[Cite as *State v. Brown*, 2016-Ohio-5415.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103835

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOE BROWN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-593970-A

BEFORE: McCormack, J., Jones, A.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: August 18, 2016

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TIM McCORMACK, J.:

{¶1} Defendant-appellant Joe Brown appeals from a judgment of the Cuyahoga County Court of Common Pleas that sentenced him to 29 years for three counts of rape following a guilty plea. For the following reasons, we affirm.

{¶2} On March 11, 2015, Brown was charged with four counts of rape, three counts of kidnapping with sexual motivation specifications, one count of gross sexual imposition ("GSI"), and one count of aggravated robbery. These charges concerned three separate incidents and three different victims, and they occurred in November 2003, June 2008, and October 2008. The charges also included a sexually violent predator specification and firearm specifications.

{¶3} The record shows that in November 2003, Brown rode up to Victim 1 on his bicycle and offered the woman crack and she refused. He then grabbed her, dragged her into a garage, and raped her. In June 2008, Brown was dealing drugs and approached Victim 2. He grabbed her and dragged her into a vacant house and raped her. Four months later, in October 2008, Brown took advantage of a woman asking for directions. In this case, Brown dragged Victim 3 into another garage and raped her.

{¶4} At his arraignment, the court-appointed counsel. Defense counsel subsequently moved the court for independent DNA testing, which was granted. On August 31, 2015, Brown filed a pro se motion to disqualify counsel, which the trial court denied after a hearing. On September 10, Brown pleaded guilty to three counts of rape.

In exchange, the state agreed to dismiss the firearm specifications and the sexually violent predator specifications and the remaining charges. The court sentenced Brown to an aggregate 29 years in prison.

{¶5} Brown now appeals, assigning one error for our review:

> The trial court erred in failing to remove Defendant's appointed counsel and thereafter accepting Defendant's plea, which was not knowingly, voluntarily, and intelligently entered, in derogation of Defendant's right to due process of law, as protected by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Ohio Constitution.

{¶6} Brown claims that the court erred in failing to remove appointed counsel and in accepting his guilty plea. He argues that the court did not conduct a sufficient inquiry into Brown's dissatisfaction with his court-appointed counsel, and as a result, his plea was not knowingly, voluntarily, and intelligently entered.

{¶7} Generally, when a defendant moves to disqualify his or her court-appointed counsel, it is the trial court's duty to inquire into the complaint and make it a part of the record. *State v. Corbin*, 8th Dist. Cuyahoga No. 96484, 2011-Ohio-6628, ¶ 19, citing *State v. Lozada*, 8th Dist. Cuyahoga No. 94902, 2011-Ohio-823. The inquiry, however, need only be brief and minimal. *State v. King*, 104 Ohio App.3d 434, 437, 662 N.E.2d 389 (4th Dist.1995).

{¶8} The defendant bears the burden of demonstrating proper grounds for the appointment of new counsel. *State v. Patterson*, 8th Dist. Cuyahoga No. 100086, 2014-Ohio-1621, ¶ 18. "If a defendant alleges facts which, if true, would require relief, the trial court must inquire into the defendant's complaint and make the inquiry part of the record." *Id.*, citing *State v. Deal*, 17 Ohio St.2d 17, 20, 244 N.E.2d 742 (1969). The grounds for disqualification must be specific, not "vague or general." *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 68.

{¶9} Additionally, in order for the court to discharge a court-appointed attorney, the defendant must show "'a breakdown in the attorney-client relationship of such magnitude as to jeopardize a defendant's right to effective assistance of counsel.'" *State v. Coleman*, 37 Ohio St.3d 286, 292, 525 N.E.2d 792 (1988), quoting *People v. Robles*, 2 Cal.3d 205, 215, 85 Cal.Rptr. 166, 466 P.2d 710 (1970). Defendant's right to counsel "'does not extend to counsel of the defendant's choice.'" *Patterson* at ¶ 20, quoting *Thurston v. Maxwell*, 3 Ohio St.2d 92, 93, 209 N.E.2d 204 (1965).

{¶10} We review a trial court's decision whether to remove court-appointed counsel for an abuse of discretion. *Patterson* at ¶ 19. An abuse of discretion implies that the court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶11} Here, Brown stated in his pro se motion to disqualify counsel that he "feel[s] as though [counsel] is not representing me to the fullest, my life is at stake for the crimes I have committed and [counsel] is not giving his best efforts to represent me." Brown

further stated that counsel "has not tried his hardest to obtain me a plea with the state of Ohio." Brown explained that he asked his attorney in July to inquire if the prosecutor would entertain a plea to three GSIs. He noted that counsel advised him that he did, in fact, forward the request onto the prosecutor and counsel would let Brown know when he learned something regarding the plea. Brown continued to state that he also wanted a psychological evaluation due to his placement on the mental health docket. Finally, Brown reiterated his desire to have an attorney who would "work hard in representing me" because his current counsel "is not doing that." Brown then requested a hearing and that new counsel be appointed.

{¶12} On September 3, the court held a hearing on Brown's motion. At the hearing, the court asked Brown to address his concerns. Brown stated that counsel "[is] not doing his job" and he expressed concern about the DNA report, indicating that the DNA included a victim from a previous case. Counsel agreed with Brown regarding the evidence. Counsel explained to the court that he and his client reviewed the results and they discovered that the DNA lab inadvertently conducted testing on a rape victim from a previous case and not on one of the victims on a current case. In response, the court noted that Brown's "beef" was not with counsel, but rather, the evidence.

{¶13} The court also addressed Brown's concern regarding a plea agreement. At that point, there was a lengthy discussion with the prosecutor, who confirmed that defense counsel had, in fact, addressed Brown's desire to plead to three GSIs, and he and defense counsel were engaged in plea negotiations. The prosecutor explained that it took him

some time in getting the "mark on the file." The court then explained to Brown as follows:

> So, Mr. Brown, what [the prosecutor] is saying is [defense counsel] made the plea request that you asked for. It's the prosecutor who had to go through his chain of command, and the prosecutor did not get back to [defense counsel] until the day after you filed your motion complaining about the lack of plea negotiations.

Thereafter, the prosecutor advised the court that he was authorized to accept a plea to three counts of rape. In exchange, the state would dismiss the firearm specifications, the sexually violent predator specifications, and the remaining counts and agree to a sentence range of 21 to 30 years. The prosecutor then summarized the state's evidence in the case.

{¶14} Prior to concluding the hearing, the court asked Brown what defense counsel is not doing "that you think he should [be doing]." Brown replied that he does not "trust him defending my life, sir. * * * I'm just requesting a lawyer that's going to defend me to his utmost." Thereafter, the court asked defense counsel if he will represent Brown to the best of his professional ability in the event that Brown's motion is denied. Counsel indicated that he would. In a journal entry filed later the same day, the trial court denied Brown's pro se motion to disqualify counsel.

{¶15} In light of the foregoing, we find that the trial court conducted a thorough inquiry into Brown's assertions. The court held a hearing on Brown's motion and inquired into his concerns regarding the DNA evidence and the plea negotiations. The court noted that Brown's concerns regarding the DNA was not a matter that concerned

the actions of his attorney or the attorney-client relationship, but rather, was an issue with respect to the quality or the sufficiency of the evidence. The court also addressed Brown's desire to enter a plea. The court precipitated a lengthy discussion regarding a possible plea. At this time, the prosecutor confirmed that defense counsel had, in fact, relayed Brown's request for a plea and the reason for the delay in responding to Brown's request was that the prosecutor had not obtained the necessary approval.

{¶16} Additionally, we find Brown's claims that defense counsel was not "representing [him] to the fullest," or that counsel was not "giving his best efforts to represent [him]" to be vague and general and not supported by the record. The record shows that defense counsel reviewed the DNA evidence with Brown prior to the hearing, counsel had been actively participating in plea negotiations with the prosecutor upon his client's request, and counsel advised the court that he would represent Brown to the best of his professional ability in the event that Brown's motion was denied. Even if Brown did not get along with counsel, or that he did not like counsel, "a lack of rapport is not sufficient to constitute a total breakdown when it does not inhibit the attorney from both preparing and presenting a competent defense." *State v. Davis*, 8th Dist. Cuyahoga No. 101208, 2014-Ohio-5144, ¶ 13, citing *State v. Lewis*, 11th Dist. Lake No. 2012-L-074, 2013-Ohio-3974, ¶ 48.

{¶17} We therefore find that the trial court did not abuse its discretion in denying Brown's pro se motion to disqualify counsel. There is no evidence that Brown's right to effective assistance of counsel was jeopardized.

{¶18} Moreover, we find that Brown's plea was knowing, intelligent, and voluntary.

{¶19} In order to ensure that a defendant enters a plea knowingly, voluntarily, and intelligently, a trial court must engage in an oral dialogue with the defendant in accordance with Crim.R. 11(C). *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he or she can make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Schmick*, 8th Dist. Cuyahoga No. 95210, 2011-Ohio-2263, ¶ 5.

{¶20} Crim.R. 11(C)(2) requires that a trial court determine from a colloquy with the defendant whether the defendant understands (1) the nature of the charge and maximum penalty, (2) the effect of the guilty plea, and (3) the constitutional rights waived by a guilty plea. *See, e.g., State v. Hussing*, 8th Dist. Cuyahoga No. 97972, 2012-Ohio-4938, ¶ 18. The constitutional rights include the rights to a jury trial, to confront witnesses, to have compulsory process to obtain 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)(c); *State v. Hinton*, 8th Dist. Cuyahoga No. 102710, 2015-Ohio-4907, ¶ 21.

{¶21} Here, the record indicates the court conducted a full Crim.R. 11 hearing before accepting Brown's plea. At the plea hearing, the state presented the charges, the

maximum penalties for the charges, and the effects of Brown's plea as it related to the charges. Brown stated that he discussed the proposed plea with defense counsel and he wished to enter into the plea bargain.

{¶22} Subsequently, the court engaged Brown in a Crim.R. 11 colloquy. At this time, Brown advised the court that he was not under the influence of illegal drugs or alcohol; however, he was taking a prescription medication for clinical depression. Brown indicated that, at times, his medical condition or medication may interfere with his ability to think rationally. When the court asked Brown if he was thinking rationally and clearly that morning, Brown responded, "I don't know." Thereafter, the court asked Brown if he discussed the proposed plea with counsel, to which Brown replied that he had. Brown confirmed that his counsel answered any questions he had regarding the plea to his satisfaction. Brown then agreed to inform the court that if he does not understand something during the hearing, he will stop the court and ask for an explanation.

{¶23} The court then advised Brown of the rights he would be waiving by making a plea. The court explained the nature of each of the charges against him and fully explained the maximum sentence for each offense, advising Brown that he faced a possible maximum aggregate sentence of 30 years. The court also explained the other consequences of his plea, including postrelease control and the possibility of financial sanctions, such as fines, and the requirements of sex offender registration. After each

individual explanation, the court asked Brown if he understood and Brown said that he did.

{¶24} Thereafter, the court asked Brown if he preferred a fair trial on all of the original charges or the outlined plea bargain on the three amended charges. Brown replied, "If I was to have trial, I wouldn't want him to be my lawyer." The following exchange took place:

> Court: Well, we've discussed that before.
>
> Brown: I know.
>
> Court: [Defense counsel] is as effective as, if not more than, anybody else that I am aware of. I have not heard a reason why he should be disqualified.
>
> Brown: Conflict of interest.
>
> Court: I'm not sure that's true based on what I heard at the hearing. [Counsel] is duty bound to represent you to the best of his ability * * *. Even if he thinks the evidence against you is very strong, and he is recommending a plea bargain, I think we had the same conversation, it's your decision to accept or not [accept] the plea bargain.
>
> If you accept it, fine. We'll do that in the next couple of minutes or so. If you decline, that is fine, too. And we'll have a fair trial where I have no doubt that [defense counsel] will represent you as effectively as anybody else could.
>
> I cannot say [defense counsel], or any lawyer, or for that matter, a worse one, can tell you what the result is going to be at trial.
>
> Brown: I'll take the plea.

Brown then entered a guilty plea to the three counts of rape, and the court accepted his guilty pleas and found Brown guilty of the charges.

{¶25} Based upon the above, we find that Brown knowingly, voluntarily, and intelligently entered a guilty plea to the charges. Although he made an initial statement that "sometimes" he did not think clearly, he did not indicate any confusion, hesitation, or lack of understanding at any time during the colloquy. Rather, he indicated that he understood every advisement. Additionally, the record does not demonstrate that the court's failure to disqualify counsel negated the voluntariness of Brown's plea.

{¶26} Accordingly, in light of the trial court's thorough inquiry into Brown's motion to disqualify counsel and Brown's knowing, voluntary, and intelligent plea agreement, Brown's assignment of error is overruled.

{¶27} Judgment affirmed.

It is ordered that appellee recover of 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.

TIM McCORMACK, JUDGE

LARRY A. JONES, SR., A.J., and
SEAN C. GALLAGHER, J., CONCUR