[Cite as *State v. Boyer*, 2024-Ohio-1319.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOSEPH L. BOYER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 CO 0026

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2022 CR 00424

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Judges, and William A. Klatt, Judge of the Tenth District Court of Appeals, Sitting by Assignment (Retired).

JUDGMENT:
Reversed and Remanded.
Guilty Plea and Convictions Vacated.

Atty. Vito J. Abruzzino, Columbiana County Prosecutor and *Atty. Shelley M. Pratt*, Assistant Prosecutor, for Plaintiff-Appellee

Atty. Mark J. Lavelle, for Defendant-Appellant

Dated: March 21, 2024

WAITE, J.

{¶1} Appellant Joseph L. Boyer appeals the trial court's denial of his presentence motion to withdraw his guilty plea and argues that his counsel was constitutionally ineffective. Because this record reflects Appellant was misinformed about the most crucial fact involved in his change of plea hearing, the court should have granted the presentence motion to withdraw his guilty plea. For this reason, Appellant's first assignment of error is sustained and the judgment of the trial court is reversed. Appellant's second assignment of error regarding ineffective assistance of counsel is moot based on our ruling on the first assignment of error. Appellant's plea is vacated and the case is remanded for further proceedings.

Facts and Procedural History

{¶2} On September 14, 2022, Appellant was indicted by the Columbiana County Grand Jury for attempted felony murder in violation of R.C. 2923.02, 2903.02(B), a first degree felony; felonious assault in violation of R.C. 2901.11.(A)(2), a second degree felony; and domestic violence pursuant to R.C. 2919.25(A), a fourth degree felony. On January 9, 2023, the court held a change of plea hearing. At the start of this hearing, the court stated that there was no plea agreement, but that count one would be dismissed at sentencing if Appellant pleaded guilty to the other charges. (1/9/23 Tr., p. 8.) The court did not explain its reasons for these proposed actions despite the fact that there was no plea agreement. Earlier that day, Appellant had signed a written response to the court regarding his change in plea, however, in the document he stated that he wished to have a bench trial and that someone had forced him to plead guilty. This document was

reviewed by the trial judge at the change of plea hearing. The contradictory nature of the written statement to the court was not discussed at the hearing. However, the court reviewed Appellant's constitutional and nonconstitutional rights under Crim.R. 11, then accepted his guilty plea to counts two and three of the indictment. The judgment entry accepting the guilty plea was filed January 10, 2023.

{¶3} On February 10, 2023, Appellant filed a motion to withdraw his guilty plea. A hearing was held on March 24, 2023. Two letters and a statement prepared by Appellant for the court were entered into evidence. The judge had not seen the prepared statement prior to the hearing and allowed Appellant to testify as to his reasons for filing the motion to withdraw. The court denied the motion in a judgment entry filed on April 5, 2023.

{¶4} The sentencing hearing was held on April 24, 2023. The court sentenced Appellant to eight to twelve years in prison for felonious assault, count two, and twelve months in prison on count three, domestic violence, to be served consecutively. The final sentencing order was filed on April 25, 2023.

{¶5} On April 25, 2023, the state filed a motion to dismiss count one of the indictment "as a result of a legal issue with the charge." The court granted the motion on April 26, 2023.

{¶6} Appellant filed a notice of appeal on May 5, 2023 and raises two assignments of error.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA.

{¶7} Appellant asserts that a presentence motion to withdraw a guilty plea should be freely and liberally granted. He argues that he presented multiple reasons for withdrawing his plea that were reasonable and supported by the record. Appellant cites the appropriate law regarding withdrawing a presentence guilty plea, which sets forth a nine-factor test. He contends that he was led to believe count one would be dismissed in exchange for his guilty plea to counts two and three in the indictment. He later discovered that count one, attempted felony murder, was not a crime in Ohio and was required to be dismissed regardless of his plea to the remaining counts. Allegedly, the attorneys at the January 9, 2023 change of plea hearing knew this, as well as the trial judge, but it was not explained to Appellant. He believed he was potentially subject to over thirty years in prison if he went to trial, but absent count one, his potential sentence was only thirteen years in prison. The risk of a thirty-year prison term was an important factor, possibly the deciding factor, for his decision to enter the plea, and it was not made clear to him that he was never at risk of spending thirty years in prison.

{¶8} The trial court set forth in its judgment entry the correct legal standards regarding a presentence motion to withdraw a plea. 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." This rule provides a clear and demanding standard for deciding a postsentence motion to withdraw a guilty plea, but gives no guidelines for deciding a presentence motion. *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992). While a presentence motion to withdraw a plea shall be freely and liberally granted, the trial court must determine "whether there is a

reasonable and legitimate basis for the withdrawal of the plea." *Id.* at 527. Further, "a defendant does not have an absolute right to withdraw a plea prior to sentencing." *Id.*

{¶9} A ruling on a presentence motion to withdraw a plea is within the sound discretion of the trial court. *State v. Cuthbertson*, 139 Ohio App.3d 895, 898, 746 N.E.2d 197 (2000). An abuse of discretion is more than an error of judgment; it implies a decision that is unreasonable, arbitrary, or unconscionable. *Xie* at 528. "[U]nless it is shown that the trial court acted unjustly or unfairly, there is no abuse of discretion." *Id.* at 526.

{¶10} We have adopted a list of nine factors which must be weighed when considering a presentence motion to withdraw a plea: (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. 08 MA 12, 2008-Ohio-5043, ¶ 13; see also *State v. Fish*, 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1st Dist.1995) (listing eight factors). This list is non-exhaustive and other factors may be considered. *State v. Lundy*, 7th Dist. Mahoning No. 07 MA 82, 2008-Ohio-1535, ¶ 18. Consideration of the factors involves a balancing test, and no single factor is conclusive. *Scott* at ¶ 13.

{¶11} Appellant testified at the motion to withdraw hearing that one of his two attorneys explained to him that the state would dismiss count one, attempted felony murder, after he pleaded guilty to the remaining counts. (3/24/23 Tr., p. 12.) He was

under the assumption that there was a plea agreement in place and that the documents he signed in relation to the guilty plea constituted a plea agreement. (3/24/23 Tr., pp. 12-13.) This is not an unreasonable assumption, given the facts of this case. Yet, no plea agreement had been reached in this case, and the dismissal of count one was not in response to Appellant's guilty plea, nor did it provide consideration for the plea. Count one was dismissed solely because it did not constitute a crime that could be charged in Ohio, as discussed below.

{¶12} The most serious charge in the indictment, attempted felony murder, was determined to be invalid during the change of plea hearing, although the actual reason for dismissing it was not explained at the change of plea hearing. The prosecutor stated that "some legal issues" arose regarding count one, and that it would be dismissed based on *State v. Nolan*. (1/9/23 Tr., p. 3.) The dismissal was, in fact, due to *State v. Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016, although this citation is not in the record of the change of plea hearing and the holding of the case was never mentioned. *Nolan* held "that attempted felony murder is not a cognizable crime in Ohio." *Id.* at ¶ 10. Clearly, Appellant would have no idea what "*State v. Nolan*" stood for or why count one was actually dismissed at the time, because there was no explanation beyond the cryptic remarks made by the state.

{¶13} The prosecutor and the trial judge did not attempt to explain to Appellant why count one was dismissed, at least as far as can be determined by the trial court record. The record from the change of plea hearing reveals only that count one was dismissed due to "developments and discussions" between the attorneys and that they had reached a "resolution" to the case. (1/9/23 Tr., p. 2.) A layperson would understand

this as a plea negotiation, but there clearly was no plea agreement reached or entered in this case and the eventual dismissal of count one had nothing to do with any plea agreement. The trial judge specifically stated there was no plea agreement, yet addressed Appellant as if his guilty plea arose through plea negotiations.

{¶14} Regarding *State v. Nolan*, attempted felony murder is not a cognizable crime in Ohio because *attempted* felony murder requires proof of a *mens rea* of purposely or knowingly, but felony murder does not. A felony murder charge can arise from an unintended or accidental death. *Id.* at ¶ 10. Felony murder is, in essence, a strict liability crime with no need for the state to prove a *mens rea* for murder. A crime charged under the attempt statute, R.C. 2923.02, on the other hand, requires proof of specific intent. *Id.* at ¶ 7. "Attempted felony murder" is contradictory, because it would contain a *mens rea* requirement for a crime that does not have a *mens rea* requirement. Put another way, "felony murder [is] a strict-liability offense and an 'attempt' [is] a specific-intent offense." *State v. Urbanek*, 2023-Ohio-2249, 220 N.E.3d 146, ¶ 36 (6th Dist.).

{¶15} Appellant apparently was presumed to have been aware of this legal analysis, even though the prosecutor apparently did not know about it when the state sought the indictment. The record indicates that the prosecutor was not made aware of the problem until the change of plea hearing. The trial judge, the prosecutor, and Appellant's counsel all allowed Appellant to plead guilty "to the indictment" without explaining to Appellant that the first count was a legal nullity that required dismissal. Appellant was simply told at the change of plea hearing that the "indictment" would eventually be changed to remove count one. (1/9/23 Tr., p. 4.) Count one was not dismissed until the day after the court entered the final judgment of sentence.

{¶16} In reviewing *Xie/Scott* factor eight (the reasons the defendant gave for withdrawing the plea), the trial judge failed to note the key reason that Appellant sought to withdraw his plea: no one explained to him at the change of plea hearing why count one was being withdrawn and that it had nothing to do with Appellant agreeing to plead guilty to the other counts. The court looked only at Appellant's assertion that he now had a defense to the charges. Since Appellant did not actually raise a defense at the hearing, the court negated this factor. (4/5/23 J.E., p. 6.)

{¶17} The underlying problem, that Appellant was left in the dark regarding the dismissal of count one, affects many of the *Xie/Scott* factors. Counsel failed him, because this crucial legal point was not explained. The extent of the Crim.R. 11 change of plea hearing was deficient, as the judge never engaged in a colloquy with Appellant about count one and gave Appellant little or no information as to the actual reason for its eventual dismissal. We can only conclude that Appellant did not understand the nature of the charges in the indictment because no one explained to him that he was charged with a crime that was a nullity. Finally, Appellant's motion was not given full and fair consideration because the judge, having a second opportunity to review and explain the situation regarding the dismissal of count one, again failed to address the matter.

{¶18} The issue with count one's dismissal is more than sufficient to allow Appellant to withdraw his plea. The record also reflects that other errors occurred in the plea process. Appellant testified at the hearing on the motion to withdraw that he wanted to go to trial despite his attorney's recommendation that he accept a "plea agreement." (3/24/23 Tr., pp. 15, 20.) This is confirmed by Appellant's Written Responses to the Court wherein he stated that he wanted to have a trial before a judge. (1/19/23 Written

Responses, p. 1.) Inexplicably, the trial judge, in its April 5, 2023, judgment entry, stated: "Mr. Boyer did not express a preference to proceed to trial. * * * His responses to my questions are also substantially supported by the Written Responses to the Court * * *." (4/5/23 J.E., p. 4.) The record contradicts the trial court's assertions in the April 5, 2023 judgment entry about whether Appellant requested to have a trial. It is true that the judge asked Appellant at the change of plea hearing if he understood he was waiving his right to trial by jury or to the court, and Appellant answered "Yes." Nevertheless, the court failed to address the contradiction in the record at hearing, and clearly misstated Appellant's answer in the Written Responses to the Court.

{¶19} As noted earlier, Appellant also stated in his Written Responses to the Court that he was forced into pleading guilty. This written response was also not discussed at the change of plea hearing. The document, signed on the day of the change of plea hearing, asked Appellant: "Has anybody or anything forced you to plead guilty?" Appellant answered "Yes" without any further explanation. At the change of plea hearing Appellant said he was entering the plea of his own free will, but his contradictory answer on his written form was not addressed. The record reflects that the court did have a copy of the written responses at the change of plea hearing and questioned Appellant about the form to make sure he had signed it.

{¶20} Appellant testified that events were happening too quickly at the change of plea hearing for him to fully understand the ramifications; that he had hearing difficulties and could not understand everything that was being said; that he was told he was facing more than thirty years in prison by going to trial, even though that was not true; that he had to make a life-altering decision in just a few minutes because he was told that the

judge was impatiently waiting for an answer from him; that he was falsely led to believe that he was involved in plea negotiations with the state in which he agreed to plead guilty to counts two and three in exchange for count one being dismissed; and that he now realizes that he never should have been charged with count one, attempted felony murder. Again, none of this is unreasonable given the facts set forth in the record of this case.

{¶21} The trial court determined that only *Xie/Scott* factor number seven (the timing of the motion to withdraw) weighed in Appellant's favor. However, many other factors weighed either heavily or at least partially in Appellant's favor, based on the blatant errors in the change of plea process. The trial court's refusal to acknowledge these factors in Appellant's favor amounts to an abuse of discretion. Appellant's first assignment of error is sustained, the guilty plea is vacated along with the conviction and sentence, and the case is reversed and remanded for further proceedings.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN ALLOWING A CONVICTION DESPITE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

{¶22} Appellant also contends that he should be permitted to withdraw his plea because his trial counsel was constitutionally ineffective. Because we are reversing the conviction and vacating Appellant's plea based on his first assignment of error, this second assignment of error is dismissed as moot.

Conclusion

{¶23} Appellant filed a motion to withdraw his guilty plea that was denied by the trial court. The record reveals that Appellant's counsel, the prosecutor, and the trial judge all led Appellant to believe that he was benefitting from a plea agreement in which the most severe count in the indictment, attempted felony murder, would be dismissed if he pleaded guilty to the other counts in the indictment. However, the attempted felony murder charge was required to be dismissed because it is a charge that cannot be prosecuted in Ohio based on the holding in *State v. Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016. This was not explained to Appellant at any time. This error, along with other mistakes in the plea process, should have led the judge to grant his motion to withdraw the plea, and refusal to allow the plea to be withdrawn amounts to an abuse of discretion. Appellant's first assignment of error is sustained, and the second assignment of error is moot. Appellant's conviction, sentence, and guilty plea are vacated, and the case is reversed and remanded for further proceedings.

Robb, P.J. concurs.

Klatt, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error is sustained and his second assignment is moot. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is reversed. Appellant's guilty plea is vacated along with his conviction and sentence. This matter is remanded to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

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.