

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-09-065

Appellee

Trial Court No. 2008-CR-318

v.

Christopher R. Hofer

DECISION AND JUDGMENT

Appellant

Decided: June 30, 2010

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Richard E. Garand, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the decision of the Erie County Court of Common Pleas denying a presentence motion to withdraw guilty pleas, and subsequent imposition of maximum, concurrent sentences. For the reasons that follow, we affirm.

{¶ 2} On May 24, 2008, appellant, Christopher Hofer, barged into his grandmother's home. Appellant asked his grandmother for a credit card which she refused. An argument ensued and appellant got into a physical altercation with his sister. Appellant's sister went to police and filed charges. On the complaint of the sister, police contacted appellant by phone and notified him of the domestic violence charge. Appellant informed police he would turn himself in the following day.

{¶ 3} That evening, a male called the police station. He stated that appellant had phoned appellant's grandmother demanding money in order to leave town. Reportedly, appellant's grandmother gave appellant \$300 cash and a debit card with \$900 on it. While police were en route, appellant's sister called 911 to advise police that appellant may be in a vehicle parked in the driveway.

{¶ 4} Officers arrived on the scene, but appellant had fled. Officers then observed a vehicle with its lights off, moving at a high rate of speed. Police pursued the suspicious vehicle, pulling up behind it. Officers witnessed appellant, whom they knew, exiting the car and fleeing on foot. The car then hurriedly turned around and drove over the grass to escape police. Officers blocked the car's exit with their cruisers. Police then detained the three men remaining in the vehicle, but were unable to apprehend appellant.

{¶ 5} Shortly after midnight, police spotted appellant who then took off running, once again evading arrest. Appellant was finally captured around 3:00 a.m. and served with the domestic violence complaint and a charge of obstructing official business.

{¶ 6} The following day, juveniles found a handgun in the front yard of a home near where appellant had fled police. The homeowner informed police that when he had mowed the lawn the previous afternoon no gun was in the yard. Officers determined that the gun was most likely discarded by appellant the previous evening while fleeing.

{¶ 7} On May 26, 2008, police interviewed appellant about the found handgun. Appellant admitted to handling the gun in the early evening of May 24 before coming to Huron, but denied throwing it from the window of the car and was unaware who did. Police also interviewed the driver of the vehicle in which appellant had attempted to flee. He stated that he had no knowledge of a gun being in the car. Police charged appellant with having a weapon under a disability.

{¶ 8} On July 11, 2008, the Erie County Grand Jury indicted appellant for domestic violence, a first degree misdemeanor, having a weapon under disability, a third degree felony, and misuse of a credit card, a third degree felony.

{¶ 9} On October 27, 2008, appellant failed to appear for a pre-trial hearing, and a bench warrant was issued for his arrest. Appellant was subsequently apprehended. The hearing was rescheduled for November 17, 2008. At the November hearing appellant agreed to enter guilty pleas on reduced counts of attempted having a weapon while under a disability, a fourth degree felony and attempted misuse of a credit card, a fourth degree felony. The domestic violence charge was to be dismissed. The trial court accepted appellant's guilty pleas and scheduled sentencing for January 29, 2009. Appellant failed to appear for sentencing, and the court issued a warrant for his arrest.

{¶ 10} Appellant was apprehended in September 2009. The court rescheduled sentencing for October 8, 2009. At sentencing, appellant asked for a continuance, advising the court that there may be issues of mitigation. The court denied appellant's request for continuance, after which appellant orally moved to withdraw his plea.

{¶ 11} The trial court proceeded to hold an evidentiary hearing as to appellant's motion. Appellant claimed that the trial court lacked jurisdiction over the charge of attempted having a weapon under disability, and that he had a witness who could provide a complete defense to the charge of attempted misuse of a credit card. The trial judge then gave appellant's counsel the opportunity to speak on behalf of the motion to withdraw the plea. Counsel gave explanation as to why he felt there was a jurisdictional issue on the weapons charge. The judge reviewed the record and determined that no jurisdictional issue existed. The court then noted that appellant's plea hearing fully complied with the requirements of Crim.R. 11. The trial court ultimately denied appellant's motion to withdraw his guilty pleas.

{¶ 12} The trial court sentenced appellant to 18 months incarceration on each count to run consecutively, for a total of 36 months. Appellant filed a timely notice of appeal setting forth the following assignments of error:

{¶ 13} "I. The trial court erred when it denied Mr. Hofer's presentence motion to withdraw his guilty plea;

{¶ 14} "II. The trial court erred when it imposed maximum consecutive sentences."

I. Pre-sentence Motion to Withdraw Guilty Plea

{¶ 15} Appellant contends that the trial court erred when it denied his presentence motion to withdraw his guilty pleas.

{¶ 16} "[A] presentence motion to withdraw a guilty plea should be freely and liberally granted. Nevertheless, it must be recognized that a defendant does not have an absolute right to withdraw a plea prior to sentencing. Therefore, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *State v. Xie* (1992), 62 Ohio St.3d 521, 527. The decision to grant or deny a defendant's motion lies within the sound discretion of the trial court and it will not be disturbed absent an abuse of that discretion. *Id.* In order to find an abuse of discretion, a reviewing court must find more than error; the reviewing court "must find that the trial court's ruling was 'unreasonable, arbitrary or unconscionable.'" *Id.*, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 17} "Some of the factors that are weighed in considering the trial court's decision on a presentence motion to withdraw a plea are as follows: (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) the extent of the hearing on the motion to withdraw; (5) whether the trial court gave full and fair consideration to the motion; (6) whether the timing of the motion was reasonable; (7) the reasons for the motion; (8) whether the defendant understood the nature of the charges and potential

sentences; and (9) whether the accused was perhaps not guilty or had a complete defense to the charge." *State v. Griffin* (2001), 141 Ohio App.3d 551, 554.

{¶ 18} Appellant asserts that he was not in possession of the weapon while in Erie County, though he admits to handling the weapon in another county earlier that day. Thus, he claims, pursuant to R.C. 2901.12(A), that jurisdiction was improper on the weapons charge. Appellant further states that, while all the elements of having a weapon while under a disability took place in the state of Ohio, the weapon and appellant were never in Erie County at the same time.

{¶ 19} The trial court, while conducting the hearing on the motion to withdraw the pleas, reviewed the police reports which stated that the gun was found in the area where appellant was apprehended. The trial court found the jurisdictional issue to be without weight. We agree with the trial court; the jurisdictional argument is without merit. See R.C. 29011(A) and 2901.12(H).

{¶ 20} Appellant also moved to withdraw his guilty plea on the charge of attempted misuse of a credit card contending that he had permission to use the credit card. Appellant claims that he was not afforded an opportunity for a full and impartial hearing because he was precluded from introducing evidence at the hearing to show that he was possibly not guilty. Appellant further asserts that counsel's request for a continuance suggests that appellant had not been in touch with counsel and was unaware of the date of the sentencing hearing.

{¶ 21} As to appellant's claim that he was precluded from introducing evidence at the hearing, we find no merit. Appellant contends that his grandmother, the alleged victim in the credit card claim, was interested in having the charge dropped. However, the victim was not present at the hearing nor did she file a victim impact statement. Appellant further alleged that his grandmother had tried contacting the prosecutor's office about dropping the charge. However, there is no evidence, other than appellant's self-serving statement made moments before being sentenced, to support the claim.

{¶ 22} Regarding appellant's continuance claim, he pled guilty to the charges on November 17, 2008, and sentencing was scheduled for January 29, 2009. Appellant had nearly three months to prepare for sentencing. Further, appellant failed to appear at the January sentencing hearing. After being apprehended in September 2009, appellant had a month to prepare for the October hearing. During this October sentencing hearing it became clear that the only reason for the requested continuance was to discuss matters of mitigation, not supposed innocence of the charges. It was only after the continuance was denied that appellant moved to withdraw his plea.

{¶ 23} Under Crim.R. 11(C), a trial court is required to determine whether an offender's plea of guilty is knowing, intelligent, and voluntary. *State v. Engle* (1996), 74 Ohio St.3d 525, 526. As the trial court noted, appellant had competent counsel and was fully aware of the charges. Appellant stated that he understood the nature of the charges against him, was entering into the plea of his own free-will, and was pleading guilty

because he was in fact, guilty. The admission was made knowingly and voluntarily. Thus, appellant's plea hearing fully complied with Crim.R. 11.

{¶ 24} The court held a full and impartial hearing on appellant's motion. Appellant had time to prepare, but presented no evidence supporting his assertion that he was not guilty of the credit card charge. Appellant's motion to withdraw his plea was made nearly a year after the plea hearing. Further, the state dropped a charge and reduced the instant charges against appellant in return for the guilty pleas. We do not find the trial court's ruling to be unreasonable, arbitrary, or unconscionable. Accordingly, appellant's first assignment of error is found not well-taken.

II. Maximum, Concurrent Sentences

{¶ 25} Appellant was sentenced to 18 months incarceration on each of two charges to be served consecutively. Appellant asserts that the trial court erred by failing to consider the factors set out in R.C. 2929.11 and 2929.12 when imposing maximum consecutive sentences.

{¶ 26} On appeal from a felony sentencing judgment, a reviewing court must first determine whether the sentence imposed complies with the applicable sentencing rules and statutes. If the sentence is clearly and convincingly contrary to law, it must be vacated. When the sentence is in conformity with the law, the sentencing decision is reviewed under an abuse of discretion standard. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4. An abuse of discretion is more than an error of law or judgment,

the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable.

State v. Adams, supra.

{¶ 27} Trial courts are not required to make findings or give reasons for imposing maximum, consecutive or more than minimum sentences. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 100. A sentencing court must consider the guidance provided in R.C. 2929.11 and 2929.12, but it is unnecessary that the court make specific findings or give reasons for imposing a sentence at the sentencing hearing. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38.

{¶ 28} The sentences given to appellant, in this case, were within the ranges given by statute. R.C. 2929.14(A)(4) and (5). The record demonstrates that that the trial court considered the sentencing factors as required by R.C. 2929.11 and 2929.12. The trial court took note of appellant's past juvenile record and extensive adult record including what the court described as "attitude offenses." Further, the court noted that appellant had been given probation, jail time, and judicial release on other offenses to no avail. Rather than taking an opportunity to rehabilitate, appellant violated his judicial release.

{¶ 29} Therefore, we cannot say that the trial court abused its discretion in handing down maximum, consecutive sentences. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 30} On consideration whereof, the decision of the Erie County Court of Common Pleas is affirmed. Costs to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.