

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

State of Ohio, : Case No. 21CA19
Plaintiff-Appellee, :
v. : DECISION AND
 : JUDGMENT ENTRY
Roger D. Burress, :
Defendant-Appellant. : **RELEASED 8/16/2022**

APPEARANCES:

Steven H. Eckstein, Washington Court House, Ohio, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and Andrea M. Kratzenberg, Lawrence County Assistant Prosecuting Attorney, Ironton, Ohio, for appellee.

Hess, J.

{¶1} Roger D. Burress appeals his conviction for one count of possession of drugs. In his sole assignment of error, Burress contends that the trial court abused its discretion when it denied his pre-sentence motion to withdraw his guilty plea. Because the trial court's decision was not unreasonable, arbitrary, or unconscionable, we overrule the assignment of error and affirm the trial court's judgment.

I. FACTS AND PROCEDURAL HISTORY

{¶2} In October 2020, the Lawrence County grand jury indicted Burress on one count of possession of drugs in violation of R.C. 2925.11(A)(C)(11)(e) and one count of trafficking in drugs in violation of R.C. 2925.03(A)(2)(C)(9)(f), both first-degree felonies. As part of a plea agreement and jointly recommended sentence, Burress pleaded guilty to the drug possession charge in exchange for the dismissal of the drug trafficking charge.

Burress signed a statement acknowledging that he had confidence in his attorney, that his attorney explained his constitutional rights and what might happen if he pleaded guilty, the nature of the allegations against him, the elements of the charges, of the possible penalties including a sentence in a penal institution, that he and his attorney believed there was a factual basis for his plea of guilty, and that he had no competent evidence to offer to show that he was not guilty of the offenses charged. During the plea colloquy, the trial court explained each of the constitutional rights that Burress would be giving up with a guilty plea and Burress acknowledged that he understood them and voluntarily relinquished them. The trial court gave Burress information about the drug possession charge and possible penalties, and Burress told the court that he understood the nature of the charge, the possible penalties, the fact that a guilty plea was a complete admission to the allegations, and that the court was not bound by the agreed sentencing recommendation and could impose the maximum sentence prescribed by law. The trial court accepted the plea, found Burress guilty, and set the matter for a sentencing hearing on October 27, 2021.

{¶3} Two days before his sentencing hearing, Burress filed a motion to withdraw his guilty plea, “because he claims he is innocent and does not wish to plead guilty to something that he did not do.” The trial court held a hearing on Burress’s motion at which he claimed that he was not guilty, “I searched with my mind and – and everything, and I’m just not guilty.” Burress explained that he believed there was a witness in Florida who would allegedly exonerate him, though he did not know the witness’s full name. The trial court stated that the witness disclosure list filed by his attorney showed that this alleged witness was known to Burress prior to entering his guilty plea.

{¶4} The trial court denied the motion to withdraw, stating that there was no change in the facts, the witness that allegedly had exonerating testimony was known and identified in a witness disclosure prior to the change of plea hearing, and “what I’m finding this to be is a change of heart.” The trial court stated that it had considered all the factors relevant to a presentence motion to withdraw a guilty plea and had determined that this was a change of heart and denied the motion:

I am finding that * * * all the requirements * * * to have been addressed at this time, in that finding that the accused was represented by highly competent counsel. The accused was given a full Criminal 11 hearing before the Change of Plea. Uh, there has now been now a full hearing on the Withdraw Motion, and the trial court has gave [sic] full and fair consideration to the Motion but finds the Motion to be nothing more than but a change of heart. Additional factors, not required, but considerations the Court can make, whether the Motion was made within a reasonable time. I don’t find it was made within a reasonable time. Again, being filed the day before the sentencing hearing for issues that we are being now told that * * * went back to the beginning of October * * * none of these issues are different than what they existed prior to you changing your plea in the first place. Uh, the Motion did set out the specific reasons for the withdrawal, but there’s no indication at all whatsoever that if we wouldn’t have went forward with the trial that was originally scheduled, which was only vacated due to the fact that you admitted to committing these crimes and changed your plea, that we would’ve been in any different situation than we are right now.

The trial court sentenced Burress to the jointly recommended sentence of four to six years in prison.

II. ASSIGNMENT OF ERROR

{¶5} Burress presents one assignment of error:

The trial court abused its discretion in denying the Defendant-Appellant’s pre-sentence motion to withdraw his guilty plea.

III. LAW AND ANALYSIS

{¶6} Crim.R. 32.1 states: “A motion to withdraw a plea of guilty * * * may be made only before sentence is imposed * * *.” Although “a presentence motion to withdraw a

guilty plea should be freely and liberally granted,” “a defendant does not have an absolute right to withdraw a plea prior to sentencing.” *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). “ ‘The decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court’ and will not be reversed absent an abuse of that discretion.” *State v. McCoy*, 4th Dist. Gallia No. 19CA4, 2020-Ohio-3088, ¶ 12, quoting *Xie* at paragraph two of the syllabus. An “abuse of discretion” is “an unreasonable, arbitrary, or unconscionable use of discretion” or “a view or action that no conscientious judge could honestly have taken.” *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23.

{¶7} Nine factors we consider when reviewing a trial court’s ruling on a pre-sentence motion to withdraw a guilty plea are:

(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. (Brackets sic.)

State v. Howard, 2017-Ohio-9392, 103 N.E.3d 108, ¶ 24 (4th Dist.), quoting *State v. McNeil*, 146 Ohio App.3d 173, 176, 765 N.E.2d 884 (1st Dist.). “ ‘ ‘Consideration of the factors is a balancing test, and no one factor is conclusive.’ ’ ” *Id.*, quoting *State v. Jones*, 10th Dist. Franklin No. 15AP-530, 2016-Ohio-951, ¶ 14, quoting *State v. Zimmerman*, 10th Dist. Franklin No. 09AP-866, 2010-Ohio-4087, ¶ 13. “ ‘The ultimate question is whether there exists a “reasonable and legitimate basis for the withdrawal of the plea.’ ’ ”

” *Id.*, quoting *State v. Delpinal*, 2d Dist. Clark Nos. 2015-CA-97 & 2015-CA-98, 2016-Ohio-5646, ¶ 9, quoting *Xie* at 527. “A mere change of heart is not a legitimate and reasonable basis for the withdrawal of a plea.” *Id.*

{¶8} As to the first factor, the competency of trial counsel, Burress concedes that the trial court found that he was represented by highly competent counsel, that he “does a fantastic job” and is one of the few members of the Lawrence County Bar with his level of experience in higher level felony cases. However, Burress argues that he did not believe his attorney was communicating with witnesses on his behalf. He argues that this factor could weigh in his favor.

{¶9} As to the second, third, and fourth factors, Burress concedes he had a full Crim.R. 11 change-of-plea hearing and this factor does not weigh in his favor. He concedes that he had a full hearing on his motion to withdraw, but argues “the trial court did most of the speaking” and this could weigh in his favor. He also argues that although the court stated that it gave his motion full and fair consideration, “it appears the trial court is irritated * * * and had come to the hearing with the preconceived idea of denying it” because the trial court spoke twice as much as he did. He asserts that this could weigh in his favor. Upon review of the record, we find that all three of these factors weigh against Burress. The trial court gave him a full change-of-plea hearing, a full hearing on his motion to withdraw, and gave his motion full and fair consideration. Burress cites no place in the record to support his claim that the trial court was irritated or was otherwise unfair in its consideration of his motion. The fact that, as he alleges, “the trial court spoke twice as much as [Burress did] at the hearing,” is not evidence that the trial court gave less than a fair or full consideration of his motion.

{¶10} The fifth factor (whether the defendant filed the motion within a reasonable time) weighs against granting the motion to withdraw. “An ‘undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.’ ” *State v. Burke*, 4th Dist. Lawrence Nos. 19CA1 & 19CA2, 2019-Ohio-4744, ¶ 16, quoting *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, ¶ 14. Burress contends that the impetus for the motion to withdraw was his innocence. However, there was no event or newly discovered fact or witness that materialized between the time that he pleaded guilty and the time he filed his motion to withdraw his guilty plea. Thus, there was no reason his motion could not have been filed more than two days prior to the sentencing hearing. *See generally State v. Collins*, 2020-Ohio-3356, 155 N.E.3d 232, ¶ 26 (7th Dist.), quoting *State v. Perez*, 7th Dist. Mahoning No. 12 MA 110, 2013-Ohio-3587, ¶ 17 (“ ‘Generally, the timing of a motion to withdraw a plea presented on the day of sentencing is treated as being unreasonable’ ”). We find this factor does not weigh in Burress’s favor.

{¶11} With regard to the sixth factor (whether the defendant’s motion gave specific reasons for the withdrawal), the fact that Burress provided specific reasons for why he wanted to withdraw his guilty plea weighs in favor of granting the motion to withdraw. However, “[w]hen reviewing a trial court’s ruling on a motion to withdraw a plea, ‘the good faith, credibility and weight of the movant’s assertions in support of the motion are matters to be resolved by that court.’ ” *Burke* at ¶ 17, quoting *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph two of the syllabus. In this case, the trial court did not find the specific reasons for withdrawal credible. The trial court found that the witness

Burress claimed could exonerate him was known to him and disclosed by his attorney prior to entering his guilty plea.

{¶12} The seventh factor (whether the defendant understood the nature of the charges, the possible penalties, and the consequences of the plea) weighs against granting the motion to withdraw. Burress concedes that he did not set forth this factor as a reason for filing his motion and that it does not weigh in his favor.

{¶13} The eighth factor (whether the defendant is perhaps not guilty or has a complete defense to the charges) is entitled to little weight in favor of granting the motion to withdraw. Defendant's claim of innocence, without more, is an insufficient ground to withdraw the plea:

When faced with a claim of innocence, “ ‘the trial judge must determine whether the claim is anything more than the defendant's change of heart about the plea agreement.’ ” A mere change of heart regarding a guilty plea and the possible sentence is insufficient justification for the withdrawal of a guilty plea. Likewise, a defendant's protestations of innocence are not sufficient grounds for vacating a plea that was voluntarily, knowingly, and intelligently entered. (Citations omitted.)

State v. Maddox, 2017-Ohio-8061, 98 N.E.3d 1158, ¶ 18 (8th Dist.); *State v. Palmer*, 4th Dist. Highland No. 02CA9, 2002-Ohio-6345, ¶ 6 (“This rationale amounts to a ‘change of heart,’ which is not a legitimate basis for granting a presentencing motion to withdraw a plea”). Burress claimed he was innocent and that he had a witness that could exonerate him, yet he knew of and had identified this witness prior to entering his guilty plea. The trial court found this to be a change of heart motion:

This is a change of heart. * * * [N]one of these issues are different than what they existed prior to your changing your plea in the first place * * * there's no indication at all whatsoever that if we wouldn't have went forward with the trial that was originally scheduled, which was only vacated due to the fact that you admitted to committing these crimes and changed your plea, that we would've been in any different situation than we are right now. * * *

So, a change of heart * * * is not a reasonable basis requiring the Court to permit the Defendant to withdraw a plea * * *.

{¶14} The ninth factor (whether permitting the defendant to withdraw the plea will prejudice the state), Burress concedes, does not weigh in his favor. He admits he did not raise this as a factor in his motion or address it at the hearing.

{¶15} After balancing the above factors, the majority of which weigh against granting the motion to withdraw, we cannot conclude that the trial court's denial of the motion to withdraw the guilty plea was unreasonable, arbitrary, or unconscionable. The trial court did not abuse its discretion when it denied the pre-sentence motion to withdraw the guilty plea. Accordingly, we overrule the assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Court of Common Pleas 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 60 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 60-day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-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 60 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.

Abele, J. & Wilkin, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, 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.