[Cite as *State v. Wilson*, 2017-Ohio-8871.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105280

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAWUD WILSON

DEFENDANT-APPELLANT

JUDGMENT:
VACATED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-596847-A

BEFORE: Blackmon, J., E.T. Gallagher, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: December 7, 2017

ATTORNEY FOR APPELLANT

David L. Doughten
David L. Doughten Co., L.P.A.
4403 St. Clair Avenue
Cleveland, Ohio 44103

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor

By: Melissa Riley
Assistant County Prosecutor
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶1} Dawud Wilson ("Wilson") appeals the trial court's acceptance of his no contest plea in this case involving several armed robberies. Wilson assigns the following errors for our review:

> I. The trial court abused its discretion by accepting the appellant's no contest plea without ensuring the appellant understood that he could not preserve a challenge to an evidentiary ruling by entering a plea of that nature.
>
> II. The advice of trial counsel that a plea of no contest would preserve a challenge for appellate review in relation to an adverse evidentiary ruling denied the appellate his right to effective assistance of counsel.

{¶2} Having reviewed the record and pertinent law, we vacate Wilson's conviction and sentence and remand this case to the trial court. The apposite facts follow.

{¶3} Between October 2014 and April 2015, a man robbed various restaurants and convenience stores located in the greater Cleveland area. Witnesses uniformly described this man as wearing a "fake" black beard. Witnesses also consistently stated that this man was carrying a gun, and he demanded cash from the register.

{¶4} On April 17, 2015, police officers in Lake County, Ohio, arrested Wilson after a robbery in Painesville Township. Wilson had glue on his face similar to the kind used to attach a fake beard. Furthermore, the officers found a fake beard, gloves, a gun, and a note handed to the cashier along with cash from the Painesville robbery in Wilson's truck. Cuyahoga County authorities were notified, and on June 23, 2015, Wilson was

indicted with 32 counts of aggravated robbery, robbery, and kidnapping. All counts included notice of prior conviction and repeat violent offender specifications.

{¶5} The court held a hearing on May 26, 2016, to address Wilson's pro se motions to dismiss counsel and exclude evidence. At this hearing, the court appointed Wilson a new attorney.

{¶6} On August 24, 2016, the court held a hearing regarding the state's notice of intent to use other acts as evidence under Evid.R. 404(B), namely, documents associated with Wilson's Lake County arrest, that led to his robbery conviction in *State v. Wilson*, Lake C.P. No. 15CR000326 (Jan. 22, 2016). The court ruled to permit the state's use of this evidence.

{¶7} On December 5, 2016, Wilson pled no contest to all 32 counts. On December 13, 2016, the court sentenced Wilson to 16 years in prison, to be served consecutively to the ten-year sentence he received in the aforementioned Lake County case.

{¶8} In his first assigned error, Wilson argues that his plea was not knowing, voluntary, or intelligent, because he entered it "to preserve his challenge to [the court's] ruling on the state's request to introduce evidence relating to his conviction in Lake County pursuant to Evidence Rule 404(B)." To support this argument, Wilson cited to the following colloquy from his plea hearing:

> THE COURT: Today is the trial date, but it's my understanding, Mr. Wilson, you're going to be pleading no contest to this 32 count indictment; is that correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: Is that correct, [DEFENSE COUNSEL]?

[DEFENSE COUNSEL]: Yes, your Honor. I have explained to Mr. Wilson all his constitutional rights. I believe he's aware of them, I believe that he understands them, I believe he'll enter the no contest plea here today knowingly, intelligently, and voluntarily, and obviously *it's his desire to enter this plea in an effort to have the ability to appeal the Court's prior ruling on the 404(B) evidence*.

THE COURT: With respect to these numerous counts will it be sufficient for you, [DEFENSE COUNSEL], and your client that the state incorporate all the facts and allegations contained within the indictment and deem that sufficient to allow the no contest plea to be accepted?

[DEFENSE COUNSEL]: Yes, your honor.

[THE STATE]: Yes, your Honor.
(Emphasis added.)

{¶9} It is undisputed that a "party cannot alter the interlocutory nature of a ruling *in limine* merely by pleading no contest to the charges and appealing the ensuing conviction. In such an event there remains no evidentiary ruling upon which error may be predicated." *State v. Hall*, 57 Ohio App.3d 144, 567 N.E.2d 305 (8th Dist.1989). *See also State v. Brown*, 38 Ohio St.3d 305, 311-312, 528 N.E.2d 523 ("A denial of a motion *in limine* does not preserve error for review. A proper objection must be raised at trial to preserve the error.").

{¶10} In determining whether a plea was entered knowingly, intelligently, and voluntarily, "an appellate court examines the totality of the circumstances through a de novo review of the record." *State v. Spock*, 8th Dist. Cuyahoga No. 99950, 2014-Ohio-606, ¶ 7; *see also State v. Petitto*, 8th Dist. Cuyahoga No. 95276,

2011-Ohio-2391, ¶ 4. If a defendant's plea is not voluntary and knowing, it has been obtained in violation of due process and is void. For a plea to be given knowingly and voluntarily, the trial court must follow the mandates of Crim.R. 11(C). *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996).

{¶11} However, it is also well settled that a plea may be invalidated where the defendant is given misinformation during the plea process. *State v. Williams*, 8th Dist. Cuyahoga Nos. 104078 and 104849, 2017-Ohio-2650; *State v. Ealom*, 8th Dist. Cuyahoga No. 91455, 2009-Ohio-1365. For example, in *State v. Hall*, this court held that "a plea is invalid if based upon the mistaken belief judicial review would be available." *Id*. at 146.

{¶12} In the case at hand, Wilson argues that the court "permitted [him] to rely upon an incorrect understanding of the law as a basis for entering a no contest plea." According to Wilson, "[n]either the judge nor the prosecutor objected or made an effort to instruct Wilson that a no contest [plea] would not enable him to challenged [sic] the court's evidentiary ruling." This, Wilson argues, rendered his plea involuntary.

{¶13} The state, on the other hand, acknowledges that "when a plea was made due to the defendant being blatantly misled as to their appellate rights by the prosecutor, defense counsel and the trial judge and this mistaken belief was a significant factor in a plea bargain reached with the State, then the defendant did not enter the plea knowingly or intelligently." The state argues that, in the instant case, "neither the prosecutor nor the trial judge made any comments regarding the ability to appeal the evidentiary ruling," Wilson's plea was not the result of negotiations with the state, and defense counsel's

statement during the plea hearing did not represent that Wilson "would be able to appeal the preliminary ruling."

{¶14} As quoted earlier in this opinion, defense counsel made the following statement to the court on the record: "I believe [Wilson will] enter the no contest plea here today knowingly, intelligently, and voluntarily, and obviously it's his desire to enter this plea in an effort to have the ability to appeal the Court's prior ruling on the 404(B) evidence." The state argues that this can be distinguished from *Hall* because, "[w]hile there was a statement on the record from [Wilson's] attorney about a possible appeal, it simply stated that the defendant had a desire to make an effort to try and appeal, not that the right to the appeal existed or that he would win the appeal."

{¶15} We do not read *Hall* that narrowly. *Hall* specifically refers to "a mistaken belief that judicial review would be available." *Hall*, 57 Ohio App.3d at 147, 567 N.E.2d 305. *Hall* does not use the words "existed" or "win." Upon review, we find that Wilson pled no contest to a 32-count indictment in its entirety based upon the mistaken belief that he could appeal the court's interlocutory ruling. As a result, his plea was not knowingly, voluntarily, and intelligently entered. Accordingly, Wilson's first assigned error is sustained, and his second assigned error is rendered moot by App.R. 12(A)(1)(c).

{¶16} The conviction and sentence are vacated, and the case is remanded for further proceedings consistent with this opinion.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

PATRICIA ANN BLACKMON, JUDGE

EILEEN T. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR