

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-08-022

Appellee

Trial Court No. 07CR185

v.

Marcos P. Bocanegra, Jr.

DECISION AND JUDGMENT

Appellant

Decided: June 30, 2009

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Andrew R. Bucher, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Marcos P. Bocanegra, appeals the June 16, 2008 judgment of the Sandusky County Court of Common Pleas which, following a guilty plea to one count of sexual battery, sentenced appellant to three years of imprisonment. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} On April 20, 2007, appellant was indicted on one count of sexual battery, in violation of R.C. 2907.03(A)(2), and one count of gross sexual imposition, in violation of R.C. 2907.05(A)(5). The charges stem from an incident on February 11, 2007, involving a 17 year old female. Appellant was more than ten years older than the young woman. A criminal jury trial was scheduled for May 1, 2008, but the parties entered into a plea agreement in which appellant entered a plea of guilty to the charge of sexual battery and a nolle prosequi was entered as to the charge of gross sexual imposition. Thereafter, on June 16, 2008, appellant was sentenced to three years of imprisonment and classified as a Tier III Sexual Offender. This appeal followed.

{¶ 3} Appellant now raises the following two assignments of error:

{¶ 4} "I. The Defendant-Appellant was prejudiced by ineffective assistance of counsel in violation of his right to counsel as guaranteed by the Sixth Amendment of the United States Constitution which directly caused an involuntary guilty plea to be entered by appellant.

{¶ 5} "II. The Defendant-Appellant entered, the trial court accepted, and sentenced upon an invalid, involuntary guilty plea in violation of Criminal Rule 11."

{¶ 6} In his first assignment of error, appellant maintains that the ineffective assistance of his trial counsel caused him to enter an involuntary guilty plea. Specifically, appellant contends that the crime he entered a plea to was the most serious of the indictment and that he entered the plea only after his mother was threatened with prosecution for alleged misconduct involving a witness.

{¶ 7} To prove ineffective assistance of counsel defendant must meet the two-prong test established by the Supreme Court in *Strickland v. Washington* (1984) 466 U.S. 668. The Court in *Strickland* held that defendant must show:

{¶ 8} "First * * * that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

{¶ 9} Under the first prong, the attorney receives a high presumption of competency. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301, and under the second prong, the appellant must show that but for the attorney's incompetence the case would have had a different outcome. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142-43, quoting, *Strickland v. Washington*, 466 U.S. 668 at 689.

{¶ 10} The Ohio Supreme Court has held on multiple occasions that a guilty plea waives the claim to ineffective assistance of counsel, "unless such errors are shown to have precluded the defendant from voluntarily entering into his or her plea pursuant to the dictates of Crim.R. 11 * * *." *State v. Kelley* (1991), 57 Ohio St.3d 127, 130. See, also, *State v. Barnett* (1991), 73 Ohio App.3d 244, 248; *State v. Coulon*, 6th Dist. No. WM-07-006, 2007-Ohio-7096, ¶ 29.

{¶ 11} Furthermore, a court must be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" in reviewing a claim of ineffective assistance of counsel. *Id.* at 689. Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995-Ohio-171. Even if the wisdom of an approach is debatable, "debatable trial tactics" do not constitute ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 48-49. Finally, reviewing courts must not use hindsight to second-guess trial strategy, and must keep in mind that different trial counsel will often defend the same case in different manners. *Strickland*, *supra* at 689; *State v. Keenan*, 81 Ohio St.3d 133, 152, 1998-Ohio-459.

{¶ 12} In the instant case, at the May 1, 2008 plea hearing, appellant was informed by the court that the charges in the indictment were "charges in the alternative" and if appellant had been convicted of both charges he would have only been sentenced on one. Appellant specifically denied being threatened in any way to enter the plea and he stated that he was satisfied with trial counsel's representation. At the June 13, 2008 sentencing, appellant's counsel made a lengthy statement on his behalf and requested that appellant receive community control. Upon review of the foregoing, we find that appellant has failed to demonstrate counsel's deficiency and the resultant prejudice to appellant. Appellant's first assignment of error is not well-taken.

{¶ 13} Similarly, in appellant's second assignment of error, he argues that the trial court erred by accepting an "invalid, involuntary guilty plea." Appellant contends that the trial court was aware of the contents of the presentence investigation report ("PSI"), wherein appellant denied the offense and stated that he just entered the guilty plea on the advice of counsel. Appellant asserts that, based on the contents of the PSI, the court should have made further inquiry into the voluntariness of appellant's plea.

{¶ 14} Before accepting a plea of guilty, Crim.R. 11(C)(2) requires that the trial court inform a defendant of the constitutional rights he waives by entering the plea. *State v. Nero* (1990), 56 Ohio St.3d 106, 107. Specifically, Crim.R. 11(C)(2) provides:

{¶ 15} "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶ 16} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶ 17} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶ 18} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront

witnesses against him or her, to have compulsory process for obtaining 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."

{¶ 19} Upon appellate review, the trial court's acceptance of a guilty plea will be considered knowing, intelligent and voluntary so long as, before accepting the plea, the trial court substantially complies with the procedure set forth in Crim.R. 11(C). *Nero* at 108. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Id.*

{¶ 20} Upon review, we find that at the May 1, 2008 plea hearing, the trial court substantially complied with Crim.R. 11(C). The court fully explained the constitutional rights that appellant was waiving by entering the guilty plea. The court questioned appellant regarding the voluntary nature of his plea, including whether any threats had been made, and appellant's satisfaction with his trial counsel. The sentencing range was set forth, including the sexual offender classification. Appellant was also informed of postrelease control and his limited appeal rights.

{¶ 21} At the sentencing hearing, the court noted that it had reviewed the PSI. Appellant and his counsel made statements to the court. Appellant did not deny the incident. Appellant stated that he was "a changed person" and that he just wanted to continue with his job and present circumstances. *Cf State v. Hicks*, 2d Dist. No. 22786,

2009-Ohio-2740 (the court affirmed the conviction where in the PSI, the defendant denied the incident but did not protest his innocence in court.) Accordingly, we find that the trial court did not err when it accepted appellant's guilty plea. Appellant's second assignment of error is not well-taken.

{¶ 22} On consideration whereof, we find appellant was not prejudiced or prevented from having a fair proceeding and the judgment of the Sandusky County Common Pleas Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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