[Cite as *State v. Moore*, 2020-Ohio-3459.]

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT**
**COUNTY OF CUYAHOGA**

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|---|---|---|
| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | Nos. 108962, 108963 and 108964 |
| v. | : | |
| QUASHAUN MOORE, | : | |
| Defendant-Appellant. | : | |

JOURNAL ENTRY AND OPINION

**JUDGMENT:** AFFIRMED
**RELEASED AND JOURNALIZED:** June 25, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-18-635068-E, CR-19-636198-C and CR-19-638207-A

***Appearances:***

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel A. Cleary, Assistant Prosecuting Attorney, *for appellee*.

Eric M. Levy, *for appellant*.

EILEEN A. GALLAGHER, J.:

**{¶ 1}** In this consolidated appeal, defendant-appellant Quashaun Moore appeals his convictions after he pled guilty in three cases. He asserts that he was denied effective assistance of counsel due to trial counsel's withdrawal of a pretrial motion for a competency evaluation and that the trial court erred in failing to hold

a competency hearing prior to accepting his guilty pleas. Moore also contends that the trial court abused its discretion in denying his presentence motion to withdraw his guilty pleas. Finally, he challenges his consecutive sentences, arguing that the imposition of consecutive sentences was contrary to law because the trial court failed to perform the analysis necessary for the imposition of consecutive sentences and that the imposition of consecutive sentences was unsupported by the record. For the reasons that follow, we affirm.

**Procedural History and Factual Background**

**{¶ 2}** On December 12, 2018, a Cuyahoga County Grand Jury indicted Moore on five counts in Case No. CR-18-635068-E ("635068") — one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1) and four counts of receiving stolen motor vehicles in violation of R.C. 2913.51(A) — for crimes committed between July 18, 2018 and October 30, 2018.

**{¶ 3}** On January 11, 2019, a Cuyahoga County Grand Jury indicted Moore on two counts in Case No. CR-19-636198-C ("636198") — one count of aggravated robbery in violation of R.C. 2911.01(A)(1) with one-year and three-year firearm specifications and one count of having weapons while under disability in violation of R.C. 2923.13(A)(2). The charges arose out of an August 6, 2018 incident in which Moore and two codefendants robbed a victim at gunpoint while he was in the retail store of a gas station. A codefendant pulled out a gun and pointed it at the victim as Moore tackled the victim and took him to the ground. While Moore was struggling with the victim on the ground, one codefendant kicked the victim and another

codefendant took a firearm from the victim, which he gave to Moore after Moore got up and exited the store with the codefendants.[1]

**{¶ 4}** On March 20, 2019, a Cuyahoga County Grand Jury indicted Moore on five counts in Case No. CR-19-638207-A ("638207") — one count of felonious assault of a police officer in violation of R.C. 2903.11(A)(1); two counts of assault of a police officer in violation of R.C. 2903.13(A); one count of obstructing official business in violation of R.C. 2921.31(A) and one count of resisting arrest in violation of R.C. 2921.33(B). The charges arose out of March 15, 2019 traffic stop involving a vehicle that was travelling without lights. A police officer recognized Moore, who was in the front passenger seat, as having an outstanding arrest warrant in connection with the August 2018 aggravated robbery, and asked him to step out of the vehicle. When police officers attempted to place handcuffs on Moore and take him into custody, Moore resisted. In the confrontation that followed, one of the officers sustained a deep cut to his left eye that bled heavily, requiring medical treatment and resulting in permanent scarring. It was only after Moore was tasered that he became compliant.

**{¶ 5}** Moore initially pled not guilty to all charges and was assigned counsel. In early April 2019, he retained new counsel. On April 3, 2019, Moore's new defense counsel filed a motion in all three cases, requesting that Moore be referred to the psychiatric clinic for evaluation, pursuant to R.C. 2945.371, to determine (1) whether

[1] The victim was killed several hours later in a separate incident. Moore was not charged in that incident.

he was competent to stand trial and (2) whether he was he eligible for referral to the court's mental health docket ("motion for competency evaluation"). In support of the motion, defense counsel stated simply: "Defense counsel has reason to believe that Defendant may not be competent to stand trial and may be eligible for referral to the mental health docket." No explanation was provided in the motion as to why defense counsel believed Moore may not be competent to stand trial. On April 10, 2019, the trial court granted the motion in part, without objection by the state, and Moore was referred to the court psychiatric clinic for a competency evaluation.

**{¶ 6}** The competency evaluation never occurred.[2] At a pretrial conference on June 4, 2019, defense counsel made an oral motion to withdraw the motion for a competency evaluation on the ground that he no longer believed there was a need for it. As he explained to the court:

> [DEFENSE COUNSEL]: There's one other issue I'd like to address, your Honor, if you don't mind. Previously I had asked the Court for a competency and a mental health evaluation. That was shortly after I met Mr. Moore and he elicited symptoms that I thought might raise the issue of his competency to stand trial.
>
> Since that time I've spent some time with him; I'm confident that he understands the nature of these proceedings and * * * I'm confident that he's able to assist in his defense and I'm going to ask the Court to withdraw that previously filed motion that he be referred for competency and for referral for mental health.

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[2] Based on statements made by the trial court and Moore at the June 4, 2019 pretrial conference, there appears to have been a dispute as to why the evaluation never occurred. The trial judge stated that she had received a doctor's note indicating that Moore was scheduled for evaluation on May 13, 2019, but that he refused to be transported to the court psychiatric clinic. Moore claimed that "[t]hey called me but they never came and got me" for the evaluation.

**{¶ 7}** The trial court granted defense counsel's motion to withdraw the motion for a competency evaluation. After several continuances, 636198 was set for trial on July 10, 2019. Cases 638207 and 635068 were set for trial on September 3, 2019.

**Plea Negotiations**

**{¶ 8}** On July 10, 2019 — the morning of trial in 636198 — the state set forth, on the record, the terms of a "packaged" plea deal that the state had offered to Moore to resolve all three cases. Moore informed the trial court that he did not accept the state's plea offer. The trial court advised Moore of the maximum potential prison sentences Moore could receive on each count if he went to trial and was found guilty. The trial court also explained to Moore how the state's packaged plea offer worked, i.e., that if Moore proceeded to trial in 636198, the plea offer would be revoked as to all three cases. Moore indicated that he understood. After reviewing this information with Moore, the trial judge asked Moore if he "need[ed] time to talk to [his] lawyer about this." Moore responded, "Yes," and the trial judge took a recess so that Moore could discuss the state's plea offer with defense counsel.

**{¶ 9}** After Moore spoke with counsel, the trial judge asked Moore what he wanted to do. This exchange followed:

> THE COURT: * * * So, Mr. Moore, now you had an opportunity to talk to your lawyer about what you would like to do today. Your case is set for trial today. What would you like to do?
>
> THE DEFENDANT: It don't matter at this point. I don't care.

THE COURT: You have to say what you would like to do. You can't say it doesn't matter, you don't care. You have to respond to me. Your one case is set for trial today, 636198. So if you would like to go to trial today, you can, absolutely. * * *

[DEFENSE COUNSEL]: Your Honor, he has expressed some dissatisfaction with my performance, so —

THE COURT: Well, [defense counsel] is your second lawyer. Today is your trial date. I'll go through everything that [defense counsel] has done for you. He has filed a number of motions on your behalf. There has been numerous pretrials. I believe there has been numerous items of discovery that have been turned over on your behalf. I think you may have even watched a video today? Did you see a video today? You're shaking your head yes?

THE DEFENDANT: Yes.

THE COURT: I don't know however many — how many other CDs or items of discovery have been turned over, but I know it's been voluminous because there have been so many pretrials. So you're set for trial today, and [defense counsel] is representing you. You retained him. I don't see any reason why he shouldn't be representing you today.

THE DEFENDANT: I don't even know what is going on in the case. I barely have — I have no discovery. Today was the first time I saw some real discovery.

THE COURT: * * * Most of the discovery has been marked counsel only. So that's probably why you haven't seen it. That's what the State has marked a number of items in discovery as counsel only, which would mean you wouldn't see it. Are there other videotapes?

[THE STATE]: Judge, the only other videotape pertaining to this portion of Mr. Moore is his own video recorded statement.

* * *

THE COURT: Do you need to see your own videotaped statement? Do you recall what you said in that?

THE DEFENDANT: No.

THE COURT: You don't need to see that. So what else would you like to see that you haven't seen? You don't need to see the recorded statement.

THE DEFENDANT: I am only going to trial for the robbery case, right?

THE COURT: That's the only case set for trial today. But the State has evaluated all of your cases for a potential plea. If you wanted to resolve — you would only go to trial on one today, but if you wanted to plead, you could plead on all 3 of them today. But if you go to trial on the one, then there is no plea available on the other 2.

THE DEFENDANT: Go to trial on all of them, right?

THE COURT: You can go to trial on all of them if you want. It's up to you. It's your choice.

**{¶ 10}** Defense counsel then advised the court that Moore was asking him "whether or not I can try for another plea deal." Moore, defense counsel and the state proceeded to engage in additional plea negotiations, ultimately reaching a more favorable plea agreement that included additional terms Moore had requested:

[DEFENSE COUNSEL]: So Mr. Moore is indicating to me if The State of Ohio would be willing to dismiss 2 of the F4's on receiving the stolen properties, then he would be willing to enter into the plea agreement, I guess.

* * *

[THE STATE]: * * * I'll amend it to include all 4 of the victims * * * in some way on 2 counts. I can do that.

* * *

THE COURT: So that's in Case Number 635068. The State is now indicating that they would dismiss 2 of those 4 receiving stolen properties, which means that your potential prison sentence in that

> case then would go from just receiving stolen properties from 6 to 3. Take out 3 years. Instead of 9 as a potential, if you got the worst case scenario, the worst case scenario would be 6. That's in Case Number 635068. What would you like to do today?
>
> THE DEFENDANT: I would like to take the plea deal.

**{¶ 11}** The trial court then, once again, asked Moore whether he would like "more time" to discuss the new plea offer with counsel. Moore indicated that he would like to speak with counsel and the trial judge took another recess so that Moore could discuss the new plea offer with counsel. After speaking with counsel, Moore indicated that he was ready to proceed and accept the state's new plea offer.

**{¶ 12}** The state set forth the terms of the parties' plea agreement on the record and defense counsel confirmed that the state had accurately represented the agreement. The trial court then proceeded with the plea colloquy.

**The Plea Colloquy**

**{¶ 13}** In response to the trial judge's preliminary questions, Moore indicated that he was a 19-year-old United States citizen, that he could read and write and that he had attended high school until his senior year but did not graduate. Moore stated that he was not under the influence of any drugs, alcohol or medication that would adversely affect his ability to understand what was happening and that he did, in fact, understand what was happening in court that day.

**{¶ 14}** The trial judge advised Moore of his constitutional rights and confirmed that Moore understood the rights he would be waiving by entering his guilty pleas. The trial judge then identified each count to which Moore would be

pleading guilty and outlined the potential penalties he faced on each of those counts. Moore indicated that he understood.

**{¶ 15}** Moore stated that no threats or promises had been made to him to induce him to change his pleas other than what had been stated on the record in open court, that he had received no promise of any particular sentence and that he was satisfied with the services provided by defense counsel. The trial court found that Moore understood the nature of the charges, the maximum penalties that could be imposed and the effect of his guilty pleas and that Moore's guilty pleas would be made "knowingly, intelligently and voluntarily."

**{¶ 16}** Pursuant to the plea agreement, in 635068, Moore pled guilty to an amended count of attempted engaging in a pattern of corrupt activity (reducing the charge from a first-degree felony to a third-degree felony) and to two amended counts of receiving stolen property.

**{¶ 17}** In 636198, Moore pled guilty to one count of aggravated robbery as charged with one-year and three-year firearm specifications, and in 638207, Moore pled guilty to an amended count of attempted felonious assault on a police officer, reducing the charge from a first-degree felony to a second-degree felony, and to one count of resisting arrest. The trial court accepted his guilty pleas and, in accordance with the plea agreement, dismissed the remaining counts.

**{¶ 18}** After accepting Moore's guilty pleas, the trial court referred Moore to the Cuyahoga County Probation Department for a presentence investigation and

report ("PSI") and to the court's psychiatric clinic for a mitigation of penalty report. The trial court scheduled a sentencing hearing for the following month.

**{¶ 19}** On August 13, 2019, in 638207, Moore filed, pro se, a motion to withdraw his guilty pleas. In the motion, Moore did not state a reason for seeking to withdraw his guilty pleas. He simply recited the language of Crim.R. 32.1 and stated that "defendant request[s] that the motion be granted in order to receive a fair trial and a legitimate Pursuit of Justice."

**{¶ 20}** At the sentencing hearing on August 14, 2019, defense counsel advised the court that Moore had informed him that he wanted to withdraw his guilty pleas in all three cases. According to defense counsel, Moore told him that "last week at some point," he had sent a "letter" to the court requesting leave to withdraw his guilty pleas, which was returned to him, and that he then sent another "letter" to the court, which the court had not yet received. Defense counsel made an oral motion to withdraw Moore's guilty pleas in all three cases, joining in and incorporating Moore's pro se written motion. The trial court conducted a hearing on the motion.

**{¶ 21}** Defense counsel argued that Moore should be granted leave to withdraw his guilty pleas because (1) Moore's motion was filed within a reasonable time, i.e., before sentencing, (2) Moore "could conceivably argue," with respect to the charges in 636198, that the video of the robbery does not "specifically identify" him, (3) Moore may have had "a valid defense" to the charge of attempted felonious assault of a police officer in 638207 because his conduct "constituted more of a

resisting arrest, more of a wrestling match than an [attempted] assault on a police officer" and (4) although he believed that there were no errors in the Crim.R. 11 colloquy and that he competently represented Moore, fulfilling both his duties "under the rules of ethics" and "to be a zealous advocate" on Moore's behalf, Moore "may disagree with that."

**{¶ 22}** Moore stated that on or around July 17, 2019, he had attempted to file a motion to withdraw his guilty pleas but that it was returned to him because it "didn't have a heading on it." He indicated that he corrected the error, "wrote it over again" and sent the motion out a few days later for filing. Moore stated that he believed he was denied effective assistance of counsel because defense counsel "made me fear my consequences to make me say I was guilty so I receive a lesser sentence." Moore claimed that he did not recall stating, at the change-of-plea hearing, that he had been satisfied with the services provided by defense counsel.

**{¶ 23}** The trial judge asserted that it was "never brought to my attention that you were having issues with your lawyer." Moore disputed this and claimed that he had, in fact, raised his dissatisfaction with counsel's performance during the July 10, 2019 hearing. The trial judge indicated that she did not have the transcript of the July 10, 2019 hearing and Moore did not submit provide a copy of the transcript to the trial court in support of his motion.

**{¶ 24}** After hearing from Moore, defense counsel and the state, and confirming that Moore had no additional evidence or arguments he wished to

submit in support of his motion, the trial court denied Moore's motion to withdraw his guilty pleas, explaining its reasoning as follows:

> So * * * Criminal Rule 32.1, permits a defendant to file a presentence motion to withdraw his plea. Although a pretrial motion to withdraw the guilty plea is generally to be freely allowed and treated with — treated with liberality by the trial court, the decision to grant or deny such a motion is, nevertheless, within the sound discretion of the trial court.
>
> Moreover, a defendant who enters a guilty plea has no right to withdraw it. To prevail on a motion to withdraw a guilty plea, a defendant must provide a reasonable and legitimate reason for withdrawing his guilty plea. * * * [D]etermining whether the defendant's reason is reasonable and legitimate also lies within the trial court's sound discretion.
>
> And the trial court does not abuse its discretion in denying a motion to withdraw a guilty plea when the following three elements are present: One, the defendant was represented by competent counsel. Two, the trial court provided the defendant with a full hearing before entering the guilty plea. And three, the trial court provided the defendant with a full hearing on the motion to withdraw his guilty plea and considered the defendant's arguments in support of his motion to withdraw his guilty plea.
>
> So we are here today on a full hearing on the motion to withdraw the plea, which is why I just asked if there was any further — anything further that the defendant would like to provide in support of his motion. And I'd also like to indicate that the motion is a pro se motion to withdraw his plea. * * *
>
> Now as I said earlier, I do not have a copy of the transcript, although my recollection of the plea was that the defendant indicated — or never indicated that he was not satisfied with his lawyer, nor indicated that he did not want to enter into a plea. And as I said, I don't have a copy of that transcript, but I don't recall any issues or any hesitation upon the defendant in going forward with the plea.
>
> * * *
>
> I believe that * * * Mr. Moore is represented by highly competent counsel.

* * *

> Also in looking at the factors that the court must consider, and obviously, as I've already stated, I'm giving a full hearing on this. * * * And as I have stated, I don't have a copy of the transcript. However, I do recall the defendant never stating that he was not satisfied with his counsel, that there were issues regarding him taking a plea or any hesitation with him in taking a plea. So there was a full hearing.
>
> And we're here on a full hearing today on his motion to withdraw the plea.
>
> And that was pursuant to Criminal Rule 11 when the defendant was afforded a full hearing prior to taking a plea.
>
> So based on that, I don't believe that the defendant has satisfied his burden in having this court permit him to withdraw his pleas. So I am going to deny your motion.

**{¶ 25}** The trial court then proceeded with the sentencing hearing. At the sentencing hearing, Moore acknowledged what he had done, apologized to the victims and his family for his actions and extended prayers to the police officer he had harmed and the family of the victim of the aggravated robbery. With respect to the robbery, however, he asserted that he was not the only person at fault in the situation, explaining that the robbery was in response to a prior altercation with the victim:

> You have to see it from both sides. It wasn't just like going in, just attacking a person if you didn't do nothing. He allegedly had a gun on him. He robbed me for a punk $20, $20 two days before. He kept pulling a gun on me every time I went to the store. * * *
>
> And this time I caught him. I'm not saying it was a good thing. I'm not saying it was the best thing to do. It was better than me pulling out a gun and shooting him. * * *

> I don't think I'm innocent. I don't think I should get a slap on the wrist because I know what I did. But you should know what your son was doing, too. He wasn't just all goody two shoes. Do you know what I'm saying? * * * But I did wrong. So I can't say I didn't do.

**{¶ 26}** After considering the PSI and mitigation of penalty report, viewing videos of defendant's conduct related to 636198 (the aggravated robbery case) and 638207 (the case involving the attempted felonious assault of a police officer and resisting arrest), photographs related to the officer's injuries in 638207 and hearing from the state, the mother of the aggravated robbery victim, defense counsel and Moore, the trial court sentenced Moore to an aggregate prison term of 18 years as follows:

- In 635068, the trial court sentenced Moore to a total of three years in prison: three years on the attempted engaging in a pattern of corrupt activity count and 18 months on each of counts of receiving stolen property, to be served concurrently with each other but consecutively to the sentences imposed in 636198 and 638207.

- In 636198, the trial court merged the two firearm specifications for sentencing and sentenced Moore to a total of eight years in prison: three years on the firearm specification, which was to be served prior to and consecutive to a five-year sentence on the aggravated robbery count, to be served consecutively to the sentences imposed in 635068 and 638207.

- In 638207, the trial court merged the attempted felonious assault of a police officer count and resisting arrest count for purposes of sentencing and the state elected to sentence Moore on the attempted felonious assault count. The trial court sentenced Moore to seven years in prison on the attempted felonious assault count, to be served consecutively to the sentences imposed in 635068 and 636198.

**{¶ 27}** At the sentencing hearing, the trial court made findings in support of the imposition of consecutive sentences and set forth these findings in its sentencing journal entries in each of the cases as follows:

> The court imposes prison terms consecutively finding that consecutive service is necessary to protect the public from future crime or to punish defendant; that the consecutive sentences are not disproportionate to the seriousness of defendant's conduct and to the danger defendant poses to the public; and that, at least two of the multiple offenses were committed in this case as part of one or more courses of conduct, and the harm caused by said multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of defendant's conduct, or defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by defendant.

**{¶ 28}** Moore appealed, raising four assignments of error for review:

> First Assignment of Error: Trial counsel was ineffective when it withdrew appellant's pretrial motion for competency and mental health evaluation.
>
> Second Assignment of Error: The trial court committed reversible error when it failed to hold a competency hearing prior to appellant being required to go forward with trial and then prior to accepting his guilty plea.
>
> Third Assignment of Error: The trial court erred and abused its discretion when it denied appellant's pre-sentence motion to withdraw his guilty plea.
>
> Fourth Assignment of Error: The trial court erred when it failed to make the necessary findings required prior to imposing consecutive sentences on the oral record at the time of sentencing and consecutive sentences are not supported by the record.

## Law and Analysis

### Failure to Hold Competency Hearing Prior to Accepting Guilty Pleas

**{¶ 29}** Moore's first and second assignments of error are interrelated. For ease of discussion, we address his second assignment of error first.

**{¶ 30}** In his second assignment of error, Moore contends that the trial court erred in failing to hold a competency hearing, pursuant to R.C. 2945.37(B), prior to accepting his guilty pleas. Moore contends that because defense counsel raised the issue of his competency before trial the trial court was required to hold a hearing on his competency before proceeding to trial or accepting his guilty pleas. Moore also contends that defense counsel's withdrawal of his motion for a competency evaluation did not relieve the court of its obligation to conduct a competency hearing.

**{¶ 31}** The conviction of a defendant who is not competent to enter a plea violates due process of law. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 155, citing *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) ("It has long been accepted that a person [who] lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."), and *State v. Berry*, 72 Ohio St.3d 354, 359, 650 N.E.2d 433 (1995) ("Fundamental principles of due process require that a criminal defendant who is legally incompetent shall not be subjected to trial."). The competence required to enter a

guilty plea is the same as the competence required to stand trial. *State v. Minifee,* 8th Dist. Cuyahoga No. 108331, 2019-Ohio-4464, ¶ 12, citing *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 57; *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶ 56. The defendant must have "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding'" and must have "'a rational as well as factual understanding of the proceedings against him.'" *Montgomery* at ¶ 56, quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); *Minifee* at ¶ 12.

**{¶ 32}** R.C. 2945.37 and 2945.371 set forth procedures for a trial court to follow in conducting competency evaluations and making competency determinations. A defendant is presumed to be competent unless it is demonstrated by a preponderance of the evidence that the defendant is incapable of understanding the nature and objective of the proceedings against him or her or of assisting in his or her defense. R.C. 2945.37(G); *see also State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 45 ("A defendant is presumed to be competent to stand trial, and the burden is on the defendant to prove by a preponderance of the evidence that he is not competent."); *State v. Collins*, 4th Dist. Lawrence No. 18CA11, 2019-Ohio-3428, ¶ 8 ("'[I]n the absence of evidence to the contrary, a criminal defendant is rebuttably presumed competent to enter a guilty plea.'"), quoting *State v. Pigge*, 4th Dist. Ross No. 09CA3136, 2010-Ohio-6541, ¶ 28.

**{¶ 33}** Pursuant to R.C. 2945.37(B), if the court, prosecutor or defense raises the issue of a defendant's competence to stand trial before trial has commenced, "the

court shall hold a hearing on the issue." R.C. 2945.371(A) provides that "[i]f the issue of a defendant's competence to stand trial is raised * * * the court may order one or more evaluations of the defendant's present mental condition." The court must hold a competency hearing within 30 days after the competency issue is raised, unless the defendant has been referred for evaluation, in which case, the court shall conduct the hearing within ten days after the filing of the report of the evaluation. R.C. 2945.37(C). A hearing may be continued for good cause. *Id.*

**{¶ 34}** The right to a competency hearing is constitutionally guaranteed only where the record contains "sufficient indicia of incompetence," "such that an inquiry into the defendant's competence is necessary to ensure the defendant's right to a fair trial." *Berry*, 72 Ohio St.3d at 359, 650 N.E.2d 433; *see also Minifee,* 2019-Ohio-4464, at ¶ 15.

**{¶ 35}** In this case, defense counsel requested a competency evaluation in April 2019 shortly after he was retained by Moore. No request was specifically made for a competency hearing. The trial court granted defense counsel's motion for a competency evaluation, but it never occurred. Two months later, after spending time with Moore, defense counsel withdrew the request, indicating that it was now clear to defense counsel that Moore understood the nature and objective of the proceedings and was able to assist in his defense. After withdrawing the request, the issue of Moore's mental state was not raised again until his appeal.

**{¶ 36}** Although R.C. 2945.37(B) states the court "shall" hold a competency hearing if a competency issue is raised before trial, as this court has recognized, a

competency issue "can be waived" and "a hearing is not required in all situations." *Minifee,* 2019-Ohio-4464, at ¶ 14; *State v. Smith*, 8th Dist. Cuyahoga No. 95505, 2011-Ohio-2400, ¶ 5. A competency hearing is required only where a competency issue is "raised *and maintained*." (Emphasis added.) *Minifee* at ¶ 14; *Smith* at ¶ 5.

**{¶ 37}** Furthermore, even where a request for a competency evaluation is properly raised and maintained, "'the failure to hold a mandatory competency hearing is harmless error where the record fails to reveal sufficient indicia of incompetency.'" *State v. McNeir*, 8th Dist. Cuyahoga No. 105417, 2018-Ohio-91, ¶ 24, 27, quoting *State v. Bock*, 28 Ohio St.3d 108, 110, 502 N.E.2d 1016 (1986).

**{¶ 38}** In this case, because the issue of Moore's competency was not maintained and there is nothing in the record to suggest that Moore exhibited any outward signs of incompetency, the trial court did not err in failing to hold a competency hearing. *See, e.g., McNeir* at ¶ 26 (where defense counsel "disputed [defendant's] incompetency allegation by detailing their previous meetings with him" and, after speaking to his attorneys, defendant did not maintain his request for a competency evaluation, "informing the court that he was actually upset with the plea bargain and was trying to get a better deal," the trial court was not required to hold a competency hearing because the issue as to defendant's competency "was not properly maintained and, therefore, not properly before the trial court").

**{¶ 39}** Moore contends that the mitigation of penalty report prepared for use in his sentencing hearing revealed "mental health issues" that should have been reviewed by a mental health professional to determine his competency and that

Moore "was also possibly denied necessary medications which could have assisted him in aiding in his own defense and making proper legal decisions."

**{¶ 40}** The mitigation of penalty report indicates that Moore had been placed in "special education/learning disability classes" in middle school and high school, that he had a history of substance abuse, including marijuana, cocaine, stimulants, opioids and anxiolytics and that he likely suffered from an untreated depressive disorder and drug dependence. However, simply because Moore may have suffered from a mental disorder or a learning disability and may have benefited from medication to treat his condition, does not mean he was not competent to enter a guilty plea.

**{¶ 41}** A trial court may not find a defendant incompetent to stand trial or plead guilty solely because he suffers from a mental illness or a learning or intellectual disability. *State v. McMillan*, 2017-Ohio-8872, 100 N.E.3d 1222, ¶ 29 (8th Dist.), citing *State v. Calabrese*, 8th Dist. Cuyahoga No. 104151, 2017-Ohio-7316, ¶ 16. A defendant suffering from an emotional or mental disability or a learning disability may still possess the ability to understand the charges and proceedings against him or her and be able to assist in his or her defense. *See, e.g., State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 29 ("'Incompetency must not be equated with mere mental or emotional instability or even with outright insanity. A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel.'"), quoting *Bock*, 28 Ohio St.3d at 110, 502 N.E.2d 1016 (1986);

*State v. Hawkins*, 8th Dist. Cuyahoga No. 108057, 2019-Ohio-4162, ¶ 17 ("'[A] defendant's emotional or mental instability does not establish incompetence for the purpose of negating a plea, which was otherwise voluntarily, knowingly, and intelligently made.'"), quoting *State v. Prettyman,* 8th Dist. Cuyahoga No. 79291, 2002 Ohio App. LEXIS 1112, 4-5 (Mar. 14, 2002); *State v. Walker*, 8th Dist. Cuyahoga No. 65794, 1994 Ohio App. LEXIS 4450, 5 (Sept. 29, 1994) ("A defendant may be mentally unstable and still be capable of understanding the charges against him and entering a plea in a knowing, intelligent, and voluntary manner."); *State v. Swift*, 86 Ohio App.3d 407, 411, 621 N.E.2d 513 (11th Dist.1993) (defendant suffering from depression was competent to enter guilty plea). The test for competency focuses entirely on the defendant's ability to understand the meaning of the proceedings against him and his ability to assist in his own defense, which can be satisfied regardless of the defendant's mental status or IQ. *McMillan* at ¶ 29.

**{¶ 42}** The record contains no "indicia of incompetence" on the part of Moore. There is nothing to suggest that any mental condition or learning disability Moore may have had (or the consequences of any prior drug use or abuse) precluded him from understanding the nature and objective of the proceedings against him, in assisting in his defense or in otherwise entering knowing, intelligent and voluntary guilty pleas.

**{¶ 43}** To the contrary, the record is replete with evidence that Moore was competent to enter and, in fact, entered knowing, intelligent and voluntary guilty pleas. Our review of the transcript from the change-of-plea hearing shows that

Moore had an understanding of the criminal proceedings against him and was assisting in his defense. During the months these cases were pending, the trial court had numerous opportunities to observe and interact with Moore. The record reflects that, throughout the proceedings, Moore asked reasonable, informed questions of the trial judge and provided reasonable, informed responses to inquiries by the trial judge that exhibited Moore's understanding of the legal process, the charges against him and the consequences of his guilty pleas.

**{¶ 44}** Moore also actively participated in the plea negotiations, essentially negotiating his own plea agreement. We find nothing in the transcript that suggests Moore was experiencing any cognitive difficulties that impacted his understanding of the nature and objective of the proceedings against him or that inhibited his ability to assist in his defense at the time he entered his guilty pleas. There is no indication that Moore was under the influence of any drugs at the time he entered his guilty pleas and Moore specifically denied that he was under the influence of any drugs, alcohol or medication that would adversely affect his ability to understand what was happening or would affect his ability to enter into a plea at the time he entered his guilty pleas. Accordingly, we find no reversible error in the trial court's failure to hold a competency hearing before accepting Moore's guilty pleas. *Cf. State v. Antill*, 7th Dist. Belmont No. 12 BE 3, 2013-Ohio-2265, ¶ 49-50 (trial court did not err in failing to hold a competency hearing because defendant never specifically requested a competency hearing and, after filing a motion for a psychological evaluation, he did not raise the issue of his mental state again until his appeal); *State*

*v. Almashni*, 8th Dist. Cuyahoga No. 92237, 2010-Ohio-898, ¶ 11-14 (any error in the trial court's failure to hold a competency hearing after a competency evaluation had been ordered was harmless where record did not contain sufficient indicia of incompetence).

**{¶ 45}** Moore's second assignment of error is overruled.

**Ineffective Assistance of Counsel**

**{¶ 46}** In Moore's first assignment of error, he argues that he was denied effective assistance of counsel due to defense counsel's withdrawal of his pretrial motion for a competency evaluation. Moore contends that the mitigation of penalty report prepared for use in his sentencing hearing revealed "mental health issues" that should have been reviewed by a mental health professional to determine his competency. He further contends that he was prejudiced by defense counsel's withdrawal of the motion because (1) there is "a possibility" that Moore was not competent and, therefore, did enter his guilty pleas knowingly, intelligently and voluntarily, (2) that Moore was "possibly denied necessary medications" that "could have assisted him in aiding in his own defense and making proper legal decisions" and (3) that Moore was denied "a possible opportunity to enter the mental health court."

**{¶ 47}** A criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Sixth Amendment to the United States Constitution guarantees a defendant the effective assistance of counsel at all ""critical stages of a criminal

proceeding," including when he enters a guilty plea.'" *State v. Romero*, 156 Ohio St.3d 468, 2019-Ohio-1839, 129 N.E.3d 404, ¶ 14, quoting *Lee v. United States*, __U.S.__, 137 S.Ct. 1958, 1964, 198 L.Ed.2d 476 (2017), quoting *Lafler v. Cooper*, 566 U.S. 156, 165, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012); *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

**{¶ 48}** As a general matter, to establish ineffective assistance of counsel, a defendant must demonstrate: (1) deficient performance by counsel, i.e., that counsel's performance fell below an objective standard of reasonable representation, and (2) that counsel's errors prejudiced the defendant, i.e., a reasonable probability that but for counsel's errors, the outcome would have been different. *Strickland* at 687-688, 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus; *see also State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 391 ("Reversal of a conviction for ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and second, that the deficient performance prejudiced the defendant so as to deprive the defendant of a fair trial."). "Reasonable probability" is "probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

**{¶ 49}** However, a claim of ineffective assistance of counsel is waived by a guilty plea, except to the extent that the ineffective assistance of counsel caused the defendant's plea to be less than knowing, intelligent and voluntary. *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11, citing *State v.*

*Spates*, 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (1992). Accordingly, where a defendant has entered a guilty plea, the defendant can prevail on an ineffective assistance of counsel claim only by demonstrating that there is a reasonable probability that, but for counsel's deficient performance, he would not have pled guilty to the offenses at issue and would have insisted on going to trial. *State v. Vinson*, 2016-Ohio-7604, 73 N.E.3d 1025, ¶ 30 (8th Dist.); *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992); *Hill*, 474 U.S. at 59, 106 S.Ct. 366, 88 L.Ed.2d 203.

**{¶ 50}** In Ohio, every properly licensed attorney is presumed to be competent. *State v. Black*, 8th Dist. Cuyahoga No. 108001, 2019-Ohio-4977, ¶ 35, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Thus, in evaluating counsel's performance on a claim of ineffective assistance of counsel, the court must give great deference to counsel's performance and "indulge a strong presumption" that counsel's performance "falls within the wide range of reasonable professional assistance." *Strickland* at 689; *see also State v. Powell*, 2019-Ohio-4345, 134 N.E.3d 1270, ¶ 69 (8th Dist.) ("'A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'"), quoting *State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175, ¶ 69.[3]

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[3] Further, counsel has an ethical obligation not to assert an issue unless there is a good faith basis for doing so. *See* Prof.Cond.R. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue in a proceeding, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."); *cf. State v. Anderson*, 8th Dist.

**{¶ 51}** As detailed above, there is no evidence in the record from which it could be found that Moore was incompetent at the time he entered his guilty pleas. Moore has not shown that defense counsel was deficient in withdrawing his motion for a competency evaluation or that he could have possibly been prejudiced by defense counsel's withdrawal of the motion. *See, e.g.*, *Hawkins*, 2019-Ohio-4162, at ¶ 30-32 ("Absent indicia of incompetence," defendant could establish that defense counsel's failure to request a competency hearing fell below an objective standard of reasonable representation or would create a reasonable probability of a different outcome; defendant's argument that a competency hearing would have resulted in a transfer of his case to the mental health docket and would have led to a different sentence than the one imposed was "pure speculation" that could not support ineffective assistance of counsel claim).

**{¶ 52}** Moore's first assignment of error is overruled.

**Denial of Presentence Motion to Withdraw Guilty Pleas**

**{¶ 53}** In his third assignment of error, Moore contends that the trial court erred and abused its discretion by denying his presentence motion to withdraw his guilty pleas. Moore claims that due to his "youth and inexperience with the adult criminal justice system, his learning disability, drug dependency, and mental health diagnosis," he "entered the guilty pleas against his will and with little understanding

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Cuyahoga No. 103490, 2016-Ohio-3323, ¶ 2 (observing that counsel's representation to the court that an argument cannot be made in good faith is entitled to deference). There is nothing in the record to suggest that Moore opposed defense counsel's withdrawal of the motion.

as to what was occurring or what options/defenses he might have had," that he had "a true lack of knowledge regarding the evidence and the application of facts to law in regard to his guilt or innocence" and that the trial court abused its discretion in denying his motion to withdraw his guilty pleas without giving "full and fair consideration" to these issues.

**{¶ 54}** We review a trial court's ruling on a presentence motion to withdraw a guilty plea for an abuse of discretion. *Xie*, 62 Ohio St.3d at 526, 584 N.E.2d 715. Unless it is shown that the trial court acted unreasonably, arbitrarily or unconscionably in denying a defendant's motion to withdraw a plea, there is no abuse of discretion and the trial court's decision must be affirmed. *See, e.g., State v. Musleh*, 8th Dist. Cuyahoga No. 105305, 2017-Ohio-8166, ¶ 36, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983), and *Xie* at 527.

**{¶ 55}** In general, "a presentence motion to withdraw a guilty plea should be freely and liberally granted." *Xie* at 527. However, even before the trial court imposes a sentence, a defendant does not have an "absolute right" to withdraw a plea. *Id.* at paragraph one of the syllabus. Before ruling on a presentence motion to withdraw a plea, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for withdrawal of the plea. *Id.* At the hearing, the defendant is entitled to "'full and fair consideration'" of his or her motion. *State v. Hines*, 8th Dist. Cuyahoga No. 108326, 2020-Ohio-663, ¶ 8, quoting *State v. Peterseim*, 68 Ohio App.2d 211, 428 N.E.2d 863 (8th Dist.1980). It is "'within the sound discretion of the trial court'" to determine whether circumstances exist that

warrant withdrawal of the guilty plea. *Xie* at 526, quoting *Barker v. United States*, 579 F.2d 1219, 1223 (10th Cir.1978). A mere "change of heart" is not enough to justify withdrawal of a guilty plea. *See, e.g., Musleh* at ¶ 35; *State v. Shaw*, 8th Dist. Cuyahoga No. 102802, 2016-Ohio-923, ¶ 6.

**{¶ 56}** Ohio courts have identified a list of nonexhaustive factors for trial courts to consider when deciding a presentence motion to withdraw a plea. *See, e.g., State v. Walcot*, 8th Dist. Cuyahoga No. 99477, 2013-Ohio-4041, ¶ 19. Those factors include: (1) whether the motion was made in a reasonable time; (2) whether the motion states specific reasons for withdrawal; (3) whether the defendant understood the nature of the charges and the possible penalties, (4) whether the defendant was perhaps not guilty or had a complete defense and (5) whether the state would be prejudiced by the withdrawal of the plea. *Hines* at ¶ 10; *State v. Bradley*, 8th Dist. Cuyahoga No. 108294, 2020-Ohio-30, ¶ 4; *State v. Heisa*, 8th Dist. Cuyahoga No. 101877, 2015-Ohio-2269, ¶ 19.

**{¶ 57}** A trial court does not abuse its discretion in denying a presentence motion to withdraw a guilty plea where: (1) the defendant is represented by highly competent counsel, (2) the defendant was afforded a full hearing, pursuant to Crim.R. 11, before he or she entered his plea, (3) after the motion to withdraw is filed, the defendant is given a complete and impartial hearing on the motion and (4) the record reveals that the court gave full and fair consideration to the plea withdrawal request (the "*Peterseim* factors"). *Peterseim*, 68 Ohio App.2d 211, 428 N.E.2d 863, at paragraph three of the syllabus; *see also State v. Armstrong*, 8th

Dist. Cuyahoga No. 103088, 2016-Ohio-2627, ¶ 17. On the record before us, we cannot say that the trial court abused its discretion in denying Moore's motion to withdraw his guilty pleas.

**{¶ 58}** As an initial matter, we note that although Moore argues on appeal that the trial court abused its discretion in denying Moore's motion without "fully and fairly" considering: (1) Moore's alleged lack of understanding "as to what was occurring or what options/defenses he might have had" and (2) his "mental health issues," neither of these was argued as a basis for withdrawal of Moore's guilty pleas below. As such, they cannot support reversal of the trial court's decision here. "'[A] party cannot present new arguments for the first time on appeal that were not raised below, and a trial court cannot be said to have abused its discretion by failing to consider arguments that were never presented to it.'" *State v. Luton*, 8th Dist. Cuyahoga No. 106754, 2018-Ohio-4708, ¶ 65, quoting *State v. D.K.*, 8th Dist. Cuyahoga No. 106539, 2018-Ohio-2522, ¶ 17; *see also State v. Pratts*, 8th Dist. Cuyahoga No. 104235, 2016-Ohio-8053, ¶ 43 ("A party may not raise for the first time on appeal an argument that could have been raised below.").

**{¶ 59}** As detailed above, Moore's pro se motion — filed only in 638207 one day before the sentencing hearing and five weeks after Moore had entered his guilty pleas — did not identify any specific reason for seeking to withdraw his guilty pleas. Moore argued at the hearing that he should be permitted to withdraw his guilty pleas because "[defense counsel] made me fear my consequences to make me say I was guilty so I receive a lesser sentence." In arguing his oral motion at the sentencing

hearing, defense counsel focused on the fact that, with respect to the charges in 636198, Moore "could conceivably argue" that the video of the robbery did not "specifically identify" him and that, with respect to the charges in 638207, Moore may have had "a valid defense" to the charge of attempted felonious assault of a police officer because his conduct "constituted more of a resisting arrest, more of a wrestling match" than attempted felonious assault on a police officer.

**{¶ 60}** Turning first to Moore's claim that his guilty pleas were the product of defense counsel "ma[king]" him "fear [the] consequences" of going to trial, we note that the uncertainty associated with going to trial and the "fear" of being found guilty of, and sentenced on, more offenses (or more serious offenses) than the defendant would have been convicted of had he or she accepted a plea agreement is a motivation that underlies virtually all guilty pleas. The fact that a defendant may have felt "pressured" to enter a plea is not a sufficient basis upon which to withdraw a plea in the absence of evidence of coercion. *See, e.g., Musleh*, 2017-Ohio-8166, at ¶ 42, citing *Shaw*, 2016-Ohio-923, at ¶ 6-9. Defense counsel's expression of opinion regarding the strength of the state's case, his or her explanation of the worst case scenario or other possible sentencing scenarios if the defendant were to go to trial and lose and defense counsel's recommendation regarding whether to accept a plea deal "does not amount to coercion" or duress sufficient to justify withdrawal of a guilty plea; "it is merely evidence of * * * defense counsel doing his job." *Walcot*, 2013-Ohio-4041, at ¶ 24; *see also State v. Martre*, 3d Dist. Allen No. 1-18-61, 2019-

Ohio-2072, ¶ 15 ("simply stating the projected outcome of a trial based upon the evidence * * * is not necessarily duress").

**{¶ 61}** Further, the record contains nothing to support Moore's assertion that defense counsel pressured him to accept the state's plea offer. To the contrary, the record shows that Moore freely rejected the state's initial plea offer and accepted a different plea offer only after the state agreed to specific terms Moore requested. Moore has not claimed that he was threatened in any way by defense counsel, that he was promised anything he did not receive in exchange for his guilty pleas by defense counsel or that defense counsel (or anyone else) provided him with incomplete or inaccurate information with regard to the offenses with which he was charged, the sentences for those offenses or the evidence in support of the state's case against him.

**{¶ 62}** Although at the outset July 10, 2019 hearing, Moore appeared to be upset and frustrated, stating that he did not "care" whether or not he went to trial because he did not know what was going on in the case and had been given "no discovery" aside from viewing a videotape of the robbery, the record reflects that this issue was resolved by the time Moore entered his guilty pleas.

**{¶ 63}** In response to Moore's concerns, the trial court identified the actions defense counsel had taken on Moore's behalf, including filing numerous motions, attending pretrial conferences and obtaining and reviewing voluminous discovery materials. The trial court further explained that most of the discovery produced by the state had been marked "counsel only" and, therefore, could not be provided to

Moore for review. Although the trial court advised Moore that he was entitled to review his own recorded statement to police, Moore indicated that he did not need to see it. After explaining to Moore his limited access to the discovery materials produced by the state, the trial judge asked Moore, "What else would you like to see that you haven't seen?" Moore did not answer the trial judge. Instead, Moore made inquiries regarding the case set for trial that day, then turned his attention to state's plea offer and the negotiation of a new plea deal that included specific terms Moore had requested. When asked at the change-of-plea hearing whether he was "satisfied with the services of [his] lawyer," Moore responded unequivocally, "Yes."

**{¶ 64}** Although Moore initially pled not guilty to the charges against him, he has not claimed that he did not commit any of the charges to which he ultimately pled guilty and has not shown that he had "evidence of a plausible defense" that could have otherwise reasonably supported a not guilty verdict. Although defense counsel argued below that the video recording of the robbery did not "specifically identify" Moore, the record reflects that Moore admitted to police officers that he was the person depicted in the video. Further, the fact that Moore's conduct giving rise to the charges in 638207 may have, in defense counsel's view, "constituted more of a resisting arrest, more of a wrestling match than an assault on a police officer," it would not have constituted "a valid defense" to an attempted felonious assault charge. There is no evidence in the record that Moore ever contended that he was not responsible for the injuries to the police officer.

**{¶ 65}** Considering the *Peterseim* factors, we note that the trial court found that Moore was represented by experienced, "highly competent" counsel based on the trial judge's prior experience with defense counsel in other trials and her knowledge of defense counsel's reputation and experience in criminal defense matters generally, including handling "numerous appeals." Moore has not challenged defense counsel's credentials on appeal.

**{¶ 66}** The record reflects that Moore was afforded a full hearing, in compliance with Crim.R. 11, before he entered his guilty pleas and that Moore understood all of the charges against him and the possible penalties prior to entering his guilty pleas. Moore does not dispute that the trial court's plea colloquy fully complied with Crim.R. 11.

**{¶ 67}** The record further reflects that the trial court gave Moore a complete and impartial hearing on his presentence motion to withdraw his guilty pleas, and gave full and fair consideration to the arguments raised by Moore and defense counsel in support of the motion. The trial court gave Moore and defense counsel every opportunity to put forth all arguments and to submit all evidence they wished to present in support of the motion before ruling on Moore's motion to withdraw his guilty pleas. Throughout the hearing, the trial judge repeatedly asked Moore and defense counsel if there was "[a]nything else that you would like to say?," if there was "any further argument on behalf of the defendant" and "if there was anything further that the defendant would like to provide in support of his motion?"

**{¶ 68}** We acknowledge that there are cases in which this court and others have held that the trial court abused its discretion in denying a presentence motion to withdraw a guilty plea based, in part, on the principle that presentence motions to withdraw a guilty plea should be freely and liberally granted. However, those cases are readily distinguishable on their facts. In such cases, there is generally a showing of a failure to comply with one or more of the *Peterseim* factors; a showing of confusion, misinformation or misunderstanding regarding some material aspect of the proceedings, plea or penalty on the part of the defendant; evidence to support a claim of innocence of, or a defense to, the charges at issue; evidence of duress or coercion beyond that associated with the stress of a looming trial and/or a showing of a lack of communication, some other issue with defense counsel's representation of the defendant or a deficiency in the plea colloquy that calls into question the knowing, intelligent and voluntary nature of the defendant's guilty plea — none of which is present here. *Compare, e.g., Hines*, 2020-Ohio-663, ¶ 6-19 (trial court abused its discretion in denying defendant's presentence motion to withdraw his guilty plea where defendant took "immediate steps" to withdraw his plea, including dismissing his original counsel, hiring new counsel, filing a motion to withdraw and moving to postpone his sentencing; defendant filed an affidavit asserting his innocence and the record was "at best" "unclear as to his innocence or guilt" and the record showed confusion and a lack of understanding by defendant regarding his plea, supporting his claim that he was "blindsided by the events of the change-of-plea hearing" due, in part, to a lack of communication with counsel); *State v.*

*Shivers*, 2016-Ohio-1378, 63 N.E.3d 517, ¶ 7-16 (8th Dist.) (trial court abused its discretion in denying defendant's presentence motion to withdraw his guilty plea where the state failed to produce videotaped interviews in violation of Crim.R. 16(B), precluding defendant from analyzing the statements he and a potential witness made to police and "hampering [defendant's] ability to enter an intelligent plea"); *State v. Worley*, 8th Dist. Cuyahoga No. 95003, 2011-Ohio-1680, ¶ 29-36 (trial court abused its discretion by failing to give full and fair consideration to defendant's motion to withdraw his guilty plea where defendant "was not granted a fair opportunity to support the basis of his motion" and trial court's decision was "based on the court's factual error relating to the pertinent procedural history" of the case); *State v. Lacey*, 8th Dist. Cuyahoga No. 78448, 2001 Ohio App. LEXIS 3714, 4-8 (Aug. 23, 2001) (trial court abused its discretion in denying motion to withdraw guilty plea where defendant had previously submitted an affidavit and a letter to the judge detailing facts in support of her claim that defense counsel had forced her to plead guilty and there was no indication in the record that the trial court considered this claim or gave defendant or counsel an opportunity to present evidence, make a statement or participate in the hearing on the motion). Moore has not cited a single case in which a trial court was found to have abused its discretion in denying a presentence motion to withdraw a guilty plea under circumstances similar to this case.

**{¶ 69}** We find no abuse of discretion in the trial court's decision that the circumstances of this case did not justify granting Moore's motion to withdraw his

guilty pleas. The record supports the trial court's conclusion that Moore failed to demonstrate a legitimate and reasonable basis for withdrawing his guilty pleas. Accordingly, Moore's third assignment of error is overruled.

**Imposition of Consecutive Sentences**

**{¶ 70}** In his fourth and final assignment of error, Moore contends that his consecutive sentences should be vacated because they were "contrary to law" and "not supported by the record."

**{¶ 71}** There are two ways a defendant can challenge consecutive sentences on appeal. *State v. Tidmore*, 8th Dist. Cuyahoga No. 107369, 2019-Ohio-1529, ¶ 15; *State v. Johnson*, 8th Dist. Cuyahoga No. 102449, 2016-Ohio-1536, ¶ 7. First, the defendant can argue that consecutive sentences are contrary to law because the trial court failed to make the findings required by R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(b). Second, the defendant can argue that the record clearly and convincingly does not support the findings made under R.C. 2929.14(C)(4). *See* R.C. 2953.08(G)(2)(a). Moore raises both arguments here.

**{¶ 72}** To impose consecutive sentences, a trial court must find that (1) consecutive sentences are necessary to protect the public from future crime or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public and (3) at least one of the following applies:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction

> imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under postrelease control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

**{¶ 73}** The trial court must make the requisite findings in support of the imposition of consecutive sentences at the sentencing hearing and incorporate those findings into its sentencing journal entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus.

**{¶ 74}** Moore does not dispute that the trial court set forth the necessary findings for the imposition of consecutive sentences both at the sentencing hearing and in its sentencing journal entries. However, he contends that the trial court only "recit[ed]" the "necessary 'buzz' words" and failed to "make" the required findings for the imposition of consecutive sentences "on the oral record." The record reflects otherwise.

**{¶ 75}** To make the requisite "findings" under the statute, "'the [trial] court must note that it engaged in the analysis' and that it 'has considered the statutory criteria and specifie[d] which of the given bases warrants its decision.'" *Id.* at ¶ 26, quoting *State v. Edmonson*, 86 Ohio St.3d 324, 326, 715 N.E.2d 131 (1999). "[A]s

long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Id.* at ¶ 29. When considering whether the trial court has made the requisite findings, an appellate court must view the trial court's statements on the record "in their entirety." *See, e.g., State v. Blevins*, 2017-Ohio-4444, 93 N.E.3d 246, ¶ 21, 23, 25 (8th Dist.).

**{¶ 76}** In this case, the trial court found at the sentencing hearing that (1) consecutive sentences were necessary to protect the community from future crime and to punish Moore, R.C. 2929.14(C)(4), (2) consecutive sentences were not disproportionate to the seriousness of Moore's conduct and to the danger he poses to the public, *id.*, (3) at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of Moore's conduct, R.C. 2929.14(C)(4)(b), and (4) Moore's "lengthy criminal history" shows that consecutive sentences are necessary to protect the public, R.C. 2929.14(C)(4)(c). The trial court's consecutive sentence findings were also incorporated in the sentencing journal entries for each case.

**{¶ 77}** The transcript from the sentencing hearing shows that the trial court made these findings after considering Moore's lengthy history of committing crimes of violence. The trial court detailed Moore's extensive juvenile record, including: delinquency adjudications for participating in a criminal gang or engaging in a

pattern of corrupt activity, kidnapping, felonious assault and aggravated riot in 2014; delinquency adjudications for burglary, receiving stolen property, theft, criminal damaging or endangering and obstructing official business in 2017 and delinquency adjudications for carrying a concealed weapon and receiving stolen property in 2018 — along with Moore's conduct in the three cases at issue, beginning shortly after he turned 18. In reviewing Moore's criminal history, the trial court specifically noted its concern regarding Moore's pattern of increasingly violent criminal behavior:

> Well, I first looked at your record. And you're very, very young, as you know, as we all know. And so looking at your record takes me back to juvenile court, as you don't have any adult offenses.
>
> * * *
>
> And so your criminal history is not great.
>
> And it consists of crimes of violence. And it's very difficult listening to the facts of the cases that you have here in front of me today, as it's more violence[.]
>
> * * *
>
> So it's concerning to me the number of cases that you have before me and looking at your record. And so much violence in all of these cases.
>
> So in considering all the relevant, seriousness and recidivism factors, and [e]nsuring that the public is protected from [future] crime and that you are punished, you are not amenable to community control 23 sanctions. You're also are not amenable to community control sanctions because you pled guilty to mandatory prison. So I am going to impose a prison sentence.
>
> And I have to take into consideration your history and the facts of the cases that you have in front of me. And as I've already said, there is so much violence. And whatever issue you say you had with the

> victim in the aggravated robbery offense, the way to resolve the issue is not to attack him the way that you did, which I'm sure you know that. But you let your anger control your actions.

**{¶ 78}** It is clear that from a review of the transcript of the sentencing hearing in its entirety that, in setting forth its findings in support of the imposition of consecutive sentences, the trial court was not merely reciting "buzz words." The record shows that the trial court's consecutive sentence findings were the result of a thorough, carefully considered analysis regarding whether consecutive sentences were necessary to protect the public and punish Moore in light of the seriousness of the offenses, Moore's age, history and background, the harm caused by Moore and the danger he poses to the public. The trial court complied with its obligations under R.C. 2929.14(C)(4).

**{¶ 79}** Moore also argues that his consecutive sentences should be vacated because the imposition of consecutive sentences is not supported by the record. Specifically, he contends that (1) "[t]he public would be protected from future crime by [Moore] if he were required to serve a single sentence or otherwise receive mental health treatment," (2) consecutive sentences were disproportionate to the seriousness of Moore's conduct and the harm caused by Moore because Moore was 19 years old "with no prior adult criminal history," "had mental health problems, learning disabilities, drug addiction and was raised in a tough environment" and "his direct acts were not violent" and (3) "[a] single prison sentence would meet the princip[les] and purposes of felony sentencing" because Moore was "a young man

[who] could be rehabilitated with a single sentence and be released as a completely different person." Once again, we disagree.

**{¶ 80}** An appellate court "may increase, reduce, or otherwise modify a sentence" or it "may vacate the sentence and remand the matter to the sentencing court for resentencing" if it "clearly and convincingly finds" that "the record does not support the sentencing court's findings" under R.C. 2929.14(C)(4). R.C. 2953.08(G)(2). "'Clear and convincing evidence is that measure or degree of proof * * * which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *State v. Franklin*, 8th Dist. Cuyahoga No. 107482, 2019-Ohio-3760, ¶ 29, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. It is "an extremely deferential standard of review." *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 21 (8th Dist.).

**{¶ 81}** There is nothing in the record before us that leads us to conclude that any of the trial court's findings in support of the imposition consecutive sentences are clearly and convincingly unsupported by the record. Accordingly, we overrule Moore's fourth assignment of error.

**{¶ 82}** Judgment affirmed.

It is ordered that appellee recover from appellant the 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 Cuyahoga County Court of Common Pleas to carry out this judgment into execution.

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

EILEEN A. GALLAGHER, JUDGE

PATRICIA A. BLACKMON, P.J., and
RAYMOND C. HEADEN, J., CONCUR