

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

State of Ohio

Court of Appeals No. L-09-1234

Appellee

Trial Court No. CR0200803572

v.

Damond Randolph

**DECISION AND JUDGMENT**

Appellant

Decided: February 4, 2011

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Michael J. Loisel, Assistant Prosecuting Attorney, for appellee.

Diana L. Bittner, for appellant.

\* \* \* \* \*

SINGER, J.

{¶ 1} Appellant appeals his conviction for complicity to bank robbery, entered on a finding of guilty after a no contest plea in the Lucas County Court of Common Pleas.

For the reasons that follow, we affirm.

{¶ 2} On October 16, 2008, a teenage female entered a Toledo bank and handed a teller a note. The note said "Give me fifties and hundreds and no one will get hurt." The girl got away with approximately \$750.

{¶ 3} The scene was repeated a few days later, on October 22, 2008, at another bank, but this time police apprehended the girl, Shontell Franks and appellant, Damond Randolph. On inquiry, Franks told police that appellant recruited her in Detroit, drove her to Toledo and coached her as to how to behave while in the bank. Franks maintained that appellant waited in the car for her while she robbed the bank. After, the two of them switched cars and drove back to Detroit. This pattern was repeated at the second robbery at which Franks and appellant were apprehended.

{¶ 4} On October 30, 2008, the Lucas County Grand Jury named appellant in a two count indictment alleging that he was an accomplice in each of the two bank robberies. Appellant pled not guilty to both counts and was released on bail.

{¶ 5} On March 11, 2009, appellant appeared with counsel, withdrew his not guilty plea to count one of the indictment and entered a plea of no contest. Following a plea colloquy, the trial court accepted appellant's plea and found him guilty as to count one. Consideration of the second count was deferred.

{¶ 6} At an April 15, 2009 scheduled pre-trial, appellant failed to appear. The court issued a capias and asked appellant's counsel to advise the surety company that there would be an upcoming bond forfeiture hearing. At that point counsel advised the court that he also represented the surety company.

{¶ 7} At a May 6, 2009 hearing, appellant's counsel appeared for the surety and asked for a continuance to permit the surety time to locate appellant. The court granted the continuance. A second continuance was granted on June 12.

{¶ 8} On July 1, 2009, appellant appeared in custody. After the court granted the surety's motion to withdraw, appellant's counsel moved to withdraw from representation, citing a total lack of communication with appellant from the time he went missing until he was again in custody. The court granted counsel's motion and appointed substitute counsel.

{¶ 9} On July 22, 2009, appellant appeared with new counsel who moved that appellant be allowed to withdraw his prior plea. The court set the motion for hearing, following which the court denied the motion and proceeded to sentencing. The court sentenced appellant to an eight year term of imprisonment. This appeal followed. Appellant sets forth the following three assignments of error:

{¶ 10} "1. Defendant-appellant was denied the effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

{¶ 11} "2. The trial court erred in not permitting defendant-appellant to withdraw his no contest plea prior to sentencing.

{¶ 12} "3. The trial court violated the policy and intent of the sentencing statutes when sentencing defendant-appellant to the maximum possible for the offense for which defendant-appellant was convicted."

## I. Ineffective Assistance of Counsel

{¶ 13} In his first assignment of error, appellant insists that he was denied effective assistance of counsel because of the conflict of interest of his original counsel. When appellant failed to appear on April 15, his original counsel advised the court that, in addition to representing appellant, counsel also represented the bail bondsman who posted appellant's bond. According to appellant, such dual representation is an inherent conflict of interest. Such conflict undermines the trust and confidence that should exist between counsel and client. Moreover, appellant maintains, counsel used personal information provided to him by appellant to aid his surety client in bringing appellant back to court.

{¶ 14} "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction \* \* \* has two components. First, the defendant must show 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. \* \* \* Unless a defendant makes both showings, it cannot be said that the conviction \* \* \* resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Accord *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶ 15} "Prejudice" exists only when the lawyer's performance renders the result of the trial unreliable or the proceeding unfair. *Id.* Appellant must show that there exists a

reasonable probability that a different result would have occurred but for counsel's deficiencies. See *id.* at 694. See, also, *State v. Lott* (1990), 51 Ohio St.3d 160, for Ohio's adoption of the *Strickland* test.

{¶ 16} Although, when appellant failed to appear, appellant's original counsel advised the court that he also represented the bond surety company; he indicated to the court that he did not intend to represent the surety in this case. Nevertheless, in subsequent appearances, counsel is seen requesting continuances and speaking on behalf of the surety. For practical purposes, this constitutes a representation of the surety, even if counsel did not enter a formal appearance.

{¶ 17} In fairness to counsel, there is nothing in the record to support appellant's allegation that counsel used personal information provided to counsel to actively aid his surety client to bring appellant to the court. Nevertheless, dual representation creates, at the least, an appearance of impropriety and where, as here, the interests of the clients are antithetical, a likelihood of an actual conflict of interest. In such a circumstance, there is certainly a question as to the adequacy of the counsel rendered once the conflict arose.

{¶ 18} Ohio courts have addressed conflicts of interest as the basis of an ineffective assistance of counsel claim many times. Much of the discussion is the adequacy of inquiry as to whether a conflict of interest exists, whether it has been waived or how to correct or address the problem once an actual conflict has been identified. *State v Gillard* (1992), 64 Ohio St.3d 311, 312; *Cuyler v. Sullivan* (1980), 446 U.S. 335.

"In order to establish a Sixth Amendment violation due to a conflict of interest, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 338.

{¶ 19} The Ohio Supreme Court described a potential conflict of interest as existing " \* \* \* where the 'interests of the defendants may diverge at some point so as to place the attorney under inconsistent duties.'" *State v. Gillard* (1997), 78 Ohio St. 3d 548, 552, quoting *State v. Dillon* (1995), 74 Ohio St.3d 166, 168. "An actual conflict of interest exists if, 'during the course of the representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action.'" *Id.* (discussing joint representation of criminal defendants)

{¶ 20} Here, a question of potential conflict of interest should have been apparent to the trial court once it became aware of prior counsel's statement that he would not represent the bonding company in this case, but proceeded on behalf of it anyway during the time appellant was missing and before he withdrew as appellant's counsel. When counsel requested leave to withdraw, he cited the noncooperation of appellant that prevented counsel from adequately representing him, not a conflict of interest because of the dual representation. New counsel was appointed.

{¶ 21} In *Gillard*, *supra*, the Supreme Court remanded the case to the trial court to determine if a conflict of interest did, in fact, exist.

{¶ 22} We do not find it necessary to remand this case given the evidence and circumstances in the record, because even if a conflict of interest did exist, we must still address the second prong of the Strickland test.

{¶ 23} Here, appellant can still show no prejudice. There is nothing in the record to suggest that counsel's representation prior to appellant's unauthorized absence was in any way deficient. After the surety returned appellant to court, original counsel's request for leave to withdraw from representation was granted. The only period during which the dual representation issue may have played any part was during appellant's voluntary absence, after a plea was negotiated. As we have indicated above, the record contains no action or omission by original counsel that would demonstrates actual prejudice. Accordingly, appellant's first assignment of error is not well-taken.

## II. Motion to Withdraw Plea

{¶ 24} In his second assignment of error, appellant asserts that the trial court abused its discretion when it denied his pre-sentencing motion to withdraw his plea.

{¶ 25} At the hearing to withdraw his no contest plea, appellant insisted that at the time of the plea he was not fully aware of its ramifications. Appellant noted that part of the bargain was to provide state and federal prosecutors with information about other criminal activity and appellant had come to understand he did not have the information that he had promised to deliver. He, therefore, requested the court vacate the bargained for plea and set the matter for trial.

{¶ 26} The state responded that its principal, if not only, witness against appellant on count one of the indictment was Shontell Franks. After her arrest, Franks had been placed in a Michigan juvenile facility, but since, because of appellant's failures to appear, nearly six months had passed. Franks had been released to foster care and would be

difficult to locate. Indeed, the state represented that it had attempted unsuccessfully on two occasions to find the girl. As a result, the state argued, it would be prejudiced if appellant's motion was granted.

{¶ 27} The trial court found appellant's assertion that he was "in over his head" when he made the plea agreement unpersuasive. The court noted that when he made his agreement with the state he was fully aware of what information that he could or could not provide prosecutors. The court said that it did not believe appellant's insistence that he was confused and merely going along with the deal. The court noted that appellant was hardly a newcomer to such negotiations, having had numerous prior contacts with the judicial system. Moreover, the court stated, having reviewed appellant's plea colloquy, it was convinced that appellant knowingly and intelligently entered the plea. The court found the motion to withdraw that plea was simply an attempt of appellant to "game" the system.

{¶ 28} "[A] presentence motion to withdraw a guilty plea should be freely and liberally granted. Nevertheless, it must be recognized that a defendant does not have an absolute right to withdraw a plea prior to sentencing. Therefore, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *State v. Xie* (1992), 62 Ohio St.3d 521, 527. The decision to grant or deny a defendant's motion lies within the sound discretion of the trial court and it will not be disturbed absent an abuse of that discretion. *Id.* In order to find an abuse of discretion, a reviewing court must find more than error; the reviewing court "must find

that the trial court's ruling was 'unreasonable, arbitrary or unconscionable.'" *Id.*, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 29} "Some of the factors that are weighed in considering the trial court's decision on a presentence motion to withdraw a plea are as follows: (1) whether the state will be prejudiced by withdrawal; (2) the representation afforded to the defendant by counsel; (3) the extent of the Crim.R. 11 plea hearing; (4) the extent of the hearing on the motion to withdraw; (5) whether the trial court gave full and fair consideration to the motion; (6) whether the timing of the motion was reasonable; (7) the reasons for the motion; (8) whether the defendant understood the nature of the charges and potential sentences; and (9) whether the accused was perhaps not guilty or had a complete defense to the charge." *State v. Griffin* (2001), 141 Ohio App.3d 551, 554.

{¶ 30} In this matter, the Crim.R. 11 hearing and the motion to withdraw plea hearing were extensive and comprehensive. The state offered a reasonable assertion that due to the delay in raising the motion, which was due to appellant's absenting himself from the jurisdiction, it would be prejudiced if the motion was granted. Although appellant asserted his innocence, the reasons for seeking to withdraw the plea were strained. Original counsel's dual representation issue gives rise to some question of effective representation, but as we have discussed there appears no resultant prejudice. The trial court's reasons for rejection of the motion are well reasoned, demonstrating a full and fair consideration.

{¶ 31} Considering the *Griffin* factors, we must conclude that when the trial court rejected appellant's motion to withdraw his plea, it acted within its sound discretion. Accordingly, appellant's second assignment of error is not well-taken.

### III. Sentencing

{¶ 32} In his remaining assignment of error, appellant suggests that the trial court abused its discretion when it sentenced him to the maximum term of imprisonment possible for his offense. Appellant argues that maximum sentences are intended to be reserved for the worst offenses or where there is the greatest likelihood of recidivism. Appellant insists that his role in the robbery was hardly the worst form of the offense. Indeed, since he stayed in the car while someone else robbed the bank, he only "in essence served as an advisor."

{¶ 33} "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus.

{¶ 34} An accomplice is to be prosecuted and punished as if he or she is a principal offender. R.C. 2923.03(F).

{¶ 35} In the sentencing entry in this matter, the court reports that it has considered the purposes and principles of sentencing and has balanced the statutory seriousness and recidivism factors. At the sentencing hearing, the court addressed appellant:

{¶ 36} "[T]o suggest that you didn't know what was going on or that you're naïve about the criminal justice system is beyond belief for this reason.

{¶ 37} "In 1994 trafficking in drugs, 12 months ORDC.

{¶ 38} "Attempted receiving stolen property, 1995, one-and-a-half years in ORDC. Shock probation was granted. Probation violation, and so probation revoked.

{¶ 39} "July 18, 1997, sentenced to 55 months in the Federal Correctional Institute for a federal bank robbery.

{¶ 40} "In August of 2001, which would have been shortly after release from federal custody, aggravated robbery with a firearm specification; four years Ohio Department of Corrections was the sentence. You were released in August of '05 under 5 years of post release control.

{¶ 41} "Sometime thereafter possession to obtain drugs conviction, and then we have a post release control for aggravated robbery, receiving stolen property in August of '05 from Cuyahoga County."

{¶ 42} It would seem that the trial court had a reasonable concern with respect to appellant's probable recidivism. Thus, the maximum sentence imposed was not arbitrary, unreasonable or unconscionable. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 43} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay court 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.

Peter M. Handwork, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Thomas J. Osowik, P.J.  
CONCUR.

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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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