

[Cite as *State v. Miller*, 2001-Ohio-3397.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 98 JE 51
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	<u>O P I N I O N</u>
)	
LESTER MILLER)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Jefferson County, Ohio Case No. 90 CR 22
---------------------------	---

JUDGMENT:	Affirmed.
-----------	-----------

APPEARANCES:

For Plaintiff-Appellee:	Atty. Bryan Felmet Jefferson County Prosecutor Atty. Adam K. Mellor Asst. Prosecuting Attorney Jefferson County Justice Center 16001 State Route Seven Steubenville, Ohio 43952
-------------------------	---

For Defendant-Appellant:	Atty. David H. Bodiker Ohio Public Defender Atty. Ivelisse Cruz Asst. State Public Defender 8 East Long Street, 11 th Floor Columbus, Ohio 43266-0587
--------------------------	---

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich

Hon. Mary DeGenaro

Dated: September 26, 2001

WAITE, J.

{¶1} This delayed appeal arises from the conviction and sentencing of Lester Miller ("Appellant") on June 20, 1991, in the Jefferson County Court of Common Pleas, pursuant to a Crim.R. 11 plea agreement to charges of aggravated murder and aggravated burglary. Appellant argues that amendments to Crim.R. 12(J) made in 1995 should be applied retroactively to the instant matter and that these require that his guilty plea and conviction be overturned. Appellant also argues that he was provided ineffective assistance of counsel and that he did not knowingly, voluntarily and intelligently enter his plea. For the following reasons, the conviction and sentence are affirmed.

{¶2} On July 8, 1989, Appellant stabbed Hugo Schiazza multiple times while burglarizing his home in Steubenville, Ohio. Mr. Schiazza died from the injuries. Appellant was seventeen years old at the time. On March 20, 1990, after the case was bound over from juvenile court, Appellant was indicted on one count of aggravated murder with a capital offense specification and one count of aggravated burglary.

{¶3} On October 12, 1990, Appellant filed a motion to suppress certain confessions he made to Jefferson County law enforcement personnel. The motion was sustained on October 19, 1990. Appellee filed an appeal of that decision. The trial court

decision was affirmed by this Court in *State v. Miller* (Jan. 11, 1991), Jefferson App. No. 90-J-41, unreported. Further appeal to the Ohio Supreme Court was denied. *State v. Miller* (1991), 59 Ohio St.3d 713, 713.

{¶4} On June 19, 1991, Appellant pleaded guilty to one count of aggravated murder and one count of aggravated burglary. The capital specification was dropped as part of the plea agreement. Appellant also signed a one-page Waiver of Rights and an eight-page Acceptance of Plea Disclosures which are part of the record.

{¶5} On June 20, 1991, the trial court filed its Journal Entry accepting Appellant's guilty plea to one count of violating R.C. §2903.01(A) and (B), aggravated murder, and one count of violating R.C. §2911.11, aggravated burglary. The court sentenced Appellant to a term of life imprisonment with eligibility for parole after 20 years on the aggravated murder count and an indefinite term of 10 to 25 years on the aggravated burglary count, to run consecutively with the sentence for aggravated murder. The entry notes that, "the Defendant fully understood the nature of the charges against him and was fully aware of the rights that are available to him under the Constitution of the United States and of the State of Ohio, that by pleading he was waiving those rights * * *". (1/20/91 Journal Entry, p. 2).

{¶6} On August 24, 1993, Appellant filed a pro se "Motion for Production of Records and Transcripts at States [sic] Expense." The motion states: "Petitioner further asserts that he is

appealing his conviction due to the errors committed in his trial in the County of Jefferson, Court of Common Pleas." Despite the fact that transcripts and records were supplied to Appellant at state expense (9/15/93 Journal Entry), Appellant did not file a notice of appeal.

{¶7} On September 20, 1996, Appellant filed a pro se Petition to Vacate Conviction or Set Aside Sentence, pursuant to Ohio's postconviction relief statute, R.C. §2953.21. The petition was denied on October 3, 1996. The only issue raised in the petition was ineffective assistance of counsel. The petition stated that the reason the claim was not raised previously was that Appellant, "was without counsel after my plea, and trial counsel said I could appeal." (9/20/96 Petition, p. 3). Appellant did not file an appeal of the denial of his postconviction relief petition.

{¶8} On November 19, 1998, Appellant filed a pro se Notice of Appeal of his June 19, 1991, conviction and sentence, along with a Motion for Leave to File Delayed Appeal.

{¶9} On December 18, 1998, this Court sustained Appellant's motion for delayed appeal, pursuant to App.R. 5(A). Appellant was also appointed appellate counsel.

{¶10} Appellant's first assignment of error asserts:

{¶11} **"AN AMENDMENT TO CRIM.R. 12(J), WHICH ADDRESSES THE CONDUCT OF CRIMINAL PROSECUTIONS, MUST BE APPLIED RETROACTIVELY TO CASES THAT ARE ON DIRECT REVIEW."**

{¶12} Appellant avers that Crim.R. 12(J), as it existed at the

time he entered into his plea agreement, allowed Appellee to file an immediate appeal of a decision to grant a motion to suppress evidence. Appellant points out that this rule was amended in 1995 and added the following language:

{¶13} "If an appeal pursuant to this division results in an affirmance of the trial court, the *state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence* that the state could not, with reasonable diligence, have discovered before filing the notice of appeal." (Emphasis added).

{¶14} Because Appellant's assignment of error raises the purely : issue of the retroactive effect of a change in the Rules of Criminal Procedure, we apply a *de novo* standard of review: "On matters of law--choice, interpretation, or application--our review is, of course, plenary." *Raceway Video and Bookshop, Inc. v. Cleveland Bd. of Zoning Appeals* (1997), 118 Ohio App.3d 264, 269.

{¶15} Appellant contends that the 1995 amendments to Crim.R. 12(J) should apply to this case retroactively. Appellant cites *Teague v. Lane* (1989), 489 U.S. 288, for the proposition that new rules of conduct of criminal prosecutions are to be applied retroactively to all cases pending on direct review and which are not yet final. Appellant argues that this case continues to be pending on direct review because we sustained his motion for delayed appeal. Therefore, Appellant concludes that the charges against him should be dismissed because there was no basis for criminal charges after Appellee lost its appeal of the 1990 suppression order.

{¶16} Appellant's arguments are not persuasive, or even particularly relevant, as to the effect of the 1995 changes to Crim.R. 12(J) on this appeal. First, Appellant's reliance on *Teague, supra*, is misplaced. *Teague* involved the impact of the retroactive application of new constitutional rulings resulting from judicial decisions in cases under collateral review in federal habeas proceedings. *Teague*, 489 U.S. at 299-300, 310. *Teague* was concerned that new constitutional rulings should be applied evenly to all persons similarly situated. *Id.* at 316. *Teague* established the doctrine of non-retroactivity: "unless a prisoner's case falls within one of two narrow exceptions, a habeas petitioner cannot gain the benefit of a new rule of constitutional law if the rule announced after the petitioner's conviction became final, nor can the petitioner seek to establish a new rule of constitutional law." *Flowers v. Walter* (C.A.9, 2001), 239 F.3d 1096, 1103.

{¶17} A *Teague* inquiry involves three steps: 1) the habeas court determines the date on which the defendant's conviction became final; 2) the habeas court considers whether the rule the defendant seeks is a new constitutional rule; and 3) if the rule being sought is a new constitutional rule, the habeas court determines if the new rule falls within one of two narrow exceptions to the *Teague* doctrine. *O'Dell v. Netherland* (1997), 521 U.S. 151, 156-157. A rule is "new" under *Teague* if a state

court considering the defendant's claim at the time the conviction became final would have been compelled to conclude that the rule the defendant seeks to apply to his case was required by the United States Constitution. *Id.* at 156. "[A] case announces a new rule if the result was not *dictated* by precedent existing at the time defendant's conviction became final." (Emphasis in original). *Teague* at 349.

{¶18} If a rule of constitutional law is found to be a "new" rule under *Teague*, the court must then determine whether either of two very narrow *Teague* exceptions apply. *Teague* at 207. The first exception covers new rules which decriminalize certain conduct or prohibit the state from imposing a specific type of punishment on a class of defendants because of their status or offense. *O'Dell, supra*, at 157. The second exception, which is even more limited, permits retroactive application of, "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Teague* at 311.

{¶19} The case at bar is on direct review, not collateral review; therefore Appellant cannot establish the first step of a *Teague* review. Furthermore, where the rule at issue does not involve constitutional implications, *Teague* does not govern the analysis. *Bousley v. United States* (1998), 523 U.S. 614, 619-620.

Finally, Appellant appears to assume that the 1995 revisions to Crim.R. 12(J) should be treated as a "new" rule under a *Teague*

analysis. Appellant has not submitted any arguments to persuade us that revised Crim.R. 12(J), if it is a "new" rule, fits into one of the two narrow exceptions to *Teague*.

{¶20} Because this case remains on direct review, we apply the same principles which are used in almost every appeal to determine the effective date and applicability of a legal rule, whether that rule derives from statute, a judicial opinion, or as in this case, a rule of criminal procedure. The rule at issue is a criminal procedural rule established by the Ohio Supreme Court under the authority of Section 5(B), Article IV, Ohio Constitution, which states, in pertinent part:

{¶21} "(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, *which rules shall not abridge, enlarge, or modify any substantive right*. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. *Such rules shall take effect on the following first day of July*, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. (Emphasis added).

{¶22} This constitutional provision makes it very clear that procedural rules of court take effect on the first of July after they are properly filed with the general assembly. The constitutional provision also makes clear that procedural rules, or amendments to those rules, shall not *abridge or enlarge* substantive rights. Appellant's argument on appeal urges this

Court to apply an amended procedural rule in a way which both abridges and enlarges substantive rights.

{¶23} Crim.R. 59(M) sets forth the specific effective date of the 1995 changes to Crim.R. 12(J):

{¶24} "(M) Effective date of amendments. The amendments to rules 12 and 19 filed by the Supreme Court with the General Assembly on January 11, 1995 and refiled on April 25, 1995 shall take effect on July 1, 1995. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies."

{¶25} The 1995 revisions of Crim.R. 12(J) became effective on July 1, 1995. All rules in conflict with the revised rule were of no further force only *after* the effective date of the revised rule. Revised Crim.R. 12(J) therefore is not retroactive, but rather only prospective, beginning on July 1, 1995.

{¶26} Crim.R. 59(M) allows us some flexibility in applying revised Crim.R. 12(J) to the instant case. In the interest of justice, we cannot support an application of the new procedural rule which would create a consequence (i.e., the dismissal of the case) that was never contemplated when Appellee appealed the 1990 trial court suppression order. The version of Crim.R. 12(J) in effect in 1990 did not prevent Appellee from continuing its prosecution of Appellant in the event Appellee lost its appeal of the suppression order. Appellee cannot be expected to factor into its decision to appeal the 1990 suppression order the possibility

that Crim.R. 12(J) might be revised in 1995, and the possibility that the revision might prevent prosecution at some future date.

{¶27} At the time Appellant entered into his plea agreement, Appellee was not prohibited by Crim.R. 12(J) from continuing to prosecute the criminal case against Appellant. *In re Hester* (1982), 3 Ohio App.3d 458, 460. This possibility created the basis for the parties to negotiate a plea agreement. A plea agreement is a contract. *State v. Barnett* (1998), 124 Ohio App.3d 746, 751. A promise to forbear pursuit of a legal claim is sufficient consideration to support a contract. *Mathis v. St. Alexis Hosp. Assoc.* (1994), 99 Ohio App.3d 159, 164. In 1991, Appellant and Appellee had legal claims to use as consideration in support of their plea bargain agreement. That consideration is not invalidated by the 1995 revision to Crim.R. 12(J).

{¶28} Even if the 1995 amendments to Crim.R. 12(J) retroactively apply to the 1991 plea agreement, Appellee provided sufficient consideration to support the plea agreement. The 1995 amendments do not absolutely bar the state from prosecuting a defendant after the state loses its appeal of a suppression order. Crim.R. 12(J). The state may prosecute for the same offenses if it uncovers new evidence. *Id.* Assuming *arguendo* that the 1995 version of Crim.R. 12(J) applies to the parties' 1991 plea agreement, Appellee could have prosecuted Appellant on all charges in the original indictment if new evidence had been found. Even this limited possibility of prosecution based on new evidence

could be sufficient consideration to support a plea agreement.

{¶29} Furthermore, to comply with Appellant's interpretation of the effects of the changes to the procedural rules would be to give Appellant an unfair and unintended result. Appellant would have us rule that, because he failed to file a timely appeal of his criminal conviction and waited to instead be granted a delayed appeal, he should have greater rights than all those persons convicted prior to the rules changes who did file their appeals in a timely fashion. This Court cannot condone giving such a benefit as a reward for Appellant's dilatory actions, even if Appellant's interpretation of the rules changes was tenable. His interpretation, as discussed above, is incorrect.

{¶30} For all the foregoing reasons, we find Appellant's first assignment of error to be without merit.

{¶31} Appellant's second assignment of error asserts:

{¶32} "COUNSEL PROVIDES INEFFECTIVE ASSISTANCE BY ADVISING A DEFENDANT TO PLEAD WHEN THE STATE'S EVIDENCE WAS SO WEAK, THAT ANY REASONABLE POSSIBILITY OF EFFECTIVE PROSECUTION HAD BEEN DESTROYED. THUS, COUNSEL'S ACTIONS VIOLATE THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY FEDERAL AND STATE CONSTITUTIONS."

{¶33} Appellant argues that, under the standard created by *Strickland v. Washington* (1984), 466 U.S. 668, in order to establish ineffective assistance of counsel a criminal defendant must show: 1) counsel's performance fell below an objective standard of reasonableness, and 2) prejudice arose from counsel's performance. A showing of actual prejudice is not required, but

the defendant must show that there was a reasonable probability that the outcome of the proceeding would have been different absent the error. *Id.* at 687; see also *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph 2 and 3 of syllabus.

{¶34} Appellant argues that the possibility he would be convicted was extremely low after Appellee lost its appeal of the 1990 order suppressing Appellant's confessions. Appellant cites Crim.R. 12(J) which states, in pertinent part:

{¶35} "When the state takes an appeal as provided by law from an order suppressing or excluding evidence the prosecuting attorney shall certify that: (1) the appeal is not taken for the purpose of delay; and (2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed."

{¶36} Appellant contends that his appointed counsel should not have recommended accepting a plea bargain for a case which had no reasonable possibility of being prosecuted. Based on the record, here, Appellant's argument is not persuasive.

{¶37} A guilty plea waives all appealable errors except for errors which are shown to have precluded a knowing, intelligent and voluntary plea. *State v. Spates* (1992), 64 Ohio St.3d 269, 272-273. Appellant may only claim ineffective assistance of counsel to the extent that counsel's errors caused the guilty plea to be less than knowing and voluntary. *Id.* at 272; *State v. Armstead* (2000), 138 Ohio App.3d 866, 870.

{¶38} In order to prove a claim of ineffective assistance of

counsel subsequent to a guilty plea, a criminal defendant must show that his counsel's performance was deficient and that, but for his counsel's errors, there is a, "reasonable probability that he would not have pleaded guilty." *State v. Xie* (1992), 62 Ohio St.3d 521, 524, quoting *Hill v. Lockhart* (1985), 474 U.S. 52, 59.

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland, supra*, 466 U.S. at 689 (citations omitted).

{¶39} A licensed attorney is presumed to be competent to handle any case before the courts of the State of Ohio. *State v. Smith* (1987), 36 Ohio App.3d 162, 163. The burden is on the party attempting to overcome the presumption of competence to prove that counsel's performance was deficient and that it prejudiced the defendant. *State v. Booher* (1988), 54 Ohio App.3d 1, 15. A reviewing court must give great deference to the strategies and tactics used by counsel at trial. *State v. Greene* (1993), 86 Ohio App.3d 620, 622.

{¶40} Appellant's trial counsel stated at the June 19, 1991, change of plea hearing that, "there is also a very strong possibility that jury would return a verdict of guilty * * *". (6/19/91 Tr., p. 9). We must presume that Appellant's counsel had a valid basis for this belief and the record does not contradict

this presumption.

{¶41} There is nothing in the record indicating that, at the time Appellant entered into his plea agreement, Appellee would have been absolutely barred from taking its case to trial or that Appellee's potential evidence was legally insufficient to support a conviction. Therefore, Appellant cannot show that he was prejudiced by his counsel's actions because Appellant could have been convicted and sentenced even more severely than that which resulted from the plea agreement. See *State v. Crickon* (1988), 43 Ohio App.3d 171, 175. Counsel's recommendation resulted in the dismissal of the capital specification from the aggravated murder charge, which in turn resulted in a reduction of the maximum sentence which Appellant could have received. This apparently successful trial tactic should not be second-guessed by a reviewing court.

{¶42} Appellant also argues that his trial counsel should not have recommended a guilty plea after the prosecutor certified, pursuant to Crim.R. 12(J), that if it lost its appeal of the 1990 suppression order it did not have a reasonable possibility of succeeding at trial. Again, this argument fails to acknowledge that Appellee, even with what appears to be a weak case, could have proceeded with prosecution, or could have uncovered new evidence to strengthen its case. Because of this real possibility, it appears that Appellant's trial counsel used a reasonable trial tactic and recommended a plea agreement rather

than have Appellant face a possible capital specification at trial. We find no error in this trial tactic, and consequently, there is no basis for Appellant's claim of ineffective assistance of counsel.

{¶43} Appellant's third assignment of error states:

{¶44} "THE TRIAL COURT ERRED IN ACCEPTING DEFENDANT'S PLEA, WHEN THE COURT FAILED TO DETERMINE IF THE DEFENDANT UNDERSTOOD THE ELEMENTS OF THE OFFENSE AND UNDERSTOOD HOW DEFENDANT'S ACTIONS SUPPORTED EACH ELEMENT. ACCEPTING SUCH A PLEA VIOLATES DEFENDANT'S DUE PROCESS RIGHTS AS GUARANTEED BY FEDERAL AND STATE CONSTITUTIONS."

{¶45} Appellant argues that he did not understand the nature of the charges against him due to the failure of the trial court to fulfill its duties under Crim.R. 11. Crim.R. 11(C)(2) states:

{¶46} "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:

{¶47} "(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.

{¶48} "(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.

{¶49} "(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."

{¶50} Appellant argues that a trial court must look at all the

facts and circumstances surrounding the case to determine if a defendant has made a knowing, intelligent and voluntary plea, citing *State v. Carter* (1979), 60 Ohio St.2d 34, 38.

{¶51} Appellant argues that, once a defendant indicates a confusion regarding any element of the crime charged, a trial court is under an increased burden to determine if the defendant understands each element, citing *State v. Higgs* (1997), 123 Ohio App.3d 400, 408, in support. Appellant argues that his explanations to the trial court as to his understanding of the charges against him indicates that he was confused. Appellant explained that he thought aggravated burglary with a specification meant that, "a person goes into a house or structure that is occupied by a person or persons." (6/19/91 Tr. p. 12). Appellant also stated that aggravated burglary involved a theft. (*Id.* at 13). The court then paraphrased Appellant's understanding of aggravated murder as, "[a] person goes into an occupied structure for the purposes of committing a theft offense and while in the course of committing that offense a death occurs in the home." (*Id.*) Appellant gave his assent to the court's explanation. (*Id.*)

{¶52} Appellant argues that the trial court did not explain all the elements of either crime and that Appellant's understanding of the crimes was deficient. Appellant argues that aggravated burglary under R.C. §2911.11 requires proof that the offender inflicted physical harm on another. Appellant also argues that

aggravated murder under R.C. §2903.10 requires proof of *mens rea*, namely, that the defendant *purposely* caused the death of another.

Appellant concludes that these errors of the trial court rendered his plea agreement void because it was not entered into knowingly, voluntarily or intelligently.

{¶53} Appellant's assignment of error is without merit.

{¶54} The cases cited by Appellant do not support his contention that a trial court must explain every element of every crime to the defendant. In fact, *Higgs* itself states:

{¶55} "Generally, Crim.R. 11(C)(2) does not require the trial court to make a detailed recitation of the elements of a charge in the absence of an indication of confusion from the defendant. * * * In the present case, appellant indicated no confusion concerning the elements * * * thus, the trial court was not required to explain [them]."

{¶56} *Higgs, supra*, 123 Ohio App.3d at 408. Appellant expressed no confusion as to the elements of either count against him. The transcript reveals that Appellant understood the definitions of aggravated burglary and aggravated murder as they related to his own actions, although he did not necessarily understand every possible ramification of the elements of those crimes.

{¶57} The aggravated burglary statute, R.C. §2911.11, as it existed at the time of Appellant's crime, did not require that the defendant inflict physical harm on another. Therefore, the failure of the trial court to discuss proof of physical harm is

not error.

{¶58} The colloquy between Appellant and the trial court concerning aggravated murder shows that the trial court substantially complied with the dictates of Crim.R. 11(C)(2). The vacation of a guilty plea is not warranted if the trial court substantially complies with the non-constitutional provisions of Crim.R. 11(C). *State v. Keefer* (1998), 128 Ohio App.3d 262, 265; *State v. Colbert* (1991), 71 Ohio App.3d 734, 737. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands that implication of his plea and the rights he is waiving." *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶59} Therefore, because Appellant expressed no confusion as to the two counts against him, and because the trial court substantially complied with Crim.R. 11(C)(2) when it explained to Appellant the nature of the charges against him, Appellant's plea was knowingly, voluntarily and intelligently entered into and his third assignment of error is without merit.

{¶60} For all the reasons stated in this opinion, we overrule Appellant's three assignments of error and affirm his conviction and sentence in full.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.