

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	Case No. 14CA3604
TRACY A. FRYE,	:	<u>DECISION AND</u>
Defendant-Appellant.	:	<u>JUDGMENT ENTRY</u>
		RELEASED 11/04/2014

APPEARANCES:

Bryan Scott Hicks, Lebanon, Ohio, for Appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Pat Apel, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

Hoover, J.

{¶ 1} Tracy A. Frye appeals from his conviction and sentence imposed by the Scioto County Common Pleas Court after he pled guilty to four felony drug trafficking offenses. On appeal, Frye contends that the trial court improperly denied his presentence motion to withdraw his guilty pleas, specifically arguing that he did not have enough time to investigate the case prior to pleading guilty. Having reviewed the record and pertinent law, we find that the trial court did not abuse its discretion in denying Frye’s motion to withdraw. Therefore, we overrule Frye’s sole assignment of error and affirm the judgment of the trial court. However, because of a clerical mistake in the trial court’s nunc pro tunc sentencing entry, we remand this cause to the trial court under App.R. 9(E).

{¶ 2} On March 1, 2011, Frye was indicted on twelve counts of drug possession and drug trafficking. More specifically, Frye was indicted on six felony drug trafficking counts in violation of R.C. 2925.03, five felony drug possession counts in violation of R.C. 2925.11, and one misdemeanor drug possession count in violation of R.C. 2925.11. The indictment also included a forfeiture specification. Although Frye initially pled not guilty to the charges contained in the indictment, on September 20, 2011, pursuant to a negotiated plea agreement with the State, Frye entered guilty pleas to Counts 1, 3, 5, and 9 of the indictment.

{¶ 3} At the plea hearing, the trial court informed Frye of the possible penalties for the charged offenses, including possible prison terms and financial sanctions. The trial court then asked Frye if he had any questions, which Frye did not. The trial court inquired as to whether Frye was on parole; and Frye stated that he was not. The trial court also explained post release control and the consequences of violating post release control. The trial court then asked Frye if he understood post release control, to which Frye responded yes. The trial court then explained community control and the consequences of violating community control. When asked by the trial court whether he understood the concept of community control, Frye responded yes. The trial court then asked Frye whether he had any questions; and Frye asked if he would be permitted to work out of town while under post release control. The trial court advised him that at first there could be some restrictions; but that eventually he might be permitted to work out of town. The trial court again asked if Frye had any questions; and Frye stated that he did not.

{¶ 4} Next, the trial court asked Frye if he wished to waive reading of the indictment; and Frye said yes. The trial court then inquired whether Frye had any questions regarding the charges he was pleading to; and Frye stated no. The trial court then proceeded to inform Frye of his constitutional rights and asked if he wished to waive those rights. Frye indicated that he did wish

to waive his constitutional rights. The trial court also inquired whether Frye was satisfied with the representation provided by his counsel; and Frye stated that he was satisfied. The trial court also verified that no promises, threats, or inducements, other than the negotiated plea deal, had been made to secure the guilty pleas. The trial court then informed Frye that if he wished to enter a plea, he would have to sign two forms that again reviewed the possible penalties and waiver of constitutional rights. Frye signed the forms and the trial court found that he had been advised of and understood the maximum penalties and the concepts of post release control and community control. The trial court further found that Frye had been advised of, understood, and waived his constitutional rights. Frye then entered guilty pleas on the four drug trafficking counts (Counts 1, 3, 5, and 9) and the trial court accepted the pleas. Sentencing was scheduled for a later date.

{¶ 5} Following the plea hearing, Frye was conditionally released and was ordered to return to court for his sentencing hearing. Frye was conditionally released as part of his negotiated plea deal. On October 4, 2011, Frye appeared for sentencing and advised the trial court that he wished to withdraw his guilty pleas. Frye was asked why sentencing should not proceed and he responded that he did not believe he was getting a good and fair plea deal because he was forfeiting his house and he had seen other drug trafficking cases get less prison time. The court then asked whether he thought the deal was fair when he entered it; and Frye stated that he did. However, the more he thought about the deal and talked to his family members and others about it, he no longer thought it was fair. The State informed the trial court that the plea deal was first offered in April 2011, and that Frye had discussed the deal with his family members on several occasions prior to the plea hearing in September. The State also informed the trial court that Frye had not fulfilled his obligation to help law enforcement with their drug

trafficking investigations during the time he was conditionally released.¹ Frye insisted that he had tried to contact the sheriff's department by telephone prior to the sentencing hearing, but that they made no effort to return his call. The State argued that Frye sought to withdraw his guilty pleas simply to avoid a longer sentence that was likely to result from his failure to help law enforcement. The trial court then asked trial counsel if he was going to file a written motion to withdraw the pleas and counsel stated that he would.

{¶ 6} On October 12, 2011, Frye filed a written motion to withdraw his guilty pleas. That same day, defense counsel also moved to withdraw as counsel. The trial court granted defense counsel's motion to withdraw as counsel after a hearing on the matter; and new counsel was assigned to represent Frye.

{¶ 7} An evidentiary hearing on Frye's motion to withdraw his guilty pleas was held on January 18, 2012. Frye testified on direct examination that he wished to withdraw his pleas because he never had the chance to evaluate the evidence in the case. Frye stated that: "I've never properly got to review my case or see anything, any motions whatsoever on my case." [Jan. 18, 2012 Tr. at 4.] On cross-examination, Frye denied knowing that a motion for discovery had been filed on his behalf and that the State had provided discovery in April 2011.² Frye testified that he never saw any discovery and that his trial counsel informed him that the State would not make any plea deals and would seek the maximum sentence if they were required to disclose the identity of their confidential informant. Frye also denied knowing that his trial had been continued twice at his request, although he did acknowledge that he was told trial had been

¹ The State alleges that as part of the negotiated plea deal Frye was required to help law enforcement in the investigation of drug trafficking cases during the time he was conditionally released. We note that the plea hearing transcript, while outlining the details of the negotiated plea deal, made no mention of this requirement. Nonetheless, Frye concedes that this was part of the negotiated plea deal.

² The record reflects that Frye requested a bill of particulars and discovery on April 1, 2011. The record further reflects that the State filed a bill of particulars and its response to Frye's request for discovery on April 8, 2011. Supplemental discovery was provided by the State on April 13, 2011, and May 6, 2011.

postponed a couple of times.³ Frye also stated that he discussed the plea deal with his children, his brother, and his aunts. Frye also testified on cross-examination that he briefly discussed the plea deal with his trial counsel. Frye also agreed that he was informed of his constitutional rights at the plea hearing and that he voluntarily waived those rights and entered the guilty pleas. Frye also acknowledged his promise to help law enforcement investigate drug trafficking cases between the time of his plea hearing and the original sentencing date. The State inquired whether Frye wished to withdraw his pleas because of his failure to fulfill this promise and Frye asserted that was not a factor in his decision to withdraw his pleas. Specifically, Frye stated, “No, that ain’t got nothing to do with why I wanted to withdraw my plea.” [Jan. 18, 2012 Tr. at 13.] Rather, he stated that his decision to agree to the deal and plead guilty was a “spur of the moment thing[.]” *Id.* at 14. However, he did agree that his counsel at the time of the plea hearing was “pretty decent counsel”. *Id.* at 15. He also testified that he knew the State was taking his house and cash as part of the deal.

{¶ 8} By judgment entry dated May 7, 2012, the trial court denied Frye's motion to withdraw his guilty pleas stating only that the motion “is not well-taken and is overruled.” The matter proceeded to sentencing on May 31 and June 6, 2012. At the sentencing hearings the trial court announced that Frye was to be sentenced to a mandatory five years in prison on count 9, eighteen months in prison on count 1, eighteen months in prison on count 3, and one year in prison on count 5. The trial court further ordered that the sentences be served consecutively, for a total of nine years in prison with judicial release negotiated at five years. Certain items were also ordered forfeited to the State. The trial court's July 5, 2012, sentencing entry incorrectly stated that Frye had pled guilty to and was thus being sentenced on counts 1, 5, 7 and 9, rather than

³ A jury trial was originally scheduled for May 31, 2011. However, trial was continued twice at Frye's request.

counts 1, 3, 5, and 9, as indicated in both the plea and sentencing hearing transcripts, as well as the September 23, 2011, judgment entry issued after the change of plea hearing.

{¶ 9} Frye filed a direct appeal from his conviction and sentence; but this Court dismissed the appeal for lack of a final, appealable order. This Court found that the record indicated that Frye had pled guilty to counts 1, 3, 5, and 9; but that the remaining eight counts, which were counts 2, 4, 6, 7, 8, 10, 11 and 12, had not been dismissed. *See State v. Frye*, 4th Dist. Scioto No. 12CA3499, 2013–Ohio–3307. Subsequent to our dismissal, the trial court filed an entry of dismissal on August 14, 2013, purporting to dismiss the remaining counts. Specifically, the entry of dismissal states that Frye was sentenced on counts 1, 5, 7, and 9, and goes on to dismiss counts 2, 3, 4, 6, 8, 10, 11 and 12 of the indictment.

{¶ 10} Following the entry of dismissal, Frye filed a direct appeal, but this Court again dismissed the appeal for lack of a final, appealable order because the entry of dismissal and the sentencing entry continued to incorrectly state the counts that were dismissed and the counts upon which Frye was being sentenced. *See State v. Frye*, 4th Dist. Scioto No. 13CA3572, 2013–Ohio–5872. Subsequent to our dismissal, the trial court filed two nunc pro tunc judgment entries in an effort to correct the sentencing entry and the entry of dismissal.

{¶ 11} Frye now appeals to this Court once again, setting forth a single assignment of error for our review.

Assignment of Error:

MR. FRYE WAS IMPROPERLY DENIED WITHDRAWAL OF HIS PLEA.

{¶ 12} In his sole assignment of error, Frye contends that the trial court improperly denied his presentence motion to withdraw his guilty pleas. Crim.R. 32.1 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.” “ ‘[A] presentence motion to withdraw a guilty plea should be freely and liberally granted.’ ” *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 57, quoting *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). However, “[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. A trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.” *Xie* at paragraph one of the syllabus.

{¶ 13} A trial court possesses discretion to grant or deny a presentence motion to withdraw a plea, and we will not reverse the court’s decision absent an abuse of that discretion. *See id.* at paragraph two of the syllabus, 526. The phrase “abuse of discretion” implies the court’s attitude is unreasonable, unconscionable, or arbitrary. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). Furthermore, “[w]hen applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court.” *In re Jane Doe I*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991).

{¶ 14} We have set forth a list of factors that we consider when determining whether a trial court abused its discretion by denying a presentence motion to withdraw a plea: “ ‘(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.’ ” *State v. Campbell*, 4th Dist. Athens No. 08CA31, 2009-Ohio-4992, ¶ 7, quoting *State v. McNeil*, 146 Ohio App.3d 173, 176, 765 N.E.2d 884 (1st Dist.2001). Other considerations include: “ ‘(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.’ ” *Id.*, quoting *McNeil* at 176. However, a change of heart or mistaken belief about the plea is not a reasonable basis requiring a trial court to permit the defendant to withdraw the plea. *Id.*, citing *State v. Lambros*, 44 Ohio App.3d 102, 103, 541 N.E.2d 632 (8th Dist.1988).

{¶ 15} Here, Frye concedes that highly competent counsel represented him, that he was given a full Crim.R. 11 hearing prior to entering his pleas, that a full hearing on his motion to withdraw was held by the trial court, and that the trial court gave full and fair consideration to his motion. We further note that the motion was timely; as it was made prior to the imposition of sentence and not long after Frye entered his guilty pleas.

{¶ 16} Frye gave several reasons for his withdrawal request. First, Frye stated that he wished to withdraw the pleas because after consulting with friends and family, he no longer felt the plea deal was fair. He noted that other individuals had been offered less prison time for similar offenses and that others had not been forced to forfeit their houses. Next, at the plea withdrawal hearing, Frye claimed that he wished to withdraw the pleas because he never had the opportunity to review the evidence of his case. Finally, upon cross-examination, Frye stated that his decision to plead guilty to the four offenses was a spur of the moment decision.

{¶ 17} We also note that Frye was informed of the nature of the charges and possible penalties at the plea hearing. The trial court asked multiple times if he understood the offenses for which he was charged and the associated penalties, and each time Frye indicated that he did. Finally, we note that Frye did not once offer any evidence or even aver that he was not guilty or had a complete defense to the charges.

{¶ 18} Given the record before us, we believe this is a classic change of heart case. Most telling were Frye’s remarks when he orally moved to withdraw his pleas. At that time, Frye

stated that he wished to withdraw his pleas because after further considering the negotiated plea deal, he no longer felt it was fair and equitable. At the plea withdrawal hearing, Frye also stated that his decision to plead guilty was a spur of the moment decision. These statements indicate that Frye simply changed his mind after entering the guilty pleas. Never once did Frye argue that he was not guilty or that he had a complete defense to the charged offenses.

{¶ 19} We also find Frye's assertion that he did not have the opportunity to evaluate the evidence unpersuasive. Discovery was requested and received in April 2011. Frye had a full five months to review the State's evidence prior to his plea hearing. The record also reflects that Frye had several months to discuss the plea deal with his family, and in fact did discuss it with his family, thus belying his assertion that his decision to accept the deal was a spontaneous decision. We further note that trial was twice continued at Frye's request, thus allowing Frye additional time to review the evidence and consider the plea deal.

{¶ 20} In sum, a review of the record reflects that Frye had a change of heart regarding his guilty pleas, which is not a reasonable and legitimate basis for withdrawing a plea. Moreover, a balance of the factors outlined above does not warrant withdrawal of his guilty pleas. Accordingly, the trial court did not act arbitrarily, unreasonably or unconscionably in denying Frye's motion to withdraw his guilty pleas, and his sole assignment of error is overruled. Nevertheless, we remand this matter to the trial court under App.R. 9(E). The trial court's nunc pro tunc sentencing entry (filed January 28, 2014), while correcting the counts to which Frye was sentenced, still contains a clerical error. That is, page 2 of the entry states that Frye was sentenced to 18 months in prison on Count 5 and to 12 months in prison on Count 3. But in reality, the trial court announced at the sentencing hearing that Frye would be sentenced to 18 months in prison on Count 3 and to 12 months in prison on Count 5. Therefore, we remand this

cause to the trial court under App.R. 9(E); and we instruct the trial court to correct the nunc pro tunc sentencing entry in accordance with Crim.R. 36.

CAUSE REMANDED WITH INSTRUCTIONS;
JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that THIS CAUSE BE REMANDED WITH INSTRUCTIONS and that the JUDGMENT IS AFFIRMED. Appellant shall pay 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 Scioto County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to [Rule 27 of the Rules of Appellate Procedure](#).

Abele, P.J. & Harsha, J.: Concur in Judgment and Opinion.

For the Court

By: _____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.