IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

STATE OF OHIO, Plaintiff-Appellee vs. ANTHONY CIOFFI, JR., Defendant-Appellant	)	CASE NOS. 2002-TR-00037 2002-TR-00039

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

I. INTRODUCTION

Defendant - Appellant, Anthony Cioffi, Jr., (hereinafter "Appellant") is presently serving a ten (10) to twenty-five (25) year prison sentence at the Trumbull Correctional Institution pursuant to judgments of conviction issued by the Trumbull County Court of Common Pleas (hereinafter "Court below").

In the Court below, Appellant sought relief from his sentence relying on a post-plea investigation which revealed that on the date Appellant entered pleas, his trial counsel had not properly evaluated life rape and other sex related charges which were resolved as part of a plea resolution agreement. As such, Appellant filed A Motion to Set Aside Judgments of Conviction And To Withdraw Pleas Of Guilty pursuant to Crim. R. 32.1 asserting that his pleas and waivers of trial rights were not knowingly, voluntarily and intelligently made. After an evidentiary hearing in the Court below, the Appellant's motion was overruled.

II. PROCEDURAL POSTURE

On November 17, 1995, an indictment in Case No. 95-CR-696 was returned by the Trumbull County Grand Jury charging the Appellant with two (2) counts of Gross Sexual Imposition, R.C. 2907.05(A)(4), felonies of the third degree and one count of Kidnapping, R.C. 2905.01(A)(2), an aggravated felony of the second degree. The case was assigned to the docket of Judge John Stuard.

The offense conduct regarding the two (2) counts of Gross Sexual Imposition stemmed from an allegation that Appellant had fondled the genitalia of Megan McKelvey (DOB: 12-29-86), the daughter of Appellant's then girlfriend, Sheila Schreckengost.

The offense conduct regarding the count of Kidnapping stemmed from an allegation that Appellant restrained his then girlfriend, Sheila Schreckengost, of her liberty to facilitate his flight immediately after she claimed to have discovered that Appellant had engaged in sexual activity with her daughter.

In connection with his legal defense, Appellant secured the services of Attorney Thomas E. Zena (hereinafter referred to as "Attorney Zena").[1]

While Case No. 95-CR-696 was pending, a second indictment, Case No. 96-CR-599, was returned by the Trumbull County Grand Jury on September 27, 1996, charging Appellant with three (3) counts of Rape, R.C. 2907.02(A)(1)(b)(2), aggravated felonies of the first degree (with life specifications), and three (3) counts of Gross Sexual Imposition, R.C. 2907.05(A)(4), felonies of the third degree. That case was assigned to the docket of Judge Mitchell F. Shaker.

The offense conduct regarding this second case stemmed from allegations that Appellant had engaged in sexual activity with his natural children years prior to the allegations lodged by Megan McKelvey which were the subject of Case No. 95-CR-696.

Again, Attorney Zena entered his appearance as counsel for the Appellant.

In connection with pretrial investigation of those allegations (involving his natural children) it is undisputed that Attorney Zena failed to evaluate the strengths and weaknesses of the State's case, and in no way, shape or form was ready to try the case if called upon by the Court below.

It is undisputed that Attorney Zena failed to secure and/or review educational, medical and/or psychological records relative to Appellant's natural children -- records which were in existence

[1] Attorney Zena had previously provided legal representation to Appellant in connection with unrelated matters. As such, Attorney Zena presumably had, or should have had, some knowledge of Appellant's background and life history including the fact that Appellant has been classified as developmentally disabled. See infra, supporting documentation of motion and transcript of evidentiary hearing at Tr. 23-24, 129-134.

and which documented extensive psychological histories of the children including significant behavior and emotional problems and denials of sexual abuse at the hands of the Appellant. Attorney Zena conducted no interviews of witnesses nor sought the assistance of any expert. As a result, Attorney Zena was in no position to render delicate legal advice and/or an informed professional opinion regarding the relevant facts and issues of that case; and in no uncertain terms, Attorney Zena was categorically incapable of counseling Appellant relative as to the merits of proceeding with trial versus accepting plea resolution.

On December 3, 1996, Appellant was scheduled to proceed with trial by jury in Case No. 95-CR-696. On that date and prior to jury selection, Attorney Zena offered counsel to the Appellant relative to plea resolution involving both of Appellant's pending cases. Attorney Zena rendered his advice and professional opinion notwithstanding the fact that he had failed, by his own admission, to conduct even a minimal independent investigation or trial preparation on the case involving the allegations lodged by Appellant's natural children in Case No. 96-CR-599. The Appellant nonetheless relied upon the advice and professional opinions of his counsel in entering into the following plea agreement on that date:

Case No. 95-CR-696: Pleas of guilty to Count One (1), Gross Sexual Imposition and to Count Three (3), Kidnapping. One (1) year imprisonment on Count One (1) to run concurrent to three (3) to fifteen (15) years of imprisonment on Count Three (3). Sentences to run concurrent to sentence imposed in Case No. 96-CR-599.

Case No. 96-CR-599: Pleas of guilty to Counts One (1) through Three (3), Rape without life specification and to Counts Four (4) through Six (6) Gross Sexual Imposition. Ten (10) to Twenty-Five (25) years of imprisonment on the first three (3) counts to run concurrently with each other and to run concurrently with one (1) year imprisonment on counts Four (4) through Six (6) which were to run concurrently with each other.

Appellant was presented with written plea forms memorializing the above which he executed.

After accepting the Appellant's pleas, the Court below imposed sentence on Appellant on December 6, 1996. Appellant has been incarcerated since that time.

While serving his sentence, Appellant secured the services of independent counsel to examine these cases and the representation and counseling provided by Attorney Zena. As part of that task a significant effort was undertaken relative to securing relevant documentation, Appellant's files from Attorney Zena[2] and facts regarding pretrial investigation and advice provided by Attorney Zena at the time of the plea.

On October 12, 1998, a sworn statement of Attorney Zena was taken. That statement was attached to Appellant's Motion To Set aside Judgment of Conviction and To Withdraw Pleas of Guilty and is part of the record before this Court.

A review of that statement supports the conclusion that Appellant plead guilty in the Court below while relying on the counseling and representation of an attorney who was wholly unprepared to resolve both cases; and, who admittedly had failed to conduct a thorough investigation of the allegations lodged by Appellant's natural children (trial in that case was scheduled to commence immediately after the first trial). As such, it was the thrust of Appellant's motion that Attorney Zena could not have possibly counseled the Appellant within the meaning and spirit of the Sixth Amendment relative to the wisdom of accepting plea resolution.

An evidentiary hearing on that motion was held on January 31, 2002. The decision of the Court below overruling the motion was issued on March 11, 2002

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[2]A complete file which Attorney Zena, to this day, has yet to produce. (Tr. 21-23).

This matter is now before this Court pursuant to Appellant's timely notice of appeal.

III. STATEMENT OF FACTS

At all times relevant to this proceeding, Appellant relied upon the skill and expertise of his retained trial counsel. This is particularly true given the fact that Appellant is a man of low intelligence having been classified as developmentally disabled and only nominally literate.

At the evidentiary hearing in the Court below, licensed psychologist, Thomas Walter, testified on behalf of the Appellant. Mr. Walter, who has completed between 15,000-16,000 psychological evaluations in his twenty-seven year career, testified relative to his findings having tested Appellant approximately eight (8) months prior to the December 3, 1996, plea. (Tr. 119-158). Mr. Walter's significant findings can be summarized for this Court as follows: Apellant was found to be "catastrophically reactive" to stressful situations (Tr. 127-129); Appellant was found to have border line intelligence such that Mr. Walter found "substantial cognitive limitation in this man" (Tr. 130-131); academically Apellant was placed in the moderately retarded range (Tr. 137); and, finally, Appellant was found to experience great difficulty in his decision making ability (Tr. 138). As a consequence of these psychological findings, Mr. Walter opined that Apellant, on December 3, 1996, was a person who was totally dependent upon the advice and counseling of his criminal defense attorney in deciding whether to go forward with trial or to accept or reject plea resolution. In this regard, the following colloquy is highlighted for this Court's consideration:

Q. Mr. Walter, I'm just about to wrap up, but I want to throw a couple of facts at you and I want you to render an opinion for me. I want you to assume that Mr. Cioffi in 1995, up until December of 1996, had been charged in two unrelated cases for a multitude of sex crime offense conduct in this county.

A. Yes.

Q. And I want you to further assume that he hired an attorney in which to represent his legal interests?

A. Yes.

Q. And I want you to further assume that the cases were not consolidated for trial, which meant one of the cases was scheduled to proceed on December 3, 1996, and the other unrelated case was to proceed sometime shortly thereafter, okay?

A. Yes.

Q. And I want you to further assume that on the morning of that December 3, 1996 trial, Mr. Cioffi is making a decision as to whether or not to plea bargain his case, which is a fancy term of compromising his case or to proceed to trial. And I want you to further assume that he's making this decision while sitting here in this Courthouse, while jurors are literally checking in, okay?

A. Yes.

Q. Knowing what you know about Mr. Cioffi, and certainly the psychological testing and diagnostic conclusions made by you, taking that into consideration, do you have an opinion based upon a reasonable degree of psychological certainty, relative to Mr. Cioffi's dependence on his attorney to make an informed decision to resolve his case or go to trial. Do you have an opinion?

A. Yes, I do.

Q. What is that opinion?

A. It is my opinion that Mr. Cioffi would be totally dependent on his attorney to make those decisions. He would not be able to competently make these decisions on his own for a number of reasons. One, he does not have the capacity to conceptualize all of the different variations of things to consider; and secondly, he has a history of making poor decisions and he's someone who needs someone else to tell him what to do, how to think, how to be and so forth. He's like a loose cannon or bus without a driver, going all over the place, without that executive capacity to make those decisions and to control his own behavior. So, yes, I believe he would be totally dependent on an attorney to make those decisions.

(Tr. 141-144, emphasis added).

Appellant's trial counsel, Thomas Zena testified at the evidentiary hearing. Mr. Zena, an experienced member of the bar practicing criminal law in the Trumbull and Mahoning County areas, admitted that when he offered counsel to Appellant at the December 3, 1996, plea hearing,

he was not a state of "trial preparedness" relative to the life rape case, Case No. 96-CR-599. (Tr. 51-52). Moreover, Mr. Zena stated that he had not seen, nor shared with Appellant, a letter from the D&E Counseling Center dated October 1, 1996 (marked as defense Exhibit A at the evidentiary hearing) wherein a psychologist advised Assistant Prosecuting Attorney Thomas Wrenn of the following exculpatory information regarding Appellant's children:

> Matthew Cioffi was seen for initial assessment on April 21, 1995 by Ms. Meg Harris, M.S. Ed., L.P.C. following his discharge from the Youth Services Unit of Tod's Hospital. Although Matthew's mother, Lisa Phillips, reported initially that Matthew "may have been sexually molested by their (biological) father"; there was nothing in the extensive information received form the hospital (including a psychological evaluation) that suggested corroborative findings and/or treatment for abuse. In fact, there is specific reference to Matthew denying being a victim of sexual abuse. Matthew was admitted to the hospital on March 30, 1995 with a diagnosis of psychological evaluation suggested a diagnosis of Major Depression after a suicide attempt. A psychological evaluation suggested a diagnosis of Adjustment Disorder with Depressed Mood and a rule-out of Attention Deficit Hyperactivity Disorder.
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> The clinical service plan developed by the primary Therapist, Dave Tammaro, L.S.W. on May 11, 1995 and signed buy Matthew's mother targeted disruptive behaviors as the problem. In total, Matthew and/or his mother were seen in three sessions by Mr. Tammaro. There were no reference to allegations or reports of sexual abuse in any of the Therapist's progress notes.
>
> Anthony Cioffi was initially referred to D&B in October, 1990 by a Home-School visitor after Anthony's mother indicated that she believed Anthony's father had and was molesting him since age three (3). Mahoning County CSB had reportedly investigated but could not substantiate abuse. Meanwhile the mother failed two appointments here and Anthony was not seen for intake until March, 1991 at age six (6) years and two (2) months. At that time Anthony was seen to present with multiple developmental and adjustment problems; a Case Manager was assigned to coordinate services. After multiple attempts to contact the family met with failure, the case was closed in May, 1991 with no services delivered.
>
> Anthony returned to D&E with his mother and brother in April, 1995. The mother sought out assistance due to multiple problems including allegedly unresolved issues of sexual abuse when he was a very young child. Initially diagnostic assessment suggested an Oppostional-Defiant disorder; Attention-Deficit Disorder was also suspected and not ruled out. Information received after the intake indicated that Anthony had been placed in the Developmentally Handicapped program at his school; most recent testing indicated an intellectual level within the mild range of mental retardation. Specific cognitive, behavioral, and emotional deficits were noted.

As with his brother a service plan was developed that focused on the disruptive behaviors. Due to the family's move to Trumbull County there was no significant follow-up.

Essential the only information regarding sexual abuse was supplied by the boy's mother. There is no information within the files that would corroborate or substantiate, for example, statements given by either child. In fact, apparently Anthony had steadfastly denied to therapists, evaluators, and case workers that he was molested, at least perhaps until more recent times.

These are clearly troubled, maiajusted and developmentally impaired youth. They have developed significant problems that have required clinical interventions as early as age three (3). As of this date of the last contact with this family the sporadic treatment interventions has resulted in minimal gains. (emphasis added).

Finally, Mr. Zena admitted during testimony at the hearing that when Appellant decided to pursue plea resolution on December 3, 1996, he did so without the benefit of reviewing and discussing with his attorney "documented evidence where [his] children had previously denied sexual activity" (Tr. 65), or the expected and necessary insight of a thorough defense investigation of the allegations. (Tr. 73-81). Considering that Attorney Zena was in no position to evaluate Appellant's exposure in Case No. 96-CR-599, query how Appellant under these circumstances; particularly with his limited cognitive ability, could have made an "informed" decision under these circumstances-- a decision which would have a profound effect on the next twenty-five years of his life![3]

III. LAW AND ARGUMENT

Assignment of Error:

The trial court erred in overruling Defendant-Appellant's motion to set aside judgments of conviction and to withdraw pleas of guilty

[3] Had Appellant proceeded to trial in Case No. 95-CR-696, been found guilty and been sentenced to maximum consecutive sentences, his term of incarceration would have been 12-15 years. By pleading in Case No. 96-CR-599, as a package plea resolution, his sentence was increased by 10 years on the maximum end. Appellant's decision on December 3, 1996, therefore warranted careful and thoughtful analysis relative to Case No. 96-CR-599.

The issue presented in this case is whether Appellant, who is mentally challenged, could have knowingly, voluntarily and intelligently waived his trial rights and entered pleas of guilty to certain serious offenses when his trial counsel, upon whom he was relying for insight and guidance, had not, at the time of the plea, evaluated the strengths and weaknesses of at least one of the cases (the life rape prosecution) upon which Appellant was resolving.

A. CRIMINAL RULE 32.1 PERMITS AN INDIVIDUAL TO WITHDRAW A PLEA POST - SENTENCE TO CORRECT A MANIFEST INJUSTICE

A motion to withdraw a plea of guilty is governed by the standards set forth in Crim. R. 32.1 which states as follows:

> A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended, but to correct manifest injustice the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

It is Appellant's contention that the record of this case supports a finding of "manifest justice" as required by Crim. R. 32.1 and that the Court below abused its discretion in overruling his motion given the factual predicate perfected below and now presented to this Court for review.

B. APPELLANT'S GUILTY PLEAS CANNOT BE DEEMED TO HAVE BEEN KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY MADE INSOFAR AS TRIAL COUNSEL COMPLETELY FAILED TO INVESTIGATE AND EVALUATE AT LEAST ONE OF APPELLANT'S CASES.

Guilty pleas are governed by Crim. R. 11, which provides in pertinent part:

> "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally" and:
>
> "(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation."

"(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence."

"(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself."

Before accepting a guilty plea the trial court must inform the defendant that by pleading guilty, he is waiving the rights enunciated in Crim. R.11(C)(2). In determining whether the trial court has met its duties, reviewing courts have distinguished nonconstitutional and constitutional rights. State v. Gibson (1986), 34 Ohio App. 3d 146, 147.

For rights not protected by the Constitution, reviewing courts consider whether the trial court substantially complied with the requirements of Crim. R. 11(C)(2) and the defendant subjectively understood the implications of his plea and the nature of the rights he was waiving. State v. Nero (1990), 56 Ohio St. 3d 106, 108. For a waiver of constitutional rights to be valid under the Due Process Clause, there must be an intentional relinquishment or abandonment of a known right or privilege. State v. Buchanan (1974), 43 Ohio App. 2d 93, 96. In Buchanan, supra, the Court of Appeals stated:

The waiver must be voluntarily, intelligently and knowingly made and the defendant must understand the nature of the charges against him and the consequences of his plea of guilty. Otherwise it is in violation of due process and is therefore void.

Id. at 96. Accord State v. Kelley (1991), 57 Ohio St. 3d 127, 129.

In State v. Mikulic (1996), 116 Ohio App 3d 787, the Court considered the issue of whether failure to advise a defendant about the general defense of insanity precluded a knowing, voluntary and intelligent guilty plea to a robbery charge. The Mikulic Court in deciding that the defendant's plea was not knowingly, voluntarily or intelligently made noted that:

> [w]here it is manifest that the plea is premised upon incorrect legal advice, the plea is in violation of the defendant's right to due process and is not voluntary.

In Mikulic the Court proceeded to explain the basis for its conclusion in stating:

> In this instance, the record compels the conclusion that defendant did not knowingly, voluntarily, and intelligently plead guilty to the robbery charges, since he was not given correct information regarding the defense of insanity. That is, although the defense attorney and the trial court correctly noted that, for an otherwise sane individual, the voluntary ingestion of drugs did not give rise to the defense of insanity, see, e.g., State v. Wolons (1989), 44 Ohio St. 3d 64, 68, 541 N.E. 2d 443, 446-447, there is a general defense of insanity that defendant was not advised upon.
>
> * * *
>
> This omission, coupled with defendant's extensive psychiatric history, including psychiatric hospitalizations within days of the alleged offenses, compel us to conclude that under the facts of this matter, defendant's guilty pleas were not knowingly, intelligently, and voluntarily made.

Id. at 790-791.

Appellant respectfully submits that his case is legally analogous to Mikulic and that Appellant's guilty pleas, and waivers of trial rights, likewise cannot possibly be deemed to have been knowingly, voluntarily and intelligently made. However, Appellant submits that the circumstances existing in his case are even more egregious. This contention is premised upon the fact that whereas Mikulic was merely not advised of the "general defense of insanity", Appellant herein was not counseled relative to the strengths or weaknesses of at least one of the pending cases in a meaningful sense. Attorney Zena's failure to advise Appellant of defense/trial strategies or of his evaluation of at least one of the cases was attributable to the fact that counsel did no pretrial investigation or preparation and was essentially engaging in speculation, conjecture and hypothesis relative to the State's case. It was under these circumstances that he offered counseling to the Appellant at the time of plea. While it does not appear that Attorney Zena's actions were intentional or malicious, this categorical haphazard manner of providing

counsel to a criminally accused, particularly one who is developmentally handicapped and nominally literate, defies the bounds of regularity of the process and is tantamount to a complete breach of the obligations of a criminal defense lawyer.

IV. CONCLUSION

When Appellant entered pleas before this Court, he did so based on limited information at best. As a practical manner, while he stood before the Court with the assistance of Attorney Zena on the date of trial, he lacked a meaningful understanding of his cases, defenses, strategies and options due to no fault of his own. While he may have executed a written plea agreement and responded to questions such that the Court satisfied itself that the pleas were knowingly, voluntarily and intelligently entered, the fact is Anthony Cioffi, Jr. never was in a position to waive his rights and enter guilty pleas within the meaning and spirit of Due Process considerations due to no fault of his own. This case presents a great injustice which must be corrected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion was sent by regular U.S. mail this 29 day of July, 2002 to Thomas C. Wrenn, Assistant Trumbull County Prosecuting Attorney, 160 High Sreet, N.W., Third Floor, Administration Building, Warren, Ohio 44481.

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