**[Cite as *State v. Emerson*, 2015-Ohio-2121.]**

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO<br><br>Plaintiff-Appellee<br><br>-vs-<br><br>LABRONCHEA EMERSON<br><br>Defendant-Appellant | JUDGES:<br>Hon. W. Scott Gwin, P. J.<br>Hon. John W. Wise, J.<br>Hon. Craig R. Baldwin, J.<br><br>Case No. 14 CA 79<br><br>O P I N I O N |

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| CHARACTER OF PROCEEDING: | Criminal Appeal from the Court of Common Pleas, Case No. 14 CR 66R |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | June 1, 2015 |

APPEARANCES:

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| For Plaintiff-Appellee | For Defendant-Appellant |
| BAMBI COUCH PAGE<br>PROSECUTING ATTORNEY<br>JOHN C. NIEFT<br>ASSISTANT PROSECUTOR<br>38 South Park Street<br>Mansfield, Ohio 44902 | WILLIAM C. FITHIAN, III<br>111 North Main Street<br>Mansfield, Ohio 44902 |

*Wise, J.*

**{¶1}.** Appellant Labronchea Emerson appeals the decision of the Court of Common Pleas, Richland County, which denied his pre-sentence motion to withdraw a no contest plea. The relevant procedural facts leading to this appeal are as follows.

**{¶2}.** On March 7, 2014, the Richland County Grand Jury indicted appellant on two counts of felony child endangering. The indictment reads in pertinent part as follows:

**{¶3}.** "Count I: **LABRONCHEA L. EMERSON,** DOB: xx/xx/xxxx, SSN: xxx/xx/xxxx, on or about the 25th day of January, 2014, at the County of Richland, Ohio, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty one years of age, did recklessly create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support, the violation resulting in serious physical harm to the child involved, in violation of section 2919.22(A) of the Ohio Revised Code, a felony of the third degree

**{¶4}.** "Count II: **LABRONCHEA L. EMERSON**, DOB: xx/xx/xxxx, SSN: xxx/xx/xxxx, on or about the 25th day of January, 2014, at the County of Richland, Ohio, did recklessly abuse a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, the violation resulting in serious physical harm to the child involved, in violation of section 2919.22(B)(1) of the Ohio Revised Code, a felony of the second degree."

**{¶5}.** Appellant thereupon entered pleas of "not guilty," and a jury trial was scheduled. Appellant was initially represented by Attorney R. Joshua Brown.

**{¶6}.** On or about March 30, 2014, appellant retained Attorney Ronald L. Frey. On July 2, 2014, appellant, with the assistance of Attorney Frey, changed his plea to one of no contest to Count I, third-degree felony child endangering.[1] In exchange, the State agreed to dismiss Count II, second-degree felony child endangering. At the change of plea hearing, the trial court engaged with appellant in a Crim.R. 11(C) plea colloquy. As part of the plea bargain, the State also agreed not to pursue any criminal charges for an incident between appellant and probation officers during pretrial supervision. Appellant stated that he was college-educated, that he was not under the influence of any drugs or alcohol, and that he was ready to make important decisions about his life. Tr. I at 3-4. Appellant also completed an admission of guilt form that described his rights and the nature of the plea bargain then being offered.

**{¶7}.** Although appellant had originally been named as the perpetrator, he told the trial court that he did not mean to leave his children alone and was sorry that one got injured because of it. Tr. I at 15. Appellant was found guilty by the trial court. Sentencing was thereafter scheduled for August 26, 2014.

**{¶8}.** However, on July 24, 2014, Attorney Frey moved for leave to withdraw as defense counsel, stating that appellant wished to discharge him. The trial court granted same on July 28, 2014.The court then appointed Attorney Benjamin Kitzler as defense counsel; however, this order was in effect for only a few days.

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[1] Appellant's brief refers to this event as a guilty plea rather than a no contest plea; we will hereinafter generally adhere to such terminology in the interest of consistency.

**{¶9}.** On July 30, 2014, Attorney Timothy E. Potts was appointed as appellant's defense counsel. On August 13, 2014, prior to sentencing, appellant, with the assistance of Attorney Potts, filed a motion to withdraw his aforesaid plea, which stated that the basis therefor would be "more fully explained and detailed at the hearing." However, before the motion to withdraw plea could be addressed, Attorney Potts was removed as counsel, and Attorney Roeliff Harper was appointed on September 3, 2014 to represent appellant.

**{¶10}.** On October 1, 2014, the trial court held a hearing on the motion to withdraw plea. Appellant's sole witness was himself. The gist of his argument was that he believed he should not have pled no contest to the Count I felony charge when he believed that serious physical harm did not occur as a result of the incident in question. *See* Tr. II at 24, 52-53, 55. Officer Michael Garn was called to testify for the State at the hearing. He stated that the victim had a mark near her eye and bruising on her body, which included a large "footprint-sized" bruise on her back. *See* Tr. II at 64. He also indicated that the child victim stated that appellant choked her, hit her with a dog leash, and kicked her in the back. Tr. II at 63-65.

**{¶11}.** Via judgment entry filed October 9, 2014, the trial court denied appellant's motion to withdraw his plea.

**{¶12}.** On October 22, 2014, following a sentencing hearing, the trial court sentenced appellant to twelve months in prison and three years of discretionary post-release control.

**{¶13}.** On October 23, 2014, appellant filed a notice of appeal. He herein raises the following two Assignments of Error:

**{¶14}.** "I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ALLOW APPELLANT TO WITHDRAW HIS GUILTY PLEA TO THE CHARGE OF ENDANGERING CHILDREN.

**{¶15}.** "II. TWO OF APPELLANT'S ATTORNEYS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL. THEIR DEFICIENT REPRESENTATION PREJUDICED APPELLANT."

I.

**{¶16}.** In his First Assignment of Error, appellant contends the trial court erred in denying his pre-sentence motion to withdraw his guilty plea to the child endangering offense. We disagree.

**{¶17}.** Crim.R. 32.1 states as follows: "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."

**{¶18}.** Thus, unlike the "manifest injustice" standard governing a post-sentence motion, Crim.R. 32.1 has no specific guidelines for granting a pre-sentence motion to withdraw a guilty plea. *State v. Calloway,* Hamilton App.No. C–040066, 2004–Ohio–5613, ¶ 11, citing *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715. A presentence motion to withdraw a plea should be freely and liberally granted; however, the decision is left to the trial court's sound discretion. *Id.,* citing *Xie* at 526. Furthermore, a trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. *Xie, supra.* The court should examine whether the defendant was represented, whether the withdrawal will

prejudice the prosecution, the timing of the motion, the reasons given for the withdrawal, the defendant's understanding of the charges and penalties, and the existence of a meritorious defense. *State v. Graham,* Holmes App.No. 04–CA–001, 2004–Ohio–2556, ¶ 39 (additional citations omitted).

**{¶19}.** In the case sub judice, there is no dispute that appellant had been represented at the plea hearing by retained counsel, Attorney Frey, although he obtained appointed counsel, Attorney Potts, several weeks after the plea was accepted. The presentence motion to withdraw plea was filed about five weeks after the plea. At the subsequent hearing on said motion, appellant agreed that he had told the court at the plea hearing that he had been "satisfied with the legal help [he] received from [Attorney Frey]." Tr. II at 40. Furthermore, appellant, via counsel, stipulated that the change of plea transcript was authentic and accurate. Tr. II at 41. Said change of plea transcript clearly indicates that the trial court had advised appellant, inter alia, of the potential penalties and the level of felony involved, and had further recited to appellant the allegations in the indictment as to Count I, while the more serious Count II was to be dismissed. Tr. I at 8-13.[2]

**{¶20}.** In regard to appellant's suggestion of a meritorious defense *(see Graham*, *supra*), appellant's main issue in seeking to withdraw the plea was that he should not have pled no contest to felony child endangering when he believed that "serious physical harm" had not taken place. *See* Tr. II at 24, 52-53. Appellant stated that he had felt forced to plead no contest and was "so stressed out," but later stated that his

[2] Part of appellant's present argument appears to be that he was not properly advised at the plea hearing that the State has the burden of proof. However, this argument was not made at the motion to withdraw proceedings.

plea was of his own free will. *See* Tr. II at 25, 55. Appellant indicated he remembered the preliminary hearing where he heard the victim and Officer Michael Garn testify to the victim's injuries, including the presence of bruising on her back. *See* Tr. II at 49.

**{¶21}.** Ohio courts have held that "[u]nder certain circumstances, a bruise can constitute serious physical harm because a bruise may satisfy the statutory requirement for temporary serious disfigurement." *State v. Bootes*, 2nd Dist. Montgomery No. 23712, 2011-Ohio-874, ¶ 19, citing *State v. Worrell,* 10th Dist. Franklin No. 04AP–410, 2005–Ohio–1521, ¶ 47–51. *See*, *also*, *State v. Jarrell,* 4th Dist. Scioto No. 08CA3250, 2009–Ohio–3753, ¶ 14. Furthermore, this Court has recognized that " * * * the mere insertion of legally cognizable defenses does not impel the trial court to permit withdrawal of the guilty plea." *State v. Kimbrough* (March 28, 1988), Stark App. No. CA–7363, citing *U.S. v. McKoy* (D.C.Cir.1981), 645 F.2d 1037, and *U.S. v. Barker* (D.C.Cir.1975), 514 F.2d 208.

**{¶22}.** Upon review, we are not inclined to determine that the trial court's refusal, following a hearing, to allow a pre-sentence withdrawal of appellant's plea under these circumstances constituted an abuse of discretion.

**{¶23}.** Accordingly, appellant's First Assignment of Error is overruled.

II.

**{¶24}.** In his Second Assignment of Error, appellant maintains he did not receive effective assistance of counsel during the preparation of and the proceedings on the motion to withdraw plea. We disagree.

**{¶25}.** As an initial matter, we must address whether an "ineffective assistance" claim is cognizable in regard to an attorney's performance in connection with a

presentence Crim.R. 32.1 motion. It is well-established that a criminal defendant's right to the assistance of counsel attaches at all "critical stages" of criminal proceedings. *See United States v. Wade,* 388 U.S. 218 (1967). We note in *State v. Strickland*, 2nd Dist. Montgomery No. 25673, 2014-Ohio-5451, ¶ 15, the Second District Court of Appeals cited, inter alia, *Brunsen v. State*, Nevada No. 50830, 2009 WL 3191711 (Sept. 10, 2009), for the proposition that a hearing on a motion to withdraw a guilty plea is a critical stage of litigation. The *Strickland* court thus reiterated that a criminal defendant is entitled to appointed counsel at a hearing on a motion to withdraw a plea, where the motion was made prior to sentencing, because he or she is entitled to counsel through each critical stage of the proceeding. *Id*., citing *State v. Meadows,* 6th Dist. Lucas No. L–05–1321, 2006–Ohio–2622, ¶ 11 (additional citations omitted). We also note the Eight District Court of Appeals, in *State v. Cranfield*, 8th Dist. Cuyahoga No. 53325, 1988 WL 8429, addressed the merits of a defendant's assigned error that he had been denied the effective assistance of counsel during the hearing on his motion to withdraw a guilty plea.

**{¶26}.** We will therefore proceed on appellant's "ineffective assistance" claims in the present appeal.

**{¶27}.** The standard of review for ineffective assistance of counsel in criminal cases is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. A claim for ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to an appellant. The second prong is whether the

appellant was prejudiced by counsel's ineffectiveness. *Strickland, supra; State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

**{¶28}.** In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley* at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*

**{¶29}.** However, it is well-established that a reviewing court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the appellant as a result of the alleged deficiencies. *See Bradley* at 143, quoting *Strickland* at 697. Furthermore, "[a] defendant must demonstrate actual prejudice, and speculation regarding the prejudicial effects of counsel's performance will not establish ineffective assistance of counsel." *State v. Halsell,* 9th Dist. Summit No. 24464, 2009–Ohio–4166, ¶ 30, citing *State v. Downing,* 9th Dist. Summit No. 22012, 2004–Ohio-5952, ¶ 27. Actual prejudice means there is a reasonable probability that but for counsel's unprofessional errors, the outcome of the case would have been different. *See State v. Adams,* Licking App.No. 2005–CA–0024, 2005–Ohio–5211, ¶ 18.

*Attorney Potts*

**{¶30}.** Appellant first maintains that Attorney Potts, who filed the motion to withdraw plea on his behalf (but did not argue the motion), failed to include specific bases in said written motion and purportedly failed to consult or meet with appellant. Appellant attempts to rely on *dehors* information that Attorney Potts was facing his own

criminal matter at about the time of the motion at issue, although we do take notice that Mr. Potts was suspended from the practice of law for an interim period by the Ohio Supreme Court on February 13, 2015. *See In re Potts*, --- N.E.3d ----, 2015-Ohio-535.

**{¶31}.** Appellant's testimony at the plea withdrawal hearing indicates that Attorney Potts did communicate to appellant that "he was going to file a bunch of motions for me," and that he thereafter filed the motion to withdraw plea. Tr. II at 61. Although appellant stated he did not have an opportunity to review the motion prior to its filing, he agreed that Attorney Potts "handled [the] matter competently. Tr. II at 61. Furthermore, as the State correctly notes in its response brief, appellant was subsequently provided a full hearing on his Crim.R. 32.1 motion, with a different attorney, during which the trial court pared the issues down to appellant's central contention regarding the existence of serious physical harm to the victim.

**{¶32}.** Upon review of the record before us, we find no ineffective assistance of counsel in regard to Attorney Potts during his involvement in the case.

*Attorney Harper*

**{¶33}.** Appellant next challenges the performance of Attorney Harper at the plea withdrawal hearing, chiefly contending that said counsel failed to present sufficient evidence or call proper witnesses to support the motion. However, this Court has recognized that " * * * complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." *State v. Phillips,* Stark App.No. 2010CA00338, 2011–Ohio–6569, ¶ 26, quoting *Buckelew v. United States* (5th Cir.1978), 575 F.2d 515, 521 (internal quotation marks omitted).

Furthermore, the scope of the hearing to be held on a motion to withdraw a plea should reflect the substantive merit of the motion itself. *State v. McNeil* (2001), 146 Ohio App.3d 173, 176.

**{¶34}.** We note appellant was provided a liberal opportunity to voice his own testimony during the motion hearing; that portion of transcript, including cross-examination, runs approximately forty-three pages.

**{¶35}.** Upon review, we find no demonstration of prejudice for purposes of an ineffective assistance claim in regard to Attorney Harper during his role of presenting the withdrawal of plea motion.

**{¶36}.** Appellant's Second Assignment of Error is therefore overruled.

**{¶37}.** For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Richland County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Baldwin, J., concur.

JWW/d 0514