[Cite as *State v. Bogarty*, 2020-Ohio-4996.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 109143
v.	:	
DARYON BOGARTY,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 22, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-19-640948-A

Appearances:

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

Charles Ruiz-Bueno Co., L.P.A., and J. Charles Ruiz-Bueno, *for appellant*.

EILEEN T. GALLAGHER, A.J.:

{¶ 1} Defendant-appellant, Daryon Bogarty, appeals from his convictions and sentence following a guilty plea. He raises the following assignments of error for review:

1. The trial court erred in failing to provide the proper postrelease control notification before removing Bogarty from the sentencing hearing.

2. The trial court committed reversible error when it denied Bogarty's oral motion to withdraw his guilty plea.

{¶ 2} After careful review of the record, we affirm the trial court's judgment.

I. Procedural and Factual History

{¶ 3} In June 2019, Bogarty was named in a six-count indictment, charging him with aggravated burglary in violation of R.C. 2911.11(A)(1); burglary in violation of R.C. 2911.12(A)(1); assault in violation of R.C. 2903.13(A), with a pregnant victim specification; abduction in violation of R.C. 2905.02(A)(2); disrupting public services in violation of R.C. 2909.04(A)(3); and aggravated menacing in violation of R.C. 2903.21(A). The indictment stemmed from allegations that Bogarty forced his way into the apartment unit of a female victim and accused her of having his gun. Ultimately, Bogarty assaulted the victim as he searched for his gun in her apartment. The victim was pregnant at the time of the incident.

{¶ 4} At a hearing held in July 2019, Bogarty expressed that he wished to withdraw his previously entered pleas of not guilty and accept a plea agreement with the state. Following a Crim.R. 11 colloquy, Bogarty pleaded guilty to attempted burglary as amended in Count 2 of the indictment; assault, with a pregnant victim specification, as charged in Count 3 of the indictment; abduction as charged in Count 4 of the indictment; and aggravated menacing as charged in Count 6 of the indictment. Counts 1 and 5 were nolled. The trial court accepted Bogarty's guilty

pleas and referred him to the county probation department for a presentence investigation and report.

{¶ 5} Bogarty appeared for sentencing in September 2019. In the midst of the hearing, Bogarty orally requested to withdraw his guilty pleas, stating, in relevant part:

> Your Honor, first of all, I would like to say I'm not understanding this plea deal. When I took the plea deal, the understanding was probation with the possibility of getting sentenced up to the Court's discretion. And right now, Your Honor, it is very imperative that I withdraw from my plea deal.

{¶ 6} Bogarty conceded that he was not promised probation in exchange for his plea, but expressed that it was "his understanding" that he would be placed on probation based on defense counsel's representations. The following exchange then occurred on the record:

> TRIAL COURT: Did you (defense counsel) give Mr. Bogarty the understanding that he would be getting probation on this case?
>
> DEFENSE COUNSEL: I think what he is trying to say —
>
> TRIAL COURT: I'm asking you (defense counsel), I know what Mr. Bogarty is trying to say. I'm asking a very direct yes or no answer question. Did you (defense counsel) say anything to Mr. Bogarty that would lead him to believe that he would have a, quote, understanding that he would be granted probation?
>
> DEFENSE COUNSEL: I'll kind of break that down a little bit. He understands it's not mandatory time and the understanding is that ultimately the sentencing is up to the Court, so he shouldn't have an understanding that he is getting probation. His understanding should be that that's our goal. That's different than promising anything or causing him to have an understanding that he's getting probation. I would say no to that question.

(Tr. 22-23.)

{¶ 7} In an abundance of caution, the trial court determined that it was necessary to delay sentencing and order the transcript of the plea hearing before rendering a decision on Bogarty's motion to withdraw his guilty pleas.

{¶ 8} Bogarty appeared before the trial court approximately one week later. At this hearing, Bogarty reiterated his position as follows:

> Again, Your Honor, I would just like to say that a prison term, I feel, would not be appropriate, for one, because I feel like I truly did not cause harm or do things to the victim. So if a prison term in your terms would be appropriate, then I would like to withdraw my plea.

(Tr. 28.)

{¶ 9} The trial court denied Bogarty's motion to withdraw, stating:

> Well, Mr. Bogarty, unfortunately that's not how life works. You pled guilty. You tell me you want to withdraw your plea unless you get probation. That's not going to hold up in the Court of Appeals or anywhere else.
>
> Mr. Bogarty, you were fully advised of your sentencing here and what you pled guilty to, you voluntarily entered into this plea agreement. Now I intend to sentence you in a manner consistent with protecting society from future violent crime.

(Tr. *id.*)

{¶ 10} As the court attempted to proceed with sentencing, Bogarty began interrupting the court, again expressing his desire to withdraw his plea. The trial court warned Bogarty that if he spoke another word, the court would "sentence [him] in absentia." (Tr. 30.) After Bogarty interrupted the court a second and third time, he was removed from the courtroom. The trial court noted that Bogarty's

behavior was "completely inappropriate" and that he had "forfeited his right to be present at sentencing." (Tr. 31.)

{¶ 11} The trial court sentenced Bogarty to an aggregate six-year prison term, and advised that once Bogarty was released he would serve a mandatory three-year period of postrelease control.

{¶ 12} Bogarty now brings this timely appeal.

II. Law and Analysis

A. Postrelease Control

{¶ 13} In his first assignment of error, Bogarty argues the trial court erred by failing to impose postrelease control before he was removed from the courtroom.

{¶ 14} "Postrelease control" involves a period of supervision by the Adult Parole Authority after an offender's release from prison that includes one or more postrelease control sanctions imposed under R.C. 2967.28. R.C. 2967.01(N). Postrelease control is mandatory for some offenses and is imposed at the discretion of the Parole Board for others, depending on the nature and degree of the offense. R.C. 2967.28(B) and (C).

> [I]n order to comply with separation-of-powers concerns and to fulfill the requirements of the postrelease-control-sentencing statutes, * * * a trial court must provide statutorily compliant notification to a defendant regarding postrelease control at the time of sentencing.

State v. Qualls, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 18, citing R.C. 2929.19(B) and 2967.28. This includes "notifying the defendant of the details of the postrelease control and the consequences of violating postrelease control." *Id.* The trial court must also "incorporate into the sentencing entry the postrelease-control

notice to reflect the notification that was given at the sentencing hearing[,]" which includes incorporating the consequences of violating postrelease control. *Id.* at ¶ 19; *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 11 ("[T]he imposed postrelease control sanctions are to be included in the judgment entry journalized by the court."); *State v. Grimes*, 151 Ohio St.3d 19, 2017-Ohio-2927, 85 N.E.3d 700, ¶ 1.

{¶ 15} On appeal, Bogarty submits that, regardless of the basis supporting his removal from the courtroom, the trial court failed to comply with its statutory duty to notify him of his postrelease control obligations. Bogarty's position relies on the Ohio Supreme Court's decision in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864.[1] In *Jordan*, the court stated, in relevant part:

> when a trial court fails to notify an offender about postrelease control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and, therefore, the sentence must be vacated and the matter remanded to the trial court for resentencing.

Id. at ¶ 27. Bogarty suggests that, pursuant to *Jordan*, the trial court was required to make the necessary postrelease control notifications in his presence.

{¶ 16} We recognize that it is axiomatic that a criminal defendant has a fundamental right to be present at all critical stages of his criminal trial. Article I, Section 10, Ohio Constitution; *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426,

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[1] In *State v. Harper*, Slip Opinion No. 2020-Ohio-2913, the Ohio Supreme Court overruled the holding in *Jordan* that a trial court's failure to properly impose postrelease control renders the sentence — or that part of the sentence — void and permits it to be corrected at any time before it expires. *Id.* at ¶ 39-42.

892 N.E.2d 864, ¶ 100. Crim.R. 43(A)(1) provides that "the defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence." This right, however, is not absolute. A defendant's presence can be waived or extraordinary circumstances may exist that require the defendant's exclusion, such as a defendant's misconduct. *State v. Chambers*, 10th Dist. Franklin No. 99AP-1308, 2000 Ohio App. LEXIS 3104 (July 13, 2000), citing *State v. Williams*, 6 Ohio St.3d 281, 286, 452 N.E.2d 1323 (1983). As set forth in Crim.R. 43(B):

> Where a defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with the defendant's continued physical presence, the hearing or trial may proceed in the defendant's absence * * *, and judgment and sentence may be pronounced as if the defendant were present.

{¶ 17} Thus, a defendant can lose the right to be present during a criminal proceeding if, after a warning by the trial court that continued disruptive behavior will result in removal, the defendant persists with conduct that is so disorderly, disruptive, and disrespectful of the trial court that the proceeding cannot continue with the defendant in the courtroom. *Illinois v. Allen*, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

{¶ 18} In this case, Bogarty does not dispute the reasonableness of the court's decision to remove him from the courtroom. Nevertheless, having independently reviewed the record, we find the court was within its authority to do so. Bogarty began interrupting the court in frustration with the court's denial of his motion to withdraw, and continued his disruptive behavior after the court warned him that he

would be removed from the courtroom if his outbursts persisted. Under these circumstances, we find the trial court acted within its discretion by proceeding with the sentencing hearing in Bogarty's absence. Crim.R. 43(B). Unlike the circumstances presented in *Jordan*, the court made the required postrelease notifications on the record, stating:

> [Bogarty] will be subject to a mandatory three-year term of post-release control, which if he violates will subject him to additional prison sanctions up to one half of the Court's originally-entered sentence.
>
> If he commits a new felony while on post-release control, the subsequent sentencing judge can sanction him with prison time of one year or the remaining time period left on his three-year period of post-release control. Whatever is greater must be imposed and must run consecutive to the sentence on the new felony.

(Tr. 34.) Pursuant to Crim.R. 43(B), the court's pronouncement of the sentence, including the postrelease-control notifications, are treated "as if the defendant were present." Defense counsel remained in the courtroom throughout the sentencing hearing, and there is no information in the record to suggest Bogarty's interests were not protected in his absence. Accordingly, we find no error. Bogarty's first assignment of error is overruled.

B. Motion to Withdraw Guilty Plea

{¶ 19} In his second assignment of error, Bogarty argues the trial court committed reversible error by denying his presentence motion to withdraw his guilty plea.

{¶ 20} We review a trial court's ruling on a presentence motion to withdraw a guilty plea for an abuse of discretion. *State v. Xie*, 62 Ohio St.3d 521, 526, 584

N.E.2d 715 (1992). 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.

{¶ 21} 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.

{¶ 22} 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.

{¶ 23} 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 this court, we cannot say that the trial court abused its discretion in denying Bogarty's motion to withdraw his guilty pleas.

{¶ 24} A review of the transcripts in this case demonstrates that Bogarty was represented by highly competent counsel. Bogarty stated that he was satisfied with

defense counsel's representation, and he has not challenged defense counsel's competency on appeal. (Tr. 7.)

{¶ 25} The record further reflects that Bogarty was afforded a full hearing, in compliance with Crim.R. 11, before he entered his guilty pleas. Prior to entering his guilty pleas, Bogarty was informed of his constitutional and nonconstutional rights, including the nature of his charges, the effect of his plea, and the maximum penalties that could be imposed. (Tr. 5-12.) Defense counsel expressed that the trial court complied with Crim.R. 11 in all regards. (Tr. 11.) Bogarty did not ask any questions at the plea hearing, and there is nothing in the transcript of the plea hearing to suggest that Bogarty was confused or under any type of duress prior to entering his guilty pleas. Rather, Bogarty confirmed that no threats or promises had been made to him to induce him to change his pleas, and he indicated that he was satisfied with the services rendered by his trial counsel.

{¶ 26} On appeal, however, Bogarty argues that he reasonably believed "that there was a possibility of probation rather than mandatory jail time" based on the trial court's statements during the plea hearing. However, the transcript of the plea hearing reveals that the trial court properly advised Bogarty of the maximum penalties he faced for each offence, and sufficiently notified Bogarty that his first-degree misdemeanor assault charge carried "mandatory time." (Tr. 9.) The court explained as follows:

> Count 3 (assault) because of the pregnancy specification, because of mandatory time, the Judge has no discretion, but must, is required under the law to at least give that period of time local incarceration, jail.

(Tr. *id.*) *See also* R.C. 2929.24(G). Accordingly, we are unpersuaded by Bogarty's suggestion that the trial court's Crim.R. 11 colloquy was inadequate.

{¶ 27} Finally, we find the trial court provided Bogarty 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 Bogarty in support of the motion. As stated, Bogarty's motion to withdraw was premised on his statement that he entered into the plea agreement with the understanding that he would receive probation, "with the possibility of getting sentenced up to the Court's discretion." (Tr. 20.) Based on Bogarty's statement, the court determined that it was necessary to delay sentencing in order to review the plea hearing transcript and further assess Bogarty's oral motion to withdraw. When the proceedings reconvened on September 30, 2019, the trial court stated that it considered Bogarty's contention that "he had been promised probation," but ultimately concluded that the transcript of the plea hearing did not support Bogarty's position, stating:

> The record clearly indicates that rather than a promise of probation was made, that Mr. Bogarty was explained the mandatory time feature of Count Number 3 on this matter.

(Tr. 25.)

{¶ 28} Considering the *Peterseim* factors, we find no abuse of discretion in the trial court's determination that the circumstances of this case did not justify granting Bogarty's motion to withdraw his guilty pleas. The record supports the trial court's conclusion that Bogarty failed to demonstrate a legitimate and reasonable

basis for withdrawing his guilty pleas. Accordingly, Bogarty's second assignment of error is overruled.

{¶ 29} 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 is terminated. Case remanded to the trial court for execution of sentence.

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

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EILEEN T. GALLAGHER, ADMINISTRATIVE JUDGE

RAYMOND C. HEADEN, J., CONCURS;
EILEEN A. GALLAGHER, J., DISSENTS WITH SEPARATE ATTACHED OPINION

EILEEN A. GALLAGHER, J., DISSENTING WITH SEPARATE OPINION:

{¶ 30} I respectfully dissent from the majority opinion as to the first assignment of error and would reverse and remand for resentencing.

{¶ 31} I recognize that the provisions of Rule 43 of the Ohio Rules of Criminal Procedure allow for a hearing to proceed in the defendant's absence but that allowance is predicated on a defendant's conduct "in the courtroom is so

disruptive that the hearing or trial cannot reasonably be conducted with the defendant's physical presence * * *."

{¶ 32} In this case, during the sentencing hearing, the defendant literally uttered 77 words, the first 57 being spoke on invitation of the court to allocate and the last 5, spoken before his removal, was an inquiry of the trial court "Can I reserve my appeal * * *." The record does not reflect that the defendant was aggressive, disrespectful or vile. I do not find that the defendant's conduct was such that he was disruptive let alone so disruptive to justify his removal from the courtroom.