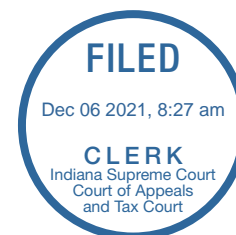


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Zachary Foor,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

December 6, 2021

Court of Appeals Case No.
21A-CR-523

Appeal from the Madison Circuit
Court

The Honorable Mark Dudley,
Judge

Trial Court Cause No.
48C06-2003-MR-777

Crone, Judge.

Case Summary

- [1] Zachary Foor appeals the denial of his motion to withdraw his guilty plea. We affirm.

Facts and Procedural History

- [2] On March 25, 2020, the State charged Foor with the murder of his girlfriend's eleven-month-old child. On November 6, 2020, Foor and his public defender signed a plea agreement, pursuant to which the State agreed not to seek a life sentence without parole. In exchange, Foor agreed to plead guilty as charged and to waive "the right to appeal any sentence imposed by the Court, including the right to seek appellate review of the sentence pursuant to Indiana Appellate Rule 7(B), so long as the Court sentences the defendant within the terms of [the] plea agreement[.]" which left sentencing to the trial court's discretion. Appellant's App. Vol. 2 at 75.
- [3] On November 13, the trial court held a hearing and asked Foor under oath if he had an opportunity to review the plea agreement with his attorney before he signed it and if he was satisfied that he understood its terms. Foor answered yes to both questions. The court also asked if Foor was under the influence of any alcohol or drugs. Foor said that he was not. The court then asked if Foor felt that the guilty plea was his "own free choice and decision" and if he was satisfied with his attorney's representation. Foor answered yes to those questions. Tr. Vol. 2 at 8. The prosecutor recited a factual basis for the charge, and the court asked Foor if that was "in fact what happened[.]" *Id.* at 10. Foor

replied, “Yes your Honor.” *Id.* The trial court took Foor’s plea under advisement and set a sentencing hearing for December 11.

[4] On December 9, Foor submitted an unverified pro se motion to withdraw his guilty plea in which he alleged, among other things, that he “felt pressured to go along with the agreement” and was “under the influence of heroin” when he signed it. Appellant’s App. Vol. 2 at 77-78. The next day, the State filed a response, and the trial court set a hearing on Foor’s motion for January 14, 2021. On December 22, Foor filed an unverified pro se motion to terminate his attorney’s representation in which he alleged, among other things, that his attorney “pressured” him into signing the plea agreement and admitted to negotiating with the prosecution without his consent. *Id.* at 90. At the January 14 hearing, Foor’s counsel disputed Foor’s allegations but stated that he should be removed as Foor’s counsel “so that [Foor] may proceed with his attempt to withdraw his guilty plea.” Supp. Tr. at 9. The trial court granted Foor’s motion to terminate representation, appointed replacement counsel, and reset the hearing on Foor’s motion to withdraw his guilty plea, which ultimately was held in combination with a sentencing hearing on March 18.

[5] At the hearing, Foor presented no evidence in support of his motion. The trial court denied the motion, accepted Foor’s guilty plea, and sentenced him to sixty-five years executed. At the conclusion of the hearing, notwithstanding the waiver provision in the plea agreement, the court advised Foor that he had a right to appeal his sentence. Foor now appeals, but he challenges only the denial of his motion to withdraw his guilty plea.

Discussion and Decision

[6] Indiana Code Section 35-35-1-4(b) provides in pertinent part,

After entry of a plea of guilty, ... but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty ... for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea. The motion to withdraw the plea of guilty ... shall be in writing and verified.

Foor's motion was unverified, and therefore the trial court properly denied it.

Marshall v. State, 590 N.E.2d 627, 631 (Ind. Ct. App. 1992), *trans. denied*.¹

[7] Foor suggests that we should nevertheless consider the merits of his appeal because nothing in the record shows that he “had been informed that he was waiving the right to appeal his sentence by the plea agreem[e]nt.” Appellant's Br. at 11. Foor's argument has at least three flaws. One, the waiver issue was not (and could not have been) raised in his motion to withdraw his guilty plea and therefore has no bearing on or relevance to the trial court's ruling. Two, the record *does* show that Foor was informed that he waived the right to appeal his sentence: the trial court asked him under oath whether he read the plea agreement with his attorney before he signed it and whether he was satisfied

¹ We note that Foor presented no testimony from his former counsel to support the allegations in his motion, and thus “[t]he trial court was entitled to infer that counsel would have testified otherwise had he been called.” *Coomer v. State*, 652 N.E.2d 60, 63 (Ind. 1995). Indeed, counsel disputed several of Foor's allegations at the hearing on the motion to terminate representation. Also, at the sentencing hearing, the trial court stated that it did not believe that Foor was under the influence of heroin when he signed the plea agreement or during the plea hearing. Tr. Vol. 2 at 116.

that he understood it, and he answered yes to both questions. And three, the trial court's erroneous advisement regarding Foor's right to appeal does not affect the validity of his guilty plea. *See Creech v. State*, 887 N.E.2d 73, 77 (Ind. 2008) ("By the time the trial court erroneously advised Creech [at the conclusion of his sentencing hearing] of the possibility of appeal, Creech had already pled guilty and received the benefit of his bargain. Being told at the close of the hearing that he could appeal presumably had no effect on that transaction."). Accordingly, we affirm.

[8] Affirmed.

Bradford, C.J., and Tavitas, J., concur.