

[Cite as *State v. Pizzaro*, 2011-Ohio-611.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94849

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSE A. PIZZARO

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521427

BEFORE: Sweeney, J., Kilbane, A.J., and Keough, J.

RELEASED AND JOURNALIZED: February 10, 2011
ATTORNEY FOR APPELLANT

Nancy Schieman, Esq.
9368 Sunrise Court
Mentor, Ohio 44060

ATTORNEYS FOR APPELLEE

William D. Mason, Esq.
Cuyahoga County Prosecutor
By: Marcus L. Wainwright, Esq.
Asst. County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Jose A. Pizzaro, appeals from the trial court's decision that denied his pro se presentence motion to withdraw his guilty plea. For the reasons that follow, we affirm.

{¶ 2} At all times throughout the trial court proceedings defendant was represented by court appointed counsel. On December 10, 2009, defendant pled guilty to felonious assault with a three year firearm specification. In exchange, other charges and specifications were dismissed. On December 30, 2009, defendant filed a pro se motion to withdraw this plea based upon an expressed dissatisfaction with his legal representation and his alleged misunderstanding of the plea he entered. Defense counsel never joined in the motion nor was it mentioned by any party during the court proceedings.

{¶ 3} The allegations contained in defendant’s motion are contradicted by the record as reflected in the plea proceedings. For example, defendant affirmed his understanding of the potential consequences of the plea that were explained in explicit detail by the trial court. Further, the trial court directly inquired if defendant was “satisfied with the legal representation [he] received” to which defendant responded, “yes.” The trial court asked defendant if he had any questions about his Constitutional rights or the penalties he faced or “how pleading guilty means [he was] giving up the rights that he [had] * * * In other words, [did he] have any questions at all about these proceedings?” And, defendant said, “No. I understand everything.” Defendant denied being promised anything by anybody in order to obtain his guilty plea. The trial court also asked if anyone had threatened him to obtain his plea, including the court or his lawyer. Defendant said, “No.”

{¶ 4} The trial court denied defendant’s motion to withdraw his guilty plea and imposed an eight year prison sentence in this case, to be served consecutively to sentences imposed on the defendant in other cases. Defendant’s assignment of error provides:

{¶ 5} “The trial court erred by overruling Appellant’s presentence motion to withdraw his plea of guilty without first holding a hearing.”

{¶ 6} “[A] presentence motion to withdraw a guilty plea should be freely and liberally granted.” *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d

715. However, “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. * * * Absent an abuse of discretion on the part of the trial court in making the ruling, its decision must be affirmed.” Id.

{¶ 7} The Ohio Supreme Court has clearly prohibited hybrid representation; that is a combination of pro se representation along with the assistance of counsel. See, *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶32 (“a criminal defendant has the right to representation by counsel or to proceed pro se with the assistance of standby counsel. However, these two rights are independent of each other and may not be asserted simultaneously.”) One who is represented by counsel and who does not move the court to proceed pro se, may not “act as co-counsel on his own behalf.” *State v. Greenleaf*, Portage App. No. 2005-P-0017, 2006-Ohio-4317, ¶70, quoting, *State v. Thompson* (1987), 33 Ohio St.3d 1, 6-7, 514 N.E.2d 407.

{¶ 8} In this case, defendant, while represented by counsel, unilaterally filed a pro se motion to withdraw his plea.¹ As set forth previously, every basis of the motion was contradicted by defendant’s own statements in the record. While the motion indicated that defendant did not want his assigned

¹Defendant served only the clerk of courts with the motion. See R. 42 at Certificate of Service.

attorney to continue to represent him, he did not ask to proceed pro se. Defendant was represented by counsel at the sentencing hearing, who addressed the court on defendant's behalf. Furthermore, when defendant personally addressed the court during the sentencing hearing, he did not raise the matter nor any of the allegations he had made in the pro se motion. Had defense counsel filed a presentence motion to withdraw or joined in the pro se motion that was filed, the law would have required some type of hearing. *State v. Wittine*, Cuyahoga App. No. 90747, 2008-Ohio-5745. There is no indication that defense counsel was even aware that defendant had filed this motion.

{¶ 9} Had the trial court entertained defendant's pro se motion while defendant was simultaneously being represented by appointed counsel, this would have effectively constituted hybrid representation in violation of the established law. *Id.* Accordingly, the trial court's denial of the motion was appropriate since it was not properly before the court. See, also, *State v. Greenleaf*, Portage App. No. 2005-P-0017, 2006-Ohio-4317, ¶¶ 66-72.

{¶ 10} The assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the

common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR