The Supreme Court of Ohio

CASE ANNOUNCEMENTS

July 27, 2023

[Cite as *07/27/2023 Case Announcements #2*, 2023-Ohio-2574.]

APPEALS NOT ACCEPTED FOR REVIEW

2023-0487. State v. Mowery.
Henry App. No. 7-22-06, 2023-Ohio-563.
Donnelly, J., dissents, with an opinion joined by Brunner, J.

DONNELLY, J., dissenting.

{¶ 1} This appeal provides a much-needed opportunity to revive the robust standard of review that should be applied when trial judges interject themselves into plea negotiations in criminal cases. I dissent from this court's decision not to exercise jurisdiction.

{¶ 2} The trial judge who accepted the guilty plea of appellant, Nathan Mowery, was one of a series of judges who had been assigned to the case. At a pretrial hearing that took place over one year after Mowery's indictment, the judge expressed frustration at how long the case had dragged on, saying, "[T]his case would be completely over with by now if I was handling this from start to finish." 2023-Ohio-563, ¶ 5. The trial judge told Mowery at the pretrial hearing that it was the last day that he would accept a plea on the single, second-degree felony count of engaging in a pattern of corrupt activity. The judge informed Mowery that if Mowery were to exercise his right to a jury trial and lose, he would immediately impose a lengthy prison term based on his personal views of the nature of the charge. The judge stated in open court: " 'Some people may think because some states have legitimized marijuana that this isn't a big deal, it's a big deal to me and anybody that is convicted will get eight to twelve, and * * * the jury will be sitting there when I impose the sentence.' " *Id.* Mowery entered a guilty plea later that day. The trial court ultimately imposed a prison term of six to nine years.

{¶ 3} A trial judge's sentencing power "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, 293, 407 N.E.2d 1384 (1980). Misuse of the sentencing power, or even the appearance of such misuse, is unacceptable for any purpose—including the purpose of clearing a lagging case from the docket. *United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir.1973) ("courts must not use the sentencing power as a carrot and stick to clear congested calendars").

{¶ 4} Whether or not a trial judge intends to coerce a defendant into pleading guilty, the threat of a longer sentence absent a plea is inherently coercive. *See United States v. Braxton*, 784 F.3d 240, 245 (4th Cir.2015); *United States v. Markin*, 263 F.3d 491, 498 (6th Cir.2001); *United States v. Cano-Varela*, 497 F.3d 1122, 1133 (10th Cir.2007); *United States v. Allen*, 305 Fed.Appx. 654, 656 (11th Cir.2008). A judge's mere "participation in the actual [plea] bargaining process presents a high potential for coercion." *Byrd* at 292. "Coercion is avoided when a judge does not initiate a discussion of the sentence, and when a judge does not speculate on the sentencing consequences of future procedural contingencies." *State v. Azeen*, 163 Ohio St.3d 447, 2021-Ohio-1735, 170 N.E.3d 864, ¶ 27, fn. 3, quoting *People v. Cobbs*, 443 Mich. 276, 284, 505 N.W.2d 208 (1993). Coercion is *not* avoided when trial judges "state or imply alternative sentencing possibilities on the basis of future procedural choices, such as an exercise of the defendant's right to trial by jury or by the court." *Cobbs* at 283.

{¶ 5} The trial judge who accepted Mowery's guilty plea did not merely answer questions during the parties' plea negotiations, nor did he merely play a minor participatory role while observing the parties' negotiations. The trial judge's statements give the strong impression that he was soliciting Mowery's guilty plea and threatening to impose a longer prison term if Mowery were to exercise his right to trial by jury and receive a guilty verdict. Additionally, the judge's threat appears to have been motivated by a desire to dispose of the case as quickly as possible.

{¶ 6} Despite the problems with Mowery's plea process that are apparent in Mowery's filings with this court, the Third District Court of Appeals declared that "the statements made by the trial court during the pretrial, while possibly inartful, were not coercive." 2023-Ohio-563 at ¶ 9. The appellate court additionally held that Mowery's plea could not have been coerced, because Mowery indicated during his Crim.R. 11 plea colloquy that "he had not been threatened into agreeing to the plea." 2023-Ohio-563 at ¶ 9.

{¶ 7} To begin with, a blatant threat of a longer sentence cannot be cured by having the defendant say, "I was not threatened," any more than a venomous snakebite can be cured by having the victim say, "I was not bitten." A rote call-and-response recitation of Crim.R. 11 is nothing more than a charade in such a context. *See United States v. Braxton*, 784 F.3d 240, 245 (4th Cir.2015) ("a defendant's mere statement that his plea was voluntary, made in response to questioning by the very judge whose apparent preferences raised the specter of coercion in the first place, cannot dispel that concern [that the plea was involuntary]").

{¶ 8} Similarly, the fact that the trial court's statements appear to be coercive is not cured by simply reframing the statements with softer words like "inartful." When a trial judge interjects himself into a criminal defendant's plea-negotiations process, the judge's participation "must be carefully scrutinized to determine if the judge's intervention affected the voluntariness of the defendant's guilty plea." *Byrd*, 63 Ohio St.2d at 293, 407 N.E. 2d 1384. If the judge's statements could possibly lead a defendant to believe that he would not be treated fairly if he were to exercise his right to a jury trial, "the plea should be held to be involuntary and void under the Fifth Amendment and Section 10, Article I of the Ohio Constitution." *Id*. at 293-294.

{¶ 9} The problems with Mowery's plea process strike me as a clear symptom of the intense pressure that our criminal-justice system puts on defendants to enter pleas instead of daring to burden the system by exercising their basic constitutional rights. The pressure to plead is so great that trial judges seem to feel increasingly comfortable with superintending such pressure in open court and punishing defendants who do not submit. It only further emboldens trial courts to coerce pleas and to impose trial taxes when courts of appeals minimize such conduct by describing it as "inartful," or "intemperate," and when this court does the same. *See, e.g., State v. Rahab*, 150 Ohio St.3d 152, 2017-Ohio-1401, 80 N.E.3d 431, ¶ 26-27 (dismissing as "intemperate" the trial court's statements, when imposing a longer prison term after the defendant rejected a plea offer of a much shorter prison term and chose to go to trial: "[G]uess what, you lost your gambling. You did this. * * * You wanted to go to trial. All right, big winner you are").

{¶ 10} It is certainly unacceptable that plea coercion might evade meaningful appellate review through the secrecy of backroom plea deals at the trial level, but it is also unacceptable that potential coercion may evade meaningful review via euphemisms and denialism at the appellate level. We should take this opportunity to reinvigorate the inquiry into the validity of

criminal defendants' pleas when trial courts initiate or participate in the plea-negotiations process. Because I would accept Mowery's jurisdictional appeal, I dissent.

BRUNNER, J., concurs in the foregoing opinion.