

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

State of Ohio

Court of Appeals No. L-14-1066

Appellee

Trial Court No. CR0201301586

v.

Deangelo Gott

DECISION AND JUDGMENT

Appellant

Decided: March 13, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Jon Paul Rion and Nicole Rutter-Hirth, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Deangelo Gott, appeals from several judgments of the Lucas County Court of Common Pleas: the judgment granting the prosecution a continuance of the trial date and denying appellant's motion to dismiss journalized on September 17, 2013; the judgment denying appellant's motion to withdraw his plea journalized on

March 3, 2014; and the judgment of conviction of charges of robbery and felonious assault journalized on March 18, 2014. Because we find the trial court abused its discretion by refusing to grant appellant's motion to withdraw his guilty plea, we reverse the judgment of conviction dated March 18, 2014.

{¶ 2} Appellant was indicted in a multi-count indictment alleging one count of robbery, a violation of R.C. 2911.02(A)(2), a second degree felony; one count of aggravated robbery, a violation of R.C. 2911.01(A)(1), a first-degree felony; and two counts of felonious assault, violations of R.C. 2903.11(A)(2), both second degree felonies. All counts also allege a firearm specification pursuant to R.C. 2941.145.

{¶ 3} It was alleged that on March 8, 2013, appellant and his friends, members of a gang, attended a party being held in the basement of a Vermaas Avenue home. When the owner of the home asked the group to leave, the group became more rowdy and sang a gang song. As the crowd began to leave, one person was struck in the face, pushed to the floor, and kicked and punched. His money, cellphone, and shoes were taken. Afterward, he was shot in both legs. A second victim was shot in the chest at close range with a .45-caliber handgun.

{¶ 4} The victims were Kevin Coffey-Fench and Trayvon Sutton. Both identified appellant from a photographic array. Appellant entered a not guilty plea at his arraignment held April 26, 2013, and counsel was appointed to represent him. Retained counsel was hired in mid-March 2013, and took the case over from the appointed attorney in late March 2013. Two other gang members who were later identified as Peete

Mohammad and Juan Sallie were indicted in May 2013, with charges of complicity. The state sought an order requiring Kevin Coffey-Fench to post bond to secure his appearance at trial as a witness, which was issued on August 30, 2013. He was taken into custody on September 3, 2013, to ensure his appearance at trial scheduled for September 16, 2013.

{¶ 5} At a hearing on September 16, 2013, the prosecutor admitted he was having difficulty obtaining the cooperation of the two victims, but that he had been contacted by one victim and the other was present. While the prosecution was ready to proceed to trial, it asked for a continuance without giving a reason other than the fact that one of the defense lawyers had a conflict. All of the defense lawyers, however, objected to the continuance and sought to have their cases dismissed for want of prosecution stating that they were ready to proceed. The court granted the prosecution's request and continued the trial to September 30, 2013.

{¶ 6} On the day of trial, the state requested a dismissal of the indictments against Peete Mohammad and Juan Sallie. After voir dire was conducted in appellant's trial, appellant withdrew his plea and entered a guilty plea to one count of robbery and one count of felonious assault. All other counts and the firearm specifications were to be dismissed at sentencing. Shortly thereafter, new counsel for appellant filed a motion to vacate his plea arguing his plea was not intelligently and knowingly made. A two-day evidentiary hearing was held on October 18 and November 8, 2013. In a March 3, 2014 judgment, the trial court denied appellant's motion to withdraw his plea.

{¶ 7} On March 14, 2014, appellant was sentenced to a term of seven years of imprisonment for the robbery conviction and seven years of imprisonment for the felonious assault conviction. The two sentences were ordered to be served consecutively. Appellant appeals from the judgment of conviction and sentencing, asserting the following assignments of error:

FIRST ASSIGNMENT OF ERROR:

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING GOTT'S MOTION TO VACATE HIS PLEA BECAUSE IT WAS NOT THE PRODUCT OF AN INTELLIGENT, CALCULATED DECISION.

SECOND ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED IN IMPOSING A FOURTEEN YEAR SENTENCE, WHICH IS NEARLY A MAXIMUM, CONSECUTIVE SENTENCE.

{¶ 8} In his first assignment of error, appellant argues that the trial court abused its discretion by denying his motion to vacate his plea on the grounds that it was not knowingly and voluntarily made.

{¶ 9} Having entered a guilty plea, appellant waived all appealable errors that might have occurred during the trial court proceedings unless he demonstrates that the alleged errors precluded him from entering a knowing, voluntary plea. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 105. A guilty plea waives right to claim that accused was prejudiced by constitutionally ineffective counsel, except to

extent defects complained of caused plea to be less than knowing and voluntary. *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991), paragraph two of the syllabus. To establish a claim of ineffective assistance of appointed counsel, the defendant must show that his counsel's representation "fell below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Accord *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus.

{¶ 10} Appellant asserts that he was compelled to plead guilty because his retained attorney did not provide effective representation. Appellant asserts his retained counsel failed to investigate the case to find exculpatory witnesses, was not prepared to go to trial, and based the defense solely on the hope that the victim would not appear at trial.

{¶ 11} There is no absolute right to withdraw a guilty plea after conviction, but prior to sentencing the motion should be freely and liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992), paragraph one of the syllabus. The matter is left to the sound discretion of the trial court judge who is in the better position to evaluate both the motivation of the defendant in pleading guilty and the credibility and weight to be given to the reasons for seeking to withdraw the plea. *Id.* at paragraph two of the syllabus. Therefore, we will not reverse the trial court's denial of the motion unless the defendant can establish that the trial court abused its discretion. *Id.* at 525. An abuse of discretion standard requires a finding that the trial court committed "more than an error of

law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable * * *." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 12} Crim.R. 32.1 gives no criteria for determining when withdrawal of a plea is justified. However, the courts evaluate the trial court's decision based upon the following considerations:

(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. Murphy*, 176 Ohio App.3d 345, 2008-Ohio-2382, 891 N.E.2d 1255, ¶ 39 (6th Dist.), citing *State v. Griffin*, 141 Ohio App.3d 551, 554, 752 N.E.2d 310 (7th Dist.2001).

A change of heart or a mistaken belief about entering a plea is an insufficient reason to permit withdrawal of the plea. *State v. Locher*, 4th Dist. Scioto No. 11CA3414, 2012-Ohio-787, ¶ 17; *State v. Lawhorn*, 6th Dist. Lucas No. L-08-1153, 2009-Ohio-3216, ¶ 23 (citations omitted).

{¶ 13} At the evidentiary hearing, appellant's retained trial counsel testified that he had been practicing over five years when he took over this case from appointed counsel. With respect to this case, he had been informed by the prosecutor at five meetings that the case against appellant and the co-defendants was weak and that the victims were not cooperative and might not appear. Discovery indicated that appellant had been identified by both victims in photo arrays and, therefore, he was the prime suspect. Retained counsel knew that the investigating officers had a difficult time finding anyone left at the scene to interview who had witnessed the events. Retained counsel also testified that he did not hire an investigator or interview any of the 15-20 people indicated in the police report as having been present nor the alleged victims, including two individuals identified by Sutton ("Chicken," later identified as Kieshaun Banks, and T. Jones, whom retained counsel suspected might be Tyrell Jones based on conversations with appellant). Retained counsel also did not interview any other individuals identified in discovery as having been present at the time of the offense; namely, Cornelius Stephens, Joshua Meyers, or Chris Ragland. Appellant's attorney was informed that Mohammad believed appellant left the party before the shooting occurred.

{¶ 14} Retained counsel testified that he initially met with defense counsel for the other defendants and appellant's family members. Retained counsel also spoke to one witness suggested by appellant, Paul, by telephone. However, retained counsel did not subpoena any witnesses to testify on appellant's behalf even though he believed appellant was innocent.

{¶ 15} At some point in time, retained counsel came to the conclusion, because the trial had been postponed several times, that Sutton would not testify against appellant and Coffey-Fench had left the state to avoid being subpoenaed by the prosecution. Therefore, retained counsel discontinued his investigation of the case. He knew, however, that the prosecutor's office was attempting to make sure the victims were present for trial and was issuing warrants procuring their presence.

{¶ 16} Retained counsel also did not file a motion to suppress the evidence obtained from the photo identification even though the detective actually involved in the case administered the photo lineup and used only six photos. In hindsight, retained counsel believed that he should have filed a motion to suppress because there was no other physical evidence to support the conviction. He had not done so solely because he thought the case would be dismissed. He denied that it was a strategic decision.

{¶ 17} On the day of trial, retained counsel was surprised when the cases against two of the three co-defendants were dismissed and appellant's case proceeded to trial. Had he known the victims would appear, retained counsel testified he would have prepared differently. He would have interviewed people present at the party and the victims. He also planned to call Mohammad to testify after his case was dismissed.

{¶ 18} Appellant also presented the testimony of another defense attorney who testified that he would always prepare for trial by interviewing as many witnesses as he could find or employ an investigator if there were multiple witnesses or a complicated case, he would have filed a motion to suppress under the circumstances of this case.

However, the trial court did not permit the attorney to testify as an expert regarding what should have been done in the present case.

{¶ 19} Retained counsel was present, however, at a prior trial date of September 16, 2013, when the prosecution had indicated that one witness was present for trial and another had been contacted. At the hearing on the motion to withdraw the plea, retained counsel testified he had indicated that he was ready to proceed the morning of trial only because he believed that the victims had not appeared.

{¶ 20} Before trial began, retained counsel orally asked for a continuance, but his request was denied. Because of the changed circumstances, retained counsel advised appellant that the outcome of the trial would be based upon whose testimony the jury believed and, therefore, he recommended that appellant accept the plea. At the time of the plea, appellant did not complain about his trial counsel's lack of investigation or the lack of witnesses on his behalf.

{¶ 21} One week prior to the hearing on the motion to withdraw his plea, appellant's newly-retained appellate counsel hired JGI Investigations. JoAnne McLean, from JGI, testified that she worked with her associates, Joe Bandeen and Jim Lariviere. They spoke with the homeowners, and witnesses to some of the events. Chris Ragland stated that he saw 50 or 60 kids leaving the house when he arrived. Cornelius Stephens, a neighbor, told her a four-foot-nine-inch light-skinned male and a five-foot-three-inch white female left the residence together. Bandeen spoke to Peete Mohammad. From her brief review of her firm's reports and her investigation, McLean determined the agency

had not uncovered any evidence of appellant's guilt. However, at that time, the agents had not interviewed the police officers involved, the victims, or the parents of the victims. She attempted to speak to Kevin Coffey, Sr. because she had been told by the victim's uncle that Coffey, Sr.'s son, Kevin Coffey, Jr., had told his father he was not sure who shot him.

{¶ 22} Lariviere testified that he interviewed Mohammad. Mohammad told the investigator that he met appellant at the party and that he left a few minutes after appellant, which was before the shooting occurred. Mohammad named a few other individuals who were outside at the time. At the time of the hearing, Lariviere was still investigating this matter and believed that there were additional witnesses who could be interviewed.

{¶ 23} Lariviere also testified that his firm had initially been hired by the appointed counsel for a co-defendant. A few weeks before the scheduled trial date, JGI was told by this attorney to stop the investigation because the case was expected to be resolved. Retained counsel never contacted the agency for information.

{¶ 24} On the second hearing date for the motion to withdraw the plea, Lariviere testified that he had done some additional investigation and found witnesses from the Toledo fire reports. His agents interviewed a woman, Courtney Russell, whose car had broken down in the area and was on fire the night of the crime. While she was waiting for a fire truck, she saw a group of people, young black males, outside the house and heard shots fired. She also described a person leaving the group going back toward the

residence after the shooting: an approximately five-foot-three to five-foot-four-inch black male with dreadlocks. Lariviere believed the person she identified is Juan Sallie. Lariviere also testified that he interviewed Mohammad, who stated that he and Deangelo went upstairs during the party and outside of the house. Deangelo left to go to the home of a girl Mohammad did not know and Mohammad was outside the house when he heard the shots. It was his belief that appellant had already left the area. Later, Mohammad saw appellant further down the street.

{¶ 25} The defense also submitted the affidavit of Kieshaun Banks, a/k/a “Chicken,” who attested that he was not present the day of the crime and has no information about it. Sutton had identified Chicken and T. Jones as being at the house when the shooting occurred. The court did not allow the affidavit to be submitted.

{¶ 26} Appellant testified that he did not commit the offenses charged and entered a guilty plea only because he learned the morning of trial that the prosecution’s witnesses would testify.

{¶ 27} A properly licensed attorney is presumed to have acted in a competent manner. Therefore, the burden is on the defendant to prove otherwise. *State v. Lott*, 51 Ohio St.3d 160, 175, 555 N.E.2d 293 (1990). The reasonableness of the attorney’s actions must be assessed from counsel’s perspective at the time the alleged erroneous decision was made. *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) and *State v. Wilkins*, 64 Ohio St.2d 382, 390, 415 N.E.2d 303 (1980).

{¶ 28} First, the failure to file a motion to suppress constitutes ineffective assistance only when the record supports a finding that the motion would have been granted and the failure to file the motion resulted in prejudice to appellant's case. *State v. Tate*, 8th Dist. Cuyahoga No. 81682, 2004-Ohio-973, ¶ 9, and *State v. Burley*, 7th Dist. Mahoning No. 93-CA-204, 1998 WL 544509, *4 (Aug. 11, 1998). However, the failure to file a motion to suppress is not ineffective assistance when it is the result of a tactical decision. *State v. Madrigal*, 87 Ohio St. 3d 378, 389, 721 N.E.2d 52 (2000).

{¶ 29} Appellant's retained trial attorney testified that in hindsight he should have filed a motion to suppress, but he did not testify why he did not do so originally other than his reliance upon the belief that no witness for the prosecution would appear. He also did not testify as to how the photograph identification process was suggestive other than that it violated R.C. 2933.83. The trial court found that appellant had failed to present evidence to demonstrate that there was a basis for suppressing the photo identification other than the fact that the procedure used violated R.C. 2933.83.

{¶ 30} A violation of R.C. 2933.83 does not automatically require that the evidence be suppressed. *State v. Winters*, 6th Dist. Lucas No. L-12-1041, 2013-Ohio-2370, ¶ 44. Therefore, we agree with the trial court that there was insufficient evidence to support a claim of ineffective assistance regarding the failure to file a motion to suppress. While the parties do not dispute that the photo array violated state law, there was no specific evidence presented that the photographic identification was highly

suggestive and unreliable and should have been suppressed as a result of a constitutional violation.

{¶ 31} The trial court also found, and the record supports, that the motion to withdraw the plea was timely and presented a potential basis for granting the motion; appellant never complained about his attorney's representation; the court conducted a proper Crim.R. 11 plea hearing; the prejudice to the state would be significant in this case because the victims had not been cooperative and it had been difficult for the prosecution to secure witnesses for the trial; and appellant was given opportunity to fully present his argument and evidence to support his motion to withdraw his plea.

{¶ 32} However, we conclude two findings made by the trial court were not supported by the record. First, the trial court found that appellant did not insist that he was innocent. Appellant asserted during the plea hearing that he did not do anything when he was asked to tell what happened. But, when the court pressured appellant to tell what he did in order to enter the guilty plea, appellant complied and told the facts of the offense as counseled by his attorney. At that moment there was an outburst from appellant's uncle who told him not to admit to things he did not do. Clearly appellant felt compelled to recite the facts of the crime in order to take a plea and avoid a lengthy sentence if convicted after a trial.

{¶ 33} Second, we conclude that the retained trial counsel did render ineffective assistance by not fully investigating the case prior to trial. At the hearing on the motion to vacate appellant's plea, retained trial attorney testified that he spoke to appellant's

family, co-counsel on several occasions, people appellant suggested, and to the prosecutor. The trial court concluded that this level of investigation was sufficient giving deference to the attorney's judgment. The court also concluded that the attorney did not render ineffective assistance when he failed to subpoena the witnesses he interviewed. This finding, however, did not address the issue raised by appellant that had his attorney properly investigated the case, he would have discovered witnesses who would have testified on his behalf. One of those witnesses included his co-defendant, Mohammad.

{¶ 34} The total failure to investigate a case to establish a defense constitutes ineffective assistance because any resulting trial strategy decision would be unreasonable. *Kimmelman*, 477 U.S. at 384, 106 S.Ct. 257, 91 L.Ed.2d 305 (complete lack of investigation based on a mistaken belief was unreasonable), and *State v. Anderson*, 1st Dist. Hamilton No. C-040541, 2005-Ohio-4301, ¶ 13. This case presents not a total failure to investigate, but a failure to continue the investigation solely because the attorney erroneously anticipated that the charges would be dismissed.

{¶ 35} The trial court found that the level of investigation in this case was reasonable based on the attorney's evaluation of the case. We disagree. The attorney testified under oath that his only reason for failing to investigate the case was his reliance on the victim witnesses not appearing at trial. Realizing the error, new counsel was immediately retained to file a motion to vacate the plea after appellant was convicted. It is clear from the trial counsel's testimony that his inexperience led him to erroneously

rely upon the fact that the prosecution did not seem to be able to secure a witness to testify and that this was not a trial strategy.

{¶ 36} Ultimately, however, the resolution of the motion to vacate rests on a balancing of the factors noted above. While the impact on the state is great in this case because of the uncooperativeness of the victim witnesses, we find that the ineffective assistance of trial counsel outweighs this and all the other factors. Therefore, we conclude that the trial court abused its discretion by denying the motion to vacate. Accordingly, we find appellant's first assignment of error well-taken.

{¶ 37} In his second assignment of error, appellant argues that the trial court erred by imposing a 14-year sentence. In light of finding the first assignment of error well-taken, we find this assignment of error is moot.

{¶ 38} Having found that the trial court did commit error prejudicial to appellant, the judgments of the Lucas County Court of Common Pleas dated March 3, 2014 and March 18, 2014, are reversed. This case is remanded to the trial court for further proceedings consistent with this decision. Appellee is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgments reversed.

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

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, 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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.