶ 30} There is nothing in the record to suggest that appellant's guilty plea was unknowing, involuntary, or unintelligent. The trial judge did not abuse her discretion in denying appellant's motions to continue, and the record is devoid of any evidence that appellant was denied the effective assistance of counsel. Appellant's assignments of error are overruled.

Judgment 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 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.

FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR