[Cite as *State v. Muldrow*, 2020-Ohio-4815.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TIJUAN MULDROW,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case Nos. 19 MA 0124; 19 MA 0125

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case Nos. 19 CR 139A; 19 CR 101

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

JUDGMENT:
Affirmed.

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. John A. McNally, IV, John A. McNally, III, CO., LPA, 100 Federal Street East, Suite 600, Youngstown, Ohio 44503

Dated: September 28, 2020

WAITE, P.J.

{¶1} Appellant Tijuan Muldrow appeals two October 18, 2019 Mahoning County Common Pleas Court judgment entries. The entries pertain to Appellant's convictions in two cases, numbered 19 CR 000101 and 19 CR 000139A. Appellant argues that the trial court erroneously denied his *pro se* pre-sentence motion to withdraw his guilty plea and his *pro se* motion to remove counsel. He also argues that the court erroneously calculated his jail time credit. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This action involves two separate drug-related indictments. Until the sentencing hearings where they were joined, these cases proceeded separately through the system.

Case Number 19 CR 00101

{¶3} Appellant was arrested on January 23, 2019. He was released on a recognizance bond the next day. An indictment was filed on February 21, 2019, where Appellant was charged with: trafficking in a fentanyl related compound, a felony of the second degree in violation of R.C. 2925.03(A)(2), (C)(9)(c); trafficking in cocaine, a felony of the second degree in violation of R.C. 2925.03(A)(2), (C)(4)(c); aggravated trafficking in drugs, a felony of the second degree in violation of R.C. 2925.03(A)(2), (C)(1)(a), (C)(1)(b); having weapons while under disability, a felony of the third degree in violation of R.C. 2923.12(A)(3), (B); trafficking in "marihuana", a felony of the fourth degree in

violation of R.C. 2925.03(A)(2), (C)(3)(a), (C)(1)(b); possession of a fentanyl related compound, a felony of the fourth degree in violation of R.C. 2925.11(A), (C)(11)(b); possession of cocaine, a felony of the fourth degree in violation of R.C. 2925.11(A), (C)(4)(b); aggravated possession of drugs, a felony of the fifth degree in violation of R.C. 2925.11(A), (C)(1)(a); aggravated possession of drugs, a felony of the fifth degree in violation of R.C. 2925.11(A), (C)(1)(a); possession of drugs, a felony of the fifth degree in violation of R.C. 2925.11(A), (C)(2)(a); endangering children, a misdemeanor of the first degree in violation of R.C. 2919.22(A), (E)(2)(a); and illegal use or possession of drug paraphernalia, a misdemeanor of the fourth degree in violation of R.C. 2925.14(C)(1), (F)(1). Each of the felony drug offenses included two specifications: forfeiture of money in a drug case and forfeiture of a property in a drug case. The monetary specification involved $634. The property specification involved surveillance equipment.

{¶4} On March 5, Appellant's bond was revoked because new charges were filed against him under a separate indictment in case number 19 CR 00139A, which is later discussed.

{¶5} On March 14, 2019, at Appellant's request, his appointed counsel was removed and new counsel was appointed. On March 22, 2019, the trial court sustained a motion to withdraw filed by Appellant's second counsel and appointed a third attorney.

{¶6} On April 29, 2019, Appellant filed a motion to suppress evidence seized pursuant to a search warrant based on an argument that the warrant was stale. At some point, the state produced an updated affidavit which had been used to obtain the warrant. Apparently, the warrant was obtained through the second affidavit, however, after the

warrant was approved, the wrong affidavit was attached when it was produced for discovery. After learning this, counsel withdrew the motion to suppress.

{¶7} On August 5, 2019, Appellant filed a *pro se* motion to suppress the evidence based on the arguments in counsel's prior motion. The trial court overruled the motion. On August 28, 2019, Appellant filed a *pro se* motion titled "Defendant stands to uphold motion to dismiss charges." This motion again raised the same arguments as the earlier motion to suppress. It does not appear that the trial court ruled on this motion. On September 2, 2019, Appellant filed a *pro se* motion to suppress the evidence based on the identical arguments. The trial court overruled the motion.

{¶8} On September 25, 2019, the state dismissed the following charges and all attenuated specifications: possession of a fentanyl related compound, possession of cocaine, two counts of aggravated possession of drugs, possession of drugs, and illegal use or possession of drug paraphernalia. On the same date, Appellant pleaded guilty to the remaining counts as charged within the indictment. The written plea agreement stated that "[t]he state will recommend 11 years total. The defense can argue." (9/25/19 J.E.) This recommendation was made at the plea hearing.

Case Number 19 CR 00139A

{¶9} A second indictment, pertaining to both Appellant and a codefendant, was filed on March 7, 2019. In that indictment, Appellant was charged with: possession of drugs, a felony of the fifth degree in violation of R.C. 2925.11(A), (C)(4)(a); possession of drugs, a felony of the fifth degree in violation of R.C. 2925.11(A), (C)(2)(a); endangering children, a misdemeanor of the first degree in violation of R.C. 2919.22(A), (E)(2)(a); and

illegal use or possession of drug paraphernalia, a misdemeanor of the fourth degree in violation of R.C. 2925.14(C)(1), (F)(1).

{¶10} On March 22, 2019, the trial court granted defense counsel's motion to withdraw and appointed new counsel.

{¶11} On May 21, 2019, Appellant pleaded guilty to all offenses as charged within the indictment. In the Crim.R. 11 written plea agreement, the state agreed it would seek one year of incarceration.

Pro Se Motions and Sentencing

{¶12} On September 25, 2019, a judgment entry that a joint sentencing hearing would be held on both case numbers was issued. Sentencing was set for October 2, 2019. On October 1, 2019, Appellant filed a *pro se* motion to withdraw his guilty plea and a motion to remove counsel. The trial court continued the sentencing hearing and scheduled a motion hearing. These motions were filed under both case numbers.

{¶13} On October 8, 2019, the court held a motion hearing. Appellant was given an opportunity to address the court and argued that he was led to believe he would receive an aggregate sentence of four years. Appellant claimed he did not learn that the state planned to recommend he be sentenced to eleven years until after he entered his guilty plea. He claimed that he first learned of the state's recommendation when he read a newspaper article about his case. After hearing arguments from both sides, the court denied both motions and immediately proceeded to sentencing.

{¶14} On case number 19 CR 00101, Appellant was sentenced to: 36 months in prison for trafficking in fentanyl related compounds, thirty-six months for trafficking in cocaine, thirty-six months for aggravated trafficking in drugs, thirty-six months for having

weapons while under disability, eighteen months for trafficking in "marihuana", and six months for endangering children. The court ordered the trafficking fentanyl based compound and trafficking in cocaine sentences to run consecutively, but concurrent to the remaining convictions and concurrent to Appellant's sentence in 19 CR 00139A. In 19 CR 00139A, the court sentenced Appellant to: one year for possession of drugs, one year for the other count of possession of drugs, six months for endangering children, and thirty days for illegal use or possession of drug paraphernalia. Hence, the trial court imposed an aggregate sentence of six years of imprisonment. In case number 19 CR 00101 Appellant received credit for 257 days served. In case number 19 CR 00139A he received credit for 253 days served.

ASSIGNMENT OF ERROR NO. 1

> THE TRIAL COURT ABUSED ITS DISCRETION IN NOT ALLOWING APPELLANT TO WITHDRAW HIS GUILTY PLEAS IN CASE NOS. 19 CR 00101 AND 19 CR 00139A WHERE HIS PRE-SENTENCING MOTION WAS TIMELY MADE, AND THE STATE WOULD NOT HAVE SUFFERED PREJUDICE IF GRANTED.

{¶15} Appellant argues that the trial court abused its discretion when it denied his pre-sentence motion to withdraw his guilty plea. Although it is not clear, it appears that Appellant is contesting the plea entered in both case number 19 CR 00101 and 19 CR 00139A.

> Even though the general rule is that motions to withdraw guilty pleas before sentencing are to be freely allowed and treated with liberality, * * * still the

> decision thereon is within the sound discretion of the trial court. * * * Thus, unless it is shown that the trial court acted unjustly or unfairly, there is no abuse of discretion. * * * One who enters a guilty plea has no right to withdraw it. It is within the sound discretion of the trial court to determine what circumstances justify granting such a motion. * * * (Internal citations omitted.)

State v. Xie, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992).

{¶16} When reviewing whether a trial court abused its discretion in denying a pre-sentence motion to withdraw, an appellate court examines the following 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. Jones, 7th Dist. Columbiana No. 18 CO 0023, 2020-Ohio-3578, ¶ 12, citing *State v. Scott*, 7th Dist. Mahoning No. 08 MA 12, 2008-Ohio-5043, ¶ 13; *State v. Fish*, 104 Ohio App.3d 236, 661 N.E.2d 788 (1st Dist.1995). "No one factor is conclusive for the determination of whether the trial court should have granted the motion to withdraw."

Jones at ¶ 13, citing *State v. Morris*, 7th Dist. Mahoning No. 13 MA 19, 2014-Ohio-882, ¶ 22.

Whether the state will be prejudiced

{¶17} Appellant claims that the state conceded this factor, as neither case involves lay witnesses. The only witnesses are law enforcement officers, who would be readily available to testify.

{¶18} The state concedes that it would not suffer prejudice but maintains that this is only one factor for this Court to consider.

{¶19} Based on the limited record before us, the state would not suffer prejudice, as the state concedes. As such, this factor favors Appellant.

The representation afforded to the defendant by counsel

{¶20} Appellant concedes that this factor favors the state. At the plea hearing, the trial court asked Appellant if he was satisfied with his counsel. Although Appellant expressed that he and his counsel had several disagreements, he was satisfied with counsel's representation.

{¶21} Even though the record establishes that Appellant and his counsel had disagreed, counsel was able to reach an agreement with the state where six of the twelve charged counts were dismissed in case number 19 CR 00101. Further, the agreement resulted in a recommendation of eleven years in prison as opposed to the twenty-three and one-half years that was the possible maximum sentence. While Appellant had not yet been sentenced as of the motion hearing, we note, however, that he received only six years in the aggregate.

{¶22} Accordingly, this factor weighs in favor of the state.

The extent of the Crim.R. 11 hearing

{¶23} Appellant concedes that this factor favors the state. A review of the 19 CR 00101 plea hearing reveals that the trial court complied with all requirements of a Crim.R. 11 hearing. No transcripts were provided for the 19 CR 00139A hearing. "When a defendant fails to provide a complete and proper transcript, a reviewing court will presume regularity of the proceedings in the trial court." *State v. Dumas*, 7th Dist. Mahoning No. 06 MA 36, 2008-Ohio-872, ¶ 14, citing *State v. Johnson*, 9th Dist. Lorain No. 02CA008193, 2003-Ohio-6814, ¶ 9.

{¶24} As such, this factor weighs in favor of the state.

Nature of the charges and possible punishment

{¶25} Appellant did not provide an analysis of this factor.

{¶26} At the plea hearing, the trial court explained the nature of the charges and the maximum possible penalties, including the maximum possible penalty, to Appellant. Appellant indicated that he understood the nature of the charges and the maximum possible penalties.

{¶27} This factor weighs in favor of the state.

The extent of the motion to withdraw hearing

{¶28} Appellant concedes that this factor favors the state. Appellant agrees that the hearing was extensive and he was given ample opportunity to raise concerns and ask questions.

Whether the trial court gave full and fair consideration to the motion

{¶29} Appellant concedes that the court gave full and fair consideration to the motion. This factor weighs in favor of the state.

Whether the timing of the motion as reasonable

{¶30} Appellant asserts that both parties agree the motion was timely filed. Appellant is correct that the state conceded this factor at the motion hearing. However, the state does not concede this factor on appeal. The state argues that the motion to withdraw was filed the day before the scheduled sentencing hearing. Pursuant to established caselaw, the state argues that this was unreasonable. See *State v. Galloway,* 7th Dist. Mahoning No. 10 MA 147, 2011-Ohio-4257.

{¶31} The state correctly points out that Appellant's motion was filed on the day before the scheduled sentencing hearing. In case number 19 CR 00101, Appellant pleaded guilty on May 21, 2019 and the motion to withdraw was filed on October 1, 2019. As to case number 19 CR 00101, Appellant pleaded guilty on September 25, 2019 and filed his motion to withdraw on October 1, 2019.

{¶32} Again, it appears that Appellant is contesting both of his pleas. As noted by the state at the hearing, in 19 CR 00101 the motion to withdraw was filed days after the plea was entered but several months after his plea in 19 CR 00139A. We note that the state conceded this factor at the hearing.

{¶33} The motion filed in 19 CR 00101 is timely, as it was filed only days after the plea was entered even though it was filed on the eve of the sentencing hearing. As to 19 CR 00139A, however, the motion was filed on the day before the sentencing hearing and months after the plea was entered. Thus, it is not timely. Accordingly, this factor may weigh in Appellant's favor as to 19 CR 00101 but in favor of the state in 19 00139A.

The reasons for the motion

{¶34} Appellant claims that his trial counsel led him to believe he would receive a four-year aggregate sentence. He claims that he did not know that the state intended to argue for an eleven-year sentence until he read a newspaper article after he already entered his plea. He urges that he would never have signed an "open plea" where both sides could argue for a different sentence and allow the trial court to choose the sentence.

{¶35} The state responds that Appellant simply does not like the sentence he received. The state urges that mere pressure by counsel to enter into a plea is insufficient grounds to withdraw a plea.

{¶36} Preliminarily, we note that Appellant had not been sentenced at the time of the motion hearing. Even so, Appellant's claims are unsupported by the record. On September 25, 2019, Appellant signed the written plea agreement in case number 19 CR 00101. The plea agreement expressly stated: "The state will recommend 11 years total. The defense can argue." (9/25/19 Plea Agreement). In addition, the 11-year recommendation was addressed at length during the plea hearing. The following conversation occurred at the hearing.

> **THE COURT**: All right. There's an offer of 11 years for both cases. You've heard Attorney Brevetta, if this case went to trial and if you were convicted on all counts, you could receive a maximum sentence of 23 ½ years.
>
> **THE DEFENDANT**: Yes, sir.
>
> **THE COURT**: The 11 years that the state [sic] of Ohio is recommending is not what we call an agreed sentence, so Attorney Lavelle would have an opportunity to present mitigation to me and argue for something less.

THE DEFENDANT: Yes, sir.

THE COURT: All right. I will tell you this, and I tell everyone when we're in this situation, I don't know enough about you or enough about these cases to tell you what I'm going to do, but if you enter a plea of guilty accepting responsibility, I would not impose more than the 11 years that the state is asking for. So you're capping any risk. And I'm not saying I'm going to come in at 11. Mitigation might be presented that convinces me that something less should be imposed. Are you with me so far?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And Attorney Lavelle's right, whether it was Attorney Gardner or Attorney Gollings, Attorney Lavelle, it doesn't matter who was representing you at the time that the original offer was made.

THE DEFENDANT: I understand that, sir. I was just pointing out that they had never made no -- like that deal, that's all. I know it doesn't make a difference.

(Plea Hearing, pp. 5-7.)

{¶37} Later in the hearing, trial counsel explained to the court that he told Appellant he personally thought the appropriate sentence range was four to six years. But he also stated that Appellant "knows that the state will be requesting a term of incarceration of 11 years both on this case and in his companion case." (Plea Hrg., p. 11.)

{¶38} Appellant was sentenced to only one year in the companion case, which was ordered to run concurrent to the sentence imposed in 19 CR 00101. The written plea agreement in 19 CR 00139A indicates that the state sought, and Appellant received a one-year sentence.

{¶39} It is clear from this record Appellant was aware at the time he signed the written plea agreement and during the plea hearing colloquy that the state would seek an eleven year sentence. Thus, his claim that he first learned of this fact from a newspaper article after he pleaded guilty is not supported by the record. Further, his claim that he did not know that the trial court could impose a sentence other than four years is also contradicted by the record. The trial court indicated at the plea hearing that it could, but would not, impose more than the eleven years requested by the state. The court also stated that it had discretion to impose any appropriate sentence and would consider mitigating evidence that might be presented. Thus, Appellant's claim that he did not understand that the court could impose a sentence other than what was recommended is also unsupported by the record.

{¶40} As such, this factor weighs in favor of the state as to both case numbers.

Whether the accused had a complete defense to the charge

{¶41} Appellant does not provide an argument as to this factor. Appellant does generally assert within his brief that he and his counsel disagreed about his defense. At the plea hearing, defense counsel clarified that Appellant did not understand the difference between possession and trafficking which was causing disagreements as to what defenses might be available.

{¶42} However, as the state points out, Appellant did not raise the possibility of a specific defense at any point in this matter, including on appeal. He conceded guilt as to possession of the drugs. Additionally, the state noted at the motion hearing that it had evidence of several buys conducted by a confidential informant involving Appellant.

{¶43} In reviewing the record as a whole, the factors weigh heavily in favor of the state. The record is devoid of any evidence that the trial court abused its discretion in denying Appellant's motion to withdraw his plea in either case. As such, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> THE TRIAL COURT ERRED IN FAILING TO GRANT MR. MULDROW'S PRE-SENTENCING MOTION TO REMOVE COUNSEL IN CASE NOS. 2019 CR 00110 [SIC] AND 00139A.

{¶44} Appellant argues that it is clear from the record the client-attorney relationship had completely broken down and jeopardized his right to effective counsel. Appellant contends that his counsel did not have his best interests at heart, that they had several arguments, and that counsel did not respond to his messages. Appellant contends that the trial court failed to question him despite being aware of those concerns.

{¶45} In response, the state argues Appellant failed to establish a break-down in the relationship that affected his right to effective counsel. The state urges that Appellant admitted guilt and is only unhappy with his sentence. The state also contends that defense counsel explained the discussion of a four-year sentence was part of the early

talks between counsel and the state but that specific term was never agreed to by the state.

{¶46} Although not raised by the parties, Appellant had several attorneys in this matter. In case number 19 CR 00101, Appellant had a total of three attorneys appointed to represent him. On March 14, 2019, at Appellant's request, his lawyer's motion to withdraw was sustained and another was appointed. On March 22, 2019, only a week later, the court granted the second lawyer's motion to withdraw and appointed a third. In case number 19 CR 00139A, on March 22, 2019, the trial court sustained the motion to withdraw and the same attorney Appellant ultimately was appointed in his companion case.

{¶47} The record establishes that the trial court attempted to provide Appellant counsel that would satisfy him. We note that Appellant's most recent attempt to remove his counsel, which is at issue in this appeal, occurred the day before his sentencing hearing was scheduled to occur. Regardless, Appellant indicated at the plea hearing that he was satisfied with his counsel's representation despite their disagreements. As such, Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

> THE TRIAL COURT'S SENTENCING ENTRIES FOR CASE NO. 2019 CR 00101 AND CR 2019 00139A REFLECT DIFFERING AMOUNTS OF CREDIT FOR JAIL TIME SERVED IN THE MAHONING COUNTY JUSTICE CENTER PRIOR TO SENTENCING.

{¶48} Appellant argues that the trial court's jail time credit calculation was incorrect. Appellant argues that the sentencing entries in his cases reflect different jail time credit calculations. In 19 CR 00101, the trial court granted 257 days of credit whereas in 19 CR 00139A, the trial court granted only 253 days of credit. Appellant requests a remand for the purpose of a proper calculation of jail time credit.

{¶49} The state responds by arguing that Appellant was held on two separate cases and he is only entitled to credit for the offense for which he is serving time. Thus, he would not receive credit in one case for time served on another case.

{¶50} The record shows that Appellant was arrested in case number 19 CR 00101 on January 23, 2019. It appears that he was held in jail until he was released on a recognizance bond on January 24, 2019. He remained on bond until March 5, 2019 when the state filed a motion to revoke based on the conduct that led to his second indictment. He was not officially held on 19 CR 00139A until March 10, 2019. Thus, he was not held for equal time in both case numbers.

{¶51} "When a defendant is sentenced to concurrent prison terms on multiple charges, the court must apply jail-time credit under R.C. 2967.191 toward each concurrent prison term. But 'a defendant is only entitled to jail-time credit for confinement that is related to the offense for which he is being sentenced.' " (Internal citations omitted.) *State v. Mason*, 7th Dist. Columbiana No. 10 CO 20, 2011-Ohio-3167, ¶ 16, *State v. Dailey*, 3d Dist. No. 8-10-01, 2010-Ohio-4816, ¶ 25; 28.

{¶52} It is clear from the record that the two different calculations resulted from the fact that Appellant was held for different lengths on separate case numbers. Thus, the trial court did not err in awarding different amounts of jail time credit. Notably,

Appellant will receive the benefit of the different calculations because the sentences were ordered to run concurrently, and the larger credit is applied to the longer sentence in this matter. Accordingly, Appellant's third assignment of error is without merit and is overruled.

Conclusion

{¶53} Appellant argues that the trial court erroneously denied his *pro se* pre-sentence motion to withdraw his guilty plea and his *pro se* motion to remove counsel. He also argues that the court erroneously calculated his jail time credit. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are 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.