

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

State of Ohio

Court of Appeals No. L-10-1137

Appellee

Trial Court No. CR0200201071

v.

Robert Lamar Flanigan

DECISION AND JUDGMENT

Appellant

Decided: May 13, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Eric Allen Marks, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Robert Lamar Flanigan, appeals the May 4, 2010 judgment of the Lucas County Court of Common Pleas which, following an evidentiary hearing, denied appellant's motion to withdraw his guilty plea and resentenced him

following a de novo resentencing hearing held pursuant to *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434. For the reasons set forth herein, we affirm.

{¶ 2} A brief history of the facts is as follows. On January 14, 2002, appellant was indicted on three counts of robbery, one count of burglary, and one count of aggravated robbery. The charges stemmed from a string of robberies in south Toledo. Appellant entered not guilty pleas to the charges.

{¶ 3} On April 2, 2002, appellant filed a motion to suppress his videotaped statement to police. Appellant argued that due to his serious crack cocaine addiction, his statements were made in contravention of his *Miranda* rights and were obtained as a result of police coercion. Following a hearing, the court denied the motion.

{¶ 4} On May 14, 2002, appellant entered guilty pleas to three counts of robbery, R.C. 2911.02(A)(2), second degree felonies, and one count of robbery, a lesser included offense of aggravated robbery, R.C. 2911.02(A)(1). Appellant was then sentenced to a total imprisonment term of 11 years and five months.

{¶ 5} On direct appeal to this court, appellant argued that the trial court erred in denying his motion to suppress. We concluded that appellant's *Miranda* waiver was valid and affirmed. See *State v. Flanigan*, 6th Dist. Nos. L-02-1200, L-02-1201, 2003-Ohio-5182.

{¶ 6} On June 6, 2005, appellant filed a motion to correct improper sentence and a request for a new sentencing hearing. Appellant's motion was based on the United States Supreme Court case of *Blakely v. Washington* (2004), 542 U.S. 296. Thereafter, the trial

court denied the motion agreeing with the state that *Blakely* was inapplicable. On appeal, citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, we again affirmed the trial court's judgment. See *State v. Flanigan*, 6th Dist. No. L-05-1309, 2006-Ohio-1621.

{¶ 7} On September 28, 2007, the trial court filed a nunc pro tunc judgment entry correcting the sentencing entry to reflect that appellant had been notified of his appellate rights under R.C. 2953.08 and postrelease control obligations under R.C. 2929.19(B)(3) and 2967.28.

{¶ 8} On October 16, 2008, appellant filed a motion to vacate his "void" sentence pursuant to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*). The court denied the motion on January 7, 2009, finding that, pursuant to *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*), the holding in *Colon I* was prospective in nature and applied only to those cases pending on the date of the decision.

{¶ 9} On August 25, 2009, appellant filed a motion for resentencing following the Supreme Court of Ohio's decisions in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250 and *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197. Appellant argued that he was not properly advised of his postrelease control obligations and, thus, his sentence was void. In conjunction with his motion, appellant also filed a motion to withdraw his guilty plea arguing that because his sentence was void, it was to be viewed as a presentence motion.

{¶ 10} The trial court did treat the motion to withdraw as a presentence motion and conducted an evidentiary hearing. The court ultimately denied the motion and

proceeded to a de novo resentencing hearing. On May 4, 2010, appellant was resentenced and this appeal followed.

{¶ 11} Appellant now raises the following assignments of error for our review:

{¶ 12} "I. The trial court erred in denying appellant's request to withdraw his guilty plea.

{¶ 13} "II. Appellant was denied his right to effective assistance of counsel."

{¶ 14} In appellant's first assignment of error, he argues that under the factors in *State v. Eversole*, 6th Dist. Nos. E-05-073, E-05-076, E-05-074, E-05-075, 2006-Ohio-3988, his motion to withdraw his guilty plea should have been granted.

{¶ 15} Crim.R. 32.1 provides:

{¶ 16} "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court, after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶ 17} A presentence motion to withdraw a guilty plea is to be freely and liberally granted. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. The *Xie* court further indicated that a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *Id.* at paragraph one of the syllabus. Rather, "[a] trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Id.* The court further held that "[t]he decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court." *Id.* at

paragraph two of the syllabus. Accordingly, in order to find that the trial court abused its discretion, a reviewing court must find that the court's ruling was "unreasonable, arbitrary or unconscionable." *Id.* at 527.

{¶ 18} Appellant contends that the trial court failed to consider the factors relied upon by this court in *Eversole*, *supra*, citing *State v. Fish* (1995), 104 Ohio App.3d 236, 240. Such factors, to be weighed when considering a motion to withdraw a guilty plea, provide:

{¶ 19} "(1) [W]hether the prosecution would be prejudiced if the plea was vacated; (2) whether the accused was represented by highly competent counsel; (3) whether the accused was given a full Crim.R. 11 hearing; (4) whether a full hearing was held on the motion; (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." *Id.* at ¶ 13. These factors are not exhaustive and are germane to both trial court and appellate court review. *Fish* at 240.

{¶ 20} Appellant's arguments focus on the first, second, fifth, and eighth factors. Appellant first contends that the state failed to demonstrate how it would be prejudiced if the plea was vacated. Although the state did raise the argument before the trial court, appellant asserts that at the hearing, no evidence was presented to support this contention.

{¶ 21} We agree with the state that the prejudice it would suffer is self-evident. The plea in this case was tendered in 2002. Surely, an eight-year lapse would hinder the state's ability to prepare for a trial; the case involved multiple robberies, at multiple locations, with multiple victims.

{¶ 22} As to the second *Eversole* factor, appellant contends that his counsel at the time of the plea was not competent. Appellant states that counsel is currently serving a suspension from the practice of law.

{¶ 23} Counsel's suspension was unrelated to appellant's case and occurred several years after appellant entered his plea. Moreover, counsel was suspended for inflating her court-appointed billing statements that she submitted to Lucas County. Counsel's suspension was not related to her representation of her clients. See *Toledo Bar Assn. v. Stahlbush*, 126 Ohio St.3d 366, 2010-Ohio-3823.

{¶ 24} At the hearing on the motion to withdraw his plea, appellant testified that counsel tried to get him to enter a plea, she never discussed the elements of the charges with him, she never reviewed the indictment with him, and that counsel indicated that he was going to get a three-year prison sentence and treatment for his drug problem. On cross-examination, appellant acknowledged that during the plea colloquy he was informed of the possible penalties; appellant stated that he acknowledged that he understood but was proceeding solely on what his attorney had promised him.

{¶ 25} We first note that appellant never raised an ineffective assistance of counsel argument on direct appeal and never attempted to reopen his appeal to raise such an

argument. The sentence was imposed nearly eight years prior to appellant raising this issue.

{¶ 26} An attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-156. There is nothing in the record to suggest that trial counsel's representation of appellant fell below an objective level of reasonableness. *Strickland v. Washington* (1984), 466 U.S. 668, 688. Counsel filed the appropriate pretrial motions and vigorously argued the motion to suppress. Had appellant been convicted of the counts in the indictment he could have been sentenced to over 30 years of imprisonment. Counsel secured a plea agreement with the state which resulted in the first degree felony being reduced to a second degree felony and a dismissal of one of the second degree felonies. Appellant was then sentenced to 11 years and five months in prison.

{¶ 27} We further note that under *Eversole*, the lengthy delay in filing the motion weighs in favor of it being denied. There was also strong evidence of actual guilt. At the plea hearing, appellant recounted the details of the crimes. Appellant did have a limited recollection of one of the robberies but did not dispute that he went into the business, threatened the victim with a knife, and left with money.

{¶ 28} Based on the foregoing, we find that the trial court did not abuse its discretion when it denied appellant's motion to withdraw his guilty plea. Appellant's first assignment of error is not well-taken.

{¶ 29} In appellant's second assignment of error, he contends that his counsel was ineffective in the preparation of appellant's motion to withdraw the plea and in the

representation he provided at the April 1, 2010 hearing. Specifically, appellant argues that counsel's one page memorandum in support of the motion to withdraw the plea failed to recite and rely on the *Eversole* factors. Further, according to appellant, at the hearing appellant's counsel failed to argue against the state's prejudice argument and failed to call witnesses, including appellant's former counsel.

{¶ 30} As stated above, an attorney is presumed to be competent. At the conclusion of the suppression hearing the trial court noted that it was bound by the *Eversole* factors. Further, appellant has presented no argument indicating that the court would have granted the motion had counsel called the "appropriate" witnesses, including appellant's former counsel. As discussed above, in our view, former counsel had effectively represented appellant.

{¶ 31} Accordingly, appellant has failed to demonstrate that counsel's representation was constitutionally ineffective. *Strickland*, supra. Appellant's second assignment of error is not well-taken.

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

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

Stephen A. Yarbrough, 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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