

[Cite as *State v. Kemps*, 2007-Ohio-6606.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

|                     |   |  |
|---------------------|---|--|
| STATE OF OHIO       | : |  |
|                     | : |  |
| Plaintiff-Appellee  | : | C.A. CASE NO. 21846                          |
| v.                  | : | T.C. NO. 2005 CR 4297                        |
|                     | : |  |
| DAVE KEMPS, JR.     | : | (Criminal appeal from<br>Common Pleas Court) |
|                     | : |  |
| Defendant-Appellant | : |  |

**OPINION**

Rendered on the 7<sup>th</sup> day of December, 2007.

JOHNNA M. SHIA, Atty. Reg. No. 0067685, Assistant Prosecuting Attorney, 301 W. Third Street, 5<sup>th</sup> Floor, Dayton, Ohio 45422  
Attorney for Plaintiff-Appellee

CHARLES BURSEY II, Atty. Reg. No. 0073962, 333 West First Street, Suite 445, Dayton, Ohio 45402  
Attorney for Defendant-Appellant

DONOVAN, J.

{¶ 1} Defendant-appellant David Kemps, Jr., appeals his conviction and sentence for one count of aggravated robbery (deadly weapon), pursuant to R.C. § 2911.01(A)(1), a felony of the first degree.

{¶ 2} Kemps was indicted for one count of aggravated robbery, accompanied by a

firearm specification, and one count of abduction on November 15, 2005. Kems was arraigned on November 17, 2005, stood mute, and the trial court entered not guilty pleas on his behalf. On that same day, Kems filed a motion to enter a plea of not guilty by reason of insanity and a motion for a competency evaluation. On January 23, 2006, the trial court found Kems competent to stand trial.

{¶ 3} Pursuant to negotiations with the State, on February 3, 2006, Kems entered a no contest plea to one count of aggravated robbery (deadly weapon). In return for his plea, the State dismissed count two, the abduction charge, as well as the firearm specification attendant to the aggravated robbery charge. The trial court found Kems guilty of aggravated robbery and sentenced him to an agreed seven (7) year term of imprisonment. The sentence was ordered to be served concurrently with sentences imposed on three separate robbery charges. The trial court also ordered Kems to pay approximately \$2,180.00 in restitution to the victim of the robbery.

{¶ 4} On October 19, 2006, Kems filed an untimely notice of appeal and motion for leave to file a delayed appeal in which he claimed ignorance of the law. We sustained Kems' motion for leave to file a delayed appeal on November 3, 2006.

I

{¶ 5} Kems' sole assignment of error is as follows:

{¶ 6} "DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND ENTERED A PLEA THAT IS INVOLUNTARY AND VOID OR VOIDABLE."

{¶ 7} In his sole assignment, Kems contends that he was "railroaded" into accepting a no contest plea and that his counsel was ineffective for coercing said plea. Kems argues that a full reading of the transcript from the plea hearing held on February 3, 2006, indicates that he

lacked a full understanding of the nature of a no contest plea and the restitution involved. Further, Kemp asserts that he was pressured by his own attorney to enter the no contest plea based on the inaccurate explanation offered to him. Thus, Kemp contends that his plea is void because it was unknowingly and involuntarily made under duress.

{¶ 8} “When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel’s essential duties to his client. Next, and analytically separate from the question of whether defendant’s Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel’s ineffectiveness.” *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135.

{¶ 9} The above standard contains essentially the same requirements as the standard set forth by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, supra, at 687-688. “Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* Thus, counsel’s performance will not be deemed ineffective unless and until counsel’s performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel’s performance. *Id.*

{¶ 10} For a defendant to demonstrate that he has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, absent counsel's errors, the result of the trial would have been different. *Bradley*, supra, at 143. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, supra, at 694. "The test for vacating a guilty plea due to the ineffectiveness of counsel is that but for counsel's errors, the defendant would not have pled guilty but would have gone to trial." *Bradley*, supra. This same test applies in analyzing a no contest plea.

{¶ 11} In the instant case, Kemps contends that he received ineffective assistance of counsel when his counsel gave him incomplete and incorrect advice on how restitution would be collected, as well as an incorrect explanation regarding the implications of a "no contest" plea. Additionally, Kemps argues that the trial court erred when it did not require him to affirmatively admit to the truth of the facts concerning his no contest plea on the record. Kemps maintains that these failures on the part of defense counsel and the trial court deprived him of his ability to enter a voluntary, knowing, and intelligent plea.

{¶ 12} The record of Kemps' plea hearing, however, severely undermines his claims in this regard. While we agree that defense counsel's explanations of a "no contest" plea and the restitution process were inaccurate, the trial court provided a precise and thorough clarification of those concepts to Kemps before accepting his plea. This is illustrated in the hearing transcript as follows:

{¶ 13} "The Court: A no contest plea means a guilty plea, which you're pleading to the three robbery charges. That means, you're completely admitting you're guilty of three aggravate [sic] robberies, a no contest plea to aggravate [sic] robbery, you're not admitting you're guilty

but you're admitting to the truth of the facts in the indictment read by the prosecutor. Based upon those facts in those charges, the Court will find you guilty of the aggravated robbery and you will be sentenced in that case. That's what a no contest means."

{¶ 14} \*\*\*

{¶ 15} "The Court: \*\*\* I'm going to change the plea to no contest for the aggravate [sic] robbery. Now, I'm not sure we said this. Let's make clear the other part of this plea agreement. It is agreed you will receive in a few minutes, a seven year sentence for all these charges. I think I did say it. That means you are going to serve the seven years and no early release from prison, no motion for judicial release ordering your release. Do you understand that?"

{¶ 16} "Kemps: Yes, sir. \*\*\*."

{¶ 17} \*\*\*

{¶ 18} "The Court: \*\*\* Now, let me explain generally what each of these charges could carry. The robbery, each of the three robbery charges<sup>1</sup>, those are felonies of the third degree. Generally speaking, a robbery could carry a fine of \$10,000.00, plus court cost, restitution, and could carry a term of imprisonment anywhere from one to five years. That's generally what each of those robbery charges could carry.

{¶ 19} "Kemps: Yes, sir.

{¶ 20} "The Court: The agreement is you are going to receive a seven-year sentence. What you will receive is seven years on the aggravated robbery, and the Court is going to order three years on each of the robberies all to run concurrent for a total sentence of seven years. Do

---

<sup>1</sup>These three robbery charges are separate and distinct from the aggravated robbery charge which is the subject of the instant appeal.

you understand that?

{¶ 21} “Kemps: Yes, sir.”

{¶ 22} \*\*\*

{¶ 23} “The Court: Now, I’m repeating myself but I want you to understand pleading guilty to three robbery charges means you’re completely admitting you’re guilty. The Court is going to find you guilty of those charges and you will be sentenced to those charges. Do you understand that?”

{¶ 24} “Kemps: Yes, sir.

{¶ 25} “The Court: Pleading no contest to a charge, you’re not admitting you’re guilty, but the truth of the facts read from the prosecutor, based on those facts in the indictment, the Court is going to find you guilty to aggravated robbery. Do you understand that?”

{¶ 26} “Kemps: Yes.”

{¶ 27} The trial court then went on to explain to Kemp what constitutional rights he was waiving by pleading no contest to the aggravated robbery charge. The court explained to Kemp that he was waiving the right to a jury trial and the right to confront the witnesses against him. The court also explained to Kemp that he was waiving the right to testify (or not) in his own defense. During the trial court’s lengthy explanation, the record does not contain any evidence that Kemp was confused or did not understand the nature of the no contest plea he was entering. This is reflected by the following exchange:

{¶ 28} “The Court: To the charge of aggravated robbery 4297, your plea is?”

{¶ 29} “Kemps: No contest.

{¶ 30} “The Court: Court accepts Mr. Kemp’s plea of no contest and guilty plea. The

Court finds that the defendant has voluntarily entered his pleas. He knowingly, intelligently, judgmently [sic] waived his constitutional rights. The nature of the charge, the maximum penalty that he could face, he know's he's going to receive the seven years agreed upon sentence. He understands the act of his plea of guilty, and the no contest, and he knows the Court is going to find guilty of those charges, impose a seven-year sentence plus restitution. \*\*\*.”

{¶ 31} \*\*\*

{¶ 32} “Kemps: I just want to thank the Court and my attorney for the patience, helping me out because it could have been worse. I'm not upset. I think this really is going to save my life. I have a terrible crack problem. These seven years, walk out clean, thank you all.”

{¶ 33} Based on these portions of the record, it is clear that while defense counsel's explanation of a no contest plea was deficient, the trial court did a thorough and comprehensive job of explaining the effect of a no contest plea to Kemp. There is simply nothing in the record to support Kemp's assertion that his plea was anything other than knowingly, voluntarily, and intelligently made. Kemp has failed to demonstrate that there is a reasonable probability that but for his counsel's failure to properly describe the effect of a no contest plea, the result of the case would have been different.

{¶ 34} Additionally, Kemp correctly points out that the trial court never explicitly inquired of him whether he was executing his plea voluntarily pursuant to Crim. R. 11(C)(2)(a) which states in pertinent part:

{¶ 35} “(2) In felony cases, the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant

personally and doing all of the following:

{¶ 36} “(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.”

{¶ 37} We have held that “although strict compliance with Crim. R. 11(C)(2) is preferred, ‘substantial compliance’ is acceptable, provided that the defendant is not prejudiced.” *State v. Hamilton* (June 10, 1994), Montgomery App. No. 14256, citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163. “Substantial compliance means that under the totality of the circumstances[,] the defendant subjectively understands the implications of his plea and the rights he is waiving.” *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. The defendant bears the burden of demonstrating prejudice if compliance is less than strict. *State v. Shropshire* (Sept. 4, 1992), Montgomery App. No. 12829.

{¶ 38} In light of the foregoing, it clear that the trial court substantially complied with Crim. R. 11(C)(2)(a) insofar as it thoroughly explained the effect that a no contest plea would have with respect to the aggravated robbery charge. Even though the trial court did not specifically inquire of Kemps whether he was voluntarily entering his no contest, the court made him keenly aware of the effects of such a plea with its comprehensive explanation in that regard. After providing its exhaustive explanation of the effects of a no contest plea, the court personally inquired of Kemps whether he clearly understood everything that had been explained to him and whether he still wished to enter a no contest plea. Kemps answered in the affirmative as to both questions. Thus, the trial court substantially complied with the mandate

contained in Crim. R. 11(C)(2)(a) and properly found that Kemps' plea of no contest was voluntary. Based on the testimonial evidence contained in the record, Kemps has failed to establish that any prejudice resulted from the trial court's omission.

{¶ 39} Contrary to Kemps' final assertion, the record evidences that the trial court clearly and explicitly explained the restitution process as well as that an order of restitution would be placed on the record at the close of the hearing. Regardless of the questionable explanation provided by defense counsel, the trial court made sure that Kemps sufficiently understood that restitution would be ordered and what the process entailed. Thus, Kemps is unable to establish any prejudice as a result of his counsel's inaccurate explanation.

{¶ 40} Kemps' sole assignment of error is overruled.

## II

{¶ 41} Kemps' sole assignment of error having been overruled, the judgment of the trial court is affirmed.

.....

BROGAN, J. and GRADY, J., concur.

Copies mailed to:

Johnna M. Shia  
Charles Bursey II  
Hon. Dennis J. Langer