

[Cite as *State v. Oglesby*, 2015-Ohio-2557.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 26251
Plaintiff-Appellee	:	
	:	Trial Court Case Nos. 2013-CR-50 &
v.	:	2013-CR-1282
	:	
BRYAN OGLESBY	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 26th day of June, 2015.

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FAIN, J.

{¶ 1} Defendant-appellant Bryan Oglesby appeals from his conviction and

sentence, following guilty pleas, to one count of Felonious Assault (serious harm), one count of Felonious Assault (deadly weapon), one count of Having a Weapon While Under a Disability, all with firearm specifications, and one count of Assault. Oglesby contends that the trial court erred when it overruled his pre-sentence motion to withdraw his plea, following a hearing. He argues that his motion should have been sustained, because he did not understand the charges and potential defenses, did not understand the potential sentences that could be imposed, and received ineffective assistance of counsel in regard to his decision to plead guilty.

{¶ 2} Although the evidence at the hearing was conflicting, there is evidence in the record to support a finding that Oglesby understood the elements of the offenses with which he was charged, and potential defenses, and understood the sentences that could be imposed. There is also evidence in the record to support a finding that Oglesby's decision to plead guilty was not the result of ineffective assistance of counsel. Consequently, the judgment of the trial court is Affirmed.

### **I. The Course of Proceedings**

{¶ 3} Oglesby was charged in one indictment with one Count of Felonious Assault (serious physical harm), in violation of R.C. 2903.11(A)(1), a felony of the second degree, one count of Felonious Assault (deadly weapon), in violation of R.C. 2903.11(A)(2), a felony of the second degree, and one count of Having a Weapon While Under a Disability (prior offense of violence), in violation of R.C. 2923.13(A)(2), a felony of the third degree. Each of the counts in this indictment included a firearm specification, each was alleged to have been committed on the same date, and the two Felonious Assault counts involved

the same victim, Javon Britton.

{¶ 4} Oglesby was charged in another indictment with Assault Upon a Corrections Officer, in violation of R.C. 2903.13(A), a felony of the fifth degree.

{¶ 5} At a pre-trial hearing on October 30, 2013, the trial court sustained Oglesby's motion for an in camera review of the grand jury testimony of one witness to see if there were inconsistencies in her testimony or other material subject to production under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). At this hearing, the State offered a plea bargain whereby Oglesby would plead guilty to all of the counts in both indictments, and the State would agree to an aggregate prison sentence in the range of seven to ten years. Oglesby counter-offered a plea bargain with a mandatory minimum sentence of five years. The State did not accept this offer, but agreed to leave its seven-to-ten-year offer on the table while the trial court conducted its in camera review.

{¶ 6} A plea hearing occurred on November 5, 2013. Oglesby rejected the State's plea offer with respect to the sentence, and pled guilty to all of the charges and specifications in both indictments, without an agreement as to the sentence. This hearing occurred before a different trial judge. Sentencing was set for November 20, 2013.

{¶ 7} Before the sentencing hearing, Oglesby sent the trial court his own, pro se letter expressing his desire to withdraw his plea, and his counsel filed a motion to withdraw the plea. This motion came on for a hearing on January 9, 2014. At that hearing, Oglesby's counsel asked to withdraw. When it became evident that Oglesby's counsel might have to testify, he was permitted to withdraw, and the hearing was continued.

{¶ 8} On April 11, 2014, the trial court heard Oglesby's motion to withdraw his plea. New counsel had been assigned to represent Oglesby. Oglesby's prior counsel, Clyde Bennett, II, testified. Oglesby also testified. The State called Bryan Cavender, a detective in the Montgomery County Sheriff's Office, who had been present at the November 5, 2013 plea hearing.

{¶ 9} In its 23-page decision, entry, and order overruling Oglesby's motion to withdraw his plea, the trial court summarized its findings:

(1) There is no evidence that the State is prejudiced by Defendant's *Motion to Withdraw*.

(2) Mr. Bennett provided competent legal counsel to Defendant, both prior to, and at the time of entering his guilty pleas. Mr. Bennett testified that he reviewed the entirety of the discovery with Defendant in 2013 CR 00050 [the multi-count indictment] prior to Defendant's decision to enter his pleas. Mr. Bennett further testified that he met with Defendant the morning of his Plea Hearing to go over the State's plea offer, Defendant's counteroffer, and the possibility of an open plea arrangement.<sup>1</sup> He testified that he explained that the maximum sentence he would face with an open plea was greater than the ten-year maximum plea offer. Although he admitted that he told Defendant that Defendant would not receive the full fifteen-year maximum prison sentence<sup>2</sup> in proceeding with an open plea,

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<sup>1</sup> At the plea hearing, the process of Oglesby's pleading guilty without an agreement as to sentence, so as to preserve the possibility of a minimum sentence, was characterized as an "open plea."

<sup>2</sup> It appears that everyone was assuming, correctly as it turned out, that the two Felonious

this was his professional belief based upon his experience and knowledge of Defendant's case.<sup>3</sup> Furthermore, Defendant's assertion that Mr. Bennett's representation was incompetent for failing to obtain and review the Grand Jury testimony of witness Marie Barrow is unavailing. Mr. Bennett testified that he did not feel it was useful to Defendant's case. This was a strategic decision that Mr. Bennett made as Defendant's counsel.

(3) Defendant was afforded a full hearing in accordance with Crim.R. 11. Defendant acknowledged that he understood his rights, as well as the charges and penalties of his offenses. Judge Krumholtz confirmed with Defendant several times throughout the Plea Hearing that he understood the proceedings. Furthermore, Defendant acknowledged that he was entering his pleas voluntarily, and that he was not promised a particular sentence. The Court confirmed that Defendant understood he was proceeding with no agreement in place as to his sentence. Additionally, the Court ensured that Defendant was made aware of his constitutional rights, and that by entering his guilty pleas, he was giving up those rights. Defendant acknowledged his understanding of all of Judge Krumholtz's inquiries.

(4) The Court provided a full hearing on Defendant's *Motion to*

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Assault charges would merge, and that all the firearm specification sentences would merge, leaving eight years for Felonious Assault, three years for Having a Weapon While Under a Disability, three years for the firearm specification, and one year for Assault, for a possible maximum of fifteen years.

<sup>3</sup> Bennett also testified that he had previously tried cases before the trial judge in this case.

*Withdraw*. The Court afforded Defendant the opportunity to call any witnesses and present any evidence he wished. Defendant testified on his own behalf, and presented testimony as to his reasoning for his *Motion*. In order to further support his claims, Defendant called Mr. Bennett to testify. Therefore, the Court finds that Defendant was provided a full hearing on his *Motion to Withdraw*.

(5) The Court further concludes that the timing of Defendant's *Motion* was reasonable. Defendant sent a letter to the Court, dated November 14, 2013, which was received by the Court on November 20, 2013. Prior to that, on November 15, 2013, Mr. Bennett filed Defendant's *Motion to Withdraw*. Defendant's Plea Hearing occurred on November 5, 2013, and his sentencing was set for November 20, 2013. The *Motion to Withdraw* was filed five days prior to the Defendant's sentencing date, and therefore, the Court finds the timing of the *Motion* was reasonable.

(6) The Court finds the reasoning set forth by Defendant in support of his *Motion to Withdraw* unpersuasive. Defendant claims a lack of understanding the parameters of his pleas, the nature of the charges against him, and the maximum prison sentence that he faced by entering an open plea. The record of the Final Pretrial and the Plea Hearing demonstrate that Defendant had a clear understanding of the nature of the charges and penalties against him. Furthermore, Judge Krumholtz made it clear that Defendant was proceeding with no agreement with respect to his sentencing and even asked Defendant is [sic] a particular sentence had

been promised to him. Defendant did not express any indication that he did not understand the proceedings at the time of his pleas. Additionally, the record of both the Hearing on Defendant's *Motion to Withdraw* on January 9, 2014, and the Hearing on Defendant's *Motion to Withdraw* on April 22, 2014,<sup>4</sup> show that Mr. Bennett explained the elements of Defendant's charges, as well as the penalties. Mr. Bennett explained the State's offer to Defendant, and that in order to receive the possibility of five years, he would need to proceed with no agreement in place. Defendant was told that he would be facing [the possibility of] a higher sentence than the maximum ten years within the State's offer, and Defendant still proceeded with his pleas. Therefore, the Court finds Defendant's reasoning unpersuasive.

(7) Judge Krumholtz thoroughly explained all charges and penalties to Defendant before he entered his pleas, and Defendant acknowledged that he understood the proceedings. Throughout the Plea Hearing, Judge Krumholtz verified that Defendant understood the explanations provided by both the Court and the State with respect to the charges and penalties against Defendant. The Court even asked Defendant if he had any questions, which he did; however, this was resolved by Mr. Bennett. Based on Defendant's repeated confirmation that he understood the charges and penalties, the Court finds that Defendant fully understood the nature and consequences of the charges against him.

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<sup>4</sup> The transcript reflects that this hearing took place on April 11, 2014.

(8) The Court finds that this factor insufficient [sic], as no evidence was provided by Defendant to support any assertion of a complete defense or purported innocence.

The Court finds that all criteria set forth in [*State v. Donaldson*], 2d Dist. Greene No. 06CA110, 2007-Ohio-5756], with the exception of prejudice to the State and the timeliness of Defendant's *Motion*, weigh in favor of overruling Defendant's *Motion to Withdraw*. The Court further finds that it has complied with all requirements of [*State v. Bennett*], 192 Ohio App.3d 608, 2011-Ohio-961, 949 N.E.2d 1064 (2d Dist.)] regarding the discretion afforded to the Court.

**{¶ 10}** Although there was conflicting evidence at the hearing on Oglesby's motion to withdraw his plea, there is evidence in the record to support the trial court's findings.

**{¶ 11}** Following the overruling of Oglesby's motion, he appeared for sentencing. The trial court merged the two Felonious Assault convictions, and the State elected to have Oglesby sentenced on the serious-physical-harm Felonious Assault conviction. The trial court also merged all the firearm specifications. The trial court then sentenced Oglesby to eight years in prison for Felonious Assault, with three years for the firearm specification to be served consecutively to, and prior to, that sentence; to three years for Having a Weapon While Under a Disability, with that sentence to be served concurrently; and to one year for Assault, with that sentenced to be served consecutively, for a total sentence of twelve years. The trial court made the statutory findings required for consecutive sentences.

**{¶ 12}** From his conviction and sentence, Oglesby appeals.



**II. The Trial Court Did Not Abuse its Discretion in  
Overruling Oglesby's Motion to Withdraw his Plea**

**{¶ 13}** Oglesby's sole assignment of error is as follows:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT  
OVERRULED MR. OGLESBY'S MOTION TO WITHDRAW HIS GUILTY  
PLEAS.

**{¶ 14}** A pre-sentence motion to withdraw a guilty plea should be freely and liberally granted if there is a reasonable and legitimate basis for withdrawal of the plea. *State v. Xie*, 62 Ohio St. 3d 521, 527, 584 N.E.2d 715 (1992). But even a pre-sentence motion to withdraw a plea is confided to the sound discretion of the trial court. *Id.*, 526. A mere change of heart is not a sufficient ground. *State v. Lambros*, 44 Ohio App.3d 102, 103, 541 N.E.2d 632 (8th Dist.1988).

**{¶ 15}** Oglesby argues that the trial court abused its discretion in overruling his motion, because his pleas were not voluntarily, knowingly, and intelligently made, and because his trial counsel was ineffective. In support of the former argument, Oglesby contends that he lacked adequate time to make an intelligent decision, and that he was misled by his counsel as to the sentence he would receive.

**{¶ 16}** When Oglesby elected to plead guilty, the State's offer to agree to a sentence in the range of seven to ten years had been on the table for at least six days, from the October 30, 2013 pretrial conference, when it was referred to, to the plea hearing on November 5, 2013. The State presented evidence that during the plea hearing,

Oglesby went into the jury room with his attorney, Clyde Bennett, for 45 minutes to an hour, before returning to the courtroom. Bennett, who testified for Oglesby at the hearing, testified that he met with Oglesby a day or two before the hearing, and that he met with Oglesby in the jury room for 45 minutes to an hour during the plea hearing, with a copy of the indictment. Bennett testified that he explained that by pleading guilty without an agreement as to the sentence, the possibility of receiving a minimum five-year sentence would be preserved. He also testified that he would not have proceeded with the taking of the plea if Oglesby had had reservations concerning the plea, or if he had reason to believe that Oglesby did not understand the plea and its consequences.

**{¶ 17}** From our review of the record, we find an adequate basis for the trial court to have concluded that Oglesby had sufficient time to consider the plea. In this connection, it is significant that the November 5<sup>th</sup> trial date had been canceled, which alleviated the time-pressure that Oglesby would otherwise have been under to make a decision that morning.

**{¶ 18}** Oglesby's other argument is that his trial counsel misled him concerning the sentence that might be imposed. In this connection, Oglesby points to testimony that Bennett told him he would not get the maximum possible sentence (with appropriate mergers) of fifteen years. As the State points out, this was correct advice – the sentence actually imposed was twelve years. In any event, there is no evidence that Bennett misadvised Oglesby as to the theoretical maximum sentences that could be imposed. And the trial court advised Oglesby, at the plea hearing, of the maximum sentences that could be imposed for the offenses. We conclude that the trial court had an adequate basis in the record from which to conclude that Oglesby was not misled as to the

maximum possible sentence that could result from his plea.

**{¶ 19}** Oglesby also argues that the Assault charge, in the separate indictment, was not sufficiently explained to him. Bennett admitted that he gave little consideration to this charge, the least of the charges pending against his client:

Q. Okay. And you're asking this Court to indicate that you never discussed with him pleading to that case prior to November 5th.

A. I'm not asking the Court for anything. What I am doing is testifying to the best of my recollection and trying to tell you the truth as I sit here under oath. And my recollection was I – as I sit here quite frankly I just do not recall talking to Mr. Oglesby a lot about the assault charge other than him saying he didn't do it when he was initially charged. I just don't – I don't recall anything else. I recall focusing on the felonious assault charge with Mr. Britton.

Q. Would you have let Mr. Oglesby plead to that charge on November 5th, 2013 if he didn't want to do it?

A. If he didn't want to do it?

Q. If he sat there and said I don't want to plead to that case would you have plead him to that case?

A. No.

**{¶ 20}** At the November 5, 2013 plea hearing, the trial court had the prosecutor recite all of the charges against Oglesby, including the Assault Upon a Corrections Officer. The trial court then asked Oglesby if he understood what the prosecutor had just

said about the various charges, to which Oglesby responded in the affirmative. The trial court then asked if the facts set forth by the prosecutor were true, to which Oglesby responded in the affirmative. The trial court then asked Oglesby “have you discussed with Mr. Bennett all of the elements of the charges against you and the possible defenses and motions that he could file in an effort to defend your case?” Oglesby responded in the affirmative.

{¶ 21} The judge who presided over the plea hearing was not the same judge who presided over the hearing on, and decided, the motion to withdraw the plea. Nevertheless, it was agreed at that hearing that the transcript of the plea hearing would be part of the record that the trial court could consider in deciding the motion. We conclude that there is evidence in the record from which the trial court could conclude that Oglesby understood the Assault charge.

{¶ 22} Oglesby points out that at one point during the plea hearing, after he had signed the plea forms, but before his pleas were accepted, he had a question:

THE COURT: Mr. Oglesby, now that you’ve signed the waiver and plea forms; is there anything that you don’t understand about this plea process? Do you have any questions for the Court?

THE DEFENDANT: Yeah, I got one question.

THE COURT: Yes, sir.

MR. BENNETT: Excuse me, Your Honor.

(Pause in proceedings)

MR. BENNETT: We’re ready to proceed, Judge.

THE COURT: All right. And I take it, Mr. Oglesby, that in talking to

your counsel the question you had has been –

THE DEFENDANT: Yes, Your Honor.

THE COURT: -- answered? All right.

**{¶ 23}** The record reflects that whatever question Oglesby had, his trial counsel had answered it to his satisfaction.

**{¶ 24}** Oglesby argues that his decision to plead guilty was the result of ineffective assistance of counsel. He argues that he had insufficient time within which to consult with his counsel. We conclude that there is evidence in the record to support a finding that Oglesby had sufficient time to consult with his counsel concerning his decision to plead guilty. He argues that his trial counsel was unprepared. We conclude that there is nothing in the record to support a conclusion that any lack of preparation affected Oglesby's decision to plead guilty.

**{¶ 25}** Oglesby argues that his counsel accepted the State's offer of a seven-to-ten-year plea bargain without his consent. This is belied by the record. The record reflects that the trial date was canceled based upon the mutual hope of the defense counsel and the prosecutor that a plea bargain could be reached, with defense counsel testifying that he thought his client would accept the offer. But there is nothing in the record to reflect that defense counsel purported to have accepted the State's offer on behalf of his client. To the contrary, it was clearly Oglesby's decision, based at least in part on the advice of counsel, to reject the State's offer and plead guilty without an agreement concerning the sentence.

**{¶ 26}** We conclude, based upon the evidence in the record before us, that the trial court did not abuse its discretion when it overruled Oglesby's motion to withdraw his plea.

Oglesby's sole assignment of error is overruled.

**III. Conclusion**

{¶ 27} Oglesby's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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FROELICH, P.J., and DONOVAN, J., concur.

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