[Cite as *State v. Rodriquez*, 2016-Ohio-5239.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103640

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

OMAR PIETRI RODRIGUEZ

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-563281-A

BEFORE: Jones, A.J., Keough, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: August 4, 2016

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LARRY A. JONES, SR., A.J.:

{¶1} Defendant-appellant Omar Pietri Rodriguez appeals from the trial court's September 25, 2015 judgment denying his motion to withdraw his guilty plea without a hearing. We reverse and remand for a hearing on the motion.

{¶2} In 2012, Rodriguez was charged in an eight-count indictment. Counts 1, 2, 3, and 4 related to victim, A.F., who was under 13 years of age, and charged rape, attempted rape, gross sexual imposition, and kidnapping, respectively. Counts 5, 6, 7, and 8 related to victim, P.F., and charged digital rape, two counts of vaginal rape, and kidnapping, respectively. A.F. and P.F. are sisters, and are Rodriguez's distant cousins. At the time of the alleged incidents, Rodriguez was dating the girls' maternal aunt.

{¶3} The victims reported the incidents to the police in October 2011, at which time they signed statements. According to A.F., Rodriguez digitally penetrated her vagina on one occasion, and on another occasion, he touched her vaginal area and tried to force her to put her mouth on his penis. In regard to P.F., she reported that Rodriguez had raped her on three separate occasions. The victims gave follow-up statements in November 2011 and maintained the above allegations.

{¶4} In 2013, Rodriguez pleaded guilty to Counts 1 and 3 (digital rape and gross sexual imposition) relative to A.F., and Count 5 (digital rape) relative to P.F. The remaining counts were nolled. The matter was referred for a presentence investigation, upon the completion of which, sentencing was had. The victims spoke at sentencing. A.F. told the court that "my little story was a lot, most of the things weren't true. Some

particular things happened that weren't mentioned." P.F. told the court, "I just want to say that some of the things I said I exaggerated."

{¶5} The assistant prosecuting attorney told the court that he had had "numerous conversations with both girls and * * * asked them * * * if their statements were true, and they * * * confirmed them to [him] numerous times." He indicated that sentencing was the first time he heard that their claims were exaggerated. The assistant prosecuting attorney then asked the victims on the record if their statements to the police were true. P.F. responded "yes," and elaborated, "I said that some of the things I exaggerated. I just don't understand why there is a kidnap, because I am not saying that."

{¶6} The court reminded P.F. that Rodriguez had not pleaded to kidnapping and questioned her as to whether the "sexual nature of things" that she had previously described were true. P.F. responded by asking "[d]o I have to talk about this?" The assistant prosecuting attorney told her that she did not have to talk about it, but asked: "your confusion is on the kidnapping, not on the rape. Is that fair to say?" P.F. responded, "[r]ight. Because I don't understand that whole thing about the charges."

{¶7} Defense counsel asked for a continuance so that he could investigate the matter. The court denied the request, stating that the "time for that has passed. That should have been done in the course of your discovery as you interviewed them or tried to interview them."

{¶8} Rodriguez addressed the court. He told the court that the charges were based on his own "ignorance of the law." He stated that he "made a couple of

mistakes," and asked for forgiveness. His counsel explained Rodriguez's claim of ignorance of the law as a "clash in cultures." Specifically, according to defense counsel, in Rodriguez's Puerto Rican culture it is not unusual for family members to "have relations, and the consequence of that is that the parent of the girl would go to the parent of the perpetrator and have a conversation and they could get married."

{¶9} The trial court stated that it appreciated the "cultural aspect" of this case, but found it "not quite applicable" here. The court sentenced Rodriguez to five years on each of the three counts, with the sentences on the two rape counts to be served consecutively, for a total ten-year term.

{¶10} Approximately two months after sentencing, Rodriguez filed a motion to vacate his plea and requested a hearing. In its motion, the defense contended that neither trial defense counsel, nor anyone working for him, ever tried to interview the victims. Further, after sentencing, both victims went to the Cuyahoga County Public Defender's Office and "indicated that they wished to recant most of their accusations."

{¶11} Accordingly, on March 5, 2013, A.F. provided a sworn statement before a court reporter, taken at the county public defender's office. A.F. stated that her previous statement to the police was false, and that she only had one sexual encounter with Rodriguez, which consisted of him kissing her on the lips and touching her buttocks. She said that she exaggerated the other allegations to get attention.

{¶12} P.F. averred in an affidavit that the "only thing that ever happened with [Rodriguez] was when he put his fingers in my vagina. It only happened once. The

other two times — where I accused him of putting his penis in me — did not ever happen. I was just exaggerating."

{¶13} The state opposed Rodriguez's motion to withdraw his plea. In support of its opposition, the state submitted the affidavit of the assistant prosecuting attorney who handled the case. The state also submitted a letter, written by A.F. in December 2012, which was before the plea and sentencing, asking the state to dismiss the case because "there's lots of heat and pressure on me, I want it to end with me dropping it."

{¶14} The assistant prosecuting attorney averred that he had had "numerous conversations with the defense counsel and the victims prior to the plea hearing." During his conversations with defense counsel, counsel told him that he had hired a private investigator for the case. The state's attorney averred that he spoke with the victims' father, who said that he did not want his daughters talking to the private investigator. According to the assistant prosecuting attorney, together he and defense counsel called the victims, their father answered the phone, and refused to let defense counsel speak to the victims.[1]

{¶15} The state's attorney also averred that he and defense counsel had "numerous conversations regarding potential recantations." As a result of the conversations, the state's attorney "spoke with the victims in person and via telephone numerous times." At no time did the victims recant their prior allegations. The assistant prosecuting

[1]The record indicates that the victims' mother and father did not live together. The mother resided in Cleveland and the father resided in Florida. At times, the victims were in Florida with their father.

attorney stated that the victims only expressed that they did not understand the kidnapping charge.

{¶16} In response to the state's opposition, Rodriguez submitted an affidavit averred to by A.F. and a second affidavit averred to by P.F. In her affidavit, A.F. averred that the letter she wrote to the state's attorney about the pressure she was feeling about the case was not because of pressure her family was putting on her. Rather, A.F. averred that the "pressure came from inside me. I felt wrong about what I was doing and that was what I meant by 'pressure.'" A.F. further averred that she told the assistant prosecuting attorney about her desire to not to pursue the case, and he responded that "there was nothing that could be done to stop it, even if he went to a boss."

{¶17} According to A.F., neither her mother nor her father told her that she was not permitted to talk to anyone about the case; A.F. averred that it was the state's attorney who directed her not to talk to anyone about the case.

{¶18} In her second affidavit, P.F. averred that all her statements from her first affidavit were true. She further averred that she was not pressured by anyone to recant the allegations against Rodriguez, and that neither her mother nor her father told her that she was not to talk to anyone regarding the case. Like A.F., P.F. averred that it was the state's attorney that instructed her not to speak with Rodriguez's attorney or anyone from the defense team.

{¶19} The defense also submitted the affidavits of the victims' mother and Rodriguez's uncle. The mother averred that throughout the investigation of the case, the

assistant prosecuting attorney told her and the victims not to talk to anyone about the case, and that she "understood that to mean that [she] should not let [her] daughters talk about the case to anyone helping [Rodriguez]." The mother also averred that no one from the defense team ever asked her if they could speak to her daughter about the case. She averred that she would have permitted that had she been asked. Further, the mother averred that she did not place any pressure on her girls to either make the allegations or to change them.

{¶20} Rodriguez's uncle averred that he has known A.F. and P.F. all of their lives and that they both "long had a reputation in the family for not telling the truth." The uncle averred to another instance of alleged sexual abuse P.F. had made against another man that P.F. later recanted. According to the uncle, "almost immediately" after A.F. and P.F. made the allegations in this case, "they started telling family members that they had been either exaggerating what happened, or were lying outright."

{¶21} The trial court summarily denied Rodriguez's motion to withdraw his plea without a hearing. Rodriguez now assigns two errors for our review:

> I. The trial court erred in denying appellant's motion to withdraw his guilty plea.
>
> II. The trial court erred in failing to grant a hearing on the appellant's motion to withdraw his guilty plea.

{¶22} A postsentence motion to withdraw a guilty plea is governed by the "manifest injustice" standard. *See* Crim.R. 32.1. A manifest injustice has been defined as a "clear or openly unjust act," *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203,

208, 699 N.E.2d 83 (1998), meaning that a postsentence withdrawal motion to withdraw a guilty plea is allowable only in extraordinary cases. *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). Because the decision of whether an injustice exists requires an examination of the underlying facts asserted in the motion, we review a trial court's refusal to allow a postsentence motion to withdraw a guilty plea for an abuse of discretion. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992); *State v. Bankston*, 8th Dist. Cuyahoga No. 92777, 2010-Ohio-1576, ¶ 50.

{¶23} Although a hearing is generally required for presentence motions to withdraw guilty pleas, postsentence motions to withdraw guilty pleas are treated differently. This is because the courts presume that guilty or no contest pleas are voluntarily entered in compliance with Crim.R. 11. *See State v. Hall*, 8th Dist. Cuyahoga No. 55289, 1989 Ohio App. LEXIS 1602 (Apr. 27, 1989). The movant thus has the burden of showing why the plea was infirm, a burden that requires "a prima facie showing of merit before the trial court need devote considerable time to it." *State v. Wittine*, 8th Dist. Cuyahoga No. 90747, 2008-Ohio-5745, ¶ 9. Therefore, a hearing "must only be held if the facts alleged by the defendant, accepted as true, would require that the defendant be allowed to withdraw the plea." *State v. Barrett*, 10th Dist. Franklin No. 11AP-375, 2011- Ohio-4986, ¶ 9, citing *State v. Williams*, 10th Dist. Franklin No. 03AP-1214, 2004-Ohio-6123, ¶ 6.

{¶24} After careful review, we find that the trial court abused its discretion by not affording Rodriguez a hearing on his motion. On this record, Rodriguez has at least

presented a prima facie showing of merit. We recognize the state's contention that the victims did not fully recant, and that under their "new statements" P.F. described an instance of rape (digital penetration) and A.F. described an instance of gross sexual imposition. But although P.F.'s new statement would accurately reflect Rodriguez's plea (Count 5, rape by digital penetration), A.F.'s new statement would not accurately reflect his plea. Specifically, in addition to gross sexual imposition (Count 3), Rodriguez also pled to a count of rape relative to A.F. (Count 1, rape by digital penetration).

{¶25} We recognize that the trial court had the power to evaluate the credibility and weight of the affidavits. But the traditional factfinding role of the trial court is based on its ability to observe the demeanor, gestures, and voice inflections of witnesses who testify. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). In such a case as this one, where the defendant has raised at least a prima facie showing of merit, the more prudent course of action would have been to hold a hearing on the motion to withdraw the plea.

{¶26} In light of the above, the second assignment of error is sustained, and the first assignment of error is moot.

{¶27} Judgment reversed; case remanded for a hearing on the motion to vacate the plea.

It is ordered that appellant recover of appellee 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 common pleas court to carry this judgment into execution.

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

LARRY A. JONES, SR., ADMINISTRATIVE JUDGE

KATHLEEN ANN KEOUGH, J., and
EILEEN T. GALLAGHER, J., CONCUR