

**IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ROBERT JONES,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**  
**Case No. 18 MA 0121**

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Criminal Appeal from the  
Court of Common Pleas of Mahoning County, Ohio  
Case No. 17 CR 716

**BEFORE:**

Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

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**JUDGMENT:**

Affirmed.

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*Atty. Paul J. Gains*, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

*Atty. Joseph W. Gardner*, 19 E. Front Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: September 28, 2020

**WAITE, P.J.**

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{¶1} Appellant Robert Jones appeals the judgment of the Mahoning County Common Pleas Court denying his motion to withdraw his guilty plea. Jones argues the trial court abused its discretion in denying his presentence motion to withdraw this plea. Based on the following, the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On June 22, 2017, officers from the Youngstown Police Department were called to a residence on Olivette Court in the city to investigate a report that gunshots had been fired. Three men were involved in an argument outside of the residence. The officers drew their service weapons and ordered all three men to the ground. Two of the men complied. The third, later identified as Appellant, refused. One of the men on the ground, later identified as the victim, pointed at Appellant and shouted to the officers that he had a gun. Appellant was again ordered to the ground and, this time, he complied. All three men were patted down for weapons. A .38 caliber revolver was recovered from Appellant's waistband, with two live rounds and four spent casings in the cylinder. Appellant was placed under arrest.

{¶3} On July 27, 2017, Appellant was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(2), a second-degree felony which carried a firearm specification, in violation of R.C. 2941.145. He was also indicted on one count of carrying a concealed weapon in violation of R.C. 2923.12(A)(2)(F), a fourth-degree felony.

{¶4} On November 29, 2017, following plea negotiations, Appellant pleaded guilty to all charges in the indictment. The parties agreed to jointly recommend a three-

year mandatory prison term (for the gun specification) consecutive to a four year prison term, for a total of seven years. The state would agree to judicial release after Appellant served three and one-half years. The trial court accepted the guilty plea after advising Appellant of the constitutional and nonconstitutional rights he was waiving by pleading guilty.

{¶15} A sentencing hearing was scheduled for January 19, 2018, but was continued to allow Appellant to file a motion to withdraw his guilty plea. On February 15, 2018, Appellant filed his motion to withdraw his guilty plea. While that motion was still pending, on July 6, 2018 Appellant filed a motion to determine his competency to stand trial. On September 11, 2018, the parties stipulated to Appellant's competency and the trial court found him competent to stand trial.

{¶16} On September 24, 2018, the trial court held an extensive hearing on Appellant's motion to withdraw his guilty plea. The parties had filed written briefs prior to the hearing. At the hearing, defense counsel argued that Appellant had been reluctant to enter into the plea agreement all along and "maintained to [Defense counsel] throughout the process that he acted in self-defense." (9/24/18 Tr., p. 4.) Defense counsel contended that Appellant was approached by the victim after the competency hearing who told Appellant that on the day of the incident the victim "was highly intoxicated and he doesn't remember what happened." (9/24/18 Tr., p. 5.) Defense counsel argued that he believed Appellant had a meritorious claim of self-defense. In the colloquy with Appellant, the court asked why Appellant felt pressured. Appellant said he was a victim, too. He believed the court had pressured him at the plea hearing, and cited to the following exchange:

**THE COURT:** Did anyone tell you that you had better plead guilty or else?

**THE DEFENDANT:** If I didn't plead guilty, I would get more time, do more time.

**THE COURT:** Who said that?

**THE DEFENDANT:** I think you did.

**THE COURT:** Okay.

(9/24/18 Tr., p. 8.)

{¶17} Referring to the transcript of the plea hearing, the judge recited the majority of the plea colloquy where the court discussed its consideration of the plea recommendation, the facts of the case, and the possibility of judicial release, and again asked Appellant at what point he felt pressured by the court. In response, Appellant indicated that he was sick and had multiple health issues following a car accident.

{¶18} The court proceeded to evaluate all relevant factors associated with granting a motion to withdraw a guilty plea as set forth in *State v. Fish*, 104 Ohio App.3d 236, 661 N.E.2d 778 (1st Dist.1995). The court's main focus was on whether Appellant had a meritorious claim of self-defense. The state argued that Appellant had created the situation. Because he had appeared at the victim's home carrying a gun hours after the two had an altercation at a nearby convenience store, this precluded any jury instruction on self-defense. (9/24/18 Tr., p. 16.) Moreover, the victim had initially given a very detailed description of the incident and had only recently become unwilling to cooperate and testify truthfully, stating he was too intoxicated to remember what had occurred on

the day of the incident. (9/24/18 Tr., p. 18.) On October 15, 2018, the trial court denied Appellant's motion.

{¶9} A sentencing hearing was held on October 24, 2018. The trial court sentenced Appellant to a term of four years in prison for felonious assault and three years for the accompanying firearm specification, to be served consecutively. He sentenced Appellant to a one year term for carrying a concealed weapon, to be served concurrently to his sentence for felonious assault and the firearm specification, for a total stated prison term of seven years.

{¶10} Appellant filed this timely appeal.

#### ASSIGNMENT OF ERROR

The trial court erred when it did not permit the defendant-appellant to withdraw his guilty plea.

{¶11} The decision on whether to grant a motion to withdraw a guilty plea is within the sound discretion of the trial court. *State v. Ocel*, 7th Dist. Jefferson No. 08 JE 22, 2009-Ohio-2633 citing *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992). An abuse of discretion implies more than an error of law or judgment; it connotes that the trial court's attitude was unreasonable, arbitrary or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶12} Crim.R. 32.1 governs motions to withdraw a guilty plea. It provides:

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.

{¶13} A motion to withdraw a guilty plea made prior to sentencing should be freely allowed and liberally granted. *Xie* at 527. However, there is no absolute right to withdraw a guilty plea. *Id.* The trial court must conduct a hearing on the motion to determine if a reasonable and legitimate basis for the motion exists. *Id.* at 527.

{¶14} In Ohio, when determining whether a trial court abused its discretion in denying a pre-sentence motion to withdraw a guilty plea, the reviewing court must consider nine factors:

(1) whether the state will be prejudiced by withdrawal; (2) the representation afforded to the defendant by counsel; (3) the extent of the Crim.R. 11 plea hearing; (4) whether the defendant understood the nature of the charges and potential sentences; (5) the extent of the hearing on the motion to withdraw; (6) whether the trial court gave full and fair consideration to the motion; (7) whether the timing of the motion was reasonable; (8) the reasons for the motion; and (9) whether the accused was perhaps not guilty or had a complete defense to the charge.

*State v. Scott*, 7th Dist. Mahoning No. 18 MA 0012, 2008-Ohio-5043, ¶ 13, citing *Fish*.

{¶15} No single particular factor is determinative as to whether the motion should have been granted. Instead, all of these factors should be weighed. Other factors that are deemed relevant may be considered, as well. *State v. Lundy*, 7th Dist. Mahoning No.

07 MA 82, 2008-Ohio-1535, ¶ 18 citing *State v. Cuthbertson*, 139 Ohio App.3d 895, 899, 746 N.E.2d 197 (7th Dist.2000). Additionally, we have long held that a mere change of heart does not form a sufficient basis for the withdrawal of a guilty plea. *State v. Johnston*, 7th Dist. Columbiana No. 06 CO 64, 2007-Ohio-4620, ¶ 32.

{¶16} Regarding the first factor, prejudice to the state, the state argued at hearing that the victim had become increasingly uncooperative and unwilling to testify, and recently had claimed a lack of memory because he was intoxicated, despite having provided a detailed account of the incident several times early on in the investigation. (9/24/18 Tr., pp.17-18.) Allowing Appellant to withdraw his guilty plea would jeopardize the state's ability to present the testimony of a key witness. In response, Appellant argued that if the incident occurred as the state recites in its facts, the victim witness would be unable to forget it, and if the victim is now unwilling or uncooperative perhaps it was because he was not being truthful in his original account of the incident. A review of the record seems to suggest this factor favored the state.

{¶17} Regarding the second factor, Appellant does not assert that his trial counsel was ineffective and the record does not reveal any basis for such an argument.

{¶18} The third and fourth factors relate to the nature of the Crim.R. 11 hearing and the plea colloquy conducted by the trial court. Appellant argued that at the pretrial held before the plea hearing the trial court "talked extensively" about the seriousness of the charges and that Appellant faced a potential prison sentence of up to 12 and one-half years, which could be construed as pressuring him to accept the plea agreement. Appellant also argued that his comment, "I am going to have my teeth pulled too" made at the end of pretrial should have indicated that he was feeling pressured, and the trial

court abused its discretion by not questioning him about the comment later, in the plea hearing. Again, this comment was uttered at a pretrial hearing and not at the Crim. R. 11 hearing. Appellant makes no claim that his Crim.R. 11 hearing was inadequate and the third *Fish* factor specifically applies to the scope of the Crim.R. 11 hearing, and not every instance in which a defendant appears before the trial court. Our review of the plea hearing reveals no inadequacies. Appellant did not reiterate the “teeth pulled” comment or give any other indication that he was hesitant to enter a guilty plea. To the contrary, during the court’s plea colloquy Appellant stated several times that he understood the charges, the potential penalties, and the constitutional and nonconstitutional rights he was waiving by pleading guilty. Appellant also stated that he understood the guilty plea and that he was entering his guilty plea knowingly, intelligently and voluntarily:

**THE COURT:** Do you understand that by pleading guilty to these charges you will be admitting to them and the conduct that lead [sic] to the charges?  
Do you understand that?

**THE DEFENDANT:** Yes.

\* \* \*

**THE COURT:** Mr. Jones, did anyone promise you anything or threaten you in any way?

**THE DEFENDANT:** No.

**THE COURT:** You signed [the guilty plea] on your own accord?



**THE DEFENDANT:** Yes.

(11/27/17 Tr., pp. 4, 14.)

{¶19} A review of the transcripts from the Crim.R. 11 hearing reveals that the trial court’s plea colloquy was thorough and complete, fully apprising Appellant of both his constitutional and nonconstitutional rights. It is clear from his repeated affirmations during the hearing that Appellant understood the nature of the charges and possible penalties and the trial court was correct in deciding these factors favored the state.

{¶20} Regarding the fifth factor concerning the hearing on the motion to withdraw his plea, and the sixth factor, regarding whether the trial court adequately considered the motion, Appellant again argued that his statement about having his “teeth pulled” made at pretrial before he entered his guilty plea should have resonated with the trial court at his hearing on the motion to withdraw as it was evidence that his plea was not voluntary. The state contended that Appellant did not establish that his plea hearing was inadequate, that he did not have enough time to consider his plea, or that he experienced pressure to accept the agreement. Moreover, it appeared Appellant had only changed his mind.

{¶21} The record shows that in order to provide enough time to consider Appellant’s withdrawal motion, the trial court had continued his sentencing hearing. The court also ordered the parties to submit briefs on the issue prior to the hearing. Defense counsel and the state were both given ample opportunity to argue the merits. The trial court engaged in an in-depth discussion of each of the *Fish* factors, including reviewing the transcripts from the plea hearing. It is evident from the record that the trial court held a full and fair hearing on Appellant’s motion and completely considered all the allegations

raised in Appellant’s motion. *State v. Fletcher*, 7th Dist. Mahoning No. 17 MA 0034, 2018-Ohio-3726, ¶ 25. Factors five and six weigh in the state’s favor.

{¶22} Regarding the seventh factor, Appellant argued the timing of his motion to withdraw, made approximately three months after he entered his guilty plea and after a sentencing hearing was scheduled, was “within the time permitted under the rules.” (Appellant’s Brf., p. 18.) The state contended the motion was unreasonable because it was made three months after his guilty plea. The record reflects that the trial court held a hearing and accepted Appellant’s guilty plea on November 29, 2017. A sentencing hearing was scheduled for January 19, 2018. Appellant sought and was granted a continuance of the sentencing hearing until February 5, 2018, which may have been a typographical error because the next matter in the record is the filing of Appellant’s motion to withdraw his guilty plea on February 15, 2018. The state filed its response to the motion on March 15, 2018. While the motion was pending and sentencing was held in abeyance, Appellant filed a motion to determine his competency to stand trial, which further delayed sentencing. The hearing on the motion to withdraw was ultimately held on September 24, 2018. At this hearing, the trial court acknowledged on the record that Appellant’s motion was filed within a reasonable time. (9/24/18 Tr., p. 27.) Accordingly, although the filing of the motion to withdraw was made three months after Appellant entered his guilty plea, it was filed before Appellant was sentenced. This factor weighs in Appellant’s favor.

{¶23} Factor eight, the reasons for the motion to withdrawal the guilty plea, does not weigh in Appellant’s favor. He argued in his written brief to the trial court that “he was just pleading guilty because he believed that was the best deal, not because he is truly guilty.” (2/15/18 Motion to Withdraw Guilty Plea, p. 2.) Appellant argued that he

consistently maintained to his counsel that he was acting in self-defense. (9/24/18 Tr., pp. 22-23.) The state argued at the withdrawal hearing that Appellant gave no indication when he entered his plea that he maintained he had acted in self-defense. Additionally, the facts in this matter do not support a jury instruction on self-defense where Appellant left the scene of an earlier dispute between himself and the victim and hours later proceeded to the victim's residence with a gun, creating the circumstance that arose in the shooting. (9/24/18 Tr., pp. 16-17.) The state argued that it was only after Appellant learned the victim was changing his story, claiming he was too intoxicated to remember anything, that Appellant sought to withdraw his plea. "When a defendant asserts a claim of innocence as the reason for withdrawing a guilty plea before sentence, the trial court must compare the interests of and potential prejudice to each party." *Cuthbertson* at 900-901. The evidence in the record does not support Appellant's reason for seeking to withdraw his guilty plea. The transcript from the plea hearing clearly demonstrates Appellant made a knowing, intelligent and voluntary plea. Appellant cites no part of the record that indicates otherwise. This factor weighs in the state's favor.

{¶24} The final factor required the court to determine whether the accused was not guilty or had a complete defense to the charge. Again, Appellant argued he had maintained to his counsel that he acted in self-defense. His counsel argued at the withdrawal hearing that without the testimony of the victim, the state's version as to how the events transpired would be a question of fact for the trial court. Defense counsel conceded that Appellant went to the victim's house, but argued that Appellant's intentions were unclear. (9/24/18 Tr., p. 23.) The state argued that the evidence, including the police report and witness testimony, would demonstrate that a claim of self-defense was

not available to Appellant. (9/24/18 Tr., pp. 16-17.) The victim had repeated his version of events multiple times and had only recently begun to indicate that he had been too intoxicated to remember accurately what transpired. (9/24/18 Tr., pp. 17-19.) The state listed a number of other witnesses who presumably would corroborate the victim's initial story. The state was correct as to the record and that Appellant would not be entitled to a claim of self-defense as a potential meritorious defense to the charge. This factor also weighs in the state's favor.

{¶25} We agree with the trial court that after careful consideration of each of the relevant factors, it is clear that a majority of the factors weigh in the state's favor. Although no single factor is determinative, the majority weigh in the state's favor. *State v. Lundy*, 7th Dist. Mahoning No. 07 MA 82, 2008-Ohio-1535, ¶ 18 citing *State v. Cuthbertson*, 139 Ohio App.3d 895, 899, 746 N.E.2d 197 (7th Dist.2000). The trial court provided an extensive Crim.R. 11 hearing as well as a hearing on Appellant's motion. Appellant demonstrated during the plea colloquy that he entered his plea knowingly, voluntarily and intelligently. His reason for wanting to withdraw his plea, that he had maintained to his counsel that he was acting in self-defense, was thoroughly examined by the trial court and the court concluded that the facts did not support a jury instruction on self-defense. It appears that Appellant simply changed his mind regarding pleading guilty, and we have long held that a mere change of heart is not a sufficient basis for the withdrawal of a guilty plea. *State v. Johnston*, 7th Dist. Columbiana No. 06 CO 64, 2007-Ohio-4620, ¶ 32.

{¶26} In sum, the record does not demonstrate that the trial court abused its discretion in overruling Appellant's motion to withdraw his guilty plea. Appellant's assignment of error is without merit and is overruled.

{¶27} Based on the foregoing, Appellant’s assignment of error is without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, J., concurs.

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For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**