[Cite as *State v. Tatum*, 2015-Ohio-1743.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101890

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TELSTAR TATUM

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-583284-A

BEFORE: Keough, P.J., Blackmon, J., Laster Mays, J.

RELEASED AND JOURNALIZED: May 7, 2015

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Defendant-appellant, Telstar Tatum, appeals his conviction and sentence for sexual battery, rendered after his guilty plea. In his single assignment of error, Tatum asserts that "the trial court's encouraging [him] to accept a plea rather than go to trial by emphasizing to him the benefits of the state's plea offer and the risks of trial rendered his guilty plea involuntary and therefore unconstitutional."

{¶2} A defendant's plea must be knowingly, intelligently, and voluntarily made. *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450.

{¶3} The enforcement of a plea that does not satisfy all three of these criteria is unconstitutional under both the United States and Ohio Constitutions. *Id.*

{¶4} As to the judge's participation in the plea-bargaining process, the Ohio Supreme Court has cautioned that "the judge's position in the criminal justice system presents a great potential for coerced guilty pleas and can easily compromise the impartial position a trial judge should assume." *State v. Byrd*, 63 Ohio St.2d 288, 292, 407 N.E.2d 1384 (1980). Judicial participation is strongly discouraged but does not render a plea per se involuntary; the ultimate inquiry is whether the judge's active conduct could have led the defendant to believe he could not get a fair trial, including a fair sentence after trial, and whether the judicial participation undermined the voluntariness of the plea. *State v. Sawyer*, 183 Ohio App.3d 65, 2009-Ohio-3097, 915 N.E.2d 715, ¶ 54 (1st Dist.), citing *Byrd* at 293.

{¶5} Since the United States Supreme Court's decision in *Missouri v. Frye*, __ U.S. __ , 132 S. Ct. 1399, 182 L.Ed.2d 379 (2012), it is important that a record be made demonstrating that a defendant is aware of a plea deal if one is presented, which may necessarily involve the participation of the trial judge in placing the plea deal on the record. *State v.*

Jabbaar, 8th Dist. Cuyahoga No. 98218, 2013-Ohio-1655, ¶ 27. "A trial judge's participation in the plea bargaining process must be carefully scrutinized to determine if the judge's intervention affected the voluntariness of the defendant's guilty plea." *Byrd* at 293. A judge's comments must not be considered in isolation, however; instead, we consider the record in its entirety to determine the voluntariness of the guilty plea. *Jabbaar* at ¶ 29, citing *State v. Finroy*, 10th Dist. Franklin No. 09AP-795, 2010-Ohio-2067, ¶ 7. In this case, we find nothing in the record demonstrating that the trial court's involvement coerced Tatum's plea or undermined the voluntariness of his plea.

{¶6} Tatum was charged in a four-count indictment with two counts of rape with sexually violent predator specifications and one- and three-year firearm specifications; one count of kidnapping with sexual motivation and sexually violent predator specifications, and one- and three-year firearm specifications; and one count of having a weapon while under a disability, with one- and three-year firearm specifications.

{¶7} Trial was to begin on the morning of June 2, 2014, but the proceedings were continued until the afternoon because the state's main witness, the alleged victim, had refused to come to court. The victim was present when the proceedings reconvened that afternoon, and the state informed the court that it was ready to proceed.

{¶8} Following a discussion of and the court's ruling on Tatum's motion in limine, the court stated that it was required to place on the record the status of any plea negotiations in the case. The prosecutor informed the court that it was prepared to accept a plea to one count of sexual battery and dismiss all the other charges and specifications. The judge then asked Tatum:

> THE COURT: Okay. And was that your understanding, Mr. Tatum, that you would be permitted to plead guilty to sexual battery and they would dismiss the rape and the other charges?

> THE DEFENDANT: Was that brought to my attention? Yes, it was, Your Honor.
>
> THE COURT: Okay. Can I assume then that you and Mr. Jenkins talked about the differences between a plea of guilty and being sentenced on sexual battery versus getting convicted of rape and these other charges?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And they're breathtaking, aren't they, the differences?
>
> THE DEFENDANT: Yes.
>
> THE COURT: So let's go through and make sure you and I agree on the difference * * *.

{¶9} The trial court then had a lengthy discussion with Tatum to ensure that he was fully informed of and understood the possible penalties if he was convicted of the offenses as indicted or pled to sexual battery. We find nothing improper or coercive in the trial court's explanations to Tatum of the possible sentences, or in the trial court's questions to Tatum to ascertain that he understood the possible penalties. "When the trial court labors to make sure that a defendant understands the charges against him and the possible penalties, this assurance does not amount to an infringement on the constitutional right to a voluntary plea." *State v. Carmicle*, 8th Dist. Cuyahoga No. 75001, 1999 Ohio App. LEXIS 5211 (Nov. 4, 1999).

{¶10} The record in this case reflects that the trial judge made sure that Tatum had the information necessary to make an informed decision; it did not coerce or pressure him to take the plea deal that had been offered. Indeed, the trial judge indicated several times that she had no opinion on what Tatum should do. At one point, the judge told Tatum:

> THE COURT: Now, I'm not here to say the state can prove all this stuff. I have no clue. Right? You understand, I don't know anything about this case. So I'm not here to say they can prove this stuff.

{¶11} And later in the hearing, the judge told Tatum:

> THE COURT: Now, I can't evaluate what your prospects are because I don't know anything about the case, right?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And I'm certainly not going to sit here and say you ought to take this plea bargain, Mr. Tatum. Okay. That's none of my business, none of my concern. I have no information to gauge that whatsoever. My job is to make sure we build a record that you knew what you were being offered. Okay?
>
> THE DEFENDANT: Yes, Your Honor.

{¶12} Later, when defense counsel informed the court that Tatum wanted to accept the plea deal, the judge once again made clear that she had no position on what Tatum should do:

> THE COURT: Okay. So that's what you're considering, Mr. Tatum?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Now, you heard me say probably more than once I don't know anything about this case. So I'm not saying you ought to take this action or you should not take this action. Right?
>
> THE DEFENDANT: I understand, Your Honor.

{¶13} Subsequently, the judge again emphasized that Tatum did not have to accept the plea offer:

> THE COURT: Now, you understand that you're welcome to plead guilty if that's what your personal decision is to do, but you do know we could instead continue trial today, tomorrow, and on into the week until we're done, right?
>
> THE DEFENDANT: I understand, Your Honor.

{¶14} "[A] plea of guilty or no contest will be presumed to be coerced if the trial judge takes a partisan position in support of the plea." *State v. Chenoweth*, 2d Dist. Montgomery No. 15846, 1997 Ohio App. LEXIS 4608, *3 (Sept. 19, 1997). That is not demonstrated on the record of this proceeding.

{¶15} There is no merit to Tatum's contention that the trial judge's statement "I'll go off the record at this time if you two want to have a conversation," made after the discussion of the possible penalties was completed, was meant to coerce him to take the plea. In fact, Tatum confirmed on the record that he had had many conversations with his counsel during the discussion of the plea with the court:

> THE COURT: You have a very able lawyer, and I noticed that during the time we've been out here on the record, numerous times the two of you had very intensive conversations between the two of you. And you noticed, didn't you, that at that time the court just shut up and we stopped all the talking till the two of you were done talking, right?
>
> THE DEFENDANT: Thank you, Your Honor.
>
> THE COURT: Okay. Well, and we just wanted you to confirm for the record that there have been a lot of discussions, for a nice period of time, with your counsel from time to time so that your questions, I presume could be answered and you could talk to Mr. Jenkins about whatever you needed to talk to him about, right?
>
> THE DEFENDANT: Yes, Your Honor.

{¶16} There is also no merit to Tatum's contention that the judge somehow coerced his plea because she discussed his possible placement in a community-based correctional facility. The judge made very clear to Tatum that placement in such a program was not guaranteed if he pled guilty to sexual battery:

> THE COURT: So I know that a sex offender can't be sent to my CBCF. I know that there's at least one that might possibly take a sex offender. I wouldn't want you to plead guilty expecting — I wouldn't want you to plead guilty to sexual battery expecting that you would necessarily get a program like that. Okay. You might not.

{¶17} Last, the record does not support Tatum's contention that in an effort to coerce a plea, the judge made "repeated" statements about how good the offered deal was and "insisted" that Tatum agree with her. The three instances cited by Tatum were neither partisan in tone nor

coercive in effect: (1) the judge's statement that the differences between the sentences on a plea to sexual battery and on the offenses as indicted were "breathtaking" was correct, a fact Tatum said he understood after talking with his attorney; (2) the judge's statement that "I agree with you. They'd all be bad" was merely agreement with Tatum's unsolicited comment that "none of it would be no good" in reference to the possible sentences on the sexually violent predator specification and firearm specifications; and (3) the judge merely stated the obvious when she told Tatum that getting the sexually violent predator specification dismissed as part of the plea was "kind of a nice thing to get out of the case, right?" because he could have been sentenced to life on that specification.

{¶18} In short, there is nothing in the record to suggest that the trial judge coerced or induced Tatum's plea, which was made knowingly, voluntarily, and intelligently. The assignment of error is therefore overruled.

{¶19} 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
ANITA LASTER MAYS, J., CONCUR