

[Cite as *State v. Hempfield*, 2010-Ohio-6570.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
BRITTANY A. HEMPFIELD	:	Case No. 10-CA-87
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 10CR150

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 30, 2010

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Farmer, J.

{¶1} On March 26, 2010, the Licking County Grand Jury indicted appellant, Brittany Hempfield, on two counts of aggravated trafficking in drugs in violation of R.C. 2925.03(A)(1) and/or (2) and (C)(1)(b) and/or (c), one count of aggravated possession of drugs in violation of R.C. 2925.11(A) and/or (C)(1)(a), and one count of possession of drug paraphernalia in violation of R.C. 2925.14.

{¶2} On July 23, 2010, appellant pled guilty as charged save for the drug paraphernalia count which was dismissed. By judgment entry filed same date, the trial court sentenced appellant to an aggregate term of six years in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT COMMITTED PLAIN ERROR AND/OR ABUSED ITS DISCRETION BY IMPOSING A SENTENCE HARSHER THAN THE PLEA AGREEMENT."

II

{¶5} "THE TRIAL COURT ERRED, COMMITTED PLAIN ERROR, AND/OR ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO WITHDRAW HER PLEAS OF GUILTY."

I

{¶6} Appellant claims the trial court erred and abused its discretion by imposing a sentence harsher than the plea agreement. We disagree.

{¶7} In support of her argument, appellant attempted to present a statement of facts pursuant to App.R. 9(C) which provides the following:

{¶8} "If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App.R. 10, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal."

{¶9} None of the requirements of App.R. 9(C) have been followed and therefore, we will not consider the "prepared statement."

{¶10} On July 23, 2010, appellant signed three guilty pleas. None of these pleas represented a plea agreement. The guilty pleas recite the maximum prison terms. During the plea hearing, the trial court asked appellant if any promises had been made, to which she responded in the negative. T. at 13. Defense counsel prior to sentencing noted the following:

{¶11} "Also, as part of the plea negotiations, the prosecution is to return or make available Brittany's memory card which we want to use to download pictures of her son. It was confiscated, along with the cell phone from the initial arrest."

{¶12} "Brittany, to her credit, saving the Court time and money, has admitted to Counts 1, 2, and 3, including the forfeiture specifications.

{¶13} "I would suggest to the Court that Counts 2 and 3 merge for sentencing purposes." T. at 19.

{¶14} The trial court gave both parties the opportunity to make any other statements prior to sentencing, but neither did. T. at 21.

{¶15} The absence of any record of any formalized negotiated plea agreement or any acknowledgement of any plea agreement leads us to conclude that the trial court did not abuse its discretion in so sentencing appellant.

{¶16} Assignment of Error I is denied.

II

{¶17} Appellant claims the trial court erred in failing to grant appellant's motion to withdraw her guilty pleas. We disagree.

{¶18} Crim.R. 32.1 governs withdrawal of guilty plea and states "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." The right to withdraw a plea is not absolute and a trial court's decision on the issue is governed by the abuse of discretion standard. *State v. Smith* (1977), 49 Ohio St.2d 261. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶19} "It is well established that, even though a defendant does not have an absolute right to withdraw a plea prior to sentencing, a presentence motion to withdraw a guilty plea should be 'freely and liberally granted.'***Although such a motion is to be treated liberally, the trial court's decision is still ultimately one of discretion. In determining whether the trial court has properly exercised its discretion, this court is aided by the following factors: (1) whether the accused was represented by highly competent counsel, (2) whether the accused was given a full Crim.R. 11 hearing before entering the plea, (3) whether a full hearing was held on the withdrawal motion, and (4) whether the trial court gave full and fair consideration to the motion.***In addition to these factors, there are other considerations, including (1) whether the motion was made within a reasonable time; (2) whether the motion set out specific reasons for the withdrawal; (3) whether the accused understood the nature of the charges and the possible penalties; and (4) whether the accused was perhaps not guilty or had a complete defense to the charges." *State v. McNeil* (2001), 146 Ohio App.3d 173, 175-176. (Footnotes omitted.)

{¶20} Appellant was sentenced on July 23, 2010. Appellant filed her Crim.R. 32.1 motion on the same day at 10:24 a.m. after sentencing, but prior to the judgment entry on sentence being filed at 4:02 p.m. The trial court neither granted nor denied the motion nor set the matter for hearing.

{¶21} R.C. 2505.02 governs final orders. Subsection (B) states the following in pertinent part:

{¶22} "(B) An order is a final order { that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶23} "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶24} "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment."

{¶25} Upon review, we find the issue under this assignment to be premature.

{¶26} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ William B. Hoffman

s/ Patricia A. Delaney

JUDGES

SGF/sg 1210

