

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

| | | |
|----------------------|---|-------------------------------------|
| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-Appellee, | : | Case No. 08CA31 |
| | : | |
| vs. | : | Released: September 17, 2009 |
| | : | |
| TRISTA CAMPBELL, | : | <u>DECISION AND JUDGMENT</u> |
| | : | <u>ENTRY</u> |
| Defendant-Appellant. | : | |

APPEARANCES:

Michael D. Miller, Athens, Ohio, for Defendant-Appellant.

C. David Warren, Athens County Prosecuting Attorney, and George Reitmeier, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for Plaintiff-Appellee.

McFarland, J.:

{¶1} Defendant-Appellant, Trista Campbell, appeals the decision of the Athens County Court of Common Pleas. Appellant argues the trial court erred in denying her motion to withdraw her guilty plea and that she had ineffective assistance of counsel in the proceedings below. Because the trial court did not abuse its discretion in finding Appellant demonstrated no reasonable and legitimate basis for withdrawing her plea, we overrule her first assignment of error. Further, because Appellant is unable to demonstrate it was reasonably probable that, but for her trial counsel's

ineffective assistance, the trial court would have allowed her to withdraw the plea, we also overrule her second assignment of error. As such, both of Appellant's assignments of error are overruled and the decision of the trial court is affirmed.

I. Facts

{¶2} Appellant was indicted on two counts of unlawful sexual conduct with a minor, a fourth degree felony. At arraignment, she pleaded not guilty to the charges. As a result of a subsequent plea agreement, and following a Crim.R. 11 hearing, in which the trial court determined Appellant was acting knowingly, intelligently and voluntarily, Appellant changed her plea to guilty on both counts. As part of the plea agreement, the State agreed to recommend placement in a community based correction facility for six months, with a sex offender treatment plan, in lieu of jail time.

{¶3} Approximately three months later, and several days before her scheduled sentencing, Appellant filed a motion to withdraw her guilty pleas, claiming she had been coerced by her husband. After holding a hearing on the motion and giving Appellant and the State an opportunity to present their arguments, the trial court denied the motion and proceeded to sentencing. The court sentenced Appellant to five years of community control, ordered

her to complete the correctional center sex offender program and designated her as a Tier II sex offender. Following sentencing, Appellant timely filed the current appeal.

II. Assignments of Error

- I. DID THE TRIAL COURT ABUSED [sic] ITS DISCRETION WHEN IT FAILED TO ALLOW APPELLANT TO WITHDRAW HER PLEA[.]
- II. WAS THE DEFENDANT DENIED EFFECTIVE ASSISTANCE [sic] OF COUNSEL AS GAURANTEED [sic] BY THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND THE OHIO CONSTITUTION[.]

III. First Assignment of Error

{¶4} In her first assignment of error, Appellant argues the trial court erred in denying her motion to withdraw her pre-sentence guilty plea. As the basis of her motion, Appellant alleged she had been coerced into the plea by her husband.

{¶5} Under Crim.R. 32.1: “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.” While the general rule is that pre-sentence motions to withdraw a guilty plea should be “freely allowed and treated with liberality,” defendants have no absolute right to withdraw a plea prior to sentencing. *State v. Xie* (1992), 62 Ohio

St.3d 521, 526, 584 N.E.2d 715, quoting *Barker v. United States* (C.A.10 1978), 579 F.2d 1219, 1223. Before allowing such action, the trial court must determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. *Xie* at 527.

{¶6} “The decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court.” *Xie* at paragraph two of the syllabus. As such, a reviewing court may not reverse a trial court’s decision absent an abuse of this discretion. An abuse of discretion is more than an error of judgment. In order for a reviewing court to find an abuse of discretion, the trial court’s decision must be “unreasonable, arbitrary or unconscionable.” *Xie* at 527, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. When an appellate court applies this standard, it can not substitute its judgment for that of the trial court. *State v. Jeffers*, 4th Dist. No. 08CA7, 2009-Ohio-1672, at ¶12; *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

{¶7} Further, in determining whether a trial court abuses its discretion in denying a motion to withdraw a pre-sentence guilty plea, we consider the following factors: “(1) whether the accused was represented by highly competent counsel, (2) whether the accused was given a full Crim.R.

11 hearing before entering the plea, (3) whether a full hearing was held on the withdrawal motion, and (4) whether the trial court gave full and fair consideration to the motion.” *State v. McNeil* (2001), 146 Ohio App.3d 173, 176, 765 N.E.2d 884, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 214, 428 N.E.2d 863. Other considerations include: “(1) whether the motion was made within a reasonable time; (2) whether the motion set out specific reasons for the withdrawal; (3) whether the accused understood the nature of the charges and the possible penalties; and (4) whether the accused was perhaps not guilty or had a complete defense to the charges.” *McNeil*, citing *State v. Fish* (1995), 104 Ohio App.3d 236, 240, 661 N.E.2d 788. Finally, a change of heart or mistaken belief about the guilty plea is not a reasonable basis requiring a trial court to permit the defendant to withdraw the plea. *State v. Lambros* (1988), 44 Ohio App.3d 102, 103, 541 N.E.2d 632.

{¶8} In the case sub judice, Appellant’s memorandum in support of the motion consisted only of the statement that “[t]he Defendant states that her husband, who she is now divorcing, forced her to enter her guilty plea.” During the hearing on the motion to withdraw the plea, the trial court gave both Appellant and the State a full opportunity to present their arguments. Appellant’s counsel stated that, a week prior, Appellant requested that he file a motion to withdraw her plea. Counsel then simply restated that “she felt

that she was coerced into entering that plea by her soon to be ex-husband.” This was the entirety of Appellant’s argument. Appellant neither testified about the alleged coercion nor provided any evidence in support of the motion. After hearing the State’s arguments against withdrawing the plea, including that the victim had already been informed that he would not be required to testify, the trial court denied Appellant’s motion.

{¶9} As the trial court noted, a review of Appellant’s guilty plea demonstrates she entered that plea knowingly, intelligently, and voluntarily. During the thorough Crim.R. 11 hearing, the trial court asked Appellant if she had had a chance to read the plea and discuss it with counsel, if her counsel had answered her questions to her satisfaction, and if she had signed the form voluntarily while understanding the consequences. To each of these questions, Appellant answered, “Yes.” The court then asked Appellant if anyone threatened, forced or in any way caused her to plead guilty against her will. Appellant answered, “No.”

{¶10} As previously stated, besides the unsubstantiated, non-specific and very brief statement that she had been coerced by her husband, Appellant presented no evidence of any kind to justify the withdraw of her guilty plea. While a pre-sentence motion to withdraw a guilty plea is to be granted “liberally and freely,” a defendant must present a reasonable and

legitimate basis for the motion. Under the circumstances of the case sub judice, we are unable to find that the trial court abused its discretion in determining Appellant failed to do so. Accordingly, Appellant's first assignment of error is overruled.

IV. Second Assignment of Error

{¶11} Appellant's second assignment of error is closely related to her first. She argues she had ineffective assistance of counsel in that her trial counsel submitted her motion to withdraw her guilty plea without providing adequate evidence of the alleged coercion.

{¶12} In order to establish ineffective assistance of counsel, an appellant must show that counsel's representation was both deficient and prejudicial. *In re Sturm*, 4th Dist. No. 05CA35, 2006-Ohio-7101, at ¶77; *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052. Deficient representation means counsel's performance was below an objective standard of reasonableness. *Id.* To show prejudice, an appellant must show it is reasonably probable that, except for the errors of his counsel, the proceeding's outcome would have been different. *Id.*

{¶13} We have stated that "[a] reviewing court when addressing an ineffective assistance of counsel claim, should not consider what, in hindsight, may have been a more appropriate course of action." *State v.*

Wright, 4th Dist. No. 00CA39, 2001-Ohio-2473, at *22. Instead, reviewing courts must be highly deferential. *Id.* Further, “a reviewing 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.’” *Id.*, citing *Strickland*.

{¶14} Appellant contends her trial counsel was ineffective because he should have “submitted affidavits, testimony and/or exhibits to justify the Appellant’s motion.” Appellant also states her trial counsel should have “brought forward case law to back up Appellant’s contention that she was entitled to withdraw her previous change of plea.” For the following reasons, we do not find Appellant’s argument persuasive.

{¶15} As the State indicates in its brief, Appellant does not identify the affidavits, testimony or other evidence she claims her trial counsel should have introduced. Further, if such evidence exists, Appellant has failed to produce it for purposes of this appeal and it is not within the record of the proceedings below. In lieu of providing such evidence, Appellant simply argues that if trial counsel would have preformed as required, the trial court would have allowed Appellant to withdraw her plea. In the

absence of any evidence supporting this position, such an argument amounts to mere speculation.

{¶16} To maintain her ineffective assistance of counsel argument, Appellant must demonstrate it was reasonably probable that, but for her counsel's errors, the trial court would have granted her motion to withdraw her plea. Because she fails to do so, her second of assignment of error is overruled.

V. Conclusion

{¶17} In our view, neither of Appellants assignments of error have merit. The first fails because she presented no reasonable and legitimate basis for withdrawing her guilty plea. The second fails because she is unable to demonstrate that, but for her trial counsel's errors, the trial court's decision would have been otherwise. Accordingly, both assignments of error are overruled and the decision of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.