[Cite as *State v. Prinkey*, 2011-Ohio-2583.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-A-0029**
- vs -	:	
RICHARD A. PRINKEY, SR.,	:	5/27/11
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 337.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Edward M. Heindel, 450 Standard Building, 1370 Ontario Street, Cleveland, OH 44113 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Richard A. Prinkey, Sr., appeals the judgment of the Ashtabula County Court of Common Pleas sentencing him to four years in prison on one count of Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, in violation of R.C. 2925.041(A)(C)(1).

{¶2} Appellant pled guilty, by way of *North Carolina v. Alford* (1970), 400 U.S. 25, to the aforementioned charge. At a May 20, 2010 sentencing hearing, appellant informed the trial court that he wished to withdraw his plea. A hearing was held, and the

trial court overruled appellant's request. Appellant was sentenced on said date. A timely notice of appeal was filed and, as his sole assignment of error, appellant states:

{¶3} "The trial court erred when it denied Prinkey's pre-sentence motion to withdraw his *Alford* guilty plea."

{¶4} Crim.R. 32.1 provides a means for a criminal defendant to withdraw a guilty plea and states, "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶5} Here, appellant moved the court to withdraw the guilty plea prior to sentencing. Motions to withdraw guilty pleas before sentencing are to be freely given and treated with liberality. *State v. Xie* (1992), 62 Ohio St.3d 521, paragraph one of the syllabus. This court has recognized that although such motions are to be treated liberally, "the right to withdraw a plea is not absolute." *State v. Ziefle*, 11th Dist. No. 2007-A-0019, 2007-Ohio-5621, at ¶9, citing *State v. Xie*, supra.

{¶6} "In rendering a judgment, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. *** After considering the basis of the motion, the trial court's decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court." *Ziefle*, supra.

{¶7} An appellate court is limited in its review of a trial court's decision regarding a motion to withdraw a guilty plea to determine whether the trial court abused its discretion. *State v. Gibbs* (June 9, 2000), 11th Dist. No. 98-T-0190, 2000 Ohio App. LEXIS 2526, at *6-*7. An abuse of discretion is the trial court's "'failure to exercise

sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶8} In *Alford*, supra, the United States Supreme Court held that a plea of guilty may be accepted by the trial court despite the fact that the defendant maintains actual innocence of the charges. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, at ¶13. "An individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Alford*, supra, at 37.

{¶9} In *State v. Piacella* (1971), 27 Ohio St.2d 92, syllabus, the Supreme Court of Ohio applied *Alford*, supra, and held:

{¶10} "Where the record affirmatively discloses that: (1) defendant's guilty plea was not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) counsel's advice was competent in light of the circumstances surrounding the indictment; (4) the plea was made with the understanding of the nature of the charges; and, (5) defendant was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both, the guilty plea has been voluntarily and intelligently made."

{¶11} On appeal, appellant concedes that the trial court explained his Crim.R. 11 and constitutional rights and advised him of the terms of post-release control. Appellant is not arguing that the trial court failed to conduct a Crim.R. 11 colloquy, but rather that the trial court erred in accepting his *Alford* plea where the trial court did not make an inquiry as to why he pled guilty despite his protestation of innocence and where the trial court failed to make an inquiry of the state's evidence.

{¶12} At the plea hearing, the record is replete with instances that appellant's motivation in entering the *Alford* plea was to reduce the mandatory term of imprisonment from five years to two years, since appellant's prior conviction, as stated in the indictment, was removed. The trial court acknowledged that appellant was entering an *Alford* plea and then explained to appellant:

{¶13} "This plea of guilty signed form says it's by way of Alford, which is -- it just makes reference to a Supreme Court decision *** in which the Supreme Court said that a person could plead guilty to a charge even though they felt they were not guilty of it if they were receiving some benefit that made it worthwhile to take the plea rather than take the risk of going to trial. And, in this case, the mandatory portion of the sentence is being reduced from five down to two. *** [Y]ou could go ahead and plead guilty and I could accept your plea, even though you're not actually admitting that you've had [sic] committed this offense. Do you have any questions about that?"

{¶14} "THE DEFENDANT: No, Sir."

{¶15} At the hearing on May 20, 2010, appellant further acknowledged that he understood the negotiated plea agreement and the fact that the mandatory sentence time was to be reduced from a five-year mandatory sentence to a two-year mandatory sentence.

{¶16} Therefore, appellant's motivation in entering into the *Alford* plea is evident from the record. That is, appellant was aware that the state of Ohio was willing to withdraw the language relating to appellant's previous conviction as specified in the indictment, to wit: that appellant had been "previously convicted of Illegal Manufacture of Drugs in violation of section 2925.04(A) in case number 2001-CR-172, in violation of section 2925.04 of the Ohio Revised Code," if he entered into the plea agreement.

Consequently, appellant was subject only to a two-year mandatory term of imprisonment. R.C. 2925.041(A)(C)(1).

{¶17} Appellant next argues that the trial court was required to make an inquiry into the state's evidence. Appellant was charged with illegal assembly or possession of chemicals for the manufacture of drugs, a violation of R.C. 2925.041(A)(C)(1), which states:

{¶18} "(A) No person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code.

{¶19} "***

{¶20} "(C) Whoever violates this section is guilty of illegal assembly or possession of chemicals for the manufacture of drugs. Except as otherwise provided in this division, illegal assembly or possession of chemicals for the manufacture of drugs is a felony of the third degree, and, except as otherwise provided in division (C)(1) or (2) of this section, division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. *** If the chemical or chemicals assembled or possessed in violation of division (A) of this section may be used to manufacture methamphetamine, the court shall impose a mandatory prison term on the offender as follows:

{¶21} "(1) If the violation of division (A) of this section is a felony of the third degree under division (C) of this section and the chemical or chemicals assembled or possessed in committing the violation may be used to manufacture methamphetamine, except as otherwise provided in this division, the court shall impose as a mandatory

prison term one of the prison terms prescribed for a felony of the third degree that is not less than two years. If the violation of division (A) of this section is a felony of the third degree under division (C) of this section, if the chemical or chemicals assembled or possessed in committing the violation may be used to manufacture methamphetamine, and if the offender previously has been convicted of or pleaded guilty to a violation of division (A) of this section, a violation of division (B)(6) of section 2919.22 of the Revised Code, or a violation of division (A) of section 2925.04, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than five years."

{¶22} As this court has previously noted, "[f]ootnote ten of the *Alford* decision requires a factual basis when a defendant pleads guilty at the same time as he is protesting his innocence, so that the trial court can assure itself that the defendant is entering his guilty plea voluntarily and intelligently:

{¶23} "'Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea ***; and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.'" *State v. Al-Jumailee*, 11th Dist. No. 2006-P-0037, 2007-Ohio-2061, at ¶24-25, citing *North Carolina v. Alford*, 400 U.S. at 38, fn. 10.

{¶24} Contrary to appellant's assertion, the state set forth the following factual basis for the plea at the hearing:

{¶25} "A search warrant was executed at the property of Mr. Prinkey and as a result of that search warrant, there were at least 25 items that are consistent with the

production of methamphetamine that were found on that property. The police had acted – information that it was a recent and ongoing meth lab there and the evidence that they found would substantiate that. And that was on the date and location that the indictment indicated."

{¶26} A review of the record reveals the trial court complied with the requirements of *Piacella*, and, thus, appellant's guilty plea was voluntarily and intelligently made.

{¶27} Appellant also maintains that the trial court erred in denying his motion to withdraw his guilty plea made prior to sentencing, when the record indicates that the trial court did not engage in the proper inquiry before accepting his *Alford* plea. As stated, we have held that based on the record, appellant's *Alford* plea was voluntarily and intelligently made. Therefore, we must determine whether the trial court erred in overruling appellant's motion to withdraw his guilty plea prior to sentencing.

{¶28} In evaluating presentence motions to withdraw guilty pleas, this court has generally applied the four-prong test set forth in *State v. Peterseim* (1980), 68 Ohio App.2d 211, 213-214. In *Peterseim*, the Eighth Appellate District held:

{¶29} "A trial court does not abuse its discretion in overruling a motion to withdraw: (1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim.R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request." Id., paragraph three of the syllabus.

{¶30} First, although appellant does not raise any issue relating to his counsel, the record on appeal demonstrates that appellant was properly represented by court-appointed counsel. At the plea hearing, appellant indicated that he did not have any problems with his counsel and that his counsel adequately discussed the plea agreement with him. Further, it is well-settled that "*** a properly licensed attorney practicing in this state is presumed to be competent." *State v. Brandon*, 11th Dist. No. 2009-P-0071, 2010-Ohio-6251, at ¶19, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 397.

{¶31} Second, the record demonstrates and appellant acquiesces that he was afforded a proper hearing pursuant to Crim.R. 11. Before entering into his plea agreement, the trial court explained to appellant the nature of the charges as well as the maximum penalties. The trial court also apprised appellant that by entering into the plea agreement, he was surrendering certain constitutional and statutory rights. Appellant assured the trial court that he understood the nature of these rights and that he knowingly and voluntarily waived them. Appellant indicated that he was pleading guilty on his own free will and that he had not been coerced or forced into entering the plea agreement. Consequently, this prong of the *Peterseim* factor was met.

{¶32} As to the third and fourth *Peterseim* factors, after appellant's counsel informed the trial court that appellant wished to withdraw his plea, the trial court afforded appellant a hearing on said motion. Appellant's attorney informed the trial court that appellant had indicated he did not have enough time with counsel to seriously consider the offer or the merits of his case. Appellant was then questioned by his counsel and stated that he did not "want to plead to something that [he] didn't do." However, he acknowledged that by entering into the plea agreement, his mandatory sentence was to

be reduced from a five-year mandatory sentence to a two-year mandatory sentence. Moreover, as previously discussed, appellant indicated that he was satisfied with his counsel's performance and, further, did not allege any deficiency in his counsel's performance on appeal. We therefore find that appellant was given a full and impartial hearing on his motion to withdraw his plea agreement. Additionally, the record indicates that the trial court, after hearing appellant's allegation, gave them full and fair consideration. Consequently, the third and fourth *Peterseim* factors were met. We hold the trial court did not abuse its discretion in overruling appellant's presentence motion to withdraw his guilty plea.

{¶33} For the foregoing reasons, appellant's assigned error is without merit. The judgment of the Ashtabula County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.