

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

KIM SHREVE

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 22-COA-041

O P I N I O N

CHARACTER OF PROCEEDINGS:

Appeal from the Ashland County Court of
Common Pleas, Case No. 22-CRI-077

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 22, 2023

APPEARANCES:

For Plaintiff-Appellee

CHRISTOPHER R. TUNNELL, ESQ.
Ashland County Prosecuting Attorney

NADINE HAUPTMAN, ESQ.
Assistant Prosecuting Attorney
110 Cottage Street, Third Floor
Ashland, Ohio 44805

For Defendant-Appellant

BRIAN A. SMITH, ESQ.
Brian A. Smith Law Firm, LLC
123 South Miller Road – Suite #250
Fairlawn, Ohio 44333

Hoffman, P.J.

{¶1} Defendant-appellant Kim Shreve appeals the judgment entered by the Ashland County Common Pleas Court convicting him following his plea of guilty to domestic violence (R.C. 2919.25(A),(D)(4)) and sentencing him to thirty-six months incarceration. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE CASE¹

{¶2} On March 11, 2022, Appellant was indicted by the Ashland County Grand Jury with domestic violence, including a specification he had been convicted of three prior offenses of violence involving a family member (R.C. 2919.25(A), (D)(4)); abduction (R.C. 2905.02(A)(2),(C)), and two counts of violation of a protection order (R.C. 2919.27(A)(1), (B)(4)). Appellant entered a plea of guilty to the charge of domestic violence, and the State dismissed the remaining charges. Appellant was convicted upon his plea, and the case was set for sentencing at a later date.

{¶3} On September 28, 2022, which was prior to sentencing, Appellant filed a pro se motion which stated, “CRIMINAL RULE, 32.1, Withdrawal of [GUILTY] PLEA.” On the same day, Appellant filed a pro se motion which stated, “[MOTION], To dismiss [attorney] Matthew Malone, Reason, ..NEGLECT of clients best interest,” and a pleading he labeled “grievance” against his attorney for unethical neglect of client. On October 6, 2022, Appellant withdrew his motion to dismiss his attorney. The trial court overruled all of Appellant’s pro se motions on October 21, 2022.

{¶4} The case proceeded to a sentencing hearing on November 9, 2022. Appellant was represented by counsel at the hearing. The trial court sentenced Appellant

¹ The facts underlying the conviction are not a part of the record before this Court on appeal.

to thirty-six months incarceration and ordered Appellant to pay court costs. It is from the November 10, 2022 judgment of the trial court Appellant prosecutes his appeal, assigning as error:

I. THE TRIAL COURT ERRED IN FAILING TO CONDUCT A HEARING ON APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA.

II. THE TRIAL COURT'S FAILURE TO WAIVE APPELLANT'S COURT COSTS WAS AN ABUSE OF DISCRETION.

III. THE FAILURE OF APPELLANT'S TRIAL COUNSEL TO SEEK A WAIVER OF COURT COSTS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF APPELLANT'S RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

I.

{¶15} Appellant argues the trial court erred in overruling his presentence motion to withdraw his guilty plea without a hearing.

{¶16} A trial court must conduct a hearing on a presentence motion to withdraw a plea to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715, 719 (1992). However, in the instant case Appellant's motion was filed pro se. "When a criminal defendant is represented by counsel and counsel does not join in the defendant's pro se motion or

otherwise indicate a need for the relief sought by the defendant pro se, the trial court cannot properly consider the defendant's pro se motion.” *E.g., State v. Smith*, 1st Dist. No. C-160836, 2017-Ohio-8558, 99 N.E.3d 1230, ¶ 32.

{¶7} In the instant case, Appellant filed a motion to dismiss his court-appointed attorney at the same time he filed his motion to withdraw a plea. However, Appellant did not have an absolute right to dismiss his attorney, and the decision whether or not to remove court-appointed counsel and allow substitution of new counsel is addressed to the sound discretion of the trial court. *State v. Anderson*, 5th Dist. Richland No. 2020 CA 0078, 2021-Ohio-3298, ¶ 14. Before the trial court could rule on Appellant’s motion to dismiss his attorney, Appellant withdrew the motion. At sentencing, Appellant was represented by the same court-appointed attorney who had represented him throughout the proceedings.

{¶8} Further, in order to proceed pro se, a defendant must make an intelligent and voluntary waiver of the right to counsel, with the knowledge he will have to represent himself and of the dangers inherent in self-representation, and the waiver of counsel must affirmatively appear on the record. *See, e.g. State v. Ngaka*, 5th Dist. Delaware No. 19 CAC 09051, 2020-Ohio-3106, ¶ 9-10. At no point in the proceedings did Appellant assert the right to self-representation, nor did the trial court find he had validly waived counsel. We find Appellant was represented by counsel throughout the proceedings, and at no point in the proceedings did Appellant represent himself. Therefore, we find the trial court did not err in failing to hold a hearing on his pro se motion to withdraw his plea, which was filed pro se and not by his attorney.

{¶9} The first assignment of error is overruled.

II.

{¶10} Pursuant to R.C. 2947.23, the trial court is required to impose the costs of prosecution against all convicted defendants, regardless of whether the defendant is deemed indigent. However, the court has jurisdiction at sentencing or any time thereafter to waive, suspend, or modify payment of costs. R.C. 2947.23(C). “[A] trial court is not required to consider the defendant's ability to pay in assessing a motion to waive, suspend, or modify court costs under R.C. 2947.23(C), though it is permitted to do so.” *State v. Taylor*, 161 Ohio St.3d 319, 2020-Ohio-3514, 163 N.E.3d 486, ¶16.

{¶11} At the sentencing hearing, Appellant stated to the trial court:

Your Honor, I still do have my employment...Within 24 hours upon any release of incarceration, I could be working and have obtained work over the last 18 months prior to that incarceration, and the offense that I committed.

I was averaging 50 hours a week. Some were 50 hours and some were 45, Your Honor, but I just did it as a basic average over the last 18 months prior to this arrest.

{¶12} Sent. Tr. 6.

{¶13} Based on Appellant's representation to the court he would have employment upon his release from incarceration, we find the trial court did not err in failing to waive court costs in the instant case.

{¶14} The second assignment of error is overruled.

III.

{¶15} In his third assignment of error, Appellant argues his trial counsel was ineffective for failing to seek a waiver of court costs.

{¶16} A properly licensed attorney is presumed competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988). Therefore, in order to prevail on a claim of ineffective assistance of counsel, Appellant must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). In other words, Appellant must show counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.*

{¶17} As discussed earlier in this opinion, Appellant represented to the trial court he would have employment waiting for him when released from incarceration. We find Appellant has not demonstrated a reasonable probability had counsel sought a waiver of court costs, the trial court would have granted waiver. Appellant has therefore not demonstrated counsel was ineffective in failing to seek a waiver of costs.

{¶18} The third assignment of error is overruled.

{¶19} The judgment of the Ashland County Common Pleas Court is affirmed.

By: Hoffman, P.J.

Wise, J. and

Delaney J. concur

