

[Cite as *State v. Hardy*, 2020-Ohio-3185.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : No. 108865
 :
 v. :
 :
 CORDERO HARDY, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 4, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-18-634070-A and CR-19-637655-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting
Attorney, and Jonathan Block, Assistant Prosecuting
Attorney, *for appellee*.

Scott J. Friedman, *for appellant*.

ANITA LASTER MAYS, P.J.:

{¶ 1} Defendant-appellant Cordero Hardy (“Hardy”) appeals the trial court’s decision to deny his motion to vacate his guilty plea. We affirm the trial court’s decision.

{¶ 2} Pursuant to a plea agreement, Hardy pled guilty to one count of domestic violence, a third-degree felony, in violation of R.C. 2919.25(A); one count of carrying a concealed weapon, a first-degree misdemeanor, in violation of R.C. 2923.12(A)(2); one count of bribery, a third-degree felony, in violation of R.C. 2921.02(C); and one count of violating a protection order, a first-degree misdemeanor, in violation of R.C. 2919.27(A)(1). The trial court sentenced Hardy to 24 months imprisonment on each count to be served concurrently.

I. Facts and Procedural History

{¶ 3} During the plea negotiations between the state and Hardy, Hardy agreed to plead guilty to an amended indictment in two cases, while the state agreed to not take any position with regards to sentencing. (Tr. 74.) The state did, however, at the request of the victim speak on her behalf. The state expressed that the victim was concerned for her safety if Hardy was placed on probation instead of receiving jail time. The state also stated that the victim felt as if Hardy “continues to skirt what should be law abiding actions as he continues to then violate the protection order.” (Tr. 76.) The trial court then confirmed with the victim that the state accurately represented her position. (Tr. 80.)

{¶ 4} Before sentencing, the state expressed that they agreed with defense counsel’s statement that the state would not take a position on sentencing and then stated, “the previous position of the State was said beforehand. But, ultimately, I have the ultimate obligation to make the victim’s wishes known, Your Honor.

Thanks for that opportunity.” (Tr. 79-80.) The trial court then sentenced Hardy to 36 months imprisonment. Hardy’s trial counsel made an oral motion to withdraw Hardy’s guilty plea. The trial court denied the oral motion, but agreed to vacate its sentence and allow defense counsel to file a written motion to withdraw. The trial court continued the sentencing hearing to June 25, 2019, and then until July 1, 2019, for additional review. At the sentencing hearing, the state reiterated that its representation placed on the record was that of the victim and that the victim was present and confirmed her position regarding Hardy’s sentence. (Tr. 105-106.) The trial court sentenced Hardy to 24 months’ imprisonment. Hardy filed this timely appeal assigning one error for our review:

- I. The prosecutor breached the terms of the plea agreement when he spoke on behalf of the victim at the sentencing hearing.

II. Plea Agreements and Motion to Vacate Guilty Plea

{¶ 5} “A plea agreement is generally ‘contractual in nature and subject to contract-law standards.’ *State v. Butts*, 112 Ohio App.3d 683, 679 N.E.2d 1170 (8th Dist.1996).” *State v. Parham*, 8th Dist. Cuyahoga No. 105983, 2018-Ohio-1631, ¶ 24. In the agreement with Hardy, the state agreed to not take a position on Hardy’s sentence. “When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.’ *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).” *Id.*

{¶ 6} However, Hardy argues that the state breached its agreement when the state spoke on behalf of the victim advocating for a prison sentence rather than probation. “When an allegation is made that a plea agreement has been broken, the defendant must merely show that the agreement was not fulfilled.’ *State v. Legree*, 61 Ohio App.3d 568, 573 N.E.2d 687 (6th Dist.1988).” *Id.* If the state failed to comply with the terms of the plea agreement between it and Hardy, it could render Hardy’s plea involuntary “and undermine the constitutionality of a conviction based upon that plea.” *Id.*

{¶ 7} “In order to determine whether a plea agreement has been breached, courts must examine what the parties reasonably understood at the time the defendant entered his guilty plea. *State v. Latimore*, 8th Dist. Cuyahoga No. 92490, 2010-Ohio-1052, ¶ 7.” *Parham* at ¶ 25. In this case, the record reveals that both parties understood that the state would not take a position on Hardy’s sentencing. During sentencing, the state informed the trial court that it would refrain from taking a position on Hardy’s sentence. The state began its statement to the court by stating:

On behalf of the State, Your Honor, as part of the negotiations for the plea in this case, ultimately, Your Honor, the State indicated that it would not take a position one way or the other as to the sentence in this case. So we would abide by that as part of the plea agreement.

(Tr. 74-75.)

{¶ 8} However, the state did speak on the victim’s behalf regarding sentencing. The state said:

As prosecutor, you have to wear many hats, and in this particular case I also have to speak for the victim in this case. Your Honor, throughout my conversations with her on these matters — and I believe she has also submitted to this court in the victim impact statement. I would just reiterate to the Court, [the victim] is here, present, would answer questions of the court, but as the moment has arisen felt that *it was better suited for me to speak on her behalf.*

(Tr. 75.) (Emphasis added.)

{¶ 9} The state’s representation of the victim’s wishes does not violate the terms of the plea agreement. *See, e.g., State v. Condon*, 152 Ohio App.3d 629, 2003-Ohio-2335, 789 N.E.2d 696, ¶ 117 (1st Dist.) (“* * * according to R.C. 2929.19(A), either the victim or the victim’s representative, or *any* other person with approval of the trial court, may speak at the sentencing hearing.”). (Emphasis added.) We determine that the state was acting as the victim’s representative and only reflected the victim’s wishes in its statement, which was confirmed by the trial court. The trial court had the following exchange with the victim:

THE COURT: [Victim], let me just ask you a couple yes or no questions.

First question is, were you able to hear the comment that [the state] made? Yes or no?

STATE: No. [The State], the prosecutor.

[VICTIM]: Yes.

THE COURT: Okay.

[VICTIM]: Yes.

THE COURT: He made some statements that, as I understood, were representative of your thoughts. Did you hear those?

[VICTIM]: Yes.

THE COURT: Are any of those statements that he made or representations that he made inaccurate?

[VICTIM]: No.

THE COURT: Okay. Thank you.

(Tr. 80.)

{¶ 10} The record reflects that the state did not advocate for itself or make a sentencing recommendation to the trial court. However, defense counsel contends that in chambers it was stated that the victim was not seeking jail time for Hardy and that was one aspect Hardy relied upon when he entered his plea. (Tr. 97.) The trial court communicated that a victim has a right to change their mind. And the court nor the state has control regarding a victim's representations. (Tr. 97-98.) The court then denied defense counsel's request to withdraw Hardy's plea on the grounds that, in counsel's view, the state changed its position on remaining silent or not. *Id.* We find that the state did not breach its agreement with Hardy when it spoke on behalf of the victim.

{¶ 11} Hardy also contends that the trial court erred when it denied his motion to withdraw his guilty plea. Hardy filed a motion to vacate his guilty plea before the trial court imposed its sentence. The trial court indicated that it would continue sentencing after reading a copy of the plea hearing transcript. At the next

sentencing hearing, the trial court indicated that it did review the transcript and was ready to proceed with sentencing. The trial court denied Hardy's motion.

{¶ 12} Crim.R. 32.1 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." We review the trial court's decision to deny the appellant's motion to withdraw his guilty plea for abuse of discretion. *State v. Hines*, 8th Dist. Cuyahoga No. 108326, 2020-Ohio-663, ¶ 7. Abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 13} Although Hardy does not have an absolute right to withdraw a guilty plea, a presentence motion to withdraw a guilty plea should be freely and liberally granted. *Hines* at ¶ 8. "A mere change of heart regarding a guilty plea and the possible sentence is insufficient justification for the withdrawal of a plea." *State v. Bloom*, 8th Dist. Cuyahoga No. 97535, 2012-Ohio-3805, ¶ 13.

{¶ 14} The following factors are to be considered when determining if the trial court abused its discretion when denying a presentence motion to withdraw a guilty plea:

- (1) whether the accused was represented by highly competent counsel;
- (2) whether the accused was afforded a full hearing pursuant to Crim.R. 11 before he entered the plea;
- (3) whether, after the motion to withdraw was filed, the accused was given a complete and impartial

hearing on the motion; and (4) whether the record reveals 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).

State v. McClain, 8th Dist. Cuyahoga No. 103089, 2016-Ohio-705, ¶ 14.

{¶ 15} Additionally, this court has set forth the following factors to consider,

that (1) the motion was made in a reasonable time; (2) the motion stated specific reasons for withdrawal; (3) the record shows that the defendant understood the nature of the charges and possible penalties; and (4) the defendant had evidence of a plausible defense. *State v. Heisa*, 8th Dist. Cuyahoga No. 1018877, 2015-Ohio-2269, ¶ 19; *State v. Pannell*, 8th Dist. Cuyahoga No. 89352, 2008-Ohio-956, ¶ 13.

Id. at ¶ 15.

{¶ 16} A review of the record reveals that defense counsel is not arguing any of the listed factors but states that because the state breached its plea agreement that the motion to withdraw should have been granted. We have already determined that the state did not breach its plea agreement and therefore, we find that the trial court did not abuse its discretion by denying Hardy's motion to withdraw his guilty plea.

{¶ 17} Additionally, we find that the trial court conducted a full hearing on Hardy's motion. (Tr. 95-103.) During the hearing, the trial court stated, "I had that specific conversation with him [Hardy] which leads me to believe that now his position is only a remorseful one because he's faced with a jail sentence that I articulated on the record numerous times that I was not making any promises about what the record would be." (Tr. 99.)

{¶ 18} We find that Hardy has not demonstrated that the trial court abused its discretion in denying his motion. We also find that the prosecutor did not take a position with respect to Hardy's sentence. Further, the trial court acknowledged that the prosecutor's statements were simply the victim's statements.

{¶ 19} Hardy's sole assignment of error is overruled.

{¶ 20} Judgment affirmed.

It is ordered that appellee recover from appellant 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

ANITA LASTER MAYS, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., CONCURS;
LARRY A. JONES, SR., J., CONCURS IN JUDGMENT ONLY