[Cite as *State v. Sarver*, 2018-Ohio-2796.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case Nos. 17CA27 17CA28
vs.	:	17CA29
AARON J. SARVER,	:	
Defendant-Appellant.	:	DECISION AND JUDGMENT ENTRY

APPEARANCES:

Angela Miller, Jupiter, Florida, for Appellant.[1]

Kevin Rings, Washington County Prosecuting Attorney, and Nicole Tipton Coil, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for Appellee.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED:6-27-18
ABELE, J.

{¶ 1} This is an appeal from a Washington County Common Pleas Court judgment of conviction and sentence. Aaron J. Sarver, defendant below and appellant herein, assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "APPELLANT'S GUILTY PLEA WAS OBTAINED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND CRIM.R. 11(C)."

[1] Different counsel represented appellant during the trial court proceedings.

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN OVERRULING SARVER'S MOTION TO WITHDRAW HIS GUILTY PLEA."

{¶ 2} The present appeal arises out of two Washington County grand jury indictments and a bill of information that collectively charged appellant with six offenses: (1) illegal cultivation of marijuana in violation of R.C. 2925.04(A), a second-degree felony; (2) breaking and entering in violation of R.C. 2911.13(B), a fifth-degree felony; (3) complicity to aggravated burglary in violation of R.C. 2923.03(A)(2) and 2911.11(A)(2), a first-degree felony; (4) complicity to robbery in violation of R.C. 2923.03(A)(2) and 2911.02(A)(3), a third-degree felony; (5) possession of drugs in violation of R.C. 2925.11(A), a fifth-degree felony; and (6) trafficking in drugs in violation of R.C. 2925.11(A), a fourth-degree felony. Appellant and the state later entered into a plea agreement.

{¶ 3} Under the plea agreement, appellant agreed to plead guilty to (1) an amended charge of third-degree felony illegal cultivation of marijuana; (2) third-degree felony complicity to robbery; (3) fifth-degree felony drug possession; and (4) fourth-degree felony drug trafficking, and the state agreed to dismiss the remaining counts. The written plea agreements notified appellant of the maximum prison terms that apply to each offense and further recited that no promises were made, except as documented in the written plea agreements.

{¶ 4} At the change-of-plea hearing, the trial court reviewed appellant's written plea agreements and questioned appellant regarding his decision to plead guilty. Appellant indicated that he had discussed the matter with his trial counsel and that counsel answered appellant's questions and concerns. Appellant also stated that he understood that pleading guilty waived

various constitutional rights, including his right to a jury trial, to cross-examine witnesses against him, to have compulsory process, and to have the state prove his guilt beyond a reasonable doubt. The court asked appellant if he understood that the combined maximum prison term for the offenses is eight and one-half years in prison: "So do you understand that the maximum possible penalties could be up to eight-and-a-half years in prison * * *?" Appellant responded, "I do." The court additionally questioned appellant whether he did not understand anything about the plea proceeding. Appellant stated: "Everything's crystal clear, Your Honor."

{¶ 5} The trial court next reviewed the written plea agreements. The court pointed out that under the plea agreements, the state agreed to dismiss two of the charges: breaking and entering, and complicity to aggravated burglary. The state further agreed to recommend that appellant consecutively serve the following prison terms: (1) thirty-six months for illegal cultivation of marijuana; (2) thirty-months for complicity to robbery; and (3) concurrent twelve-and eighteen-month terms for drug possession and drug trafficking, respectively. The court then indicated that "in total," appellant would "receive seven years in prison." The court asked the parties if the court had accurately recited the terms of the plea agreement. Appellant's counsel responded: "That–that is our agreement, but also pending the results of the pre-sentence investigation."

{¶ 6} As a follow-up to defense counsel's statement, the court advised appellant that it would review a pre-sentence investigation report (PSI) to "find out a little more information about [appellant]." Appellant stated: "A little history, yes. Yes, Your Honor." The following colloquy ensued:

The Court: So, I mean, there's always a possibility that I –I go down for

penalties--.

The Defendant: And it gets worse.

The Court: -- but if I go up, if I say, wait, this is crazy, you got much worse penalty or criminal history than anybody thought—

The Defendant: I totally understand.

The Court: -- I would give you the opportunity, probably to withdraw your plea and we go from there.

The Defendant: Absolutely.

The Court: You understand?

The Defendant: I understand that entirely, Your Honor.

{¶ 7} The trial court next asked appellant whether any threats or promises were made that have not been discussed. Appellant stated, "[n]o." Later during the change-of-plea hearing, the court stated: "Okay. I'm about to accept your plea of guilty, and when I do, it's almost impossible for you to withdraw it, but you can tell me right now, you want a trial, or do you want me to accept your guilty pleas?" Appellant responded: "I want you to accept the guilty pleas." The court thus found that appellant voluntarily, knowingly, and intelligently entered his guilty pleas, ordered a PSI, and set the matter for sentencing.

{¶ 8} At the start of the sentencing hearing, however, appellant's counsel indicated that appellant wished to withdraw his guilty plea. Appellant addressed the court and explained:

> Well, it was stipulated when I came here that, you know, it was an open ended agreement that if any reason when I talked to my wife and discussed it, that I should be able to withdraw my plea right then and there. And now he's saying that I – I'm still going to have like get all this to happen and like that didn't really get recorded on the record and stuff. And I don't comprehend it at all.
>
> I feel like he's saying, basically, he was just throwing fluff over my eyes, to blind me from what's really going on, because it said—I mean, I heard him say it, you say it, and everybody say when I was at court, that I could withdraw at any moment when I – if I felt that there was any kind of wrong or not, you know, if it's – if it's not how I was feeling it was going to go when I was speaking to my wife. I can't do years. I mean, I have a family. I got kids. And he's saying seven years? I don't comprehend that. I can't do that. I can't.
>
> And – and I had it sit [sic] there on recording and everything, where it says, I can withdraw, under any circumstance, I can withdraw. And now he's

saying I can't. How does that work?

The court interjected: "If there's – somebody said you can withdraw your plea—." Appellant continued:

> Yeah, right here when we did that sentencing [sic] and all that, it was stated right then and there by all of us, that I could withdraw that plea at any moment I felt bo—bogused [sic] or anything. If I felt uncomfortable with it, or that I don't comprehend it, that I can withdraw it. It's on the recording, I guarantee you, all of that is. And – and now, he's saying I can't, and it just blows my mind that something like that, can just be so * * *
>
> * * * blatant but then it's not there, like it's – it's – it's felonious in itself.

The court indicated that it believed appellant was referring to the court's statement at the plea hearing that once the court accepted his guilty plea "it's almost impossible for you to withdraw it * * * but you can tell me right now you want to have a trial or accept your guilty plea." Appellant responded:

> No, before I even stepped in this courtroom, I – I discussed it with this man for over an hour about that ability to withdraw my plea, and he said, on normal circumstances, it's almost impossible, but it is stipulated in this. He said, it is not the regular, that it is outside of that box, and that it is stipulated that I can withdraw at any moment-- * * * that I feel uncomfortable with the outcome or the – the underlining (sic) circumstances of that situation.

{¶ 9} The trial court explained that it did not "believe that to be true," but stated that appellant would have a right to appeal and request a transcript of the hearing. The court thus denied appellant's motion to withdraw his guilty plea.

{¶ 10} With respect to sentencing, appellant's counsel asked the court to impose a four-year prison term so appellant could seek judicial release. Appellant interjected: "That ain't nothing that we discussed." The court allowed appellant to further explain, and appellant stated:

> I apologize. I feel like I was blinded entirely during this. This is not what I discussed with this man or anybody during any of this.
>
> I do need rehab. I – I've done a lot of unjustified things in my life, and it's all because I – I crave a substance that's illegal in America. And I'm not a bad person. I don't do nothing [sic] wrong. I'm supposed to be going from here and meeting my daughter and going hiking in the woods.
>
> I don't – I just thought I was going to be able to withdraw this plea. I didn't know I was going to do four years. It was so clearly spoken to me, that it was just calm and clear and – and nothing to worry about, and that if anything, I talked to my wife – she's working right now, you know, and she don't [sic] get to come here, because she's working – and I go back here and I talk to her and I tell her these things and now she's just going to be blindsided and I – I – we was [sic] already trying to set up a drug rehab to – the one that will suit me properly. I got a small company that I run and I work at a mechanic shop. She works full time.
>
> I have three kids that's – that's 16, 14, and 12. And I'm their dad, man, and I can't go the last of their childhood in a prison with more drugs than there is on the streets. That doesn't teach me anything, except for how to be a criminal. It doesn't punish me; it punishes my kids. It don't. I've done it a thousand times in my life. It is – it is just not the proper fit and I thought that it was all stated so clearly last time, that that was what – what we're saying right now, was not going to even happen at all.
>
> And now it's like totally backwards and if – if I can't withdraw my plea, if anything, can I continue this in some – like for a week, so I can discuss with my wife the outcome of this situation and try to embrace [sic] for the – the – the outcome? Because I had no idea that it was going to go this way at all, completely and entirely.

{¶ 11} The trial court then noted that appellant signed written plea agreements setting forth the offenses to which appellant agreed to plead guilty and the state's recommended sentences. The court stated: "So you knew at that change of plea, that you were going to be getting seven years * * * in prison." Appellant responded:

> No, he said that – that this prehistory thing, would maybe stipulate a rehab or some sort of other judgment beside that, and that was the reason for the – the open end on that, that if some reason you decide, well, I'm just a bad person, seven years slammer, I can go, whoa, whoa, whoa, then I don't want to say that, I'm no longer pleading guilty. And that's how it was all explained clearly to me.

* * * *

{¶ 12} The trial court noted that it had read the plea agreements in open court during the change-of-plea hearing. Appellant indicated that his trial counsel told appellant to accept the plea offer and "said this history thing, we'll stipulate this, and if any reason that the history thing doesn't --." The court stated, "All right," and proceeded with the sentencing hearing.

{¶ 13} At the conclusion of the hearing, the court explained that appellant's sentence "was supposed to be an agreed disposition. As stated at the change of plea hearing, [appellant was] supposed to get seven years prison. I met with both counsel prior to coming into the hearing, reviewed the PSI, and Defense Counsel convinced the Court to downgrade that from a seven year sentence to a five year sentence."

{¶ 14} On September 22, 2017, the trial court denied appellant's motion to withdraw his guilty pleas and imposed sentence. The court sentenced appellant to serve (1) twenty-four months in prison for second-degree felony illegal cultivation of marijuana;[2] (2) six months in prison for fifth-degree felony drug possession; (3) twelve months in prison for fourth-degree

[2] The written plea agreement indicates that appellant agreed to plead guilty to an amended charge of third-degree, not second-degree, felony illegal cultivation of marijuana. Additionally, at the sentencing hearing the trial court referred to the offense as a third-degree felony. The court's sentencing entry, however, recites that appellant was found guilty of second-degree felony illegal cultivation of marijuana. Moreover, the court's entry memorializing appellant's guilty plea indicates that appellant entered a guilty plea to second-degree felony illegal cultivation of marijuana. We, however, believe that any error the court made in referring to the illegal cultivation of marijuana offense as a second-degree felony is a clerical error that the trial court retains authority to correct. *See generally State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30 (stating that trial court's inadvertent failure in sentencing entry to make findings discussed at sentencing hearing "does not render the sentence contrary to law; rather, such a clerical mistake may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court"); *State v. Higgins*, 9th Dist. Summit No. 27700, 2018-Ohio-476, 2018 WL 769387, ¶ 21 (noting that trial court could correct mislabeled fourth-degree felony offense to fifth-degree felony when court correctly described offense as fifth-degree felony during sentencing hearing).

felony drug trafficking; and (4) twenty-four months in prison for third-degree felony complicity to robbery. The court ordered the drug-offense-related prison terms to run concurrently to one another and ordered the remaining sentences to run consecutively to one another, as well as to the concurrent drug-offense-related prison terms. The court thus sentenced appellant to a total of five years in prison. This appeal followed.

I

{¶ 15} In his first assignment of error, appellant asserts that the trial court erred as a matter of law by accepting his guilty pleas. In particular, appellant claims that the record fails to show that appellant knowingly and intelligently entered his guilty pleas. Instead, appellant claims that the trial court's and trial counsel's allegedly inaccurate or confusing information regarding the potential penalties, and appellant's ability to withdraw his guilty pleas at a later date, rendered him unable to knowingly and intelligently plead guilty. Appellant insinuates that trial counsel informed him, off-the-record, that the court would likely sentence him to drug rehabilitation. Appellant observes that at the change-of-plea hearing, the court advised appellant that although a seven-year prison term was possible, but the results of the PSI could make a difference. The court further informed appellant that he could potentially withdraw his plea before sentencing if the PSI revealed more damaging information than expected. The court stated that if the PSI revealed that appellant had a "much worse * * * criminal history than anybody thought," the court "would give [appellant] the opportunity, probably to withdraw your plea and we go from there." Appellant contends that he "was very confused given the information his attorney provided and the Court's statement about the ability to withdraw a plea." Appellant, in essence, claims that trial counsel made off-the-record assertions that the court

would impose a non-prison sanction, such as drug rehabilitation, and that if the results of the PSI indicated a prison term, then appellant could withdraw his plea.

{¶ 16} The state argues that the plea hearing transcripts plainly demonstrate that appellant was not confused at all about the potential penalties or his ability to withdraw his guilty plea at a later date. In fact, appellant admitted that "[e]verything [was] crystal clear." The state points out that appellant did not indicate during the plea hearing that he believed that the court would require him to enter a drug rehabilitation program as punishment, rather than sentence him to prison. Furthermore, the state asserts, appellant clearly stated that no one had made any promises in exchange for his guilty pleas. According to the state, these circumstances manifestly show that appellant knowingly, intelligently, and voluntarily entered his guilty pleas.

{¶ 17} Generally, a guilty plea constitutes a complete admission of guilt and operates as a waiver of non-jurisdictional defects in the proceedings. *See* Crim.R. 11(B)(1); *see, e.g., United States v. Broce,* 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed .2d 92 (1989); *State v. Obermiller,* 147 Ohio St.3d 175, 2016–Ohio–1594, 63 N.E.3d 93, ¶ 55; *State v. Fitzpatrick,* 102 Ohio St.3d 321, 2004–Ohio–3167, 810 N.E.2d 927, ¶ 78, quoting *Menna v. New York,* 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195, fn. 2 (1975) ("'[A] guilty plea * * * renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established."). A guilty plea does not, however, preclude a defendant from challenging the trial court's determination that the defendant knowingly, intelligently, and voluntarily entered the plea: "'When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea

unconstitutional under both the United States Constitution and the Ohio Constitution.'" *State v. Veney*, 120 Ohio St.3d 176, 2008–Ohio–5200, 897 N.E.2d 621, ¶ 7, quoting *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996); *accord State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶ 40; *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 9. "It is the trial court's duty, therefore, to ensure that a defendant 'has a full understanding of what the plea connotes and of its consequence.'" *Montgomery* at ¶ 40, quoting *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

{¶ 18} An appellate court that is evaluating whether a criminal defendant knowingly, intelligently, and voluntarily entered a guilty plea must independently review the record to ensure that the trial court complied with the constitutional and procedural safeguards contained within Crim.R. 11. *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014–Ohio–5601, ¶ 36; *State v. Eckler*, 4th Dist. Adams No. 09CA878, 2009-Ohio-7064, 2009 WL 5199324, ¶ 48; *accord Veney* at ¶ 13 ("Before accepting a guilty or no-contest plea, the court must make the determinations and give the warnings required by Crim.R. 11(C)(2)(a) and (b) and notify the defendant of the constitutional rights listed in Crim.R. 11(C)(2)(c)."); *State v. Kelley*, 57 Ohio St.3d 127, 128, 566 N.E.2d 658 (1991) ("When a trial court or appellate court is reviewing a plea submitted by a defendant, its focus should be on whether the dictates of Crim.R. 11 have been followed."); *State v. Shifflet*, 2015–Ohio–4250, 44 N.E.3d 966 (4th Dist.), ¶ 13, citing *State v. Davis*, 4th Dist. Scioto Nos. 13CA3589 and 13CA3593, 2014–Ohio–5371, 2014 WL 6876680, ¶ 31, citing *State v. Smith*, 4th Dist. Washington No. 12CA11, 2013–Ohio–232, 2013 WL 314369, ¶ 10. Pursuant to Crim.R. 11(C)(2), a trial court should not accept a guilty plea without first addressing the defendant personally and:

> (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.
>
> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

Thus, before accepting a guilty plea, a "trial court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses." *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), paragraph one of the syllabus*; see also* Crim.R. 11(C)(2)(c). "In addition to these constitutional rights, the trial court must determine that the defendant understands the nature of the charge, the maximum penalty involved, and the effect of the plea." *Montgomery* at ¶ 41.

{¶ 19} The purpose of Crim.R. 11(C) is "to convey to the defendant certain information so that he can make a voluntary and intelligent decision whether to plead guilty." *Ballard,* 66 Ohio at 479–80. Although literal compliance with Crim.R. 11(C) is preferred, it is not required. *State v. Clark,* 119 Ohio St.3d 239, 2008–Ohio–3748, 893 N.E.2d 462, ¶ 29, citing *State v. Griggs,* 103 Ohio St.3d 85, 2004–Ohio–4415, 814 N.E.2d 51, ¶ 19. Thus, a reviewing court ordinarily will affirm a trial court's acceptance of a guilty plea if the record reveals that the trial court engaged in a meaningful dialogue with the defendant and explained, "in a manner reasonably intelligible to that defendant," the consequences of pleading

guilty. *Ballard* at paragraph two of the syllabus; *accord State v. Barker*, 129 Ohio St.3d 472, 2011–Ohio–4130, 953 N.E.2d 826, ¶ 14; *Veney* at ¶ 27.

{¶ 20} Moreover, a defendant who seeks to invalidate a plea on the basis that the trial court partially, but not fully, informed the defendant of his non-constitutional rights must demonstrate a prejudicial effect. *Veney* at ¶ 17; *Clark* at ¶ 31. To demonstrate that the defendant suffered prejudice as a result of the court's failure to fully inform the defendant of his non-constitutional rights, a defendant must illustrate that he would not have pled guilty but for the trial court's failure. *Clark* at ¶ 32, quoting *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990) (stating that "[t]he test is 'whether the plea would have otherwise been made'"). When, however, a trial court completely fails to inform a defendant of non-constitutional rights, "the plea must be vacated." *Id.* "'A complete failure to comply with the rule does not implicate an analysis of prejudice.'" *Id.*, quoting *State v. Sarkozy*, 117 Ohio St.3d 86, 2008–Ohio–509, 881 N.E.2d 1224, ¶ 22. Additionally, when a defendant seeks to invalidate a plea on the basis that the trial court failed to properly inform the defendant of his constitutional rights, the "plea is invalid." *Veney* at ¶ 30; *Nero; see Clark* at ¶ 31, quoting *State v. Griggs*, 103 Ohio St.3d 85, 2004–Ohio–4415, 814 N.E.2d 51, ¶ 12 (stating that the plea is invalid "'under a presumption that it was entered involuntarily and unknowingly.'").

{¶ 21} In the case *sub judice*, appellant does not claim that the trial court failed to comply with Crim.R. 11(C). Instead, appellant argues that he did not knowingly and intelligently enter his guilty pleas because he apparently mistakenly believed that the trial court would sentence him to complete a drug rehabilitation program, rather than prison. He also contends that he was confused about his ability to withdraw his guilty pleas at a later date.

{¶ 22} This court has recognized that a plea agreement generally should be rescinded "'if the parties and the trial court have made a mutual mistake regarding the terms of a plea agreement.'" *State v. Moore,* 4th Dist. Adams No. 13CA965, 2014–Ohio–3024, ¶ 16, quoting *State v. Johnson,* 182 Ohio App.3d 628, 2009–Ohio–1871, 914 N.E.2d 429, ¶ 14 (4th Dist.). We have also stated: "When a defendant's guilty plea is induced by erroneous representations as to the applicable law * * * the plea is not knowingly, intelligently, and voluntarily made." *State v. Bryant,* 4th Dist. Meigs No. 11CA19, 2012–Ohio–3189, ¶ 8; *accord State v. Davner*, 8th Dist. Cuyahoga No. 104745, 2017-Ohio-8862, 2017 WL 6055510, ¶ 57 ("when an erroneous understanding of the applicable law induces a defendant's guilty plea, the plea generally is not entered knowingly and intelligently").

{¶ 23} In the case at bar, after our review of the transcript of the change of plea hearing, we do not believe that it is apparent from the record that a mutual mistake occurred among the parties and the trial court. During the plea hearing, the trial court fully questioned appellant regarding his guilty pleas and the consequences of pleading guilty. The trial court asked appellant whether he understood that the combined maximum term of imprisonment for the offenses is eight and one-half years, and that the state recommended a seven-year prison term. Appellant stated that he understood. Additionally, appellant signed three separate written plea agreements that detailed the maximum penalties for each offense and that recited the state's recommended sentence for each offense. During the plea hearing, appellant did not express any confusion regarding potential prison terms, did not give the court any indication that appellant believed that he would not be going to prison, and did not indicate that he believed that the court would sentence him to a drug rehabilitation program. Moreover, the court asked appellant

whether any promises had induced his guilty plea, and appellant responded negatively. Appellant's written plea agreements likewise indicated that no one had made any promises to appellant in exchange for his guilty pleas.

{¶ 24} We therefore believe that the record plainly demonstrates that the trial court fully questioned appellant regarding his decision to plead guilty, explained the rights that he affirmatively waived, explained the consequences of pleading guilty, and explained the maximum sentence that he could receive. The plea hearing transcript also shows that appellant was not, in fact, confused or mistaken about the potential prison terms the court could impose or his plea-withdrawal rights. Instead, appellant informed the court, on multiple occasions, that he completely understood the plea proceedings, did not have any questions, and found "everything * * * crystal clear." Appellant's unspoken, subjective belief as to the sentence that the court would impose does not render his plea unknowing or unintelligent. *See State v. Gomez*, 7th Dist. Mahoning No. 17 MA 0001, 2017-Ohio-9072, 2017 WL 6450861, ¶ 14 (determining that defendant's plea not invalid when defendant had not displayed any signs of confusion at plea hearing but later expressed "surprise at the sentence"); *State v. Johnson*, 11th Dist. Geauga No. 2016-G-0093, 2017-Ohio-293, 2017 WL 2255613, ¶ 10 (rejecting defendant's claim that "he was misled or confused as to the potential penalties he faced" when defendant's "written guilty plea set[] forth the potential penalty range for each of the offenses," "state[d] that no promises were made to him that are not in the written plea agreement," and advised defendant that the maximum prison term was twenty-six years). Under these circumstances, we cannot conclude that the trial court wrongly determined that appellant knowingly, intelligently, and voluntarily entered his plea.

{¶ 25} Furthermore, even if trial counsel did make some comments to appellant about the potential sentence the trial court would impose, the record does not contain any evidence as to the content of those comments. The record does reveal, however, that before the sentencing hearing, the court met with the parties and that appellant's counsel convinced the trial court to impose a five-year prison term, rather than the seven-year prison term the state recommended. When the court mentioned this presentencing-hearing discussion during the sentencing hearing, the court did not suggest that appellant's trial counsel had operated under the assumption that the trial court would sentence appellant only to drug rehabilitation. Moreover, none of the parties made any statement during the plea hearing that would have led appellant to believe that the court would not impose a prison term, but instead would only require appellant to complete a drug rehabilitation program. To the contrary, the trial court fully informed the appellant about the consequences or ramifications of his guilty pleas and pointed out both the maximum prison term that the court could impose–eight and one-half years–as well as the state's recommended prison term–seven years. Once the court made appellant aware of the potential prison terms, appellant could have chosen to forego his guilty pleas and proceed to trial. Instead, armed with knowledge that the court could impose up to an eight-and-one-half-year prison term, appellant chose to plead guilty. Once again, appellant's unspoken, subjective belief that the court would only require him to complete a drug rehabilitation program is not reflected in the record. Consequently, we have no basis to conclude that appellant's guilty plea was unknowing or unintelligent on the basis that he failed to comprehend the penalties he faced. *See generally State v. Davner*, 8th Dist. Cuyahoga No. 104745, 2017-Ohio-8862, 2017 WL 6055510, ¶¶ 52-54 (determining that defendant's "pleas were not rendered unknowing, unintelligent or involuntary

based solely on his trial counsel's faulty prediction of his sentences" when record showed that trial court fully informed defendant of potential consequences); *State v. Vinson*, 2016-Ohio-7604, 73 N.E.3d 1025 (8th Dist.), ¶ 32, quoting *State v. Sally*, 10th Dist. Franklin No. 80AP–850, 1981 WL 3250, *4 (June 11, 1981) ("'A good faith but erroneous prediction of sentence by defense counsel does not render the plea involuntary.'").

{¶ 26} Additionally, we do not agree with appellant that the trial court's discussion about appellant's ability to withdraw his guilty pleas at a later date rendered appellant's guilty pleas unknowing or unintelligent. The trial court informed appellant that if the PSI revealed more damaging information than expected, such that the court would be inclined to impose a harsher sentence than the state's recommended seven-year prison sentence, then it might allow appellant to withdraw his guilty pleas. The court did not state that appellant would have an absolute right to withdraw his guilty pleas. In fact, the court advised appellant that once he entered his guilty pleas, withdrawing them would be "almost impossible."[3] When the court asked appellant whether he understood the court's statements regarding his ability to withdraw his pleas at a later date, appellant stated that he understood "entirely." Furthermore, the one condition that the court cited as a potential factor that might allow appellant to withdraw his guilty pleas (the PSI revealing unexpectedly damaging information that would indicate a harsher prison term) did not arise. Rather, the opposite occurred–the court imposed a shorter prison term than the seven- and eight-and-one-half-year terms that had been discussed during the plea hearing. We therefore do

[3] We express no opinion concerning the correctness of the court's statement that once appellant entered his guilty pleas, withdrawing them would be "almost impossible." We do note, however, that generally a trial court should freely and liberally grant a presentence motion to withdraw a guilty plea and that a court may grant a postsentence motion to withdraw a guilty plea upon a finding of manifest injustice. *See generally* Crim.R. 32.1; *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992).

not believe that the record shows that appellant failed to appreciate his ability to withdraw his guilty pleas at a later date so as to render his guilty pleas less than knowing and intelligent.

{¶ 27} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

{¶ 28} In his second assignment of error, appellant asserts that the trial court abused its discretion by overruling his motion to withdraw his plea. Appellant contends that he believed that the court would send him to a drug rehabilitation program, not prison.

{¶ 29} Initially, we note that trial courts possess discretion to decide whether to grant or deny a presentence motion to withdraw a guilty plea. *E.g., State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992), paragraph two of the syllabus. Thus, absent an abuse of discretion, appellate courts will not disturb a trial court's ruling concerning a motion to withdraw a guilty plea. *Id.* at 527. An "abuse of discretion" means that the court acted in an "'unreasonable, arbitrary, or unconscionable'" manner or employed "'a view or action that no conscientious judge could honestly have taken.'" *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23. Moreover, a trial court generally abuses its discretion when it fails to engage in a "'sound reasoning process.'" *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). Additionally, "[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

B

CRIM.R. 32.1

{¶ 30} Crim.R. 32.1 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."[4] Crim.R. 32.1 thus permits a defendant to file a motion to withdraw a guilty plea before sentence is imposed. While trial courts should "freely and liberally" grant a presentence motion to withdraw a guilty plea, a defendant does not "have an absolute right to withdraw a guilty plea prior to sentencing." *Xie*, 62 Ohio St.3d at 527; *accord State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 57; *State v. Spivey*, 81 Ohio St.3d 405, 415, 692 N.E.2d 151 (1998); *State v. Wolfson*, 4th Dist. Lawrence No. 02CA28, 2003-Ohio-4440, 2003 WL 21995244, ¶ 14. Instead, "[a] trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Xie* at paragraph one of the syllabus; *accord State v. Boswell*, 121 Ohio St.3d 575, 906 N.E.2d 422, 2009-Ohio-1577, ¶ 10, superseded by statute on other grounds as stated in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958.

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[4] Appellant moved to withdraw his guilty pleas before the court imposed sentence, but after appellant had learned what sentence the court was likely to impose. Some court have held that "[w]hen a defendant discovers before sentencing the particular sentence a trial court intends to impose, * * * a pre-sentence motion to vacate his plea ordinarily should be treated as a post-sentence motion. This is so because a defendant cannot test the sentencing waters and then move to vacate his plea just before sentencing if he receives an unpleasant surprise." *State v. Williams*, 2nd Dist. Montgomery No. 26635, 2016-Ohio-5655, 2016 WL 4594765, ¶ 11, quoting *State v. Simpson*, 2d Dist. Montgomery No. 24266, 2011–Ohio–6181, ¶ 7.

In the case sub judice, appellant discovered immediately before the sentencing hearing the particular sentence that the trial court intended to impose. Thus, we question whether we should apply the more stringent "manifest injustice" standard when reviewing appellant's motion to withdraw his guilty pleas. Both appellant and the state, however, assert that the more liberal presentence standard applies. For this reason, we do not decide which standard we should apply but will instead apply the standard the parties have proposed.

{¶ 31} While a trial court possesses discretion to determine whether to grant or to deny a presentence motion to withdraw a guilty plea, it does not have discretion to determine if a hearing is required. *See Wolfson* at ¶ 15. Instead, a trial court has a mandatory duty to hold a hearing regarding a presentence motion to withdraw a guilty plea. *Xie* at paragraph one of the syllabus; *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, 2014 WL 7251568, ¶ 50; *State v. Burchett*, 4th Dist. Scioto No. 11CA3445, 2013-Ohio-1815, 2013 WL 1867629, ¶ 13; *State v. Davis*, 4th Dist. Lawrence No. 05CA9, 2005-Ohio-5015, 2005 WL 2327600, ¶ 9; *Wolfson* at ¶ 15; *State v. Wright*, 4th Dist. Highland No. 94CA853, 1995 WL 368319 (June 19, 1995).

{¶ 32} In the case sub judice, appellant did not argue that the trial court failed to hold a hearing concerning his presentence motion to withdraw his guilty plea. We therefore do not address this issue. Instead, appellant contends that the trial court abused its discretion when it ruled on the merits of his motion.

{¶ 33} This court and others have identified nine factors that appellate courts should consider when reviewing a trial court's decision regarding a presentence motion to withdraw a guilty plea: (1) whether "highly competent counsel" represented the defendant; (2) whether the trial court afforded the defendant "a full Crim.R. 11 hearing before entering the plea"; (3) whether the trial court held "a full hearing" regarding the defendant's motion to withdraw; (4) "whether the trial court gave full and fair consideration to the motion"; (5) whether the defendant filed the motion within a reasonable time; (6) whether the defendant's motion gave specific reasons for the withdrawal; (7) whether the defendant understood the nature of the charges, the possible penalties, and the consequences of his plea; (8) whether the defendant is "perhaps not

guilty or ha[s] a complete defense to the charges"; and (9) whether permitting the defendant to withdraw his plea will prejudice the state. *State v. McNeil*, 146 Ohio App.3d 173, 176, 765 N.E.2d 884 (1st Dist. 2001), citing *State v. Peterseim*, 68 Ohio App.2d 211, 214, 428 N.E.2d 863 (8th Dist. 1980), and *State v. Fish*, 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1st Dist. 1995); *e.g., State v. Jones*, 10th Dist. Franklin No. 15AP-530, 2016-Ohio-951, 2016 WL 916609, ¶ 14; *State v. Campbell*, 4th Dist. Athens No. 08CA31, 2009-Ohio-4992, ¶ 7, 2009 WL 3042045; *State v. Harmon*, 4th Dist. Pickaway No. 04CA22, 2005-Ohio-1974, 2005 WL 983245, ¶ 22. "'Consideration of the factors is a balancing test, and no one factor is conclusive.'" *Jones* at ¶ 14, quoting *State v. Zimmerman*, 10th Dist. Franklin No. 09AP-866, 2010-Ohio-4087, ¶ 13, 2010 WL 3405746; *accord State v. Crawford*, 2nd Dist. Montgomery No. 27046, 2017-Ohio-308, 2017 WL 390253, ¶ 12. "The ultimate question is whether there exists a 'reasonable and legitimate basis for the withdrawal of the plea.'" *State v. Delpinal*, 2nd Dist. Clark Nos. 2015–CA–97 and 2015CA98, 2016Ohio5646, 2016 WL 4591376, 9, 2016 WL 4591376, quoting *Xie*, 62 Ohio St.3d at 527, 584 N.E.2d 715; *accord Crawford* at ¶ 12. A mere change of heart is not a legitimate and reasonable basis for the withdrawal of a plea. *E.g., Campbell* at ¶ 7; Harmon at ¶ 22.

{¶ 34} In the case sub judice, our review of the nine factors fails to suggest that the trial court abused its discretion by denying appellant's presentence motion to withdraw his guilty pleas. First, highly competent counsel represented appellant. Appellant's trial counsel engaged in plea negotiations with the state that resulted in the dismissal of two of the charged offenses, including the most serious offense, and a recommended prison term a year and one-half less than the potential maximum. Additionally, at the plea hearing, appellant expressed that he was

completely satisfied with trial counsel's performance and even described trial counsel as "absolutely wonderful."

{¶ 35} Second, the trial court afforded appellant a full Crim.R. 11 hearing before it accepted appellant's guilty pleas. The court engaged in a colloquy with appellant to ensure that he understood the constitutional and non-constitutional implications of pleading guilty.

{¶ 36} Third, the court gave appellant's oral motion to withdraw his guilty pleas full and fair consideration. The trial court allowed appellant ample opportunity to explain the reasons underlying his motion to withdraw his guilty pleas.

{¶ 37} Fourth, the trial court gave appellant's motion full and fair consideration. The court recognized appellant's claim that he believed that the court would not impose a prison term, but pointed out that during the plea hearing, the court specifically informed appellant that he could face up to eight and one-half years in prison and that the state recommended a seven-year prison term. The court additionally noted that although appellant apparently believed that he could withdraw his guilty pleas for any reason, the court did not recall such a discussion occurring during the plea hearing.

{¶ 38} Fifth, appellant seems to have filed the motion within a reasonable time. Appellant orally moved to withdraw his guilty pleas a little more than thirty days after he entered the pleas.

{¶ 39} Sixth, appellant cited specific reasons for requesting to withdraw his guilty pleas. He claimed that he failed to understand the potential penalties he faced and his ability to withdraw his guilty pleas at a later date.

{¶ 40} Seventh, despite appellant's post-plea hearing claims to the contrary, the record

fully reflects that appellant understood the possible penalties and the consequences of his plea. At the plea hearing, appellant did not equivocate. Rather, appellant indicated that he understood the potential prison terms he faced, the plea proceeding, and his ability to withdraw his guilty plea at a later date.

{¶ 41} Eighth, appellant has not suggested that he is "perhaps not guilty or ha[s] a complete defense to the charges."

{¶ 42} Ninth, permitting appellant to withdraw his plea would possibly prejudice the state by requiring the state to try appellant under three separate indictments. We note, however, that the state has not argued that it would suffer any prejudice "'beyond the ordinary impact of any defendant's subsequent withdrawal of a guilty plea.'" *State v. Howard*, 4th Dist. Scioto No. 16CA3762, 2017-Ohio-9392, 2017 WL 6813276, ¶ 26, quoting *State v. Harris*, 10th Dist. Franklin No. 09AP-1111, 2010-Ohio-4127, 2010 WL 3443173, ¶ 26.

{¶ 43} After considering all of the foregoing factors, we cannot conclude that the trial court's decision to deny appellant's motion to withdraw his guilty pleas constitutes an abuse of discretion. Appellant's statements during the plea hearing directly contradict the claims he now makes. Nothing in the record documents that anyone promised appellant that the court would not impose a prison sentence, but instead, would require appellant to complete a drug rehabilitation program.[5] Additionally, nothing in the record suggests that the trial court gave appellant carte blanche to withdraw his guilty pleas at a later date. Rather, the record indicates that appellant made a conscious decision to plead guilty in exchange for the dismissal of two of

[5] To the extent that appellant's assignment of error relies on matters outside the record, we cannot consider those matters on direct appeal. *See State v. Wolfson*, 4th Dist. Lawrence No. 02CA28, 2003-Ohio-4440, 2003 WL 21995244, ¶ 20.

the charged offenses and a recommended seven-year prison term. The court clearly advised appellant of the maximum prison term that the court could impose, as well as the state's recommended prison term. Had appellant believed that prison was not a possibility, he should not have informed the court that he understood the terms of the plea agreements and the maximum terms of imprisonment that the court could impose. Instead, appellant should have voiced his belief that the court would not impose a prison term but would only require him to complete a drug rehabilitation program.

{¶ 44} It appears, after our review of the record, that appellant has had a mere change of heart concerning his guilty plea. However, "'a change of heart after becoming aware of an imminent, unexpectedly harsh sentence does not entitle a defendant to withdraw his guilty plea.'" *State v. Mogle*, 2nd Dist. Darke No. 2013-CA-4, 2013-Ohio-5342, 2013 WL 6410270, ¶ 25, quoting *State v. McComb*, 2nd Dist. Montgomery No. 22570, 2008-Ohio-295, 2009 WL 161330, ¶ 9; *accord State v. Buell*, 10th Dist. Franklin No. 15AP-789, 2016-Ohio-2734, 2016 WL 1704316, ¶ 20; *State v. Lampson*, 10th Dist. Franklin No. 09AP-1159, 2010-Ohio-3575, 2010 WL 3011240, ¶ 14, quoting *State v. Brooks*, 10th Dist. No. 02AP44, 2002-Ohio-5794, ¶ 51; *State v. Wolfson*, 4th Dist. Lawrence No. 02CA28, 2003-Ohio-4440, 2003 WL 21995244, ¶ 18. Thus, "[a] defendant will not be permitted to withdraw his guilty plea merely because he received a harsher penalty than he subjectively expected." *State v. Conaway*, 4th Dist. Highland No. 94CR845, 1994 WL 655907, *3. Instead, "Ohio courts have consistently held that a change of heart is deemed insufficient to justify withdrawing a guilty plea, especially where the change of heart is based upon the defendant learning what sentence a court is going to impose." *State v. Glass*, 10th Dist. Franklin No. 04AP-967, 2006-Ohio-229, 2006 WL 164419, ¶ 37 (citations

omitted). Consequently, we do not believe that the trial court abused its discretion by denying appellant's motion to withdraw his guilty pleas.

{¶ 45} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

[Cite as *State v. Sarver*, 2018-Ohio-2796.]

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Washington 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 that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____

Peter B. Abele, Judge

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.