

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

CITY OF CLEVELAND, :
 :
 Plaintiff-Appellee, :
 : Nos. 107939 and 108145
 v. :
 :
 GRAIG A. BROWN, :
 :
 Defendant-Appellant. :
 :

JOURNAL ENTRY AND OPINION

JUDGMENT: CONVICTION AFFIRMED; REMANDED FOR
RESENTENCING
RELEASED AND JOURNALIZED: December 19, 2019

Criminal Appeal from the Cleveland Municipal Court Housing Division
Case No. 2015 CRB 016131

Appearances:

Barbara A. Langhenry, Cleveland Director of Law, and
Kortney Mosley, Assistant Director of Law, *for appellee.*

Mark A. Stanton, Cuyahoga County Public Defender, and
John T. Martin, Assistant Public Defender, *for appellant.*

ON RECONSIDERATION
KATHLEEN ANN KEOUGH, J.:

{¶ 1} Pursuant to App.R. 26(A)(1)(a), defendant-appellant, Graig Brown,
has filed an application for reconsideration of this court’s opinion in *Cleveland v.*

Brown, 8th Dist. Nos. 107939 and 108145, 2019-Ohio-4457. The city has not opposed Brown's application.

{¶ 2} The general test regarding whether to grant a motion for reconsideration under App.R. 26(A)(1)(a) “is whether the motion * * * calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by [the court] when it should have been.” *State v. Dunbar*, 8th Dist. No. 87317, 2007-Ohio-3261, ¶ 182, quoting *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist. 1982).

{¶ 3} Brown's motion raises an issue that we did not previously consider. Accordingly, we grant Brown's motion for reconsideration as to the second and third assignments of error. We vacate the earlier opinion and issue this opinion in its place. *See* App.R. 22(C); *see also* S.Ct.Prac.R. 7.01.

{¶ 4} Brown appeals from the trial court's judgment that found him guilty of failing to furnish a certificate of disclosure in violation of Cleveland Codified Ordinances (“Cleveland Cod. Ord.”) 367.12(c) and sentenced him to 180 days in jail, five years of community control, and a \$1,000 fine. We affirm Brown's conviction, but vacate his sentence and remand for a new sentencing hearing.

I. Background

{¶ 5} In July 2015, Brown was charged with two counts of failing to furnish a certificate of disclosure in connection with the transfer of property located at 3333 East 142nd Street, Cleveland, Ohio, in violation of Cleveland Cod. Ord. 367.12(c).

{¶ 6} On October 29, 2018, Brown appeared before the Housing Court and entered a plea of no contest to one count of failing to furnish the required certificate of disclosure; the other count was dismissed. The court found Brown guilty and conditioned his release upon the posting of a \$5,000 bond and GPS monitoring. Brown was unable to post bond, and the case was set for sentencing three days later on November 1, 2018.

{¶ 7} At the sentencing hearing, defense counsel moved to withdraw Brown's no contest plea. The trial court held a hearing on the motion to withdraw and then denied the motion. After hearing from a housing court specialist, members of the community, and counsel, the trial court sentenced Brown to 180 days in jail, five years of active community control, and a \$1,000 fine. This appeal followed.

II. Law and Analysis

A. Motion to Withdraw No Contest Plea

{¶ 8} Immediately prior to sentencing, defense counsel informed the trial court that Brown wanted to withdraw his no contest plea. Counsel said that Brown felt his plea was a "rush to judgment," he had not had an opportunity to properly review all of the discovery in the case prior to pleading no contest, and "quite frankly, he only took the plea so he could get out of jail, and that didn't happen." (Nov. 1, 2018, tr. 2.) Counsel also argued that some of Brown's signatures on various documents attached to the presentence-investigation report had "different variation[s]" that counsel asserted "raise[d] the issue of did Mr. Brown actually sign this deed or did someone else perpetrate Mr. Brown's signature." (Tr. 8.) Counsel

contended that the motion to withdraw the no contest plea was timely because Brown had entered his plea only a few days earlier.

{¶ 9} After a hearing, the trial court denied Brown's motion. In his first assignment of error, Brown contends that the trial court abused its discretion in denying his motion to withdraw his plea.

{¶ 10} Under Crim.R. 32.1, "[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."

{¶ 11} In general, a presentence motion to withdraw a plea should be "freely and liberally" granted. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). It is well established, however, that a defendant does not have an absolute right to withdraw a plea prior to sentencing. *Id.* at paragraph one of the syllabus. "A trial court must conduct a hearing to determine whether there is a reasonable legitimate basis for the withdrawal of the plea." *Id.*

{¶ 12} The decision to grant or deny a presentence motion to withdraw is within the trial court's discretion. *Id.* at paragraph two of the syllabus. Absent an abuse of discretion, the trial court's decision must be affirmed. *Id.* at 527. An abuse of discretion occurs when the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). A trial court does not abuse its discretion in denying a motion to withdraw the plea where a defendant was (1) represented by competent counsel, (2) given a

full Crim.R. 11 hearing before he entered the plea, (3) given a complete hearing on the motion to withdraw, and (4) the record reflects that the court gave full and fair consideration to the plea withdrawal request. *State v. Peterseim*, 68 Ohio App.2d 211, 428 N.E.2d 863 (8th Dist.1980), paragraph three of the syllabus.

{¶ 13} Brown contends that the trial court abused its discretion in denying his motion because counsel was “unprepared” at the plea hearing. Specifically, Brown contends that defense counsel did not review “pertinent documents” until after the hearing. The record demonstrates otherwise. At the plea hearing, prior to accepting Brown’s plea, the court provided Brown and defense counsel with a copy of the complaint, and then paused the hearing while they both reviewed it. (Oct. 2018, tr. 6.) Although Brown complains that neither he nor defense counsel reviewed other “pertinent documents” before he entered his plea, the only factual issue relevant to Brown’s innocence was whether he signed the deed that transferred the property at issue without the requisite certificate of transfer. At the plea hearing, both Brown and defense counsel reviewed the deed, and defense counsel confirmed that the signature on the deed was in fact Brown’s signature. (*Id.* at tr. 9.) Thus, it is apparent that both Brown and his counsel reviewed the documents pertinent to his plea before Brown entered his plea.

{¶ 14} Although Brown does not explicitly raise an ineffective assistance of counsel claim, his assertion that counsel was “unprepared” at the plea hearing suggests such a claim. However, where a defendant challenges trial counsel’s performance in connection with a plea, the defendant must meet the test for

ineffective assistance of counsel. *Xie*, 62 Ohio St.3d at 524, 584 N.E.2d 715. This requires the defendant to demonstrate that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *State v. Maddox*, 98 N.E.3d 1158, 2017-Ohio-8061, ¶ 20 (8th Dist.), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant can establish the prejudice necessary for an ineffective assistance of counsel claim only by demonstrating a reasonable probability that but for counsel's deficient performance, he would not have pleaded to the offense and would have insisted on going to trial. *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11. Brown makes no such showing, much less even an assertion that he would not have pleaded no contest had counsel reviewed documents other than the complaint and the deed prior to his plea. Accordingly, on this record, we find that Brown was represented by competent counsel.

{¶ 15} Likewise, the record reflects that Brown was given a full hearing in compliance with Crim.R. 11 before he entered his plea. At the plea hearing, the court inquired of Brown regarding whether he understood the charges against him and the possible maximum penalties; Brown affirmed that he understood. The court also advised Brown of the effect of his plea and of the rights he was waiving by pleading no contest. Brown acknowledged that he understood those rights, and stated that he was entering his no contest plea of his own free will.

{¶ 16} The record further demonstrates that the trial court gave Brown a complete and impartial hearing on his presentence motion to withdraw his plea, and

gave full consideration to the arguments raised by defense counsel in support of the motion. The court first considered Brown's assertion that his motion to withdraw was timely because the plea had been entered only a few days earlier. In rejecting this argument, the court noted that it normally takes three to four weeks to complete a presentence investigation report in housing court, but because Brown had not been able to post his bond, the court had asked that the report be expedited so sentencing could be completed on the scheduled date, which was only three days after the plea hearing. Accordingly, the court found that it had made "extraordinary efforts to be fair to Mr. Brown," and that in light of the court's extraordinary efforts, Brown's motion to withdraw his plea was not made in a reasonable time. We find no error in the trial court's conclusion.

{¶ 17} The court also heard argument from Brown's counsel that the plea should be withdrawn because Brown was not able to review discovery prior to entering his plea. Specifically, counsel argued that he (counsel) realized upon reviewing documents provided with the presentence-investigation report that some of Brown's signatures on the documents had "different variation[s]," which purportedly "raise[d] the issue of did Mr. Brown actually sign this deed or did someone else perpetrate Mr. Brown's signature in the court." (Nov. 1, 2018, tr. 8.)

{¶ 18} In response, the prosecutor noted that the documents referred to by defense counsel were used in the creation of the presentence report but not in the city's proffer of evidence in the case. Of the documents proffered by the city at the plea hearing, the prosecutor acknowledged that Brown's signature was on the deed

for the property at issue, and Brown's brother Derek's signature was on a separate document. The prosecutor pointed out that "the signatures look different because they are different, because they're different people." (*Id.* at tr. 9.) Because the only factual issue regarding Brown's innocence related to whether he signed the deed that transferred the property, and Brown acknowledged before entering his plea that it was in fact his signature on the deed, the trial court properly concluded that alleged "variations" in Brown's signature on unrelated documents did not create an issue of fact regarding Brown's innocence.

{¶ 19} Moreover, when faced with a claim of innocence, "the trial judge must determine whether the claim is anything more than the defendant's change of heart about the plea agreement." *State v. Miniffee*, 8th Dist. Cuyahoga No. 99202, 2013-Ohio-3146, ¶ 2. Our review of the record demonstrates that Brown merely had a change of heart regarding his plea. Indeed, counsel acknowledged to the trial court that "quite frankly," Brown wanted to withdraw his plea because he had expected to be released from jail upon entering his plea and that did not happen. A mere change of heart regarding a plea is insufficient justification for the withdrawal of a plea. *Maddox*, 2017-Ohio-8061 at ¶ 18. Likewise, a defendant's protestations of innocence are not sufficient grounds for vacating a plea that was voluntarily, knowingly, and intelligently entered. *Id.*, citing *Miniffee* at ¶ 27.

{¶ 20} We find no abuse of discretion in the trial court's decision to deny Brown's motion to withdraw his plea. Brown's arguments at the hearing on his motion and his arguments on appeal are not sufficient to warrant the withdrawal of

his knowing, voluntary, and intelligent plea. The first assignment of error is therefore overruled.

B. A Maximum Sentence

{¶ 21} In his motion for reconsideration, Brown argues that we should reconsider our decision that affirmed his sentence of 180 days in jail, five years of active community control, and a \$1,000 fine on his misdemeanor conviction. Brown argues that his sentence should be vacated as contrary to law because it combined a maximum term of incarceration with a maximum term of community control for a misdemeanor offense.

{¶ 22} Brown did not raise this issue in his direct appeal. Instead, he argued that his sentence was excessive because his conduct relating to a single count of failing to provide the appropriate certificate of disclosure was not “sufficiently egregious” to warrant a maximum sentence. He argued further that the trial court erred in considering other charges of which he had not been convicted when it sentenced him.

{¶ 23} In our earlier decision, we noted that when sentencing an offender for a misdemeanor offense, a trial court must consider the principles and purposes of misdemeanor sentencing set forth in R.C. 2929.21: to protect the public from future crime by the offender and others and to punish the offender.

{¶ 24} The trial court must also consider the misdemeanor sentencing factors set forth in R.C. 2929.22(B). These factors are (1) the nature and circumstances of the offense; (2) whether the circumstances of the offense indicate

that the offender has a history of persistent criminal activity and there is a substantial risk the offender will commit another offense; (3) whether the offender's history, character and condition reveal a substantial risk that the offender will be a danger to others; (4) whether the victim was particularly vulnerable to the offense; and (5) whether the offender is likely to commit future crimes in general. A court may also consider "any other factors that are relevant to achieving the purposes and principles of sentencing set forth in section 2929.21 of the Revised Code." R.C. 2929.22(B)(2).

{¶ 25} In sentencing Brown to the maximum sentence for a first-degree misdemeanor, the trial court reviewed Brown's history of egregious behavior with respect to his tenants. Specifically, the court reviewed a judgment entry from the United States District Court for the Northern District of Ohio in which Brown and others had been found guilty of violating state and federal fair housing laws with respect to their landlord-tenant activities in Cleveland. The trial court noted that the federal court had concluded that Brown and his brother Derek had "engaged in a pattern of practice of renting to female tenants under leases based upon their perception that such tenants are more easily intimidated and susceptible to threats." (Nov. 1, 2018, tr. 16.) They then "repeatedly locked tenants out of their apartments without cause and without following statutory eviction procedures, trespassed in the apartments of locked-out tenants, stole tenants' rental payments, [and] security deposits," and "repeatedly threatened their tenants with physical harm to obtain rent payments or other benefits." (*Id.* at tr. 18.) The trial court noted further that

the federal court had concluded that Brown and his brother had evaded the judgments issued against them by multiple courts by continually transferring real property between their corporations and limited liability companies. (*Id.* at tr. 17.)

{¶ 26} The trial court also reviewed several cases pending against Brown in housing court, including one in which Brown had rented a property to a tenant even though the property had been condemned, and another in which the court had issued an injunction against Brown to keep him from interfering with a tenant's utilities but despite the injunction, Brown had "superglued" the locks to the tenant's home shut. (*Id.* at tr. 18-19.) The court also reviewed the details of Cuyahoga C.P. No. CR-16-607512, in which Brown had pleaded guilty to assault, noting that Brown had gone to one of his tenant's houses, and when she came to the door, had attacked her with a baseball bat, told her to "get the f--- out of my house," and then ran down the driveway with the electric meter in his hand. (*Id.* at tr. 19.)

{¶ 27} In sentencing Brown, the trial court stated that it was "taking all of these factors into consideration in my sentence in this case." (*Id.* at tr. 20.) The court noted that although this case involved a single count of transferring property without the appropriate certificate of disclosure, "it's all part and parcel of Mr. Brown's business dealings." *Id.*

{¶ 28} In our earlier decision, we noted that despite Brown's contention that the trial court erred in considering his other crimes when it sentenced him in this case, it is well established that evidence of other crimes, including crimes that may never result in criminal charges being pursued, may be considered at sentencing.

State v. Bryant, 8th Dist. Cuyahoga No. 99039, 2013-Ohio-3239, ¶ 21, citing *Mt. Vernon v. Hayes*, 5th Dist. Knox No. 09-CA-00007, 2009-Ohio-6819, ¶ 54.

{¶ 29} Accordingly, we found no error in the trial court’s consideration of other civil or criminal cases involving Brown. Brown’s history of unscrupulous business dealings in the cases considered by the trial court was relevant to the nature and circumstances of the offense in this case — which likewise involved unscrupulous behavior by Brown in a business dealing — Brown’s character, and the likelihood that he will commit future offenses. *See* R.C. 2929.22(B). It was also directly relevant to the trial court’s statutory duty to impose a sentence that would appropriately punish Brown while protecting the public from any future crime. R.C. 2929.21.

{¶ 30} Accordingly, we found that in light of Brown’s extensive criminal history relating to his business dealings, the trial court did not abuse its discretion in finding that even though this case involved a single offense, a maximum sentence was necessary to punish Brown and protect the public.

{¶ 31} Nevertheless, upon reconsideration, we conclude that the trial court erred in sentencing Brown to the maximum jail time and community control, to be served concurrently. When sentencing for a misdemeanor, R.C. 2929.22(A) permits a trial court to “impose on the offender any sanction or combination of sanctions under sections 2929.24 to 2929.28 of the Revised Code.” R.C. 2929.25(A)(1) authorizes hybrid sentences composed of a jail term followed by a period of community control sanctions, but only if the trial court suspends “all or a portion of

the jail term imposed.” R.C. 2929.25(A)(1)(b). “In other words, a trial court may not require a defendant to serve a period of community supervision after serving the maximum jail sentence for a misdemeanor.” *State v. Pratt*, 2018-Ohio-1394, ¶ 11. *See also State v. Pope*, 9th Dist. Medina No. 13CA0031-M, 2014-Ohio-2864, ¶ 11 (where trial court sentenced defendant to maximum jail term for misdemeanor offense and suspended a portion of the offense, it was authorized to impose community control sanctions).

{¶ 32} The trial court ordered Brown to serve the maximum jail term of 180 days, followed by a period of community control sanctions, to be served concurrently. Because the trial court did not suspend all or even one day of the jail term imposed, the sentence is contrary to law. Accordingly, the second assignment of error is sustained, Brown’s sentence is vacated, and the matter is remanded for resentencing.

C. Motion for Jail-Time Credit

{¶ 33} After sentencing, Brown filed a motion for jail-time credit, asserting that he was entitled to 124 days of presentence jail-time credit as of sentencing on November 1, 2018. In his motion, Brown asserted that he was held in jail from June 23, 2016 through June 28, 2016 (5 days); February 3, 2017 through April 5, 2017 (61 days);¹ and September 4, 2018 through November 1, 2018 (58 days), a total of 124

¹ The docket in Cuyahoga C.P. No. CR-16-607512 demonstrates that Brown was not in jail during this entire period. The docket reflects that Brown was jailed from February 3, 2017 to March 2, 2017, and March 22, 2017 to April 5, 2017, for a total of 43 days.

days. Brown conceded that he was arrested on warrants in Cuyahoga C.P. No. CR-16-607512, involving a charge of felonious assault pending before the common pleas court on June 23, 2016, February 3, 2017, and September 4, 2018, but asserted that he was held in jail during these time periods on both the felony charge pending before the common pleas court and the charges in this case because the housing court had also issued warrants for his arrest. Thus, he contended that he was entitled to jail-time credit in this case for 124 days.

{¶ 34} The trial court granted the motion in part and denied it in part. The court denied the motion regarding 114 of the 124 days, finding that Brown's confinement for these days was on the unrelated felony charge in the common pleas court. The trial court found, however, that the felony case was resolved on October 23, 2018, and that Brown was sentenced in this case on November 1, 2018. Thus, the trial court granted the motion for jail-time credit in this case for the 10 days after the felony case was completed. In his third assignment of error, Brown contends that the trial court erred in not granting him credit for all 124 days.

{¶ 35} In light of our resolution of the second assignment of error, this assignment of error is rendered moot and we need not consider it. App.R. 12(A)(1)(c). Jail-time credit will be relevant only if the trial court decides to impose jail upon resentencing.

{¶ 36} Conviction affirmed; remanded for resentencing.

It is ordered that the parties share 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 Cleveland Municipal Court, Housing Division, to carry this judgment into execution. Case remanded to the trial court.

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

KATHLEEN ANN KEOUGH, JUDGE

MARY EILEEN KILBANE, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

