

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

STATE OF OHIO,	:	
	:	Case No. 19CA9
Plaintiff-Appellee,	:	
	:	
vs.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
LARRY DELANEY, JR.,	:	
	:	
Defendant-Appellant.	:	RELEASED: 11/20/2020

APPEARANCES:

William L. Archer Jr., Assistant Jackson County Prosecutor, Jackson, Ohio,
for Appellee.

C. Michael Moore, Jackson, Ohio, for Appellant.

Wilkin, J.

{¶1} This is an appeal from a Jackson County Court of Common Pleas judgment entry finding Appellant, Larry Delaney, Jr., guilty of the illegal assembly or possession of chemicals for the manufacture of drugs.

Appellant asserts that the trial court erred in denying his motion to withdraw his plea. After reviewing the facts of the case and applicable law, we hold that the trial court did not abuse its discretion in denying Appellant's motion to withdraw his plea. Therefore, we overrule Appellant's assignment of error and affirm the trial court's entry of conviction.

PRODEDURAL HISTORY

{¶2} On October 2, 2015, the State charged Appellant with knowingly assembling or possessing Pseudoephedrine with the intent to manufacture Methamphetamine in violation of R.C. 2925.041(A), a third-degree felony. At his arraignment, Appellant pled not guilty to the charge.

{¶3} On August 31, 2017, Appellant changed his plea to guilty with the State recommending community control as a sentence, but with an acknowledgment that a thirty-six month maximum prison term was possible. The court ordered a presentence investigation (“PSI”) and sentencing was set for November 6, 2018.

{¶4} At the November 6, 2018 hearing, the trial court informed Appellant that his PSI indicated that he “had a substantial criminal history and that his community control sentence had been revoked in other cases.” Appellant then expressed a desire to withdraw his plea, and the court gave him leave to file the motion.

{¶5} On January 8, 2019, Appellant filed a motion to withdraw his plea alleging that when he entered his plea “he was in distress over the instant matter, acted out of fear and panic, was confused in his thought process, and prematurely entered a guilty plea.” On February 5, 2019, the

trial court held a hearing to consider Appellant's motion to withdraw, which the court denied.

{¶6} On June 11, 2019, the court held a sentencing hearing. The court noted that Appellant's PSI revealed that he had numerous prior criminal convictions, including domestic violence, felonious assault, menacing, OVI, bad checks, resisting arrest, possession of oxytocin, receiving stolen property, possession of drug instruments, illegal possession of and conveyance of drugs, violating a civil protection order, and disorderly conduct. Therefore, the trial court judge rejected the State recommended community control sanction, and instead imposed the thirty-six-month prison sentence. It is from this judgment that Appellant appeals, asserting a single assignment of error.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO WITHDRAW HIS PLEA

{¶7} The Appellant argues that the trial court erred when it denied his motion to withdraw his guilty plea. Appellant cites nine factors recognized by appellate courts in analyzing motions to withdraw pleas, that he argues, justify reversal of the trial court's decision denying his motion to withdraw his guilty plea. With regard to three of these factors, Appellant admits that he was afforded a full Crim.R. 11 hearing; that he was afforded a full

hearing on his motion to withdraw his plea; and that he understood the nature of the charges, the possible penalties, and the consequences of his plea. However, he argues that the remaining six factors, when balanced, demonstrate the trial court erred in denying his motion to withdraw his plea.

{¶8} Appellant first argues that his counsel was not “highly competent.” In support, Appellant claims that he did “what he was told to do,” he had not received nor seen a copy of his discovery, he never discussed possible defenses or strategies with his counsel, and he told his counsel that “he didn’t understand several things and this * * * I wasn’t comfortable with it.”

{¶9} Appellant also argues that the trial court did not give full consideration to his motion to withdraw his plea. Specifically, Appellant argues that, while the trial court considered some of the factors relevant in determining whether a motion to withdraw a plea should be granted, it did not consider all of them, and in that regard it did not give full consideration to his motion.

{¶10} Appellant argues that because his motion to withdraw his plea was filed prior to sentencing it should be freely and liberally granted, i.e. it was filed within a reasonable time.

{¶11} Appellant further argues that he gave specific reasons for his withdraw. Appellant submits that his motion indicated that he was “in distress over the instant matter, acted out of fear and panic, was confused in his thought process, and prematurely entered a guilty plea.”

{¶12} Appellant also argues that he was not guilty of the charges or had a complete defense. Appellant argues that at his plea withdraw hearing, he testified that he was innocent or had a complete defense, he had not received nor seen a copy of his discovery, and he had never discussed possible defenses or strategies with his counsel prior to entering the guilty plea.

{¶13} And finally, Appellant argues that the State would not be prejudiced by allowing him to withdraw his plea.

{¶14} In response, the State argues that Appellant expressed that he “was very much satisfied” with his counsel and he had “multiple meetings” with her, and that he had had enough time to talk to his counsel prior to his plea. The State alleges that Appellant admitted that he had discussions about the case with his counsel and she answered his questions. Consequently, the State argues Appellant’s counsel was highly competent.

{¶15} The State further argues that the trial court did give full consideration to Appellant’s motion to withdraw his plea. The State argues

the mere fact that the trial court did not consider all nine of the factors cited in the case law is “immaterial.” The State noted that the trial court cited the discrepancies in Appellant’s testimony at the hearing on Appellant’s motion to withdraw, noting that Appellant was merely having “buyer’s remorse.”

{¶16} The State argues that Appellant’s motion to withdraw his plea was not filed within a reasonable time because it was not filed until approximately sixteen and a half months after he pleaded guilty.

{¶17} The State argues that Appellant’s reasons for his motion to withdraw – that he “acted out of fear and panic, was confused in his thought process, and prematurely entered a guilty plea” – are not credible. The State argues that Appellant’s claim of innocence is nothing more than a self-serving assertion; there is nothing in the record to support his claim.

{¶18} Finally, The State argues that “there is no evidence in the record on prejudice to the State except for the delay of the additional almost 16 months plus the time to set the jury trial attendant to any withdrawal of the guilty plea”

LAW

{¶19} 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.” “While trial courts should ‘freely and liberally’ grant a presentence motion to withdraw a guilty plea, a defendant does not ‘have an absolute right to withdraw a guilty plea prior to sentencing.’ ” *State v. Howard*, 4th Dist. Scioto No. 16CA3762, 2017-Ohio-9392, 103 N.E.3d 108, ¶ 21, quoting *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715. A “trial court possesses broad 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.” *State v. Brown*, 4th Dist. Ross No. 16CA3544, 2017-Ohio-2647, ¶ 11, citing *Xie* at ¶ 2 of the syllabus. “The term ‘abuse of discretion’ implies that the court's attitude is unreasonable, unconscionable, or arbitrary.” *State v. Brown*, 4th Dist. Ross No. 16CA3544, 2017-Ohio-2647, ¶ 12, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). “[A] trial court generally abuses its discretion when it fails to engage in a ‘sound reasoning process.’ ” *Howard*, at ¶ 20, quoting, *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14.

{¶20} Appellate courts, including this one, have identified nine factors to assist in determining whether a trial court abused its discretion in deciding a presentence motion to withdraw a plea:

- (1) whether ‘highly competent counsel’ represented the defendant;
- (2) whether the trial court afforded the

defendant ‘a full Crim.R. 11 hearing before entering the plea’; (3) whether the trial court held ‘a full hearing’ regarding the defendant’s motion to withdraw; (4) ‘whether the trial court gave full and fair consideration to the motion’; (5) whether the defendant filed the motion within a reasonable time; (6) whether the defendant’s motion gave specific reasons for the withdrawal; (7) whether the defendant understood the nature of the charges, the possible penalties, and the consequences of his plea; (8) whether the defendant is ‘perhaps not guilty or ha[s] a complete defense to the charges’; and (9) whether permitting the defendant to withdraw his plea will prejudice the state. *State v. Nance*, 4th Dist. Meigs No. 18CA7, 2018-Ohio-2637, ¶ 13, citing *Howard*, ¶ 24.

This list is “non-exhaustive” and “ ‘[c]onsideration of the factors is a balancing test, and no one factor is conclusive.’ ” *State v. Ganguly*, 10th Dist. Franklin No. No. 14AP–383, 2015-Ohio-845, 29 N.E.3d 375, ¶ 14, citing *State v. Zimmerman*, 10th Dist. No. 09AP–866, 2010-Ohio-4087, 2010 WL 3405746.

{¶21} “ ‘ The ultimate question is whether there exists a “reasonable and legitimate basis for the withdrawal of the plea.” ’ ” *State v. Sarver*, 4th Dist. Washington Nos. 17CA27, 17CA28, 17CA29, 2018-Ohio-2796, ¶ 33, quoting *State v. Delpinal*, 2nd Dist. Clark Nos. 2015-CA-97 and 2015CA98, 2016-Ohio-5646, quoting *Xie*, 62 Ohio St.3d at 527, 584 N.E.2d 715. “A mere change of heart is not a legitimate and reasonable basis for the withdrawal of a plea.” *Howard* at ¶ 24, citing *State v. Campbell* 4th Dist. Athens No. 8CA31, 2009-Ohio-4992, ¶ 7, *State v. Harmon*, 4th Dist.

Pickaway No. 4CA22, 2005-Ohio-1974, ¶ 22. In particular, “a change of heart due to knowledge that an unexpected sentence will be imposed is not a sufficient ground to vacate a plea.” *State v. Terrell*, 2nd Dist. Greene No. 2004 CA 119, 2005-Ohio-4523, ¶ 23, citing *State v. Long*, 2nd Dist. Montgomery No. 13285, 1993 WL 155662 (May 13, 1993).

ANALYSIS

1. The Nine Court-Recognized Factors

{¶22} We begin our analysis by examining the nine factors. Initially, we note that Appellant admits that three of the factors weigh against him, i.e. he was afforded a “full Crim.R. 11 hearing,” he was afforded a “full hearing on his motion to withdraw” his plea, and he understood the nature of the charges, the possible penalties, and the consequences of his plea.

{¶23} With regard to the remaining six factors that Appellant contests, we find as follows.

a. Counsel’s Competency

{¶24} During his plea withdraw hearing, Appellant testified that he was not satisfied with his counsel at the time he entered the plea. He claims that he did “what he was told to do,” he did not see nor review his discovery, he never discussed possible defenses or strategies with his counsel, and he

told his counsel that “he didn’t understand several things and this * * * I wasn’t comfortable with it.”

{¶25} We begin with the presumption that Appellant’s counsel was competent. *State v. Shifflet*, 4th Dist. Athens No. 13CA23, 2015-Ohio-4250, 44 N.E.3d 966, ¶ 37. Although not dispositive, we note that Appellant has not filed an ineffective assistance of counsel claim, and his trial counsel was not called as a witness. Therefore, we are left to evaluate this factor based solely on Appellant’s testimony. Appellant testified on direct examination during his plea withdraw hearing that he was not satisfied with his counsel. However, on cross examination, the State asked Appellant if he recalled his testimony during his plea hearing, when asked by the trial court judge: “‘are you satisfied with your lawyer’s services,’ * * * do you recall that your response was ‘very much?’ Did you represent to the court that you were very satisfied with your lawyer’s services during the plea hearing?” In response, the Appellant admitted: “I * * * I * * * I supposed I did.”

Consequently, Appellant’s testimony regarding even his *opinion* of his counsel’s competence is conflicting at best. We find Appellant’s testimony insufficient to overcome the presumption that his counsel’s actions were competent during his plea. Therefore, we find that the highly-competent-counsel factor weighs against Appellant.

b. Consideration of Appellant's Motion to Withdraw His Plea

{¶26} Appellant argues that the trial court did not give full and fair consideration to his motion to withdraw his plea because it considered only seven of nine factors. Specifically, Appellant argues that the trial court improperly failed to consider the factors of whether Appellant's motion to withdraw was filed within a reasonable time and whether permitting the Appellant to withdraw his plea would prejudice the State.

{¶27} We have recognized that the nine factors pertaining to reviewing a motion to withdraw a plea, “apply on appellate review and *not* necessarily *when the trial court reviews the motion in the first instance.*” (Emphasis added.) *Howard*, 4th Dist. Scioto No. 16CA3762, 2017-Ohio-9392, 103 N.E.3d 108 ¶ 35 citing *State v. Coleman*, 4th Dist. Ross Nos. 16CA3555, 3556, 3557, and 3558, 2017-Ohio-2826, ¶ 25. And “[w]hile some of the nine factors may be relevant when evaluating a presentence motion to withdraw a guilty plea,” we are not aware of any authority that requires a court “to engage in a factor-by-factor analysis that explains its reasoning for denying a presentence motion to withdraw a guilty plea.” *Id.* Consequently, we do not find that the trial court failed to give full and fair consideration in considering Appellant's motion to withdraw, solely because

it did not evaluate those two factors. Therefore, the full-and-fair-consideration factor weighs against Appellant.

c. Appellant's Reasons for His Withdraw

{¶28} Appellant claims that he wanted to withdraw his plea because he was “in distress over the instant matter, acted out of fear and panic, was confused in his thought process, and prematurely entered a guilty plea.” We find that Appellant has set out specific reasons for his motion to withdraw his plea. However, he testified that he *always* has feelings of fear, panic and distress in the court room. Further, in other parts of this decision it is apparent that Appellant was not confused about the process during the plea hearing. In fact, Appellant had been through plea hearings before so he knew what to expect. In sum, while Appellant has set forth the reasons for his withdraw, we find they lack merit.

d. Timeliness of Appellant's Motion to Withdraw

{¶29} Appellant argues that because his motion was filed prior to sentencing it should be freely and liberally granted, apparently thereby implying that it was filed within a reasonable time. While Appellant accurately reflects the proper legal standard for a trial court addressing a presentence motion to withdraw a plea, a trial court has discretion in making that decision, which is a very deferential standard of review on appeal.

Although the trial court did not find it necessary to address this issue, we agree with the State that Appellant's filing a motion to withdraw a plea almost seventeen months after the plea, in which he alleged coercion, was not filed within a reasonable time. Had Appellant been concerned that his plea hearing was somehow tainted, it is difficult to conceive why he would wait more than a year to challenge it. Therefore, the filed-within-a-reasonable-time factor weighs against Appellant.

e. Appellant's Claims of Not Guilty or Innocence

{¶30} Appellant argues that at his plea withdraw hearing he testified that he was innocent or had a complete defense, he had not seen nor reviewed his discovery, and he had never discussed possible defenses or strategies with his counsel prior to entering the guilty plea.

{¶31} Appellant's mere bald assertion that he had a defense or was innocent, without more, is insufficient to support that he was not guilty or innocent of the offense charged. *State v. Jones*, 4th Dist. Scioto No. 13CA3548, 2013-Ohio-5416, ¶ 23. Moreover, Appellant's assertions that he did not see nor review his discovery or that he never discussed strategies or defenses in no way supports that he had a complete defense or he was innocent of the charges. Appellant could have at least set forth in his brief

what those alleged defenses were. He did not. Therefore, the possibly-not-guilty-or-innocent factor weighs against Appellant.

f. Prejudice

{¶32} Appellant asserts that the transcript of the plea withdraw hearing is wholly absent of evidence or a discussion about what prejudice the State would suffer if his motion to withdraw was granted. The State appears to concur except for a delay in setting a jury trial. Therefore, we find that granting Appellant’s motion to withdraw would not prejudice the State. Accordingly, the prejudice factor appears to weigh in favor of the Appellant.

2. Other Factors

{¶33} Appellant alleged that his trial counsel at the time of his plea “promised” him that if he pleaded guilty, he “would never do any jail time.” Yet, at the plea hearing, when asked by the trial court judge if he had been promised anything by anyone to enter the plea, he responded, “No.” Appellant also admitted he understood the trial court judge did not have to follow the State’s recommendation of community control for his sentencing. Moreover, when asked by the State at the plea withdraw hearing if there was something he did not understand regarding that colloquy with the trial court

judge, Appellant stated “Uh * * * I * * * I understood exactly what I was being asked.”

{¶34} At the plea withdraw hearing, when asked if the plea was in writing, Appellant responded “[n]othing was signed and made legal, no, the recommendation the three (3) years of * * * uh * * suspended time that the only thing I saw like * * * of that nature.” In fact, there is a written plea agreement in the record, which appears to bear two signatures from Appellant, and like the trial court judge’s colloquy, it set out the recommended sentence of community control, but also a possible maximum sentence of thirty-six months in prison and a \$1,000 fine. The signed plea also represented that “*no person * * * promised me leniency or in any other way coerced or induced me to plead guilty.*” (Emphasis added.)

{¶35} Finally, it was not until, what was supposed to be the sentencing hearing on November 6, 2018, when the trial court informed Appellant that his PSI “had a substantial criminal history and that his community control sentence had been revoked in other cases,” that Appellant moved the court to withdraw his plea. It appears that Appellant had “buyer’s remorse” after he realized that his significant criminal past was going to result in the trial court sentencing him to prison rather than community control. Such a change of heart is not a sufficient ground to

vacate a plea. *Terrell*, 2nd Dist. Greene No. 2004 CA 119, 2005-Ohio-4523, ¶ 23.

CONCLUSION

{¶36} Because all but one of the factors that we considered supports the trial court's decision, we find that the trial court's reasoning process was sound, and its decision to deny Appellant's motion to withdraw his plea was not otherwise unreasonable, unconscionable, or arbitrary. Therefore, because we hold that the trial court did not abuse its discretion in denying Appellant's motion to withdraw his plea, we overrule his assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson 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 proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier 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 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.

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

For the Court,

BY: _____
Kristy S. Wilkin , 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.