

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	
Appellee	:	
-vs-	:	On Appeal from the
MICHAEL MARNEROS	:	Cuyahoga County Court
Appellant	:	of Appeals, Eighth
		Appellate District Court
		of Appeals
		CA: 101872 and 101873
		(consolidated below)

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT MICHAEL MARNEROS

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TABLE OF CONTENTS

	<u>PAGE</u>
EXPLANATION OF WHY THIS FELONY CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS A MATTER OF GREAT GENERAL AND GREAT PUBLIC INTEREST	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT.....	5
PROPOSITION OF LAW I	5
When a defendant moves a trial court to withdraw a guilty plea prior to sentencing, the defendant must be afforded counsel for the purpose of making that argument; if trial counsel fails to argue in this regard, the defendant is denied the effective assistance of counsel.	
PROPOSITION OF LAW II	6
In determining whether to allow a defendant to withdraw a guilty plea prior to sentencing, a trial court should consider nine factors: "(1) whether the prosecution would be prejudiced if the plea were vacated; (2) whether the offender was represented by highly competent counsel; (3) the extent of the Crim. R. 11 hearing; (4) whether there was a full hearing on the motion to withdraw the offender's guilty plea; (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." [quoting <i>State v. Zimmerman</i>, 10th Dist No. 09AP-866, 2010-Ohio-4087, 2010 WL 3405746].	
PROPOSITION OF LAW III.....	8
A defendant must be given the opportunity to allocute with respect to the specific issue of sentencing. Statements made in support of a motion to withdraw a guilty plea are not the functional equivalent of a sentencing allocution.	
CONCLUSION	9
CERTIFICATE OF SERVICE.....	9

**EXPLANATION OF WHY THIS FELONY CASE RAISES SUBSTANTIAL
CONSTITUTIONAL QUESTIONS AND IS A MATTER OF
GREAT GENERAL AND GREAT PUBLIC INTEREST**

Michael Marneros has struggled with mental health problems. His adversity in this regard has contributed largely to his history of low-level crimes. It also causes him to have problems comprehending and navigating the legal system. He was hopeful, when confronted with the charges that brought him to court in this case that he would be referred to the Cuyahoga County mental health docket, a specialized court that is particularly adept at addressing defendants like Michael. But that did not happen, as the trial judge refused to refer the matter to the mental health court docket.

Michael agreed to a plea deal but, prior to sentencing, changed his mind. He told his attorney that he wanted to withdraw his plea and told the attorney to allow Michael to argue that issue to the court. Despite there being no waiver of counsel, and despite Michael's history, the attorney complied. Michael took on this issue without counsel. Not surprisingly, he lost.

This case raises three issues that are not unique to Michael's case because, unfortunately, there are a lot of people like Michael that are the subject of the criminal justice system. The first proposition asks this Court to hold that a defendant cannot unilaterally decide to argue a pre-sentence motion to withdraw a guilty plea without counsel . This does not mean that, in every case, a new attorney need be represented to represent the defendant in this regard. But where, as here, the motion to withdraw counsel is premised upon counsel's ineffectiveness, a trial court must determine whether

(1) trial counsel can continue with respect to the motion to withdraw a guilty plea or, (2) whether the defendant is capable of proceeding pro se, or (3) whether new counsel needs to be appointed.

The second proposition of law asks this Court to adopt a comprehensive criteria for evaluating a presentencing motion to withdraw a guilty plea that was used by the Tenth District Court of Appeals in *State v. Zimmerman*, 10th Dist No. 09AP-866, 2010-Ohio-4087, 2010 WL 3405746. This criteria provides a framework for lower courts to evaluate these motions. While this Court has held that motions to withdraw guilty pleas that precede sentencing should be liberally granted, experience indicates that lower courts are failing to appreciate this admonitions and that the majority of such motions are denied. Further guidance is needed from this Court.

The third proposition of law, if adopted by this Court, would remind trial courts that sentencing is separate from other trial matters, and that the defendant who speaks to other issues in a case must still be afforded the opportunity to be heard solely on the issue of sentencing. This does not mean that prior statements cannot also be considered at sentencing, but does ensure, particularly to defendants who are ill-equipped to follow criminal procedure, that they have a specific time to solely address the crucial issue of sentencing.

These propositions, in whole or in part, are not such as to impede the criminal justice system. To the contrary, a few more minutes at the trial court level will oftentimes obviate the need for a far more time-consuming appeal. Such is the situation presented here -- a situation that, because of the mental frailties of many criminal

defendants, is bound to recur frequently.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a plea of guilty and subsequent sentencing. The defendant was charged in CR 583992 with receiving stolen property and failing to comply with an order of a peace officer. In CR 584351, the defendant was charged with two counts of theft, one count of receiving stolen property and 7 counts of forgery.

On Tuesday, July 1, 2014, prior to trial, the trial court put the prosecution's plea offer on the record. The plea offer called for the defendant to plead guilty in CR 583992 to one count of fourth-degree felony receiving stolen property (Count 1) and one count of fifth-degree felony attempted failure to comply (Count 2, amended). The plea offer also called for the defendant to plead guilty in CR 584351 to one count of third-degree (low-tier) felony theft (Count 1) and one count of fourth-degree felony forgery (Count 3, amended to include all checks alleged in the indictment). The defendant, through counsel, stated that he did not wish to plead guilty and understood that the offer being made would be withdrawn.

Later that day, the defendant indicated that he was willing to plead guilty in accordance with the aforementioned offer. During the plea colloquy, Mr. Marneros was not asked if he were satisfied with the representation he was receiving. The trial court accepted the plea, ordered a PSI and referred the defendant for a TASC assessment (a drug treatment assessment), although the trial court noted that it did not "think that [the TASC assessment] is going to make any difference."

Approximately one month later, on August 4, 2014, the case was called for

sentencing. Counsel for the defendant placed on the record his objection to the fact that the TASC assessment was not performed. Beyond that, counsel had nothing to say pursuant to instructions given to him by Mr. Marneros.

Mr. Marneros then addressed the court and asked to withdraw his guilty pleas. He explained that he had serious drug and alcohol problems, along with mental health issues stemming from PTSD and manic depression. Mr. Marneros complained that his attorney did not advise the court of these maladies and did not pursue the possibility of treatment in lieu of conviction, nor referral of the case to a judge on the mental health docket. Mr. Marneros advised the court that he had previously been on a mental health docket.

The trial court told Mr. Marneros that he did not qualify for the mental health docket, that he would never receive intervention because of his record, and that his motion was being denied. Without providing Mr. Marneros an opportunity to then be heard regarding sentencing allocution, the trial court proceeded immediately to sentence Mr. Marneros. Mr. Marneros was sentenced CR 583992 to 18 months imprisonment for receiving stolen property (Count 1) and 12 months for failure to comply (Count 2); Mr. Marneros was sentenced in CR 584351 to 36 months for theft (Count 1) and 12 months for forgery (Count 3). All prison terms except the 12 month term for Count 3 in CR 584351 were ordered to run consecutively, for a total imprisonment of 5 ½ years (18 months + 12 months + 36 months). In support of consecutive terms, the judge stated that “the harm was so great or unusual that a single term does not adequately reflect the seriousness of your conduct, and clearly your criminal history shows that consecutive

terms are needed to protect the public.

On appeal, the Eighth District Court of Appeals upheld the pleas of guilty but reversed the sentences imposed on the basis that, in CR 584351, the offenses were allied, and, further, because there were insufficient findings made to support consecutive sentencing.

This appeal follows.

ARGUMENT

Proposition of Law I:

When a defendant moves a trial court to withdraw a guilty plea prior to sentencing, the defendant must be afforded counsel for the purpose of making that argument; if trial counsel fails to argue in this regard, the defendant is denied the effective assistance of counsel.

When counsel deliberately chose not to address any issue regarding sentencing other than the TASC referral, counsel provided ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments, and Article I, Section 10 of the Ohio Constitution. *See, Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Moreover, Mr. Marneros was provided no assistance in arguing his motion to withdraw his guilty plea, which again violated the Sixth Amendment and Article I, Section 10 of the Ohio Constitution.

It is axiomatic that the absence of any counsel is the denial of the effective assistance of counsel. *Fields v. Bagley*, 275 F.3d 478 (6th Cir. 2001). Here, Mr. Marneros had no counsel at sentencing or with respect to his motion to withdraw his guilty plea – his attorney specifically stated that he was only addressing the TASC referral.

It may be argued that Mr. Marneros was, himself, responsible for his lack of counsel. But for that argument to be compelling, it must be shown that Mr. Marneros waived counsel. In this case, there was no written waiver as required by Crim. R. 44, nor was there a colloquy with the defendant to ascertain whether he desired to represent himself, as required by the Sixth Amendment. *See, State v. Richards*, 8th Dist. No. 78457, 2001 WL 1134880.

Accordingly, Mr. Marneros' sentence should be vacated and the case remanded for a new hearing on the motion to withdraw the guilty plea.

Proposition of Law II:

In determining whether to allow a defendant to withdraw a guilty plea prior to sentencing, a trial court should consider nine factors: "(1) whether the prosecution would be prejudiced if the plea were vacated; (2) whether the offender was represented by highly competent counsel; (3) the extent of the Crim. R. 11 hearing; (4) whether there was a full hearing on the motion to withdraw the offender's guilty plea; (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." [quoting *State v. Zimmerman*, 10th Dist No. 09AP-866, 2010-Ohio-4087, 2010 WL 3405746].

The trial court erred when it refused to allow Mr. Marneros to withdraw his guilty plea. In so doing, the trial court denied Mr. Marneros due process of law in violation of the Fourteenth Amendment and Article I, Section 16 of the Ohio Constitution.

Pre-sentencing motions to withdraw guilty pleas should be freely and liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). In deciding whether a trial court errs in not granting a motion to withdraw, this Court should examine nine factors:

(1) whether the prosecution would be prejudiced if the plea were vacated; (2) whether the offender was represented by highly competent counsel; (3) the extent of the Crim. R. 11 hearing; (4) whether there was a full hearing on the motion to withdraw the offender's guilty plea; (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.

State v. Zimmerman, 10th Dist No. 09AP-866, 2010-Ohio-4087, 2010 WL 3405746.

Addressing those factors reveals that:

- (1) The State would not be prejudiced beyond the inconvenience it would have faced if it had to go to trial in the first place, *see id* at ¶ 24 (“inconvenience of having to prosecute its case,” is not prejudice).
- (2) Whether counsel was highly competent in his performance in this case is called into question by his failure to advise the trial court, either orally or via a sentencing memorandum, about Mr. Marneros’ mental health and substance abuse issues;
- (3) The Crim. R. 11 hearing did not include asking Mr. Marneros if he were satisfied with his counsel.
- (4) The motion to withdraw the guilty plea was presented solely by Mr. Marneros, without benefit of counsel’s participation.
- (5) The trial court’s consideration of the motion was cursory. The trial court stated that Mr. Marneros’ PTSD and manic depression were not grounds for referral to the mental health docket – despite knowing that Mr. Marneros had been on that docket previously.

- (6) The motion was made on Mr. Marneros' first appearance in court after having pled guilty.
- (7) Mr. Marneros articulated reasons for wanting to withdraw his guilty plea – reasons that were founded on his personal mental and physical health (addiction).
- (8) Mr. Marneros did not indicate that his motion was the result of misunderstanding the nature of the charge or the nature of the plea.
- (9) Mr. Marneros did not address in his motion the issue of guilt or innocence.

In that the first seven factors inure to Mr. Maneros' benefit, the trial court erred in not granting the motion.

Accordingly, the plea should be vacated and the case remanded for trial proceedings.

Proposition of Law III:

A defendant must be given the opportunity to allocute with respect to the specific issue of sentencing. Statements made in support of a motion to withdraw a guilty plea are not the functional equivalent of a sentencing allocution.

Although the trial court allowed Mr. Marneros to address the court with respect to his motion to withdraw his guilty plea, the trial court never allowed Mr. Marneros to speak with respect to sentencing.

The Ohio Supreme Court has determined that Crim. R. 32(A)(1) confers an absolute right of allocution. *State v. Green*, 90 Ohio St.3d 352, 358, 2000-Ohio-182, 738 N.E.2d 1208; *State v. Campbell*, 90 Ohio St.3d 320, 324-25, 2000-Ohio-183, 738 N.E.2d 1178. “The purpose of allocution is to allow the defendant an additional opportunity to state any further

information which the judge may take into consideration when determining the sentence to be imposed.” *Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 828, 592 N.E.2d 884, 8 Anderson's Ohio App. Cas. 113. See, also, *State v. Muntaser*, Cuyahoga App. No. 81915, 2003-Ohio-5809.

State v. Cook, 8th Dist. No. 85186, 2005-Ohio-4010, 2005 WL 1846991. *Cook* recognized that the failure to allow allocution, even when inadvertent, required reversal of the sentence and a remand for a new sentencing hearing.

This Court should adopt the *Cook* analysis, vacate the sentence and remand the case for a new sentencing.

CONCLUSION

For these reasons, this Court should accept the instant case and give plenary consideration to the propositions of law presented herein.

Respectfully submitted,

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SERVICE

A copy of the foregoing was served via hand delivery upon Hon. Timothy J. McGinty, Esq., Cuyahoga County Prosecutor, or his duly authorized assistant, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 20th day of July, 2015.

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