

[Cite as *State v. Jones*, 2010-Ohio-903.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 09AP-700
v.	:	(C.P.C. No. 08CR-8836)
Lavelle C. Jones,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on March 11, 2010

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

*Yavitch & Palmer Co., L.P.A.*, and *Mickey Prisley*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Lavelle C. Jones, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a plea of guilty, of kidnapping with repeat violent offender ("RVO") specification, in violation of R.C. 2905.01, which is a felony of the first degree; robbery, in violation of R.C. 2911.02, which is a felony of the second degree; and robbery, in violation of R.C. 2911.02, which is a felony of the third degree.

{¶2} On December 13, 2008, appellant entered a tanning salon with what appeared to be a handgun, which was actually a BB gun, and demanded money from the

employee. The employee gave appellant money from the cash registers, and appellant asked her where the backdoor was located. The employee walked appellant to the backdoor, and he fled. Police had previously attached a GPS unit to appellant's vehicle because he was a suspect in other crimes and, when they determined that the description of the tanning salon robber and appellant was the same, they pulled over appellant's vehicle. In appellant's vehicle was cash in a paper bag, black clothing, and a BB gun. Appellant was arrested.

{¶3} On December 23, 2008, appellant was indicted on one count of kidnapping, with RVO specification (based upon a 1984 conviction for rape), a felony of the first degree; one count of robbery, with RVO specification, a felony of the second degree; and one count of robbery, with RVO specification, a felony of the third degree. On December 26, 2008, appellant entered a plea of not guilty.

{¶4} On June 2, 2009, appellant appeared before the court to change his plea. The state indicated that appellant would be pleading guilty to the indictment, except as to the RVO specification with regard to the third-degree robbery. The state indicated that the RVO specification could only apply to a second-degree felony or higher and, therefore, the state was moving to dismiss the RVO specification as to the third-degree robbery. The court questioned whether the RVO specifications were valid, and appellant claimed they were unconstitutional because it took the sentencing discretion from the court. The court allowed appellant to plead guilty to the indictment, but the parties could brief the specification issue at the sentencing hearing.

{¶5} After the state recited the facts of the case, the trial court stated it had a "problem" with the kidnapping charge because the facts indicated that the victim was

released without being harmed, which would reduce the kidnapping offense to a second-degree felony pursuant to R.C. 2905.01(C)(1). The prosecutor countered that the "safe place unharmed" issue was an affirmative defense to be raised at trial and also argued that the victim had suffered psychological harm. The court responded that, while appellant could waive the affirmative defense and plead guilty, the evidence simply did not show the necessary "elements" for a first-degree felony kidnapping offense, and the court did not believe psychological harm constituted harm. The state indicated it would proceed with the kidnapping offense being a first-degree felony. Appellant's counsel responded he did not feel he could take the current case to trial because another case against appellant was outstanding. The trial court responded it still had a problem with the kidnapping charge because the state did not meet its burden, and the court indicated it would never find the offense to be a first-degree felony. However, the trial court accepted the guilty plea, but allowed briefing on the "safe place unharmed" issue, stating that, if psychological harm does not constitute harm, it would probably reduce the kidnapping offense to a second-degree felony on its own motion. Appellant then reiterated that he wished to plead guilty and that he understood all of the proceedings and ramifications.

{¶6} At the sentencing hearing on June 23, 2009, the prosecutor stated that sentencing for the RVO specification for the second-degree felony robbery was not possible because the indictment had not alleged actual or threatened serious physical harm, but that the RVO specification was still appropriate on the first-degree felony kidnapping count. The trial court indicated that appellant had filed a motion to dismiss the RVO specification based upon constitutionality, but it did not consider the motion a motion to withdraw his plea, and appellant agreed it was not seeking to withdraw the plea.

{¶7} The trial court and the parties then discussed whether the kidnapping offense was a first- or second-degree felony, and the court found that the phrase "safe place unharmed" related to physical harm and not psychological harm. However, the court found that the guilty plea had been to a first-degree felony and that the "safe place unharmed" affirmative defense, which would have reduced the offense to a second-degree felony, was waived by the plea. After argument by the parties, the court also found that the RVO specification was constitutional and that the kidnapping and the second-degree robbery charges would not merge for purposes of sentencing, as they were committed with a separate animus.

{¶8} The trial court then indicated that it would proceed with sentencing. At that point, appellant's counsel moved to withdraw appellant's guilty plea, asserting that he had been ineffective in his representation of appellant, although counsel admitted he would not be seeking withdrawal of the plea if the legal rulings would have been in appellant's favor. The trial court denied the motion, finding that appellant should have sought to withdraw his plea before the legal rulings, and there was no basis to withdraw a plea based upon a legal determination. The trial court proceeded to sentencing. The court found the two robbery counts merged and imposed the following terms of imprisonment: ten years for the kidnapping with an additional five years for the accompanying RVO specification, and four years for the second-degree robbery count, with all sentences to be served consecutively, for a total of 19 years. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

[I.] The trial court erred to the prejudice of appellant by denying appellant's motion to withdraw his guilty plea prior to sentencing.

[II.] Appellant's guilty plea was not given knowingly, voluntarily, and intelligently, in that trial counsel rendered ineffective assistance of counsel in violation of appellant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16 Article I of the Ohio Constitution.

{¶9} We will address appellant's assignments of error together, as there is some overlap in the arguments in support thereof. Appellant argues in his first assignment of error that the trial court erred when it denied his motion to withdraw his guilty plea. Appellant argues in his second assignment of error that his trial counsel rendered ineffective assistance. Crim.R. 32.1 allows a defendant to file a motion to withdraw a guilty plea prior to sentencing. Generally, such a motion is to be treated with liberality. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, citing *Barker v. United States* (C.A.10, 1978), 579 F.2d 1219, 1223. However, the right to withdraw a guilty plea is not absolute, and this court will not reverse a trial court's denial of such a motion absent an abuse of discretion. *Xie* at 527. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} In reviewing a trial court's decision regarding a defendant's pre-sentence motion to withdraw a guilty plea, we are required to weigh a number of non-exhaustive factors. These factors include: (1) whether the prosecution would be prejudiced if the plea were vacated; (2) whether the offender was represented by highly competent counsel; (3) the extent of the Crim.R. 11 hearing; (4) whether there was a full hearing on the motion to withdraw the offender's guilty plea; (5) whether the trial court gave full and fair consideration to the motion; (6) whether the motion was made within a reasonable

time; (7) whether the motion set forth specific reasons for the withdrawal; (8) whether the accused understood the nature of the charges and possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense to the crime. *State v. Fish* (1995), 104 Ohio App.3d 236, 240.

{¶11} With regard to the first consideration, whether the prosecution would be prejudiced if the plea were vacated, there is no evidence that the state would have been prejudiced if appellant had been permitted to withdraw his guilty plea, beyond the ordinary impact of any defendant's subsequent withdrawal of a guilty plea. A withdrawal would not have affected the state's prosecution of appellant or affected any of the evidence in the case.

{¶12} With regard to the second consideration, whether the offender was represented by highly competent counsel, we find appellant's counsel was competent. This issue also relates to appellant's second assignment of error, in which he argues his counsel rendered ineffective assistance. It is well-established that, in order to prevail on a claim of ineffective assistance of counsel, appellant must demonstrate that trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064. The standard of proof requires appellant to satisfy a two-pronged test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show by a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Id.* Further, in Ohio, a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 156.

{¶13} Appellant argues his trial counsel was ineffective for failing to fully and adequately inform him of the nature of the charges against him, the maximum potential penalty, and the effect of his plea of guilty. Specifically, appellant argues that his trial counsel should have halted the change of plea hearing when the trial court indicated that it did not believe there were sufficient facts to support a finding of guilty as to the first-degree felony kidnapping count, when he believed there was an argument as to the constitutionality of the RVO specifications, and when appellant was left with no clear understanding of the nature of the maximum potential penalty he faced. Appellant also argues that trial counsel realized that, as a result of the guilty plea, he effectively waived appellate issues that had arisen in the case.

{¶14} We disagree with appellant's arguments. First, with regard to whether he was fully informed of the nature of the charges against him, the maximum potential penalty, and the effect of his guilty plea, the trial court fully explained these issues to appellant. After a lengthy discussion with counsel surrounding the legal questions regarding the RVO specifications, and the "safe place unharmed" issue with respect to the kidnapping offense, the trial court explained to appellant the maximum possible penalties for the offenses and specifically cautioned him several times that they were subject to the outcome of the legal issues to be discussed at the sentencing hearing. The trial court gave appellant the "worst case scenario" for sentencing, indicating that they did not yet know the outcome of the RVO and kidnapping issues. Appellant told the judge that he understood the legal issues that had just been discussed and he was satisfied with his lawyer's representation. Thus, we do not find any ineffective assistance of counsel in this respect.

{¶15} With regard to whether counsel's assistance was defective in failing to halt the change of plea hearing when the trial court indicated that it did not believe there were sufficient facts to support a finding of guilt as to the first-degree felony kidnapping count and when counsel believed there was an argument as to the constitutionality of the RVO specifications, we find this argument unpersuasive. We first note that the provision in R.C. 2905.01(C), which reduces kidnapping to a felony of the second degree if the offender releases the victim in a "safe place unharmed," is a circumstance the establishment of which mitigates a defendant's criminal culpability. It is not an element of the crime of kidnapping, but it is in the nature of an affirmative defense and is to be treated as such. *State v. Leslie* (1984), 14 Ohio App.3d 343, 345. Thus, in order to find a defendant guilty of kidnapping, pursuant to R.C. 2905.01, there is no requirement on the part of the state to allege or establish that the defendant failed to release the victim in a safe place unharmed. *Id.* If, at trial, the defendant puts forth any evidence tending to establish that the victim was released in a safe place unharmed, the court is required to submit this issue to the jury under proper instructions. *Id.* Thus, although the trial court here initially indicated at the change of plea hearing that it had a "problem," in that the state did not show the "element" for a first-degree felony kidnapping, and that the court would never find the kidnapping offense was a first-degree felony because the state did not meet its burden on the safe place unharmed "element," the burden of proof was not on the state to prove such.

{¶16} Notwithstanding, even if appellant's counsel was defective for the cited reasons, as explained above, appellant must also show by a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been

different. Here, we cannot find that the result would have been different had appellant's trial counsel halted the change of plea hearing when a question was raised regarding the first-degree kidnapping count and the RVO specifications. Trial counsel candidly admitted at the change of plea hearing that he was "stuck" with pleading to what he "probably" believed was wrong, but he did not have any other option because he felt he could not take the case to trial. In discussing his weak bargaining power with the state, appellant's counsel stated, "[w]e all know why, because there's another case circling this case." The other case was what was "driving" the present case, counsel stated, and there were "other forces" that put him in a "bind." Appellant also told the court at the hearing that he considered a trial, but it was "not a fight I want to, I want to pick." The difficulty of appellant's situation was also compounded by the state's persistent refusal to voluntarily amend the charges and strike a plea based upon the same issues discussed by the trial court. Appellant's counsel stated at the change of plea hearing "I would love to do a lot of things, but the State of Ohio has said no to virtually everything." Counsel stated, "I have asked to resolve it. The State of Ohio has blanket said, no, forget it. Here are your choices. Trial, which presents significant problems and exposure for my client in front of twelve people, or plea." The state reiterated at the hearing that it wished to proceed according to the charges in the indictment despite the questions surrounding the kidnapping charge and the RVO specifications. It was clear that appellant's counsel and appellant both agreed that taking these charges to trial was not a viable option. Given these circumstances, we cannot find that the outcome would have been any different even if appellant's counsel would have halted the change of plea hearing. Appellant would likely have entered a guilty plea because of the other pending case. Therefore,

insofar as appellant argues in his second assignment of error that his counsel was ineffective, that assignment of error is overruled.

{¶17} The third consideration in reviewing a trial court's decision regarding a defendant's pre-sentence motion to withdraw a guilty plea is the extent of the Crim.R. 11 hearing. Here, the trial court held a full and thorough plea hearing. The trial court addressed appellant personally, and appellant made it perfectly clear that he was making the plea voluntarily, understood the nature of the charges and of the maximum penalty involved, understood the effect of the plea of guilty, that the court could proceed with judgment and sentence, and that he was waiving rights to a jury trial and the accompanying jury trial protections. As explained above, appellant indicated to the court that he thought about having a trial, but decided it was not a "fight" he wanted to take on. Appellant also expressed that he thought his only choice was to plead guilty because of his other pending charges, but the court explained that it would not accept the plea if appellant believed he had no choice. Appellant then stated that he meant he did not want to have a trial, so the plea was his voluntary action. The trial court informed appellant of the maximum prison terms for the counts. The trial court also acknowledged that certain legal issues remained to be resolved at the time of sentencing.

{¶18} With regard to the fourth and fifth considerations, whether there was a full hearing on the motion to withdraw the offender's guilty plea and whether the trial court gave full and fair consideration to the motion, the trial court conducted a complete inquiry into the grounds for appellant's motion to withdraw and gave fair consideration of such. Although appellant contends there was no hearing on the motion to withdraw his guilty plea, the trial court did entertain appellant's oral motion prior to sentencing. Appellant's

counsel was given a full opportunity to argue his motion and did state his grounds and arguments in support thereof. The trial court engaged in discussions with counsel regarding the bases for the motion to withdraw plea, and the trial court explained why it was denying the motion. Appellant does not explain what else could have or should have been offered at the hearing, and we see nothing to indicate that the trial court failed to give full and fair consideration to the motion.

{¶19} With regard to the sixth consideration, whether the motion was made within a reasonable time, it is true that Crim.R. 32.1 allows a defendant to file a motion to withdraw a guilty plea prior to sentencing. However, the trial court's concern was the timing of appellant's motion in light of the legal rulings it made. At the sentencing hearing, the trial court noted that the legal issues relating to the RVO and kidnapping offense were raised at the change of plea hearing, and if appellant had wanted to withdraw the plea he should have done so prior to the trial court's ruling on the legal issues at the sentencing hearing. Indeed, the trial court questioned appellant's counsel at the beginning of the sentencing hearing regarding his motion to dismiss the RVO specification and asked if appellant was withdrawing his plea, to which appellant's counsel responded "no." Appellant's counsel also admitted that, but for the adverse legal rulings, he would not be moving to withdraw the plea. Therefore, it is clear that appellant strategically waited until obtaining a ruling on the legal issues before moving to withdraw his plea, which the trial court found was belated.

{¶20} With regard to the seventh consideration, whether the motion set forth specific reasons for the withdrawal, appellant's counsel did set forth such reasons. Appellant's counsel indicated he wished to withdraw the guilty plea because he had been

ineffective in his representation of appellant. He stated that appellant agreed to plead guilty to the indictment based upon his advice, but because of the legal rulings the court made, he believed he had waived appellant's appellate rights with respect to the RVO specifications. The trial court denied the motion, finding there was no reason to permit withdrawal of the plea based upon legal determinations it had made.

{¶21} With regard to the eighth consideration, whether the accused understood the nature of the charges and possible penalties, we already discussed this issue above and found that the trial court fully informed appellant of the possible penalties and the nature of the charges before him, and appellant indicated he understood both.

{¶22} The ninth consideration is whether the accused was perhaps not guilty or had a complete defense to the crime. Appellant admitted at both the plea hearing and the sentencing hearing to all of the facts underlying the offenses. Appellant stated to the trial court that he saw the victim was working alone in the tanning salon, and he needed money. He walked into the salon holding a BB gun to his side that looked like a handgun. He told her to give him the money out of two cash registers and, after she did so, he asked her to show him the backdoor. She walked him to the backdoor, and he asked, " 'Are you ready?' " She asked " 'Ready for what?' " Appellant responded, " 'For you to go and call the police and for me to leave.' " Appellant then left the building. Furthermore, police had a GPS unit attached to appellant's vehicle at the time and were able to determine appellant's vehicle was parked behind the shopping center for about 30 minutes at the time of the crime. The prosecutor added that, when the police pulled over appellant's vehicle immediately after the crime, appellant was still wearing all black, which was what he was wearing in the surveillance video from the salon, still had the BB gun,

and had a Wendy's bag with \$279 in it, which was the same amount taken from the salon. Furthermore, although there was some dispute as to whether appellant returned the victim to a safe place unharmed, as explained above, this was not an element of the kidnapping offense, and the state was not required to prove this circumstance. Therefore, it is abundantly clear that appellant admitted to committing the crimes.

{¶23} After considering the above factors, we find the trial court did not abuse its discretion when it denied appellant's motion to withdraw his guilty plea. All of the pertinent factors discussed fall in favor of finding that the trial court did not abuse its discretion when it denied appellant's motion to withdraw his guilty plea. Key factors were that the trial court informed appellant of the maximum possible penalties and explained these were subject to resolution of the legal issues at the sentencing hearing; appellant indicated he understood the charges and possible penalties; appellant's trial counsel was not ineffective; the trial court considered the parties' arguments regarding appellant's motion to withdraw his plea; and it was clear appellant was guilty of the crimes. Given these circumstances, we cannot find the trial court abused its discretion when it denied appellant's motion to withdraw its guilty plea. Therefore, appellant's first and second assignments of error are overruled.

{¶24} Accordingly, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT and McGRATH, JJ., concur.

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