[Cite as *State v. Brantweiner*, 2020-Ohio-5235.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NOS. 2019-L-155
- vs -	:	**2019-L-156**
		2019-L-157
JO ANN BRANTWEINER,	:	**2019-L-158**
		2019-L-159
Defendant-Appellant.	:	**2019-L-160**
		2019-L-161
	:	**2019-L-162**

Criminal Appeals from the Willoughby Municipal Court, Case Nos. 2019 CRB 01631 A, 2019 CRB 01631 B, 2019 CRB 01631 C, 2019 CRB 01631 D, 2019 CRB 01631 E, 2019 CRB 01631 F, 2019 CRB 01631 G, and 2019 CRB 0631 H.

Judgment: Affirmed.

J. Jeffrey Holland, Holland and Muirden, 1343 Sharon-Copley Road, P.O. Box 345, Sharon Center, Ohio 44274 (For Plaintiff-Appellee).

Robert N. Farinacci, 65 North Lake Street, Madison, Ohio 44057 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Jo Ann Brantweiner, appeals her convictions for cruelty against companion animals. We affirm.

{¶2} In June 2019, Brantweiner was charged with eight counts of cruelty against companion animals, four in violation of R.C. 959.131(D)(1) and four under R.C. 959.131(D)(2), second-degree misdemeanors.

{¶3} Brantweiner's case was consolidated with Nadine Bechtel's criminal case since their charges involved the same animals housed at the Animal Rescue Center in Eastlake. Brantweiner and Bechtel were represented by the same attorney during most of the trial court proceedings, and they each entered pleas on the day their jury trial was to commence.

{¶4} Brantweiner entered a no contest plea to all eight counts, and the trial court found her guilty of each. The court sentenced her to 90 days on each offense with all the time suspended; imposed a $200 fine for each of the eight counts with all the fines suspended, except $200 for the first count; imposed five years of probation; and ordered her to pay restitution. Brantweiner appeals the November 1, 2019 judgment entry of sentence.

{¶5} She subsequently secured new counsel and moved to withdraw her plea and requested a hearing. We remanded for the court to address her motion to withdraw, and on remand the trial court overruled her motion to withdraw her plea March 3, 2020.

{¶6} Brantweiner raises seven assigned errors. Because the legal issues in some assignments overlap, we consider certain claimed errors together and out of the order in which they are raised.

{¶7} We address Brantweiner's first and sixth errors together which contend:

{¶8} "[1.] The trial court abused its discretion when it scheduled an evidentiary hearing on appellant's motion to withdraw plea (T.d. 92) and then prohibited appellant from introducing witness testimony or documentary and exhibit evidence. (T.p. MH, P. 66 at Ln. 17-25; P.67, Ln. 1-2.)"

{¶9} "[6.] The trial court erred to the prejudice of appellant in denying her motion to withdraw plea where appellant proffered overwhelming evidence demonstrating a manifest injustice."

{¶10} Brantweiner first contends the trial court abused its discretion by scheduling an evidentiary hearing on her motion to withdraw her plea, but then denying her the opportunity to present witnesses. She claims she appeared with nine witnesses and four exhibits, but the court decided the issue based on the parties' arguments and did not allow her evidence. In her sixth assigned error she asserts the court erred in denying her motion to withdraw her plea in light of the overwhelming evidence she proffered showing a manifest injustice. For the following reasons, both assignments lack merit.

{¶11} As stated, Brantweiner appealed the November 1, 2019 judgment entry of sentence. We subsequently remanded the case for the trial court to address her motion to withdraw her plea; however, she has not filed an amended appeal in an effort to appeal the March 3, 2020 decision overruling her motion to withdraw her plea. Brantweiner likewise has not separately appealed the March 3, 2020 judgment.

{¶12} A post-sentence judgment overruling a motion to withdraw plea is a final appealable order. *State v. Pollard*, 8th Dist. Cuyahoga No. 97468, 2012-Ohio-2311, ¶ 9 (appellate courts lack jurisdiction "to review a judgment or order which is not designated in the appellant's notice of appeal"); a*ccord State v. Kennedy*, 8th Dist. Cuyahoga No. 79143, 2002-Ohio-42.

{¶13} App.R. 12(A)(1)(a), *Determination*, dictates that a court of appeals, upon considering an undismissed appeal, shall "[r]eview and affirm, modify, or reverse the judgment or final order appealed * * *."

{¶14} Here, the order dated March 3, 2020 denying Brantweiner's motion to withdraw her plea is not the order appealed in her notice of appeal. And although we remanded to the trial court for it to consider her motion to withdraw, it was incumbent on Brantweiner to then appeal that judgment to authorize our appellate review.

{¶15} Because Brantweiner did not appeal from the order denying the motion to withdraw, we lack jurisdiction to review the order denying the motion. *Pollard*, *supra*. Accordingly, Brantweiner's first and sixth assigned errors are not considered.

{¶16} We address her second and seventh assigned errors collectively, which assert:

{¶17} "[2.] The dual representation of both co-defendants by one attorney each with adverse interests to the other was so pervasively prejudicial as to deprive appellant of her sixth amendment right to effective assistance of counsel."

{¶18} "[7.] Appellant was merely an innocent volunteer who possessed neither control nor authority nor was a caretaker or custodian as required by R.C. 959.131(D)(1) or (D)(2) and had not duty to act or not act and therefore cannot be convicted of violating this statute."

{¶19} Here Brantweiner avers that she was denied the Sixth Amendment Right to effective counsel because her attorney had a conflict of interest by representing both Brantweiner and her co-defendant Nadine Bechtel. Brantweiner claims her trial counsel did not assert the defense that she was a volunteer at the rescue shelter because her attorney also represented Bechtel, the owner and operator of the animal shelter. And

because Bechtel was in charge of the shelter, Brantweiner claims she should not have been liable for the condition of the animals.

{¶20} Brantweiner did not object to the dual representation during the proceedings, and the issue does not appear to have been addressed by the trial court.

{¶21} The Sixth Amendment guarantees a right to conflict-free counsel. *State v. Dillon*, 74 Ohio St.3d 166, 167, 657 N.E.2d 273 (1995). Although a trial court is not constitutionally required to inquire about a conflict, the "better practice is to make a prompt inquiry and advise each defendant of * * * her right to effective assistance of counsel, including separate representation * * *." (Citations omitted.) *State v. Manross*, 40 Ohio St.3d 180, 182, 532 N.E.2d 735 (1988).

{¶22} "[T]o establish a violation of the Sixth Amendment right to effective assistance of counsel, a defendant who fails to object to joint representation at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan,* 446 U.S. 335, 347, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *State v. Manross,* 40 Ohio St.3d 180, 532 N.E.2d 735 (1988). An attorney representing multiple defendants in criminal proceedings is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop during the course of the trial. *Cuyler* at 347, 100 S.Ct. 1708. A reviewing court cannot presume that the mere possibility of a conflict resulted in ineffective assistance of counsel. *Manross* at 182, 532 N.E.2d 735. A possible conflict of interest is inherent in almost all instances of joint or multiple representation. The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. *Id.* An actual conflict of interest

must be shown. *State v. Gillard,* 78 Ohio St.3d 548, 552, 679 N.E.2d 276 (1997)." *State v. Hathaway*, 2015-Ohio-5488, 55 N.E.3d 634, ¶ 13 (2d Dist.).

{¶23} "An 'actual, relevant conflict of interests' exists 'if, during the course of the representation, the defendants' interests do diverge with respect to a material factual or legal issue.' * * * In such a case, counsel's duty to one client 'tends to lead to disregard for another.' * * *." *Dillon*, *supra*, at 169, quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333, fn. 3 (1980) (Marshall, J., concurring in part and dissenting in part).

{¶24} "There is no conflict where the two defenses did not result in one assigning blame to the other and where both defendants had a common interest * * *." *Manross*, *supra*, at 182.

{¶25} As stated, Brantweiner and Bechtel were convicted of four counts of R.C. 959.131(D)(1) and four counts of R.C. 959.131(D)(2), which state:

{¶26} "(D) No person who confines or who is the *custodian or caretaker* of a companion animal shall negligently do any of the following:

{¶27} "(1) Torture, torment, or commit an act of cruelty against the companion animal;

{¶28} "(2) Deprive the companion animal of necessary sustenance or confine the companion animal without supplying it during the confinement with sufficient quantities of good, wholesome food and water if it can reasonably be expected that the companion animal would become sick or suffer in any other way as a result of or due to the deprivation or confinement * * *." (Emphasis added.)

{¶29} Neither subsection of R.C. 959.131(D) limits the offense to the owner of the animals or the person "who confines" the animals as Brantweiner contends. Instead, R.C. 959.131(D) is written in the disjunctive and includes custodians or caretakers of the animals, as well as an individual who confines the animal. Brantweiner acknowledges she was acting as volunteer at the shelter and does not challenge that she constitutes a custodian or caretaker. Thus, this argument lacks merit.

{¶30} Brantweiner also claims that had she had a different attorney, then her counsel could have argued in mitigation for a lesser sentence because Brantweiner was merely helping Bechtel. Bechtel and Brantweiner were convicted of the same eight offenses and received the same sentences.

{¶31} At sentencing, counsel presented no argument in favor of mitigation for either defendant and instead instructed her clients not to speak in mitigation. Instead, their attorney advised the court that her clients did not commit the alleged acts. It is unclear why counsel advised her clients not to speak in mitigation. However, there are several references to simultaneous federal proceedings involving the parties, and at the hearing, the state argued that Bechtel violated conditions of her bond. Thus, it appears counsel had a strategic reason for not submitting argument in favor of mitigation.

{¶32} Accordingly, Brantweiner has not shown that her attorney's duty to Bechtel caused her to disregard her duty toward Brantweiner. We find no demonstrated conflict of interest adversely affecting counsel's performance from this record and no violation of Brantweiner's Sixth Amendment right to conflict-free representation. *Dillon*, 74 Ohio St.3d 166, 657 N.E.2d 273. Her second and seventh assigned errors lack merit.

{¶33} Brantweiner's fourth assigned error asserts:

{¶34} "The explanation of circumstances, as required by R.C. 2937.07, provided insufficient grounds upon which the trial court could find appellant guilty upon accepting her no contest plea."

{¶35} A no contest plea may not be the basis for a finding of guilt without an explanation of circumstances of the offense. *Cuyahoga Falls v. Bowers*, 9 Ohio St.3d 148, 150, 459 N.E.2d 532 (1984). R.C. 2937.07, governing no contest pleas in misdemeanor cases, states in part:

{¶36} "A plea to a misdemeanor offense of 'no contest' or words of similar import shall constitute an admission of the truth of the facts alleged in the complaint and that the judge * * * may make a finding of guilty or not guilty from the explanation of the circumstances of the offense. * * * If a finding of guilty is made, the judge * * * shall impose the sentence or continue the case for sentencing accordingly."

{¶37} Brantweiner entered a no contest plea to all eight counts, and the court found her guilty of each. Brantweiner's fourth assignment argues the state's explanation of the circumstances of the offenses are insufficient to establish that she committed the offenses because the state's explanation focuses on Bechtel, and its statement was recited primarily during Bechtel's portion of the joint sentencing hearing, not hers. We disagree.

{¶38} After Bechtel entered her no contest plea, the prosecutor recited its statement of facts that it would have established at trial. The state's recitation of facts extends approximately eight pages of the transcript and includes the following:

{¶39} "[T]here was a search warrant that was served * * * [at the] Animal Rescue Center, which is a nonprofit organization which is headed by Ms. Bechtel and was assisted by Ms. Brantweiner.

{¶40} "And at that residence, there were 97 dogs and cats that were found. * * * [W]hen the warrant was served, * * all entryways were observed to be locked, there was no open or clear view inside the building, there was a strong odor of ammonia and feces that was observable 20 to 30 feet away from the building that grew stronger when investigators got closer * * *.

{¶41} "Ms. Brantweiner answered the door. * * * She eventually opened the building on her own.

{¶42} "The investigating officer found that there was fecal matter and urine all over the floors, which were sticky, cages were stacked on each other so that fecal and urine matter might go down upon other animals. There were urine-soaked newspaper where the animals were. Most of the animals did not have food or water. Some of the animals appeared to be emaciated, many of them had * * * weeping eyes and skin conditions. Some of them seemed wet with urine and fecal matter.

{¶43} "* * * [M]any of the cats were breathing through their mouths instead of through their nose, which is an indication of suffering. There's green pus surrounding the eyes on many of the animals.

{¶44} "* * * Some of the animals were dehydrated as proved by a pinch test, which is a skin turgor test well represented in the veterinary field, and I would just for further clarity, under count A, * * * pertained to 12 dogs identified as * * * Lenny, * * * Bear, * * *

Ella, * * *, Skeeter, * * * Benson, * * * Opie, * * * Carley, * * * Ralph and/or George, * * * Little Ears, * * * Max, * * * Phoebe, * * * Dudley.

{¶45} "And then under count B, * * * pertained to 22 puppies * * *.

{¶46} "The next count, count C, [concerned] * * * Diana * * *

{¶47} "* * * All of these animals were suffering because of the urine and fecal ammonia which caused their eyes and throat to burn and also a number of other veterinary problems, including open wounds, * * * one of them had an exposed tendon, and they had a number of other ailments which were untreated.

{¶48} "* * *

{¶49} "All these animals either tested to be dehydrated under the defendants' care because the defendants both were the custodians, caretakers, or keepers, confiners of the animals, or they were emaciated * * * due to inadequate food."

{¶50} Almost immediately after the recitation of facts ended, the court addressed Brantweiner, and she confirmed that she heard the statement of facts recited by the state. Brantweiner then confirmed she was pleading no contest. The court agreed to accept the facts recited as applying to both Brantweiner and Bechtel, and the state added a statement saying that "Ms. Brantweiner was in control, care, and custody and that she confined animals that were in question here * * *." Brantweiner did not object.

{¶51} And consistent with her prior argument, she also argues the court erred by finding a sufficient factual predicate for the offenses because she was acting as a volunteer, not the owner or person who confined the animals under R.C. 959.131(D)(1) and (2). As explained in her second and seventh assigned errors, however, the statute

encompasses custodians and caretakers of the animals, as well as an individual who confines the animals. Thus, her argument lacks merit.

{¶52} Finally, because Brantweiner does not challenge any other aspect of the state's explanation of circumstances of the offenses, we do not address them.

{¶53} Her fourth assigned error lacks merit and is overruled.

{¶54} Brantweiner's fifth assigned error alleges:

{¶55} "Appellant's plea of no contest was not made knowingly and is void pursuant to Crim.R. 11(D)."

{¶56} Brantweiner was initially ordered to pay $85,296.10 in restitution, which was subsequently reduced to $1,000. She claims her plea was not knowingly made because the court did not notify her that she was subject to restitution as a punishment before she entered her no contest plea. We disagree.

{¶57} "A judge's duty to a defendant before accepting his guilty or no contest plea is graduated according to the seriousness of the crime with which the defendant is charged. Crim.R. 11 distinguishes between '[p]leas of guilty and no contest in felony cases' (Crim.R. 11[C]), '[m]isdemeanor cases involving serious offenses' (Crim.R. 11[D]), and '[m]isdemeanor cases involving petty offenses' (Crim.R. 11[E]). The requirements placed upon a court take steady steps that culminate in Crim.R. 11(C)." *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, 788 N.E. 2d 635, ¶ 25.

{¶58} Crim.R. 2(C) and (D) define a "'[s]erious offense' [as] any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months, * * * [and] '[p]etty offense[s]' [as] a misdemeanor other than a serious offense." Thus, any misdemeanor punishable by less than six months is a petty offense.

{¶59} Brantweiner was charged with eight, second-degree misdemeanor offenses, subject to a maximum sentence of 90 days each. Accordingly, Brantweiner's offenses are petty offenses. Crim.R. 2(D).

{¶60} "In accepting a plea to a misdemeanor involving a petty offense, a trial court is required to inform the defendant only of the effect of the specific plea being entered. Crim. R. 11(E) construed.

{¶61} "To satisfy the requirement of informing a defendant of the effect of a plea, a trial court must inform the defendant of the appropriate language under Crim.R. 11(B)." *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, syllabus.

{¶62} "Crim.R. 11(B)(2) defines the effect of a no contest plea as follows: '[t]he plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.' * * *." *Cleveland v. O'Donnell*, 2018-Ohio-390, 106 N.E.3d 192, ¶ 11 (8th Dist.); *accord State v. Chipman*, 2d Dist. Montgomery No. 27484, 2018-Ohio-33, ¶ 12-13.

{¶63} Thus, the court was not required to advise Brantweiner that she may be ordered to pay restitution as a penalty for her no contest pleas to petty misdemeanors before it accepted her no contest plea, and her fifth assignment lacks merit.

{¶64} We address Brantweiner's third assignment last, which contends:

{¶65} "Trial counsel's performance fell below the standard of reasonableness in several respects, any of which would and did prejudice appellant and produced a fundamentally unfair result for appellant."

{¶66} "To prevail on [her] ineffective-assistance claims, [appellant] must demonstrate both that 'counsel's representation fell below an objective standard of reasonableness' and that counsel's deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish deficient performance, [appellant] must show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed [her] by the Sixth Amendment.' *Id.* at 687, 104 S.Ct. 2052. And to establish prejudice, [s]he must show 'that counsel's errors were so serious as to deprive [her] of a fair trial, a trial whose result is reliable.' *Id." State v. Bates*, 159 Ohio St.3d 156, 2020-Ohio-634, 149 N.E.3d 475 ¶ 24.

{¶67} Brantweiner identifies three ways her trial attorney was ineffective. First, Brantweiner argues her trial attorney's failure to participate in discovery, failure to prepare for trial, and defiance of the court's orders resulted in Brantweiner being forced to plead no contest on the day of trial because she had no other choice.

{¶68} As argued, the trial court ordered defense counsel at a pretrial hearing to comply with Crim.R. 16 discovery and file a trial brief. Notwithstanding the court's directive, Brantweiner's counsel did not comply. Instead, she was attempting to circumvent Crim.R. 16 and her obligation for reciprocal ongoing discovery by not requesting discovery from the state because the rule is usually triggered by the defense's discovery request. Crim.R. 16(A). Instead, according to the state, defense counsel was securing evidence via public records requests to the various departments involved in the seizure of the animals from the Animal Rescue Center in Eastlake.

{¶69} Further, on the morning of trial, the state pointed out that he only received one item from defense counsel, a veterinarian's report. The prosecutor advised that the defense had not sent him a witness list or any other evidence. Thus, he asked the court to exclude from trial anything they had not provided in discovery.

{¶70} Brantweiner's counsel responded by moving the judge to recuse herself based on her alleged relationship with the president of the local humane society, which the trial court overruled. The state emphasized that the local humane society was the impounding agency and not a party to the case or the prosecuting entity.

{¶71} Upon addressing the state's motion to exclude evidence not provided in discovery, defense counsel reiterated her argument that they were not obligated to provide discovery under Crim.R. 16. The trial court, however, did not grant the state's blanket request but advised she would reserve her ruling at the appropriate time during trial. That is when defense counsel advised that Brantweiner and Bechtel were going to enter no contest pleas.

{¶72} The state responded and explained that defense counsel was attempting to circumvent providing the state with discovery by securing its discovery via public records requests. Defense counsel did not respond but simply restated that the defendants were pleading no contest.

{¶73} Generally, tactical and strategic decisions cannot form the basis for an ineffective assistance of counsel claim. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 192; *State v. Glenn-Coulverson*, 2017-Ohio-2671, 90 N.E.3d 243, ¶ 56 (10th Dist.). "Even if the wisdom of an approach is questionable, 'debatable trial tactics' do not constitute ineffective assistance of counsel." *State v. Wilson*, 2018-

Ohio-396, 106 N.E.3d 806, ¶ 21 (5th Dist.), *appeal not allowed,* 153 Ohio St.3d 1485, 2018-Ohio-3867, 108 N.E.3d 83, citing *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995).

{¶74} Regardless, even assuming Brantweiner's attorney was deficient under the first *Strickland* prong, Brantweiner fails to establish resulting prejudice. The trial court never decided it would exclude the defense evidence not shared with the state via discovery. Further, although Brantweiner claims her attorney failed to conduct discovery, ignored court orders, and was unprepared forcing Brantweiner to enter a plea, Brantweiner does not identify any viable defenses she would have presented had her attorney been ready to proceed. Brantweiner likewise does not argue there was a lack of evidence supporting her convictions.

{¶75} Because she does not establish prejudice, her first allegation of ineffective assistance under her third assignment lacks merit.

{¶76} Second, Brantweiner argues that her counsel was ineffective based on her dual representation of Brantweiner's codefendant, Bechtel. As stated under Brantweiner's second and seventh assigned errors, however, we found no actual conflict of interest adversely affecting counsel's performance and no violation of Brantweiner's Sixth Amendment right to conflict-free representation. Thus, we do not revisit her arguments here, and her second argument under her third assignment is overruled.

{¶77} Third and finally, Brantweiner claims her attorney was ineffective because her counsel was unprepared for sentencing, which occurred on the same day as her plea.

{¶78} Upon learning that the court was proceeding with sentencing that day, defense counsel asked for a continuance to research merger. The hearing was recessed

to permit time for counsel to research the issue, but the parties were instructed not to leave the building. They reconvened for sentencing that day.

{¶79} Brantweiner's counsel then asked the court to merge Brantweiner's counts for sentencing but thereafter indicated she was still unprepared for sentencing because her research capabilities while in the courthouse were limited. The court disagreed that Brantweiner's offenses merged, and it convicted her of all eight counts.

{¶80} Like her other arguments under this assignment, Brantweiner fails to identify any resulting prejudice. She does not demonstrate that her offenses should have merged for sentencing. She likewise does not identify any other problem with her sentence. Thus, Brantweiner fails to show that her trial counsel's errors deprived her of a fair trial. *Strickland,* supra. Her third assignment of error lacks merit.

{¶81} Accordingly, each of Brantweiner's assigned errors lacks merit, and the trial court's decision is affirmed.

CYNTHIA WESTCOTT RICE, J.,

MATT LYNCH, J.,

concur.