

[Cite as *State v. Marks*, 2009-Ohio-6306.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92548

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EUGENE MARKS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-511683, CR-512473, CR-512654

BEFORE: Sweeney, J., McMonagle, P.J., and Blackmon, J.

RELEASED: December 3, 2009

JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Eugene Marks (“defendant”), appeals from his convictions and sentence relating to offenses that occurred on three different occasions. For the reasons that follow, we affirm.

{¶ 2} In Case No. CR-512654, defendant was charged with one count of drug possession that occurred on May 11, 2008. In Case No. CR-512473, defendant was charged with one count of drug possession that occurred on May 18, 2008. In Case No. CR-511683, defendant was charged with two counts of drug trafficking and one count of drug possession that occurred on May 28, 2008.

{¶ 3} At a hearing held on August 7, 2008, the court found defendant incompetent to stand trial and he was referred to the Northcoast Behavioral Center for treatment. The court later found defendant competent to stand trial at a hearing held on October 17, 2008.

{¶ 4} On October 31, 2008, defendant entered no contest pleas in all three cases. During the plea colloquy, defendant raised the issue of merger as to the drug trafficking charges, which the State conceded and reduced his potential maximum prison sentence to four years. The State proffered its version of what the evidence would show at trial and the court found defendant guilty on all counts. The matter was referred to probation for a presentence investigation report.

{¶ 5} On November 3, 2008, defendant filed a pro se motion to disqualify counsel, which was unopposed by his assigned counsel and granted by the trial

court. Defendant was assigned new counsel. On November 24, 2008, the trial court held a hearing on defendant's pro se motion to withdraw his no contest plea. Prior to the hearing, defense counsel requested a re-referral to the Court Psychiatric Clinic for further evaluation of defendant's competency to stand trial. Because the trial court ultimately denied defendant's motion to withdraw his no contest plea, it found no basis for a re-referral to determine defendant's competency to stand trial.

{¶ 6} The trial court imposed sentence as follows: an 11-month prison sentence in Case No. CR-511683, to be served consecutively to a ten-month prison sentence in Case No. CR-512473, both sentences to be served concurrently with a four-year term of community control sanctions in Case No. CR-512654. Defendant was assigned appellate counsel and presents three assignments of error for our review.

{¶ 7} "1. The trial court erred in not allowing appellant to withdraw his guilty plea prior to sentencing."

{¶ 8} A motion to withdraw a guilty plea is governed by the standards set forth in Crim.R. 32.1, which state:

{¶ 9} "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."

{¶ 10} The general rule is that motions to withdraw guilty pleas before sentencing are to be freely allowed and treated with liberality. *State v. Peterseim* (1979), 68 Ohio App.2d 211, 214, 428 N.E.2d 863, citing *Barker v. United States* (C.A. 10, 1978), 579 F.2d 1219, 1223. However, a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715. In ruling on a presentence withdrawal motion, the court must conduct a hearing and decide whether there is a reasonable and legitimate basis for the withdrawal of the plea. *Id.* at 527, 584 N.E.2d 715. The decision to grant or deny such a motion is within the sound discretion of the trial court. *Id.*

{¶ 11} “It is not an abuse of discretion to deny a presentence motion to withdraw a guilty plea when a defendant: (1) is represented by competent counsel; (2) is given a full Crim.R. 11 hearing before entering a plea; and (3) is given a hearing on the motion to withdraw that plea during which the court considers the defendant’s arguments in support of the motion. *State v. Pamer*, Medina App. No. 04CA0027-M, 2004-Ohio-7190; *State v. Sabatino* (1995), 102 Ohio App.3d 483, 657 N.E.2d 527. In summary, a sufficient reason for the withdrawal must appear on the record. See *State v. Lambros* (1988), 44 Ohio App.3d 102, 103, 541 N.E.2d 632.” *State v. Bridges*, Cuyahoga App. No. 87633, 2006-Ohio-6280, ¶5; see, also, *State v. Peterseim*, *supra* at 214, 428 N.E.2d 863.

{¶ 12} Defendant bases this assignment of error on his belief that the trial court did not properly advise him of constitutional rights as required by Crim.R.

11(C). Specifically, defendant maintains the court did not adequately inform him that “the defendant cannot be compelled to testify against himself or herself.” This is incorrect.

{¶ 13} The record contains the following advisement by the trial court:

{¶ 14} “Do you understand that you’re giving up your right to remain silent and not testify at trial?” To which defendant responded, “Yes, your Honor.”

{¶ 15} The case law relied upon by defendant concerns informing a defendant of the right to compulsory process where it was held that merely stating a “right to bring in witnesses * * * to testify” in one’s defense is not the equivalent to the defendant’s right to compel the witnesses attendance. *State v. Rosenburg*, Cuyahoga App. No. 84457, 2005-Ohio-101. It is conceivable that the defendant in *Rosenburg* may have understood from the court’s advisement that he could “bring in witnesses” but may not have understood that he could force witnesses to appear at his trial. In this case, the trial court’s advisement could not have lead to any confusion over defendant’s right not to testify at his trial. Obviously, if defendant has a “right to remain silent and [a right] not [to] testify at trial” he “cannot be compelled to testify against himself.” There is no requirement in the law that the trial court use specific language when informing a defendant of a constitutional right for purposes of Crim.R. 11(C), only that the defendant be sufficiently appraised of the enumerated rights.

{¶ 16} Defendant offers no other basis for withdrawing his guilty plea, therefore, the trial court did not abuse its discretion when it denied his motion.

{¶ 17} Assignment of Error I is overruled.

{¶ 18} “II. The trial court erred by ordering appellant to serve a split sentence when it imposed both prison and community control sanctions.”

{¶ 19} Defendant contends that the trial court erred by imposing prison sentences for his convictions in two of his cases while imposing community control sanctions for his conviction in the third case. We have previously addressed and rejected this argument in *State v. Aitkens*, Cuyahoga App. Nos. 79851 and 79929, 2002-Ohio-1080. In *Aitkens*, this Court held that “R.C. 2929.13(A) specifically authorizes a court to exercise its discretion in sentencing an offender to any sanction or combination of sanctions provided by law” and therefore a trial court properly exercises its discretion when it sentences an offender to serve a prison sentence in one case while at the same time impose community control sanctions in another. *Id.*; see, also, *State v. Molina*, Cuyahoga App. No. 83166, 2004-Ohio-1110.

{¶ 20} Assignment of Error II is overruled.

{¶ 21} “III. The trial court abused its discretion, after being advised by trial counsel that appellant’s competency was at issue, when it did not allow appellant to have further psychiatric testing.”

{¶ 22} Defendant bears the burden of establishing incompetence and the trial court’s decision will not be reversed absent an abuse of discretion. *State v. Hunter*, Cuyahoga App. No. 89456, 2008-Ohio-794, ¶16.

{¶ 23} R.C. 2945.37¹ provides:

{¶ 24} “(B) In a criminal action in a court of common pleas, a county court, or a municipal court, the court, prosecutor, or defense may raise the issue of the defendant’s competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in this section. If the issue is raised after the trial has commenced, the court shall hold a hearing on the issue *only for good cause shown or on the court’s own motion.*” (Emphasis added.)

{¶ 25} The trial court could only hold a hearing on defendant’s post-conviction request for re-evaluation “for good cause.” *State v. Berry* (1995), 72 Ohio St.3d 354, 440 (competency issue raised between guilt phase and mitigation phase of capital murder trial was not raised “before trial has commenced” and thus required a showing of good cause).

{¶ 26} Defendant makes a generalized argument that the trial court erred by not considering his post-conviction request for a re-evaluation. However, defendant did not establish good cause. Defense counsel merely stated his opinion that defendant was suffering from “severe mental issues” and said he was requesting further psychiatric testing because there “appeared to be continued issues with his competency.” This is insufficient to establish good cause that defendant was incompetent at the time of his sentencing. Further

¹ Although defendant cites to R.C. 2945.371, it is not applicable because defendant had already been convicted.

defendant's comments in the transcript are not indicative of incompetence but instead show his understanding of the legal proceedings. For example, he raised the issue of merger concerning counts one and two in his drug trafficking case and informed the court that he had reviewed his case on the docket. Defendant was able to engage in an articulate conversation with the court about the charges against him and the facts relating to them. Defendant was also cognizant and conversant on various legal issues, including search and seizure and ineffective assistance of counsel. Based on the record, the trial court did not abuse its discretion by denying defendant's request for further psychiatric testing.

{¶ 27} Assignment of Error III is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

**CHRISTINE T. McMONAGLE, P.J., and
PATRICIA A. BLACKMON, J., CONCUR**