

[Cite as *State v. Foreman*, 2015-Ohio-2259.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-140560
		C-140561
Plaintiff-Appellee,	:	TRIAL NOS. B-1305576
		B-1403568
vs.	:	
DEWEY FOREMAN,	:	<i>OPINION.</i>
Defendant-Appellant.	:	

Criminal Appeals From: Hamilton County Court of Common Pleas

Judgments Appealed From Are: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: June 12, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Rachel Lipman Curran*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Arenstein & Gallagher, *William R. Gallagher* and *Elizabeth Conkin*, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

STAUTBERG, Judge.

{¶1} Defendant-appellant Dewey Foreman appeals from the trial court's judgments denying his motions to withdraw his guilty pleas. For the following reasons, we reverse the judgments of the trial court and remand this cause for further proceedings.

{¶2} In case number B-1403568, Foreman pleaded guilty to two counts of theft from an elderly or disabled adult in violation of R.C. 2913.02(A)(1). In case number B-1305576, he pleaded guilty to two counts of nonsupport of dependents, in violation of R.C. 2919.21(A)(2) and 2919.21(B). The trial court engaged Foreman in a Crim.R. 11 colloquy and accepted Foreman's guilty pleas in both cases during the same hearing. Later, one of Foreman's attorneys—he had had two—moved the court to allow Foreman to withdraw his guilty pleas in both cases. In his written motion, Forman contended that his pleas had not been entered knowingly, intelligently and voluntarily because his father had unduly pressured him to plead to the charges, he had been denied discovery, and because his attorneys had not been honest with him.

{¶3} The trial court conducted a hearing on the motion. One of the same attorneys who had represented Foreman during his plea hearing also represented Foreman on his motion to withdraw his pleas. During that hearing, Foreman's attorney stated to the court:

[Foreman] said that we [his attorneys] had not been totally honest with him at the time he had entered his pleas, and that he did not feel that he made an intelligent, informed and voluntary decision at that time. Obviously these are his positions. We specifically, as his attorneys, question some of the things that he has said that we did or

did not do for him. However, I told him that I would gladly file this if he requested me to or I'd request another attorney to be appointed. He said no, he wanted me to file this, so we have done so to allow him to be in front of you and answer any questions that – have his chance to address the Court himself.

{¶4} Foreman then made a brief statement to the court but he did not address his contention that his attorneys had “not been totally honest with him.” The court denied Foreman’s motions.

{¶5} In one assignment of error, Foreman now argues that he was denied the effective assistance of counsel when he moved to withdraw his pleas.

{¶6} To prove ineffective assistance of counsel, a defendant generally has to demonstrate that counsel’s performance was deficient and that the deficient performance was prejudicial. *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373 (1989). Prejudice results when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley* at 142. There are certain circumstances, however, where it is so unlikely that any lawyer could provide effective assistance that ineffectiveness can be properly presumed without inquiry into actual performance. *United States v. Cronic*, 446 U.S. 648, 660-61, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). One of these circumstances is when counsel actively represents conflicting interests. *Id.* at fn. 28, quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed 2d 333 (1980); *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Another is when a defendant is denied the right to cross-examination. *Cronic*, at 659.

{¶7} At the hearing on Foreman’s motions to withdraw his pleas, Foreman’s attorney had an interest adverse to his client’s. No attorney could reasonably be expected to argue to a court that he or she had “not been totally honest with” a client, thereby coercing the client into pleading guilty. Such an argument could open an attorney to disciplinary action, and could possibly threaten his or her license. Also, the circumstances in this case left Foreman without an advocate for purposes of cross-examination. Under *Cronic*, we may presume ineffective assistance of counsel without delving into counsel’s actual performance. *See State v. Lohman*, 3rd Dist. Auglaize No. 2-13-17, 2014-Ohio-1570 (ineffective assistance of counsel presumed where defense counsel intentionally elicited testimony adverse to his client’s interests and where defendant did not have a meaningful opportunity to cross-examine the witness); *State v. Oliver*, 9th Dist. Summit No. 26446, 2013-Ohio-1977 (ineffective assistance of counsel presumed in hearing on motion to withdraw a guilty plea where court swore defense counsel and elicited testimony adverse to defendant without giving defendant the opportunity to obtain new counsel for purposes of representation and cross-examination).

{¶8} The state contends that Foreman was not entitled to representation at the hearing on his motions to withdraw his pleas, and also that Foreman cannot demonstrate prejudice. We do not reach the question of whether Foreman was entitled to representation at the hearing. The fact is that he was represented, albeit by counsel who was by then in a compromised position. Further, the ineffectiveness of counsel is presumed given these circumstances. *See Cronic* at 660-661.

{¶9} We therefore sustain Foreman’s assignment of error. The trial court’s judgments are hereby reversed, and we remand this cause for a rehearing on Foreman’s motions to withdraw his guilty pleas.

Judgments reversed and cause remanded.

CUNNINGHAM, P.J. and **MOCK, J.**, concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.