

*Ohio v. Dalton*

**793 N.E. 2d 509 (Ohio Court of Appeals 2003).**

*Judge Klatt:*

Brian J. Dalton appeals from a judgment denying his motion to withdraw his guilty plea to pandering obscenity involving a minor and pandering sexually-oriented material involving a minor. Appellant was sentenced to nine months in prison on each [of ten counts].

After serving almost four months of his prison term, appellant was granted judicial release and placed on probation for three years. However, shortly thereafter, appellant was arrested for lack of participation in his sex offender treatment program, a violation of his probation. After his arrest, appellant's mother contacted Scott Merrick, appellant's probation officer. She informed Merrick that she had visited appellant's apartment and was concerned about some items she had discovered there. She asked Merrick to come to the apartment and remove those items.

That same day, Merrick and another probation officer met appellant's mother at appellant's apartment. When they arrived, she had already placed several items on appellant's bed, including appellant's personal, handwritten journal. Merrick took all of the items back to the probation department where he began to read appellant's journal. The journal depicted appellant's personal fantasies of the violent torture and rape of a number of fictitious minor children. After reading appellant's journal, Merrick contacted a detective from the Columbus Police Sexual Abuse Squad who came to the probation department and took the journal.

Subsequently, by indictment filed February 23, 2001, appellant was charged with two counts of pandering obscenity involving a minor. Count One alleged that appellant created, reproduced or published obscene material involving a minor as one of its participants or portrayed observers. Count Two alleged that appellant bought, procured, possessed or controlled

obscene material involving a minor as one of its participants. Both charges were based solely upon appellant's personal journal discovered in his apartment.

With his counsel's advise, on or about July 3, 2001, appellant entered a guilty plea to one count of pandering obscenity involving a minor in exchange for the dismissal of the other count of the indictment. The trial court accepted appellant's guilty plea and sentenced him to seven years in prison. In addition, due to appellant's probation violation, the trial court revoked appellant's probation [from the previous offenses] and ordered appellant to serve the remainder of his original prison term consecutive to the seven-year prison term he received.

On August 2, 2001, appellant filed a motion to withdraw his guilty plea, [arguing that the new offenses] were unconstitutional as applied to him. Without an evidentiary hearing, the trial court denied appellant's motion, finding that, among other things, appellant failed to raise his constitutional arguments before he pled guilty and, therefore, he could not make those arguments in a post-sentence motion to withdraw his guilty plea..

After the trial court's decision, new lawyers filed a motion asking the trial court to reconsider its decision denying appellant's motion to withdraw his guilty plea. This motion asserted that appellant's former trial counsel ineffectively represented appellant and that the trial court should not have accepted appellant's guilty plea because the acts underlying the charge to which he pled guilty were constitutionally protected by the First Amendment. After a two-day hearing, the trial court denied appellant's motion. The trial court found that appellant's former trial counsel was not ineffective in representing appellant, that she had informed appellant of all possible constitutional defenses to the charges and that appellant made his own decision to plead guilty. Appellant now appeals.

Because appellant's motion to withdraw his guilty plea was filed after sentence was

imposed, he must demonstrate manifest injustice. The burden of establishing the existence of manifest injustice is upon the individual seeking to vacate the plea. This court's review of a trial court's denial of a post-sentence motion to withdraw a guilty plea is limited to a determination of whether the trial court abused its discretion.

Appellant contends that his trial counsel was deficient because she erroneously advised him to plead guilty based upon her misunderstanding of the charges against him. Throughout her testimony during the October 3, 2001 hearing on appellant's motion to withdraw his guilty plea, trial counsel indicated that she thought [the first of the two counts] was based on a letter appellant wrote describing appellant's sexual molestation of his young cousin, a real person (hereinafter referred to as "the cousin letter"). She further believed that the cousin letter depicted, at least in part, actual events involving a minor. Trial counsel thought that [the second count] was based on appellant's purely fictitious, personal journal. In fact, it is undisputed that both counts were based solely upon appellant's personal journal. Appellant argues that, due to his trial counsel's misunderstanding of the factual basis for the charges, she erroneously advised him to enter a guilty plea.

In finding that appellant was competently represented, the trial court found trial counsel's testimony to be credible. The trial court further determined that trial counsel had simply "misspoken" when she referred to the cousin letter as the factual basis for Count One. This court is bound to accept the trial court's findings of fact and determinations of credibility if they are supported by competent, credible evidence. Although we see no reason to disturb the trial court's determination regarding trial counsel's credibility, the trial court's finding that trial counsel misspoke when she referred to the cousin letter is not supported by competent, credible evidence.

Appellant's trial counsel indicated 13 separate times that it was her understanding that the first count was based on the cousin letter and the second count was based on appellant's personal journal. Appellant's trial counsel also testified that she understood the cousin letter described the actual sexual molestation of a minor. She further testified that the fact that this letter described acts involving a real person was first and foremost in her mind when she was discussing with appellant the possible defenses to these charges. This misunderstanding was significant because of the important differences in the constitutional protections afforded the private possession of pornographic depictions of real children and similar depictions of fictional children - differences that trial counsel recognized and that affected her legal advice.

The private possession of obscene material is constitutionally protected [citing *Stanley v. Georgia*]. However, the private possession of child pornography may be constitutionally prohibited [citing *Osborne v. Ohio*]. Although the state cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts, the state has a legitimate interest in protecting children. Therefore, the court in *Osborne* upheld the prohibition of even the private possession of pornography depicting children because such a prohibition helps to protect the victims of child pornography by destroying the market for such material.

[The Supreme Court's child pornography cases] upheld the prohibition of even the private possession of child pornography out of concern for the minor children involved and recognition of the state's interest in eradicating child sexual abuse.

However, the United States Supreme Court recently struck down portions of the Child Pornography Prevention Act of 1996, which extended the federal prohibition against the possession of child pornography to sexually explicit images that were created without depicting any real children [citing *Ashcroft v. The Free Speech Coalition*]. The CPPA defined child

pornography to include “any visual depiction” that is or appears to be of a minor engaging in sexually explicit conduct. This definition included in it “virtual child pornography” which need not include, let alone harm, real children. The court struck down this portion of the definition, finding that, child pornography involving fictional children “records no crime and creates no victims by its production.” The *Ashcroft* court held that the CPPA’s prohibition of the possession of child pornography that does not depict real children was unconstitutional.

Because there is constitutional significance to the distinction between pornographic depictions of real children and similar depictions of fictional children, understanding the factual basis for the charges against appellant was particularly important. It is uncontested that the children depicted in appellant’s journal and the repugnant acts described therein were creations of appellant’s imagination. Therefore, this case raises a substantial question concerning the constitutionality of a statute prohibiting the creation and private possession of purely fictitious written depictions of fictional children. Because appellant’s trial counsel did not understand that both counts were based solely upon the purely fictional personal journal, she could not have adequately advised appellant of the potential constitutional defense.

Further, appellant’s trial counsel’s misunderstanding of the charges also affected her understanding of a possible statutory defense. [The relevant Ohio law] prohibits obscene material that has a minor as one of its participants or a portrayed observer. A minor is defined as “a person under the age of eighteen.” [A recent Ohio appellate decision] held that a similar statute with similar language prohibits only images depicting actual, real children. Again, because appellant’s trial counsel did not realize that both counts were based solely on the personal journal which described purely fictitious events involving fictitious children, she could not have properly considered this possible statutory defense.

Appellant's trial counsel also believed that a motion to dismiss based on these defenses would require testimony from appellant that the cousin letter and the personal journal were purely fictional. Because she believed the cousin letter identified a real person and may have described real events, she did not want to place appellant in a position where he would perjure himself. Again, this concern was based on trial counsel's mistaken belief that the cousin letter was the basis for one of the charges against appellant.

For counsel to render effective assistance to a criminal defendant, she should, at the least, understand the basis of the criminal charges and possible defenses of those charges. Given trial counsel's misunderstanding of the basis of the charges and the potential defenses to the charges, and the impact of this misunderstanding on her advice to appellant, we find that trial counsel's assistance to appellant was deficient.

Having found trial counsel's assistance to be deficient, we now must determine whether appellant was prejudiced by his counsel's deficient assistance. Appellant must show that there is a reasonable probability that, but for trial counsel's errors, he would not have pled guilty. Appellant stated that trial counsel told him that he had no substantial constitutional defenses and that he would be found guilty of both charges if he went to trial. Based upon this advice, appellant chose to enter his guilty plea. Appellant further stated that, but for trial counsel's advice, he would not have entered his guilty plea. Trial counsel admitted that appellant wanted to have this case resolved as quietly as possible, but that, if a constitutional argument could have resolved the case, appellant would have wanted to pursue that defense. These statements demonstrate a reasonable probability that appellant would not have pled guilty if his trial counsel had understood the charges and adequately advised him of the potential constitutional and statutory defenses to those charges.

Obviously, the greater the likelihood that an affirmative defense would be successful at trial, the more likely it is that the defendant would not have pled guilty if he would have received effective assistance of counsel. However, the relevant inquiry is not whether appellant ultimately would have prevailed at trial, but whether he would have pled guilty if properly advised by counsel. In the case at bar, we look to determine whether there is a reasonable probability that the outcome of the plea process (i.e., the guilty plea) would have been different but for trial counsel's ineffective assistance. Here, we answer this question in the affirmative. We find, therefore, that the trial court abused its discretion in denying appellant's motion to vacate his guilty plea.

We reverse the judgment of the Franklin County Court of Common Pleas, denying appellant's motion to vacate his guilty plea, and remand this matter to the trial court for further proceedings consistent with this opinion.

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## Points for Discussion

1. Having found that Dalton's attorney was ineffective for having failed to see the First Amendment implications of the charges against her client, Judge Klatt could instruct the lower court to accept Dalton's request to rescind his earlier guilty plea. The court thus avoided having to rule directly on the question of whether one could incur legal sanctions for writing about violent sexual fantasies involving children. The prosecutor did want to re-try Dalton for the offense of the writings themselves, but in 2004 a state court dismissed the charges. Do you think this was the right result? After all, from the prosecution's perspective, law enforcement is being told it must wait for someone like Dalton to act on his fantasies before rescinding his parole.

Does the First Amendment require we put children at this level of risk?

2. The 1950's pop song, "Standing on the Corner," posits that "you can't go to jail for what you're thinking." Dalton became a poster child for civil libertarians. Scores of newspaper editorials nationwide expressed outrage that he was in effect being punished for what he was thinking. If you had been a member of a major newspaper editorial board, would you have voted for the insertion of such an editorial? If so, how would you have worded it to make clear that being against the prosecutor in this case does not mean you are *for* pedophiles?