[Cite as *State v. Taylor,* 2015-Ohio-2080.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-L-115**
- vs -	:	
CLIFFORD D. TAYLOR,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 14 CR 000715.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee,* Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Aaron T. Baker, 38109 Euclid Avenue, Willoughby, OH 44094 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Clifford D. Taylor, appeals the decision of the Lake County Court of Common Pleas to deny his motion to withdraw guilty plea, made orally prior to sentencing. The issues before this court are whether a defendant is denied effective assistance of counsel when he seeks, pro se, to withdraw a plea on the grounds that trial counsel advised him to lie when entering the plea and whether a court

may deny a motion to withdraw guilty plea on such grounds. For the following reasons, we affirm the decision of the court below.

{¶2} On October 15, 2014, the Prosecuting Attorney for Lake County charged Taylor by way of Information with two counts of Rape, felonies of the first degree in violation of R.C. 2907.02(A)(2). The Information alleged that "between the 1st day of January, 2012 and the 30th day of July, 2013, in the City of Wickliffe, * * * **CLIFFORD D. TAYLOR** did engage in sexual conduct with a minor female victim and * * * purposely compelled the minor female victim to submit by force or threat of force."

{¶3} On the same date, Taylor executed a Waiver of Indictment and Written Plea of Guilty.

{¶4} At the change of plea hearing, Clifford affirmed that he "wish[ed] to give up the right to indictment in this case, plead guilty as charged, in return for the Court at the request of the prosecuting attorney to dismiss case 14CR000019." In Case No. 14CR000019, Clifford was charged with Rape, a felony of the first degree in violation of R.C. 2907.02(A)(1)(b), and Gross Sexual Imposition, a felony of the third degree in violation of R.C. 2907.05(A)(4). Unlike Rape in violation of R.C. 2907.02(A)(2), Rape in violation of R.C. 2907.02(A)(1)(b) carries a potential "term of life imprisonment." R.C. 2907.02(B). As part of the plea agreement, there would be a jointly recommended prison sentence of twenty years.

{¶5} The following colloquy occurred between the trial court and Taylor regarding the factual basis for the charges.

> PROSECUTOR: * * * We believe that the evidence [will] show beyond a reasonable doubt that under the circumstances in

this case, the victim's will was overcome by fear or duress. This Defendant at the time was a grown man in his 40's, the victim was somewhere between the ages of 5 and 8. This Defendant lived with the victim. He was an authority figure in that when the victim's mother was not in the home he was in charge of the victim. The victim would testify she felt she had no choice but to engage in this activity.

JUDGE LUCCI: Mr. Taylor * * *, is it true?

CLIFFORD TAYLOR: Yes.

JUDGE LUCCI: And just tell me briefly what you did?

CLIFFORD TAYLOR: The part that the prosecutor will get me on is the fact that I turned around and did nothing to stop the child from doing what she was doing to me. And that's the part that they will get me on. That's the whole thing right there. I did not stop the child when she was trying to get a snack, from touching me or doing anything that she wasn't supposed to do. I just didn't stop her. I foolishly did not do anything. That's the part that they'll get me on.

JUDGE LUCCI: Well they're saying that you used force or threat of force. What would give a five-year-old to seven-year-old girl the idea that if she did not perform fellatio on you that she would be subject to force?

{¶6} At this point, trial counsel conferred with Taylor off the record.

CLIFFORD TAYLOR: I figured that she was encouraged. Didn't know I was doing it, but she got, I got her encouraged to perform that. And I guess that scared her.

JUDGE LUCCI: Okay. So you encouraged her to perform fellatio?

CLIFFORD TAYLOR: I believe so, sir.

JUDGE LUCCI: Okay. And how did you do this?

CLIFFORD TAYLOR: I guess by just being -- I guess just that she just doesn't understand. I don't know how to explain that, sir. I really don't.

JUDGE LUCCI: Well see, I have to establish the element of compelling her purposely. Compelling her to submit by force or threat of force. That is an element of the crime. So I'm * * * looking for your mental state, and I'm looking for what conduct you did in order to make the girl feel like she had to do this. * * *

{¶7} Again, trial counsel conferred with Taylor off the record.

CLIFFORD TAYLOR: I was drinking at the time, sir. And because I was drinking I was not thinking properly. This child was probably intimidated on the fact of, I probably pulled out my genitalia and turned around and told her if you want this you're gonna have to put your mouth on that. But I know damn well I was drinking, sir. Excuse my language.

JUDGE LUCCI: If you want what?

CLIFFORD TAYLOR: A pudding pop. A pudding snack.

JUDGE LUCCI: A pudding pop? Alright. So you told her if you want a pudding pop, you have to put your mouth on your penis?

CLIFFORD TAYLOR: Yes, sir.

* * *

JUDGE LUCCI: Alright. And you were a father-figure in her home? Were you dating her mother?

CLIFFORD TAYLOR: I was dating her mother.

JUDGE LUCCI: Alright. You lived there, correct?

CLIFFORD TAYLOR: Yes, sir.

* * *

JUDGE LUCCI: So you were a father-figure in her home, correct?

CLIFFORD TAYLOR: I guess so, sir. Yes, sir.

{¶8} On November 12, 2014, the sentencing hearing was held. At the beginning of the hearing, Taylor advised the trial court that "I need to rescind the plea deal," on the grounds that trial counsel "kind of threatened me, and he kind of bullied me and coerced me into turning around and make the plea deal with the prosecutor." The following colloquy occurred between Taylor and the court:

JUDGE LUCCI: And how were you coerced?

CLIFFORD TAYLOR: I was threatened with mental incompetence to stand trial. That I was going to have to take a

psychiatric evaluation to show that I was mentally incompetent to stand trial.

* * *

JUDGE LUCCI: Okay. How can you be threatened with mental incompetence?

CLIFFORD TAYLOR: He threatened me, saying that there was some reason I was not mentally thinking properly.

* * *

JUDGE LUCCI: You're competent. So if your attorney told you that he was going -- that he would like to suggest incompetency to the Court, or a competency evaluation, that's not a threat at all. What other reason do you have for wanting to withdraw your plea?

* * *

CLIFFORD TAYLOR: I was told to lie to you.

JUDGE LUCCI: Who told you to lie to me, and what was the lie?

CLIFFORD TAYLOR: The man right next to me here turned around and told me twice -- in fact you witnessed it. He was whispering in my ear to turn around and tell me how to lie to you.

JUDGE LUCCI: Give me an example.

CLIFFORD TAYLOR: This is where we get over the, how he put it -- this is the hump that we have to get over. This is what I was trying to tell you downstairs in the holding cells. This is --

JUDGE LUCCI: What hump that you have to get over?

CLIFFORD TAYLOR: That we have to turn around and present that it was forced conditions to cause the charges of rape.

* * *

JUDGE LUCCI: So what was the lie that you told me?

CLIFFORD TAYLOR: I told you a lie that she -- think I said what, something about pudding pops. What did I say about pudding pops? I don't even remember what I turned around and told you. It wasn't even true, I know that. All I know is that I had to turn around and tell you a lie so I could make a deal with the prosecutor.

JUDGE LUCCI: Tell me exactly what the lie was.

CLIFFORD TAYLOR: The lie was that I put my penis in her mouth for pudding pops. I think that's what I told you.

JUDGE LUCCI: Did you put your penis in her mouth?

* * *

CLIFFORD TAYLOR: I didn't put it in there. The penis got into her mouth, but I did not put it in there. Okay?

* * *

JUDGE LUCCI: Then who put it there?

CLIFFORD TAYLOR: She was experimenting. * * * Unfortunately, I was preoccupied when I was trying to take of -- she spilled a drink on me. I'm trying to move the drink out of the way, and the next thing I know she's grabbing me.

* * *

JUDGE LUCCI: Okay. What else did you lie to me about?

CLIFFORD TAYLOR: That was it.

{¶9} The trial judge denied Taylor's oral motion to withdraw his guilty plea and proceeded with the sentencing hearing. In accordance with the plea agreement, defense counsel and the prosecutor jointly recommended a twenty-year prison sentence. The court sentenced Taylor to eleven years in prison for each count of Rape, to be served consecutively for an aggregate prison term of twenty-two years. The court advised Taylor of post release control, ordered him to pay court costs and the costs of prosecution, and notified him of the requirements of a Tier III Sex Offender Registrant.

{¶10} On November 14, 2014, a written Judgment Entry of Sentence was issued.

{¶11} On November 21, 2014, Taylor filed a Notice of Appeal. On appeal, he raises the following assignments of error:

{¶12} "[1.] Appellant was denied effective assistance of counsel during the hearing on his motion to withdraw guilty plea."

{¶13} "[2.] The trial court abused its discretion when it denied Appellant's motion to withdraw his guilty plea before sentencing."

{¶14} The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense." "[I]nadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment." *Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

{¶15} "The Sixth Amendment right to counsel applies to critical stages of criminal proceedings." *State v. Schleiger*, 141 Ohio St.3d 67, 2014-Ohio-3970, 21 N.E.3d 1033, ¶ 13; *Iowa v. Tovar*, 541 U.S. 77, 80-81, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) ("[t]he Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process"). "[I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (Footnote omitted.) *United States v. Wade*, 388 U.S. 218, 226, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

> Reversal of a conviction for ineffective assistance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defendant." *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.

Accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus.

State v. Roberts, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 147.

{¶16} Taylor acknowledges that "[t]rial counsel could not have been expected to argue that [Taylor's] allegations were true," but contends that counsel "could have withdrawn from representation of Appellant the moment he was accused, and ask that new counsel, without the same conflict of interest, be assigned to argue Appellant's position." As a result, "[n]o attorney was provided that would argue Appellant's interest in his motion to withdraw his plea." Appellant's brief at 5. Taylor's arguments implicate the Sixth Amendment in various ways.

{¶17} With regard to the claim that trial counsel should have withdrawn from representation upon Taylor's accusation, we find no deficiency in counsel's performance.

{¶18} We note that to be entitled to the appointment of substitute counsel, a defendant must establish "good cause," typically understood as encompassing the following situations: "(1) a conflict of interest; (2) a complete breakdown of communication; and (3) an irreconcilable conflict which could cause an apparent unjust result." (Citation omitted.) *State v. Burrell*, 11th Dist. Lake No. 2013-L-024, 2014-Ohio-1356, ¶ 24. The decision is within the trial court's discretion. *State v. Cowans*, 87 Ohio St.3d 68, 73, 717 N.E.2d 298 (1999). *Compare State v. Calhoun*, 86 Ohio St.3d 279, 290, 714 N.E.2d 905 (1999) (observing that, despite defendant's claim that his plea was coerced by trial counsel, "the attorney may not withdraw until he or she has obtained leave of court and further taken reasonable steps to avoid foreseeable prejudice to his

or her client, including giving due notice to his or her client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules").

{¶19} In the present case, there is no indication in the record that trial counsel was or should have been aware of the accusation that Taylor would raise at the start of the sentencing hearing. Upon learning of the accusation, the trial court appropriately addressed Taylor directly to determine its merits. Once the motion to withdraw the plea was denied, there was no basis for appointing substitute counsel and no conflict of interest impeding trial counsel from representing Taylor for purposes of sentencing, inasmuch as counsel merely urged the imposition of the jointly recommended twenty-year sentence in accord with the terms of the plea agreement.

{¶20} Another aspect of Taylor's argument is that he was effectively without representation for the purpose of seeking to withdraw his guilty plea. Taylor asserts that the present case falls within the class of ineffective assistance cases for which prejudice is presumed. We disagree. Although a plea withdrawal hearing has been held to be a "critical stage" of a criminal prosecution, the need for demonstrating prejudice, at least under the present circumstances, is not obviated.

{¶21} "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland*, 466 U.S. at 692, 104 S.Ct. 2052, 80 L.Ed.2d 674; *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) ("[t]he presumption that counsel's assistance is essential [for a fair trial] requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial"). "[T]he defendant [is spared] the need of showing probable effect

upon the outcome * * * where assistance of counsel has been denied entirely or during a critical stage of the proceeding [since] * * * the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002).

{¶22} "At least absent unusual circumstances, a hearing on a motion to withdraw a guilty plea is sufficiently important in a * * * criminal prosecution that the Sixth Amendment requires the presence of counsel." *United States v. Crowley*, 529 F.2d 1066, 1069 (3rd Cir.1976). The absence of actual or constructive representation in this context, however, is subject to harmless error analysis. *Id.* at 1070 ("[i]n its most recent opinions * * *, the Supreme Court has observed that the role of counsel at various pre-trial and post-trial hearings depends upon the circumstances of the case and may differ significantly from the role of counsel at trial"); *compare State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 18 ("constitutional errors can be deemed nonprejudicial so long as the error is harmless beyond a reasonable doubt"). Accordingly, we require a demonstration of prejudice.

{¶23} Rather than arguing how he was prejudiced, Taylor relies upon a presumption of prejudice where defense counsel's representation is compromised by an actual conflict of interest. Taylor's reliance on this presumption is misplaced since trial counsel did not participate in the prosecution of the motion to withdraw guilty plea. As the United States Supreme Court has noted, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland* at 692, citing *Cuyler*, 446 U.S. at 348, 100 S.Ct. 1708, 64 L.Ed.2d 333. In the present

case, trial counsel did not actively represent Taylor with respect to the motion to withdraw guilty plea and, therefore, his performance could not be adversely affected.

{¶24} The fact that trial counsel did not advocate for or against Taylor with respect to the motion distinguishes the present case from *State v. Strickland*, 2d Dist. Montgomery No. 25673, 2014-Ohio-5451, upon which Taylor relies. In *Strickland*, as in the present case, the defendant orally sought to withdraw a guilty plea prior to sentencing based on trial counsel's performance during plea negotiations. *Id.* at ¶ 4 and 18. In considering the motion, the trial court placed counsel under oath and questioned him "to obtain additional information about defense counsel's experience and the plea communications in order to thoroughly and expeditiously address Strickland's motion to withdraw his plea." *Id.* at ¶ 22 and 24. The court of appeals found that "calling defense counsel as a witness placed counsel in the difficult and unexpected position of having to testify against his client, rather than act as Strickland's advocate." *Id.* at ¶ 25. Thus, the court "denied Strickland the right to counsel when it called defense counsel to testify * * * without affording new counsel to Strickland to protect his interests while defense counsel testified." *Id.* at ¶ 30.

{¶25} Where counsel did not testify against the defendant's interests, there is authority for the proposition that the trial court may consider a motion to withdraw guilty plea without appointing substitute counsel. *State v. Jones*, 8th Dist. Cuyahoga No. 95284, 2011-Ohio-2914, ¶ 23-24 ("Jones contended that he was coerced into making the plea, and the trial court correctly recognized that his trial counsel could not be expected to argue that they had participated in doing so," but, rather, "afforded Jones the opportunity to argue his motion in the same manner in which he made it, orally and

pro se"); *State v. Bunn*, 7th Dist. Mahoning No. 10 MA 10, 2011-Ohio-1344, ¶ 39 ("the trial court did not abuse its discretion by denying Bunn's plea-withdrawal motions," inter alia, as Bunn was not "prejudiced when the trial court permitted Bunn to present a pro-se argument in support of his second plea withdrawal motion").

{¶26} Finally we emphasize the uniqueness of the particular circumstances before this court. Among the federal courts, it has been recognized that the United States Supreme Court "has never specifically addressed such a claim * * *, nor has it stated how such a claim should be analyzed, i.e., as a claim that petitioner was denied his right to counsel because he was effectively unrepresented on his motion to withdraw his plea * * *, or as a claim that petitioner was denied the effective assistance of counsel because an actual conflict of interest adversely affected counsel's performance." *Hines v. Miller*, 318 F.3d 157, 163 (2d Cir.2003). The federal courts have addressed the issue from a variety of different approaches. *Id.* at 163-164 (cases cited). Yet, "irrespective of the analysis employed, [numerous reviewing courts] have affirmed the denial of a withdrawal motion despite the failure to appoint new counsel." *Id.* at 164.

{¶27} The first assignment of error is without merit.

{¶28} Under the second assignment of error, Taylor argues that the trial court erred by denying his presentence motion to withdraw his guilty plea.

{¶29} Criminal Rule 32.1 provides that "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her guilty plea."

{¶30} A presentence motion to withdraw a plea should be granted liberally. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). The Supreme Court has also recognized, however, that "[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing," but, instead, "[a] trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Id*. at paragraph one of the syllabus.

{¶31} "The decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court." (Citation omitted.) *State v. Kornet*, 11th Dist. Portage No. 2013-P-0001, 2013-Ohio-3480, ¶ 28; *State v. Bisson*, 11th Dist. Portage No. 2012-P-0050, 2013-Ohio-2141, ¶ 23 ("since the determination of a motion to withdraw lies within the trial court's sound discretion, the scope of our appellate review is limited to an 'abuse-of-discretion' analysis").

{¶32} This court has often applied the four-factor test set forth in *State v. Peterseim* to determine whether a trial court has abused its discretion in denying a presentence motion to withdraw a plea. *State v. Parham*, 11th Dist. Portage No. 2011-P-0017, 2012-Ohio-2833, ¶ 19; *State v. Humr*, 11th Dist. Portage No. 2010-P-0004, 2010-Ohio-5057, ¶ 15. Under *Peterseim*, a trial court does not abuse its discretion in denying a motion to withdraw a plea: "(1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim.R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request." 68 Ohio App.2d 211, 428 N.E.2d 863, paragraph three of the syllabus.

{¶33} Taylor contends that, whether trial counsel was "highly competent," is doubtful in light of the fact that counsel filed no motions prior to the entry of the guilty plea and Taylor's accusations. Taylor notes that, regardless of whether trial counsel actually advised him to lie during the plea hearing, he understood counsel's advice in that way. Regarding the purported threat of incompetence, Taylor argues that if trial counsel believed there were any issues with competency, it was inappropriate to allow Taylor to plead guilty without first exploring those issues. Finally, Taylor argues that, without the appointment of substitute counsel, it was impossible for his motion to withdraw guilty plea to receive a complete and impartial hearing.

{¶34} We find no abuse of discretion in the trial court's denial of the motion to withdraw guilty plea. As an initial matter, Taylor's credibility was compromised by the fact that he lied to the trial court – either at the plea hearing when he affirmed the truth of the prosecutor's statement of what the evidence would show and admitted compelling the victim or at the sentencing hearing when he denied the truth of his prior statements. Several other factors support the trial court's denial of the motion. Taylor entered his plea after a hearing fully in accord with the dictates of Criminal Rule 11. Although Taylor was clearly reluctant to admit responsibility for the rape, the only evidence of actual coercion was Taylor's self-serving testimony regarding the "threat of mental incompetence." Assuming, arguendo, that Taylor was counseled to lie, the record suggests that Taylor consented to follow this advice. Taylor did not move the court to withdraw his plea until sentencing. The day after entering the plea, Taylor wrote the trial court complaining that the police had tampered with a written statement he had produced during the investigation. Taylor did not deny the truth of his statement and did

not complain about trial counsel advising him to lie during the plea hearing. Rather, Taylor felt that the police had contaminated his statement by adding a written question about the incident. Finally, Taylor's explanation of how his penis came to be in the victim's mouth is minimally convincing. In light of the thoroughness of Taylor's plea, the delay in raising the claim that he had lied, and the lack of a compelling claim of innocence, the trial court's denial of Taylor's motion was neither unreasonable nor arbitrary.

{¶35} The second assignment of error is without merit.

{¶36} For the foregoing reasons, the denial of Taylor's motion to withdraw guilty plea by the Lake County Court of Common Pleas is affirmed. Costs to be taxed against the appellant.

TIMOTHY P. CANNON, P.J., concurs with a Concurring Opinion,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

TIMOTHY P. CANNON, P.J., concurring.

{¶37} I concur with the majority's decision to affirm the trial court's denial of Taylor's request to withdraw his guilty plea. I agree that the trial court did not abuse its discretion by denying Taylor's motion to withdraw his plea without appointing additional counsel for purposes of the hearing. However, I do so with caution and based only on the unique facts of this case.

{¶38} Taylor initially faced a four-count indictment in case no. 14CR000019, including three counts of rape, felonies of the first degree, in violation of R.C. 2907.02(A)(1)(b), which states: "No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when * * * [t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person." Apparently in order to spare the minor victim from testifying, Taylor agreed to a plea bargain with the state. In exchange for the state dismissing case no. 14CR000019, Taylor agreed to plead guilty to two counts of rape, felonies of the first degree, in violation of R.C. 2907.02(A)(2), which states: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." Simply put, the element of "less than thirteen years of age" was substituted with the element of "force or threat of force."

{¶39} At the plea hearing, the trial court expended an inordinate amount of effort explaining the pertinent details of the charge to Taylor and repeatedly inquired as to whether Taylor understood what was occurring. The state recited what it would be able to prove at trial; the trial court specifically asked Taylor whether he agreed to what the state indicated it would be able to prove; Taylor stated he agreed. However, after Taylor had fully acknowledged and admitted the allegations as recited by the state, the trial court further inquired of Taylor with regard to the "force or threat of force" element. At this point, Taylor and defense counsel engaged in two, apparently very brief, discussions off the record. Appellant then stated to the court that he had withheld a

"pudding pop" from the victim unless she engaged in fellatio. The court accepted Taylor's plea of guilty and set the matter for sentencing.

{¶40} The day after the plea hearing, the trial court received a letter from Taylor requesting, in effect, to withdraw his guilty plea. The basis for the request was certain alleged conduct of the Wickliffe Police Department. The letter did not include any mention of or allegation that his trial counsel requested he lie to the court at the plea hearing.

{¶41} Subsequently, at the sentencing hearing, the trial court correctly assessed that the allegations concerning the Wickliffe Police Department did not justify Taylor's request to withdraw his plea. However, at this time, Taylor also alleged that his defense counsel instructed Taylor to lie to the court about using "pudding pops" in order to satisfy the element of "force or threat of force."

{¶42} As stated by the majority, this court employs the *Peterseim* Test to determine whether the trial court abused its discretion in denying a presentence motion to withdraw a plea. In this case, the narrow issue before us is whether the third requirement of *Peterseim*, "a complete and impartial hearing on the motion" to withdraw, was satisfied. *State v. Peterseim*, 68 Ohio App.2d 211 (8th Dist.1980), paragraph three of the syllabus. Taylor contends this requirement was not satisfied because, as his request to withdraw his plea was based on the alleged coercion of trial counsel, he was, in effect, required to participate in the hearing without representation.

{¶43} The scope and nature of the "complete and impartial hearing" requirement is, and should be, within the sound discretion of the trial court. *Id.* at 214. Our review is limited to ensuring that Taylor had an ample opportunity to explain his reasons for the

request to withdraw his plea. If questions remain as to the request, they must be resolved by further judicial inquiry. However, there were no remaining issues to resolve after the trial court inquired of Taylor.

{¶44} The trial court was in the best position to properly assess Taylor's credibility and motive for the request. The day after the plea hearing, Taylor made no mention of the alleged "coercion" by defense counsel in his letter to the court. In addition, the court recognized that Taylor had acknowledged his guilt and admitted to the charges in the information more than once during the hearing.

{¶45} More importantly, the truth of the "pudding pop" offer was irrelevant to establish a valid plea. It was acknowledged, and has never been debated, that Taylor was in a position of authority with respect to the victim, acting as a father figure in the child's home. Based on that fact and the victim's age, it was not necessary to establish any explicit threats or displays of force. R.C. 2901.01(A)(1) defines the element of force as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." In *State v. Eskridge*, involving a father-child relationship, the Ohio Supreme Court held the "youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose." *State v. Eskridge*, 38 Ohio St.3d 56, 59 (1988) (quotation omitted); *see also State v. Dye*, 82 Ohio St.3d 323 (1998). Finally, it is inescapable that the inclusion of the element "force or threat of force" was a negotiated element, in an effort to eliminate the potential life term appellant was facing. I concur, therefore, that the third prong of *Peterseim* was satisfied.

_____

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶46} I respectfully dissent.

{¶47} The law in Ohio is clear that when a motion to withdraw a plea is made prior to sentencing, it shall be "freely allowed and treated with liberality." *State v. Xie*, 62 Ohio St.3d 521, 526 (1992). It is true that a presentence plea withdrawal motion need not be automatically granted and that the decision on the motion is within the trial court's discretion. However, the defendant is not required to establish the same manifest injustice or extraordinary circumstances as in the case of a post-sentence motion to withdraw. Although it is not the role of the appellate court to conduct a *de novo* review, the reviewing court may reverse the trial court's denial of a presentence plea withdrawal motion if the trial court acted unjustly or unfairly. *Id. See also State v. Griffin*, 141 Ohio App.3d 551, 554 (7th Dist.2001).

{¶48} Taylor's main contention is that, as he accused his trial counsel of instructing him to lie to the court during the plea hearing, counsel could not (and did not) provide any legal representation to Taylor during the hearing held on his motion to withdraw his guilty plea. The Second District in *State v. Strickland*, 2d Dist. Montgomery No. 25673, 2014-Ohio-5451, ¶14-15, succinctly noted:

> Crim.R. 44(A) reiterates this right to counsel, stating that 'where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent him at every stage of the proceedings from his initial appearance before a court through appeal as of right, unless the defendant, after being fully

> advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel.'
>
> 'A criminal defendant is entitled to appointed counsel to represent him at a hearing on a motion to withdraw a plea, where the motion was made prior to sentencing, because appellant was entitled to counsel "through each critical stage of the proceeding.' *State v. Meadows*, 6th Dist. Lucas No. L-05-1321, 2006-Ohio-2622, ¶ 11, quoting *State v. Dellinger*, 6th Dist. Huron No. H-02-007, 2002-Ohio-4652, ¶ 12; Crim.R. 44; *see also, e.g., Brunsen v. Nevada*, Nev. No. 50830, 2009 WL 3191711 (Nev.2009) ('A hearing on a motion to withdraw a guilty plea is a critical stage of litigation, and a defendant therefore has a right to counsel at the hearing.'); *Kansas v. Taylor*, 266 Kan. 967, 975, * * * (1999); *Stephens v. Florida*, 141 So.3d 701, 702 (Fla.App.2014); *United States v. Sanchez-Barreto*, 93 F.3d 17 (1st Cir.1996); *Forbes v. United States*, 574 F.3d 101 (2d Cir.2009); *United States v. Garrett*, 90 F.3d 210, 212 (7th Cir.1996).

{¶49} The majority cites to *State v. Jones*, 8th Dist. Cuyahoga No. 95284, 2011-Ohio-2914, for the proposition that the trial court may consider a defendant's motion to withdraw a guilty plea without appointing substitute counsel. However, directing its attention to *State v. Jones*, the court in *Strickland, supra, at* ¶ 29, also noted that:

> [T]he Eighth District did not discuss whether Jones had a constitutional right to the effective assistance of counsel at the hearing on his presentence motion to withdraw his guilty plea. The Eighth District's statement that Jones had been afforded the opportunity to raise and argue his motion pro se ignores the fact that he was represented by counsel and had a right to the effective assistance of counsel in raising his motion. *See United States v. Sanchez-Barreto*, 93 F.3d 17 (1st Cir.1996) ('The right to counsel is not contingent upon a request by the defendant; rather, 'we presume that the defendant requests the lawyer's services at every critical stage of the prosecution.'"), quoting *Michigan v. Jackson*, 475 U.S. 625, 633, * * * (1986). While we agree that Jones's counsel could not be expected to argue their own ineffectiveness, we find this supported, rather than detracted from, Jones's contention that he should have been appointed new counsel for purposes of the hearing on his motion to withdraw.

{¶50} Likewise, as it is unreasonable to expect Taylor's trial counsel to admit to telling his client to lie during his plea hearing, new counsel should have been appointed to represent him on his motion to withdraw to his guilty plea.

{¶51} The majority also cites to *Peterseim* for the standard to determine if a trial court abuses its discretion in denying a motion to withdraw. However, as this court held in *State v. Pudder*, 11th Dist. Portage No. 2013-P-0045, 2014-Ohio-68, ¶17-18:

> *Peterseim* does not provide the exclusive test whereby appellate courts evaluate presentence motions to withdraw guilty pleas. The Third Appellate District recently summarized the other test current in Ohio:
>
> 'We consider several factors when reviewing a trial court's decision to grant or deny a defendant's pre-sentence motion to withdraw a plea. Those factors include: (1) whether the withdrawal will prejudice the prosecution; (2) the representation afforded to the defendant by counsel; (3) the extent of the hearing held pursuant to Crim.R. 11; (4) the extent of the hearing on the motion to withdraw the plea; (5) whether the trial court gave full and fair consideration of the motion; (6) whether the timing of the motion was reasonable; (7) the stated reasons for the motion; (8) whether the defendant understood the nature of the charges and potential sentences; and (9) whether the accused was perhaps not guilty or had a complete defense to the charges. *State v. Griffin*, 141 Ohio App.3d 551, 554, * * * (* * *) (7th Dist.2001); *State v. Fish*, 104 Ohio App.3d 236, 240, * * * (* * *) (1st Dist.1995).' *State v. Maney*, 3d Dist. Defiance Nos. 4-12-16 and 4-12-17, 2013-Ohio-2261, ¶18. (Parallel citations omitted.)

{¶52} No one of these factors is said to be conclusive, but lack of prejudice to the prosecution is said to be one of the more important factors. *State v. Cuthbertson*, 139 Ohio App.3d 895, 899 (7th Dist.2000); *State v. Fish*, 104 Ohio App.3d 236, 239-240 (1st. Dist.1995).

{¶53} This court must weigh the factors to determine if Taylor should be permitted to withdraw his plea. On the one side, there is no argument that Taylor was

not represented by counsel at the hearing the trial court conducted on his request to withdraw his guilty plea. On the other side, we have the State of Ohio being returned to its original position—it has to prove Taylor guilty beyond a reasonable doubt. Absent a showing of actual prejudice, the harm to the state in vacating the plea is minimal—while the harm to Taylor may be great. The scale is further tipped in Taylor's favor when we consider that the rule to withdraw guilty pleas before sentencing is to be treated liberally and freely allowed.

{¶54} For the foregoing reasons, I respectfully dissent.