

[Cite as *State v. Zimmerman*, 2010-Ohio-4087.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-866
 : (C.P.C. No. 08CR-07-5051)
 Edwin E. Zimmerman, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on August 31, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for
appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Edwin E. Zimmerman ("defendant"), appeals from a judgment of the Franklin County Court of Common Pleas convicting him of two counts of rape and one count of attempted rape and imposing a 20-year term of incarceration, a \$35,000 fine, and the classification as a Tier III Sex Offender. For the reasons that follow, we reverse the judgment of the Franklin County Court of Common Pleas.

{¶2} By way of a July 11, 2008 indictment, defendant was charged with two counts of rape, two counts of kidnapping, one count of attempted rape, and one count of

abduction. With the exception of the abduction count, all counts carried sexually violent predator specifications. The charges stemmed from two separate incidents involving two different prostitutes. On October 23, 2008, defendant entered pleas of not guilty and not guilty by reason of insanity. Defendant then underwent evaluations to determine his competency in addition to his mental state at the time of the alleged offenses. The parties stipulated to the evaluations, which indicated that defendant was competent to stand trial and was under no mental defect at the time of the alleged offenses. As a result, the matter was scheduled for trial on June 1, 2009.

{¶3} On the morning of trial, defendant and the State entered into a plea agreement whereby defendant agreed to plead guilty to two counts of rape and one count of attempted rape in exchange for the State's agreement to dismiss the remaining counts and specifications. Before accepting defendant's change of plea, the trial court conducted a hearing in accordance with Crim.R. 11. In this hearing, the parties engaged in the typical plea colloquy, during which the trial judge addressed defendant to explain the nature of the charges, the maximum possible penalties involved, and the legal effects of entering a guilty plea. Defendant entered the plea, which the trial court accepted. Counsel then mentioned the need to recite the alleged facts for the record.

{¶4} The State alleged that on November 11, 2007, at around 3:00 a.m. or 3:30 a.m., Robin Bickerton was walking on Sullivant Avenue towards Oakley Avenue. A white van stopped next to her, at which point a man exited the van, approached her with a butcher's knife, and forced her into the van. The man drove around with her for 30 to 45 minutes and eventually ended up in an area near Rickenbacker Air Force Base. The man held Ms. Bickerton at knifepoint and forced her to perform fellatio and intercourse. He

then forced her to exit the van in an unknown area. Apparently, Ms. Bickerton had to walk approximately a mile before she reached a house where she called the police. Ms. Bickerton submitted to a rape kit examination, which contained a male fraction and semen. Through the CODIS database, the semen collected matched defendant.

{¶5} The alleged events concerning the other victim, April Fitzpatrick, occurred on December 16, 2007. On that date, Ms. Fitzpatrick was walking in the area of West Broad Street and Princeton Avenue when a man in a van asked her if she needed a ride home. Initially, she willingly entered the van but began to have reservations soon thereafter. She asked the man to stop, but he refused and only drove faster. The man drove to his residence, which was located at 123 Union Street in London, Ohio. The man forced her inside his residence and locked the door behind him. He said, "I want to [f***] you," which caused Ms. Fitzpatrick to panic. She was able to retrieve a can of mace and sprayed the man before fleeing from his residence. She then flagged down a passing motorist who took her to the London Police Department. She identified the residence where the incident occurred, which turned out to be defendant's residence.

{¶6} A warrant was issued for defendant's arrest on July 2, 2008. The next day, London police attempted to stop defendant as he was driving his vehicle. Defendant led them on a 13-mile chase reaching speeds of 120 miles per hour. Defendant was eventually arrested and gave a statement to Columbus police detectives.

{¶7} After this recitation of the alleged facts, the trial judge asked defendant whether anything caused him to want to change his guilty plea. In response, defendant explained that almost everything he heard made him question his guilty plea. Further, he indicated:

I'm pleading guilty to it, but it didn't happen like that. I just feel – I don't feel right about it, honestly, especially after hearing the way they said I did things. It didn't happen like that.

(June 1, 2009, Tr. 25.) Based upon defendant's reservations, the trial court permitted a recess during which defendant conferred with counsel. After the recess, defense counsel expressed defendant's request to change his guilty plea to a plea under *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160. The State raised no objection, and the trial court accepted defendant's *Alford* plea. As a result, the trial court found defendant guilty of two counts of rape and one count of attempted rape, dismissed the remaining counts and specifications, ordered a presentence investigation report, and set the matter for sentencing.

{¶8} Two days later, defendant wrote a letter to the trial judge. In this letter, defendant expressed his desire to withdraw his plea and requested that a different attorney be assigned to his case. As a result, defendant's counsel filed a motion to withdraw as counsel on June 10, 2009. After conducting a hearing on the motion, the trial court permitted counsel to withdraw and appointed new counsel for defendant.

{¶9} By way of new counsel, defendant filed a formal motion to withdraw his plea on June 18, 2009. The State opposed the motion, and the matter came before the trial court for a hearing on June 24, 2009. On June 26, 2009, the trial court rendered a decision denying defendant's motion to withdraw his guilty plea.

{¶10} The matter came before the court for a sentencing hearing on August 13, 2009. On August 19, 2009, the trial court imposed its sentence, which included a sentence of 9 years imprisonment on Count 1 of the indictment, 4 years on Count 2 of the indictment, and 7 years on Count 4 of the indictment. The terms of imprisonment were to

be run consecutively for a total period of 20 years of imprisonment. The judgment entry also classified defendant as a Tier III Sex Offender and ordered him to pay court costs and \$35,000 in fines. It is from this entry that defendant appeals and raises the following assignments of error:

ASSIGNMENT OF ERROR NUMBER ONE

THE TRIAL COURT ERRED WHEN IT OVERRULED THE DEFENDANT'S MOTION TO WITHDRAW HIS PLEA, WHICH WAS MADE BEFORE SENTENCING.

ASSIGNMENT OF ERROR NUMBER TWO

THE TRIAL COURT ERRED WHEN IT IMPOSED A FINE UPON THE DEFENDANT OF \$35,000.00 WITHOUT PROPERLY CONSIDERING THE DEFENDANT'S PRESENT AND FUTURE ABILITY TO PAY THE FINE AS REQUIRED BY LAW.

ASSIGNMENT OF ERROR NUMBER THREE

THE APPLICATION OF S.B. 10, OHIO'S VERSION OF THE ADAM WALSH ACT, TO THOSE CONVICTED OF OFFENSES COMMITTED BEFORE ITS EFFECTIVE DATE, VIOLATES THE EX POST FACTO PROHIBITION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION AND THE BAN ON RETROACTIVE LAWS SET FORTH IN ARTICLE II, SECTION 28, OF THE OHIO CONSTITUTION.

{¶11} In his first assignment of error, defendant argues that the trial court erred when it denied his presentence motion to withdraw his guilty plea. Such a motion is governed by Crim.R. 32.1, which 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.

"[A] presentence motion to withdraw a guilty plea should be freely and liberally granted." *State v. Xie* (1992), 62 Ohio St.3d 521, 527. However, the right to withdraw a plea is not absolute. When presented with such a motion, a "trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Id.*

{¶12} A trial court's decision on a presentence motion to withdraw a guilty plea is subject to an abuse of discretion standard of review. *Xie* at paragraph two of the syllabus. Absent an abuse of discretion, a trial court's decision must be affirmed. *Id.* at 527. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶13} Appellate review of a decision on a presentence motion to withdraw a guilty plea necessarily depends upon the particular facts and circumstances presented. *State v. Walton* (1981), 2 Ohio App.3d 117, 119. If an appellate court finds that the trial court unjustly or unfairly denied a defendant's presentence motion to withdraw a guilty plea, then a reversal is warranted. *Xie* at 526, quoting *Barker v. United States* (C.A.10, 1978), 579 F.2d 1219. Accordingly, the issue before us is whether the trial court abused its discretion in denying defendant's presentence motion to withdraw his guilty plea. In analyzing this issue, we may consider the following list of non-exhaustive factors:

- (1) whether the prosecution would be prejudiced if the plea were vacated;
- (2) whether the offender was represented by highly competent counsel;
- (3) the extent of the Crim.R. 11 hearing;
- (4) whether there was a full hearing on the motion to withdraw the offender's guilty plea;
- (5) whether the trial court gave full and fair consideration to the motion;
- (6) whether the

motion was made within a reasonable time; (7) whether the motion set forth specific reasons for the withdrawal; (8) whether the accused understood the nature of the charges and possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense to the crime.

State v. Jones, 10th Dist. No. 09AP-700, 2010-Ohio-903, ¶10, citing *State v. Fish* (1995), 104 Ohio App.3d 236, 240. Consideration of the factors is a balancing test, and no one factor is conclusive. *Id.* at 240.

{¶14} In support of his first assignment of error, defendant recites the reasons he advanced in his letter and presentence motion to withdraw his guilty plea. Defendant emphasizes that he has always maintained his innocence throughout this matter. Defendant admits that he solicited the prostitutes and promised drugs and money in exchange for sex. However, he vehemently denies ever using or threatening to use force. Likewise, he denies using or ever having a butcher's knife. Defendant instead maintains that any activities that were performed were entirely consensual amongst the parties. Defendant admits that he refused to fulfill his end of the bargain but nevertheless claims that he was innocent of the charges of rape and attempted rape.

{¶15} Defendant therefore argues that his former counsel led him astray in advising him to plead guilty. In spite of defendant's consistent version of the facts, his former counsel expressed concern over a series of incriminating statements defendant made to investigators. Defendant argues that his former counsel should have filed a motion in limine to have the admissibility of these statements determined before entering the plea. Furthermore, former counsel admitted under oath that he should have filed such a motion before entering the plea. Rather than filing such a motion, however, former counsel assumed that such statements would be admissible and damaging to the

defense. Accordingly, and based upon the charges and specifications defendant faced, former counsel expressed concern about a potentially long prison sentence had defendant been convicted after a trial. Based upon these circumstances, former counsel admitted to pressuring and coercing defendant into taking the plea. Finally, former counsel testified that immediately after the Crim.R. 11 hearing, he regretted entering the plea and believed that the case should have been taken to trial.

{¶16} After reviewing the record in the instant matter, we find that certain factors in the balancing test weigh against allowing the withdrawal. Indeed, defendant fails to mention numerous factors in this appeal. Specifically, the trial court conducted a full and thorough Crim.R. 11 hearing, which resulted in defendant's understanding the nature of the charges and possible penalties he faced. Therefore, the third and eighth factors weigh against allowing the withdrawal. The trial court similarly conducted a complete inquiry into the grounds for defendant's motion to withdraw. As such, the fourth factor weighs against allowing the withdrawal. Although defendant questions the tactics of his former counsel in failing to file a motion in limine and pressuring defendant into taking the plea, there is no argument that former counsel was anything but competent. The second factor therefore weighs against allowing the withdrawal.

{¶17} In spite of these findings and based upon the unique circumstances of this case, we nevertheless find that defendant provided a "reasonable and legitimate basis" to withdraw his plea such that the trial court unfairly and unjustly denied the presentence motion. See *Xie* at 526-27.

{¶18} We believe the circumstances of this matter are similar to a case this court previously decided in *State v. Boyd* (Oct. 22, 1998), 10th Dist. No. 97APA12-1640, 1998

Ohio App. LEXIS 4914, 1998 WL 733717. In *Boyd*, the defendant entered a not guilty plea to the offense as charged before entering a guilty plea to a lesser included offense. Id. 1998 Ohio App. LEXIS 4914, *1, 1998 WL 733717, *1. The trial court conducted a Crim.R. 11 hearing and covered the requisite legal bases. Id. 1998 Ohio App. LEXIS 4914, *2-4, 1998 WL 733717, *1. After the plea colloquy and the State's recitation of the facts, the trial court asked the defendant what plea he wished to enter, and the defendant responded, "Guilty I guess." Id. 1998 Ohio App. LEXIS 4914, *4, 1998 WL 733717, *2. Without further inquiry, the trial court accepted the defendant's plea, ordered a presentence investigation report, and set the matter for sentencing. Id.

{¶19} Within days of entering the plea, the defendant in *Boyd* asked his counsel about the process of withdrawing his plea. Id. 1998 Ohio App. LEXIS 4914, *6, 1998 WL 733717, *3. Accordingly, one month after entering the plea but before the sentencing, the defendant sent a letter to the trial court asking to withdraw the plea. Id. 1998 Ohio App. LEXIS 4914, *4, 1998 WL 733717, *2. In the letter, the defendant indicated he was innocent of the charges but entered the plea because he was afraid to go against his counsel's advice. Id. 1998 Ohio App. LEXIS 4914, *4-5, 1998 WL 733717, *2. He also requested an opportunity to prove his innocence to a jury. Id. 1998 Ohio App. LEXIS 4914, *5, 1998 WL 733717, *2. After filing a formal motion to withdraw outlining the same positions, the issue came before the trial court for a hearing. Id. The original trial judge left the bench without deciding the motion, and a successor conducted a second hearing on the motion to withdraw, during which:

Defense counsel stated that defendant had always been adamant about his innocence and wanted to go to trial; however, counsel advised defendant that given the evidence against him, it would be in his best interest to enter a plea as

opposed to going to trial. Counsel further stated that although defendant finally agreed to enter a plea, he had strong reservations about doing so. According to counsel, defendant's "guilty I guess" response at the plea hearing demonstrated his hesitation and skepticism at entering the plea.

Id. 1998 Ohio App. LEXIS 4914, *7, 1998 WL 733717, *3. The trial court denied the motion, and an appeal followed. On appeal, our court held that some of the factors weighed against allowing the withdrawal, while others weighed in favor of it. Id. 1998 Ohio App. LEXIS 4914, *12, 1998 WL 733717, *5. Specifically, our court held that the following factors weighed in favor of granting the withdrawal: the length of time between the guilty plea and the requested withdrawal, the explanation and reasons for the requested withdrawal, the defendant's claim of innocence along with his equivocation and apprehension when entering the plea, and the lack of prejudice to the State. Additionally, our court noted that a change in judges between the time the plea was entered and the time of sentencing also played a role in our analysis. Id. 1998 Ohio App. LEXIS 4914, *15-16, 1998 WL 733717, *6.

{¶20} In addition to *Boyd*, we note similarities amongst the instant matter and the case of *State v. Cuthbertson*, 139 Ohio App.3d 895, 2000-Ohio-2638. The defendant in *Cuthbertson* entered a plea and approximately one week later sent a letter to the trial court requesting to withdraw the plea. Id. at ¶4. The letter indicated that the defendant was pressured to entering the plea and that he was innocent of the crime. Id. The trial court denied his motion to withdraw, and the defendant appealed. Id. at ¶9-11. When presented with these circumstances, the Seventh Appellate District noted that the following factors favored allowing the withdrawal: the lack of prejudice to the State, the specifically stated reasons for the requested withdrawal, the timing of the requested

withdrawal, and the possibility of a complete defense. *Id.* at ¶20. In these circumstances,

Cuthbertson held:

[W]hen a defendant claims he is innocent and wishes to withdraw his plea of guilt prior to sentencing, a comparison of the interests and potential prejudice to the respective parties weigh heavily in the interests of the accused. That is, in such a situation we have the inconvenience to the state of proving the guilt of a defendant at trial versus the possibility that a person has pled guilty to a crime [he] did not commit. Absent any showing of some other real prejudice to the state which occurred solely as a result of entering into a plea bargain, as here, the potential harm to the state in vacating the plea is slight, whereas the potential harm to the defendant in refusing to vacate the plea is great. Accordingly, we hold that the failure of the lower court to allow appellant to withdraw his plea was unreasonable.

Id. at ¶21.

{¶21} The similarities amongst *Boyd*, *Cuthbertson*, and the instant matter are clear. Comparing those cases to the instant matter, it is clear that a number of the same factors weigh in favor of allowing defendant to withdraw his guilty plea. Specifically, defendant's motion was filed within a reasonable time. The State concedes as much. The sixth factor weighs in favor of allowing the withdrawal. Defendant's letter and motion sufficiently explained the reasons for requesting the withdrawal, as we have previously outlined. The seventh factor weighs in favor of allowing the withdrawal.

{¶22} With regard to the first factor, the State argues that it would be prejudiced if the withdrawal were permitted because the two victims were available and ready to testify on the morning of the trial. It further notes that the case was 11 months old at the time of the hearing on the motion to withdraw. Additionally, the newly appointed counsel apparently would have required an additional three months to become sufficiently acquainted with the case. Therefore, the State argues that the victims' memories would

have likely faded and defendant's decision to enter the plea and thereafter withdraw it was nothing more than a delaying tactic designed to manipulate the system. We are not persuaded by these arguments.

{¶23} Prejudice will not be presumed when it is not articulated. *State v. Griffin*, 141 Ohio App.3d 551, 554, 2001-Ohio-3203. Additionally, the prejudice to the State is often classified as the most important factor in the balancing test. *Cuthbertson* at ¶18, citing *Fish* at 239-40. Again, as was explained in *Cuthbertson*, the prejudice must relate "solely" to the entering of the plea bargain. *Id.* at ¶21.

{¶24} We perceive the State's arguments as relating only to the inconvenience of having to prosecute its case, rather than relating to actual, articulated prejudice. The State has failed to provide any indication that the two victims have become unavailable. See *Boyd*, 1998 Ohio App. LEXIS 4914, *15, 1998 WL 733717, *6 ("[g]enerally, [prejudice] involves one or more witnesses becoming unavailable due to the delay in the trial resulting from the plea withdrawal."). Further, the Twelfth Appellate District has noted, " '[t]he more time that passes between the defendant's plea and the filing of the motion to withdraw it, the more probable it is that evidence will become stale and that witnesses will be unavailable.' " See *State v. Osborne*, 12th Dist. No. CA2006-01-008, 2007-Ohio-1794, ¶33, quoting *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶40. Again, in the instant matter, mere days passed between the plea and the filing of the motion to withdraw it. We will not presume that the two victims have become unavailable where it has not been demonstrated.

{¶25} Additionally, the 11-month delay from the indictment to the hearing on the motion to withdraw had no relation to defendant's plea. Prior continuances were granted

for reasons unrelated to defendant's plea. Similarly, whether the newly appointed counsel needed additional time to become acquainted with the case is an issue distinct from defendant's motion to withdraw his plea. As a result of the State's failure to demonstrate actual, articulated prejudice, we find that the first factor weighs in favor of allowing the withdrawal.

{¶26} The ninth factor, whether defendant has maintained his innocence or asserted a complete defense, is disputed amongst the parties. Defendant argues that he consistently maintained his innocence throughout this matter and points to his *Alford* plea, his letter, his motion, and the testimony of his former counsel. On the other side, the State argues that defendant entered the *Alford* plea without specifically asserting innocence on the record during the Crim.R. 11 hearing.¹ In support of its position, the State cites a case decided by this court. See *State v. Horton-Alomar*, 10th Dist. No. 04AP-744, 2005-Ohio-1537. That case, however, regarded the trial court's refusal to accept the defendant's attempt at entering an *Alford* plea. *Id.* at ¶7. The instant matter is clearly distinguishable. In the instant matter, defendant requested to enter an *Alford* plea. The State had no objection. As a result, the trial court accepted defendant's *Alford* plea. The State never presented an argument challenging the trial court's acceptance of the *Alford* plea. Accordingly, we are not persuaded by the State's argument that defendant has not maintained his innocence throughout the entirety of these proceedings.

¹ Our court has previously recognized a "distinction between *Alford* pleas as originally recognized by the United States Supreme Court, in which a criminal defendant ostensibly enters a 'normal' guilty plea, and then at some point prior to the trial court's acceptance of the plea makes an assertion of innocence, and *Alford* pleas as they frequently appear in practice, in which a plea agreement is reached, and counsel agree that the defendant will place an assertion of innocence on the record as part of the agreement." *State v. Kirigiti*, 10th Dist. No. 06AP-612, 2007-Ohio-6852, fn.1.

{¶27} As the defendant did in *Boyd*, defendant expressed apprehension and equivocation when entering his plea. Defendant specifically stated that he was pleading guilty but did not feel right about it. Two days after entering the plea, defendant wrote the letter asking to withdraw it because he never used force and the activities were consensual. These positions were echoed in defendant's formal motion. During the hearing on the motion to withdraw, defendant's former counsel testified that defendant consistently maintained his innocence, and it was only after he pressured defendant did he agree to enter the plea. In these circumstances, we find that defendant did maintain his innocence. The ninth factor weighs in favor of allowing the withdrawal.

{¶28} Accordingly, we find that the following factors weigh in favor of allowing the withdrawal: the length of time between the *Alford* plea and the requested withdrawal, the specific explanation and reasons for the requested withdrawal, the defendant's claim of innocence along with his equivocation and apprehension in entering the plea, and the lack of prejudice to the State. As the courts held in *Boyd* and *Cuthbertson*, we find that defendant presented a reasonable and legitimate basis supporting the withdrawal of his plea. Accordingly, the trial court abused its discretion by unfairly and unjustly denying defendant's presentence motion.

{¶29} Based upon the foregoing, we sustain defendant's first assignment of error and overrule as moot defendant's second and third assignments of error. We reverse and remand this matter to the trial court with orders to allow defendant to withdraw his plea.

Judgment reversed; cause remanded.

BRYANT and KLATT, JJ., concur.
