[Cite as *State v. Estep*, 2024-Ohio-58.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. 23CA1
v.	:	
TANYELLE ESTEP,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Christopher Bazeley, Cincinnati, Ohio, for appellant[1].

James K. Stanley, Meigs County Prosecuting Attorney, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:1-3-24
ABELE, J.

{¶1} This is an appeal from a Meigs County Common Pleas Court judgment of conviction and sentence for the possession of drugs.

{¶2} Tanyelle Estep, defendant below and appellant herein, assigns five errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION BY OVERRULING ESTEP'S MOTION TO WITHDRAW A GUILTY PLEA."

---

[1] Different counsel represented appellant during the trial court proceedings.

SECOND ASSIGNMENT OF ERROR:

"ESTEP'S GUILTY PLEA WAS NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY GIVEN."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT FAILED TO ADVISE TUPPS [SIC.] OF THE R.C. 2929.19(B)(2)(c) FACTORS AT SENTENCING."

FOURTH ASSIGNMENT OF ERROR:

"THE HEARING PROVISION IN R.C. 2967.271 IS VAGUE AND VIOLATES MCCORMICK'S [SIC.] RIGHTS TO DUE PROCESS."

FIFTH ASSIGNMENT OF ERROR:

"THE REAGAN TOKES LAW IS UNCONSTITUTIONAL."

{¶3} In August 2022, a Meigs County Grand Jury returned an indictment that charged appellant with (1) one count of trafficking in drugs in violation of R.C. 2925.03(A)(2), (2) one count of possession of methamphetamine in violation of R.C. 2925.11(A), (3) one count of trafficking in drugs in violation of R.C. 2925.03(A)(2), and (4) one count of possession of fentanyl in violation of R.C. 2925.11(A), all first-degree felonies. Appellant pleaded not guilty to all charges.

{¶4} Subsequently, appellant agreed to plead guilty to one count of possession of drugs in violation of R.C. 2925.11(A), a second-degree felony. At the change of plea hearing, the state

recited the negotiated plea agreement wherein appellant agreed to (1) plead guilty to count one, (2) be sentenced to serve three to four and a half years in prison, (3) testify against co-defendant Michael Taylor, and (4) pay court costs. The state agreed to amend count one to a second-degree felony and dismiss counts two, three, and four of the indictment.

{¶5} At the hearing, the trial court reviewed the elements of the charges, possible sentence, and post-release control. The court further asked appellant if she understood that a guilty plea waives her right to a jury trial, her right not to testify against herself, her right to confront witnesses, her right to compulsory process, and her right to require the state to prove her guilt beyond a reasonable doubt. Appellant responded that she did so understand.

{¶6} When the trial court asked, "Ms. Estep, are you, in fact, guilty of this charge against you?" Appellant replied, "I don't feel that I am, but I don't want to take the chance of getting a lot of time away from my family, so . . ." The court stated, "Well, I've got to have * * * a good firm answer from you." Appellant replied, "Um." The court urged her to "discuss that with [counsel], and I'll ask you again." After the court went off the record for 20 seconds, the court stated, "Consult with * * * your

attorney. So, let me ask you the question again. Has everything that you've told me been of your own free will and accord?" Appellant replied, "Yes, Your Honor." The court then asked, "Okay. And are you, in fact, guilty of this charge against you?" Appellant replied, "Yes."

{¶7} At that point, the trial court stated, "Alright. Is it your desire then at this time . . . do you need some time to compose yourself?" Appellant replied, "No. I'm okay." The court then asked, "Alright. Is it your desire then, at this time, to withdraw your previous plea of not guilty and now enter a plea of guilty to this charge?" Appellant replied, "Yes, Your Honor." The court asked appellant if she signed the waiver of rights and plea agreement "voluntarily and with full knowledge of what you were doing?" Appellant answered affirmatively. When the court asked appellant if she understood both documents, she confirmed that she did. The court then scheduled appellant's sentencing hearing.

{¶8} At the November 15, 2022 sentencing hearing, trial counsel indicated that appellant "wanted [him] to file a motion to withdraw * * * her guilty plea." Counsel stated he had explained the process to appellant, and she wished to pursue her request. The trial court informed appellant that, if she withdrew her plea and was convicted, she faced "decades" more prison time.

Nevertheless, appellant stated she understood and still wished to withdraw her plea. The court's November 15, 2022 entry states, "Defendant will file a motion to withdraw guilty plea. Next date to be determined when the motion is filed."

{¶9} On November 16, 2022, appellant filed her motion to withdraw her guilty plea and stated that she had "raised the issue of withdrawing her guilty plea in two letters mailed to defense counsel several weeks prior to the filing of this motion." Appellant said she briefly communicated with counsel at her request, but could not communicate further due to "software malfunction[s]." Appellant argued that, at her September 28, 2022 change of plea hearing, she was "very hesitant to change her plea to guilty." Appellant did acknowledge that her negotiated plea reduced the charge to a second-degree felony with a mandatory three-year sentence and up to four and one-half years indefinite time. In contrast, if convicted without the plea, appellant faced a possible mandatory 22 years and up to an indefinite maximum sentence if convicted. Appellant, however, chose to maintain her innocence.

{¶10} At the December 12, 2022 withdrawal of plea hearing,[2]

[2] A different judge who did not preside over the Crim.R. colloquy decided the motion to withdraw.

trial counsel testified that he received a few letters from appellant from jail. However, due to jail protocols, it took counsel four to seven days to schedule the video call with appellant. On November 10, 2022, counsel and appellant spoke briefly "before the software malfunctioned, which then disconnected our call." Both unsuccessfully attempted to re-connect. Because appellant had a hearing scheduled on November 15, 2022 counsel met with her then and further discussed the matter. Trial counsel also referred to appellant's emotional state during the plea hearing:

> [I]f the Court does look at the per diem and the Court record, it reflects that at 3:39:38 * * * the Court record * * * reported that quote she, meaning Ms. Estep does not feel that she is guilty of the charge, but the she, meaning Ms. Estep, doesn't want to take the time away from her family. * * * [T]he Court * * * then allowed me some time to speak with Ms. Estep. Uh, she was very emotional during that hearing. Again, I know that Your Honor was not present for that. She cried multiple times, had to be given Kleenexes * * * we took time * * * but she was definitely in a very emotional state when * * * changing her plea. We believe that the statement that she made during that * * * plea hearing as well as her conduct and demeanor at that hearing demonstrated genuine hesitancy and a reluctance to change her plea * * * to guilty.

Appellant testified and stated that she entered her guilty plea:

> "[b]ecause * * * obviously three years sounds a lot better than twenty-two, but I truly feel that * * * I'm innocent of this. I had no knowledge of this, and * * * I don't want to accept any time. I want to try to fight * * * for myself and show the Courts that I am innocent of this."

{¶11} Later in the hearing, appellant stated, "I felt pressure * * * I felt pressured the whole time." When asked by whom, appellant replied, "[b]y Prosecutors, by, you know, I mean the day I was arrested. They had me in a room screaming at me, telling me, you know, I'm facing thirty years and * * * it's been very intimidating, the whole process has." Appellant continued, "I've been a victim of battered women's, I've got PTSD, and * * * it's hard for me when you have, you know, when you're a female in a room full of men, you know, um, to stand up for yourself."

{¶12} On cross-examination, the state asked appellant about her proffer that she observed drugs under the car hood and knew Michael Taylor engaged in trafficking drugs when they drove from Dayton. Appellant denied both and explained she "just sa[id] that to get three years instead of thirty." The prosecutor asked if she decided to withdraw her plea after Michael Taylor pleaded guilty, and she said no and she had written letters to her attorney before the Taylor plea. Appellant also explained, "[i]t wasn't my car, and it wasn't registered to me, but * * * I was scared because I was driving when we got pulled over."

{¶13} The state noted that Michael Taylor changed his plea on October 13, 2022, and appellant filed her motion one month later. The state argued that appellant simply "changed her mind, had

buyer's remorse."

{¶14} After consideration, the trial court denied appellant's motion to withdraw her plea and proceeded to sentencing. The court: (1) sentenced appellant to serve a definite period of three years and up to an indefinite period of four and one-half years on count one, possession of drugs in violation of R.C. 2925.11(A), a second-degree felony, (2) sentenced appellant to serve a mandatory 18 months to three-year post-release control term, (3) dismissed counts two, three, and four without prejudice pursuant to the plea agreement, (4) credited appellant with 208 jail days, and (5) ordered appellant to pay costs.

I.

{¶15} In her first assignment of error, appellant asserts that the trial court erred when it overruled her motion to withdraw her guilty plea. Specifically, appellant contends that, because she maintained her innocence both at the plea hearing and the motion to withdraw hearing, and because the state would suffer no prejudice, the trial court should have granted her motion.

{¶16} Crim.R. 32.1 provides: "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*, 2017-Ohio-9392, 103 N.E.3d 108, ¶ 21 (4th Dist.), quoting *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). Instead, "[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; *Howard, supra*; *State v. Smith*, 4th Dist. Ross No. 21CA3739, 2021-Ohio-4028, ¶ 16.

{¶17} Because a trial court has broad discretion to grant or to deny a presentence motion to withdraw a plea, appellate courts will not reverse a trial court's decision absent an abuse of discretion. *State v. Delaney*, 4th Dist. Jackson No. 19CA9, 2020-Ohio-7036, ¶ 19, citing *State v. Brown*, 4th Dist. Ross No. 16CA3544, 2017-Ohio-2647, ¶ 11, citing *Xie* at paragraph two of the syllabus; *accord Smith*, *supra*, at ¶ 17. "The term 'abuse of discretion' implies that the court's attitude is unreasonable, unconscionable, or arbitrary." *Brown* at ¶ 12, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶18} In *Smith*, *supra*, at ¶ 18, we noted that courts have identified nine factors an appellate court should consider when it

reviews a decision that involves a pre-sentence motion to withdraw a guilty 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 [or her] 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 [or her] plea will prejudice the state.

Howard at ¶ 24, citing *State v. McNeil*, 146 Ohio App.3d 173, 176, 765 N.E.2d 884 (1st Dist.2001), citing *State v. Peterseim*, 68 Ohio App.2d 211, 214, 428 N.E.2d 863 (8th Dist.1980). Consideration of this "non-exhaustive" list is a balancing test, and no one factor is conclusive. *State v. Ganguly*, 2015-Ohio-845, 29 N.E.3d 375, ¶ 14 (10th Dist.), citing *State v. Zimmerman,* 10th Dist. Franklin No. 09AP-866, 2010-Ohio-4087, ¶ 13. Therefore, the ultimate question is whether there exists a "reasonable and legitimate basis for the withdrawal of the plea." *Xie,* 62 Ohio St.3d at 527, 584 N.E.2d 715. It should be emphasized, however, that 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; *Delaney* at ¶ 21.

{¶19} The Supreme Court of Ohio recently addressed the nine-factor test in *State v. Barnes*, __ Ohio St.3d __, 2022-Ohio-4486, __ N.E.3d __. In *Barnes,* the defendant and two others exchanged gunfire in an altercation that killed one person and injured two others. *Barnes*, *supra*, at ¶ 3-4. After the defendant entered a guilty plea, he learned of video of the altercation and sought to withdraw his plea. After the trial court denied the motion and the Eighth District affirmed, the Supreme Court of Ohio concluded that "when a defendant discovers evidence that would have affected his decision to plead guilty, he has a reasonable and legitimate basis to withdraw his guilty plea before sentencing." *Barnes* at ¶ 24.

{¶20} While *Barnes* referenced the nine-factor test, the court neither applied it nor rejected it, but simply held that the "factors do not apply here." *Id.* Therefore, many appellate courts continue to apply the nine-factor test for withdrawal motions that do not involve the discovery of evidence that would have affected a defendant's decision to plead guilty. *See State v. Wroten,* 2023-Ohio-966, 211 N.E.3d 842, ¶ 31 (2d Dist.); *State v. Edwards,* 3d Dist. Union No. 14-23-11, 2023-Ohio-3213, ¶ 9; *State v. Kohler*, 5th Dist. Delaware No. 22 CAA 10 0068, 2023-Ohio-1772, ¶ 14; *State*

v. Grier, 6th Dist. Lucas No. L-21-1263, 2023-Ohio-207, ¶ 26; *State v. Johnson*, 8th Dist. Cuyahoga No. 111448, 2023-Ohio-371, ¶ 43; *State v. Campbell*, 11th Dist. Lake No. 2022-L-060, 2023-Ohio-1626, ¶ 14.

{¶21} In the case sub judice, appellant does not raise or apply the nine-factor test highlighted above. Instead, appellant argues that she believes she has a reasonable and legitimate basis to withdraw her plea. In particular, appellant maintains that, during the plea colloquy, she asserted her innocence. We begin our analysis with a review of the nine court-recognized factors.

1

Highly Competent Counsel

{¶22} Generally, courts begin with a presumption that a defendant had the benefit of competent counsel. *Delaney*, 2020-Ohio-7036, at ¶ 25, citing *State v. Shifflet*, 2015-Ohio-4250, 44 N.E.3d 966, ¶ 37 (4th Dist.). Further, as we also noted in *Delaney*, appellant in the case sub judice did not raise an ineffective assistance of counsel claim. *Delaney, supra. See also Smith, supra,* at ¶ 20. Our review of the record also reveals that, at the plea hearing, the trial court asked counsel if he thoroughly investigated the facts and law, determined whether any questions exist concerning the admissibility, confessions, or other evidence,

and whether he informed appellant of the elements of the amended offense, any relevant defenses, and appellant's constitutional rights. The trial court further asked appellant if counsel so advised her, answered any questions, and if she was satisfied with counsel's services, to which appellant replied, "very much so."

{¶23} Thus, we believe the first factor weighs in appellee's favor.

2

Crim.R. 11 Hearing

{¶24} Appellant makes no argument concerning her Crim.R. 11 hearing. Moreover, the September 27, 2022 hearing transcript reveals that the trial court afforded appellant a full Crim.R. 11 hearing before it accepted her guilty plea. The court engaged in the appropriate colloquy with appellant to ensure that she understood the constitutional and non-constitutional implications of her guilty plea.

{¶25} Thus, we believe the second factor weighs in appellee's favor.

3

Full Hearing

{¶26} The third factor asks whether appellant received a full and meaningful hearing on her motion to withdraw her plea. A court has a mandatory duty to hold a hearing to consider a presentence motion to withdraw a guilty plea. *Xie,* 62 Ohio St.3d 521, at paragraph one of the syllabus; *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, ¶ 50; *State v. Burchett,* 4th Dist. Scioto No. 11CA3445, 2013-Ohio-1815, ¶ 13; *Smith* at ¶ 25. In the case at bar, the trial court held a hearing on appellant's motion and heard testimony from appellant.

{¶27} Thus, we believe this factor weighs in appellee's favor.

4

Full and Fair Consideration

{¶28} The fourth factor asks whether a trial court fully and fairly considered the motion to withdraw a guilty plea. As noted above, the record in the case at bar reveals that the trial court gave full and fair consideration to appellant's motion.

{¶29} Thus, we believe the fourth factor weighs in appellee's favor.

5

Reasonable Time

{¶30} The fifth factor examines whether the appellant requested

to withdraw her plea within a reasonable time. In the case sub judice, appellant entered her guilty plea on September 27, 2022, then waited nearly two months to file her motion to withdraw. Appellant filed her motion the day after the trial court initially scheduled her sentencing. Generally, a motion to withdraw a guilty plea made on the day of the sentencing hearing is not made at a reasonable time. *State v. Harris,* 10th Dist. Franklin No. 09AP-1111, 2010-Ohio-4127, ¶ 31; State v. Hassink, 7th Dist. Columbiana No. 2000-CO-11, 2000-CO-12, 2000 WL 1741727 (Nov. 20, 2000) (motion to withdraw "filed contemporaneously with the appearance of new counsel and immediately prior to sentencing seems to indicate" that the defendant "may have been somewhat desperate in light of [the defendant's] sincere understanding as to the penalties which may befall him on that day"); *State v. Caballero,* 10th Dist. Franklin No. 15AP-1132, 2016-Ohio-5496, ¶ 20 (defendant failed to file motion to withdraw plea within reasonable time when waited two months after plea to file motion to withdraw and filed the same day set for sentencing). Here, if appellant believed her innocence, and entered her plea only because she felt pressured, she was fully aware of this belief when she agreed to the negotiated guilty plea. *State v. Springer,* 3d Dist. Hancock No. 5-22-29, 2023-Ohio-1617, ¶ 16 (although aware of the eventual bases for request to withdraw guilty pleas, defendant waited three months to file motion and

filed only when sentencing date near).

{¶31} Thus, we believe that appellant should have filed her motion within a reasonable time and the fifth factor weighs in appellee's favor.

6

Specific Reasons for Withdrawal

{¶32} The sixth factor asks whether appellant sufficiently outlined specific reasons for her plea withdrawal request. Here, appellant's motion asserted that she became emotional at her plea hearing and demonstrated genuine hesitancy and reluctance to change her plea. Appellant stated at the hearing, "I don't feel that I am [guilty], but I don't want to take the chance of getting a lot of time away from my family." Subsequently, appellant's plea withdrawal request stated, "after having time to fully think on the subject she does not believe that she is guilty in this matter and as such she does not believe that any period of incarceration is an acceptable outcome for this case." We recognize that appellant did, however, address a specific reason for withdrawal, and we will address the merits of that reason in the discussion of the eighth factor.

{¶33} Therefore, this factor arguably weighs in appellant's favor.

7

Nature of the Charges and the Possible Penalties

{¶34} The seventh factor asks whether appellant understood the nature of the charges and possible penalties. In the case at bar, the record reveals that the trial court conducted a very thorough Crim.R. 11 plea hearing. The court asked appellant if she understood her plea and its consequences, to which appellant replied she did. In addition, appellant did not indicate at the hearing on the motion to withdraw that she did not understand the consequences of her plea or the possible penalties.

{¶35} Thus, we believe the seventh factor weighs in appellee's favor.

8

Possible Defenses or Innocence

{¶36} The eighth factor examines whether appellant had possible defenses to the charge. "In weighing [this] factor, 'the trial judge must determine whether the claim of innocence is anything more than the defendant's change of heart about the plea agreement.'" *State v. Davis*, 5th Dist. Richland No. 15CA6, 2015-Ohio-5196, ¶ 19, quoting *State v. Davison*, 5th Dist. Stark No. 2008-CA-00082, 2008-Ohio-7037, ¶ 45. Moreover, in this examination, "the balancing test only asks whether the defendant

has *possible* defenses. Whether the appellant will be successful in those defenses is for a jury to decide." *State v. Jones*, 10th Dist. Franklin No. 15AP-530, 2016-Ohio-951, ¶ 10; *Harmon* at ¶ 33; *Smith* at ¶ 36.

{¶37} Appellant's brief addresses only this factor, and she contends she is innocent of the charges. Appellee, however, notes that appellant did not argue that she has a complete defense to the charges. Further, appellee points out that it provided the trial court with a recording of appellant's proffer statement in which appellant discussed her role in drug possession and trafficking. Moreover, in the trial court's entry that denied appellant's motion to withdraw her guilty plea, the court stated, "[t]he Court heard the arguments of the parties as well as the testimony from the Defendant on that date. The Court has also reviewed the record and the recorded proffer from Defendant." Consequently, based on this record it is difficult to conclude that appellant may have a possible valid defense.

{¶38} In light of the foregoing, we believe that the eighth factor weighs in favor of appellee.

Prejudice to the State

{¶39} The final factor asks us to examine whether the

withdrawal of appellant's plea would prejudice appellee. Appellant contends that the state's witnesses are police officers "who are available to testify at any time." Appellee, however, argues that, in addition to inconvenience to the state's witnesses, appellant's co-defendant, Michael Taylor, changed his plea and was found guilty. Thus, the state asserts that Taylor has no incentive to cooperate with the state in a trial against appellant. Further, the state notes that appellant's other co-defendant, Brian Estep, is her husband, has a warrant for his arrest and is unlikely to testify against his wife. Thus, appellee contends that, before the state entered into a plea agreement with Michael Taylor, appellee could have reached an agreement with Taylor that included his testimony against appellant had appellant not previously changed her plea to guilty.

{¶40} We agree that the state would lose leverage and suffer some degree of prejudice if appellant is permitted to withdraw her plea. A victim's reluctance to testify can be a fact that prejudices the state. *See State v. Johnston*, 7th Dist. Columbiana No. 06CO64, 2007-Ohio-4620, ¶ 10; *State v. Urbina*, 3d Dist. Defiance No. 4-06-17, 2006-Ohio-6921, ¶ 25 (state would be prejudiced if required to prepare for trial again; state's witnesses present, ready to testify; reassembly of witnesses burdensome and costly to the state as well as trial court).

{¶41} Thus, we believe this factor weighs in appellee's favor.

Conclusion

{¶42} After our review in the case sub judice, we conclude that, under these circumstances, appellant's attempt to withdraw her guilty plea does amount to a change of heart or "buyer's remorse," neither of which constitutes a legitimate basis to grant a pre-sentence motion to withdraw a plea. *Smith*, *supra,* 2021-Ohio-4028 at ¶ 44, citing *State v. Palmer*, 4th Dist. Highland No. 02CA9, 2002-Ohio-6345, at ¶ 6; *Harmon* at ¶ 36. It appears that the only motivation to withdraw her plea is that appellant changed her mind. Again, it is not unusual for a defendant to experience some degree of desperation or "cold feet" when confronted with the penalties that may be imposed that day. *Hassink*.

{¶43} Consequently, it is not an abuse of discretion for a trial court to find such justification insufficient to merit the withdrawal of a plea. *State v. Campbell,* 11th Dist. Lake No. 2022-L-060, 2023-Ohio-1626, ¶ 16, citing *State v. Silver*, 8th Dist. Cuyahoga No. 111578, 2023-Ohio-451, ¶ 6; *State v. Depetro*, 9th Dist. Medina No. 21CA0053-M, 2022-Ohio-2249, ¶ 8; *State v. Garcia*, 11th Dist. Ashtabula Nos. 2022-A-0034 and 2020-A-0035, 2021-Ohio-4480, ¶ 33.

{¶44} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II.

{¶45} In her second assignment of error, appellant asserts that she did not enter a knowing, intelligent and voluntary plea. Again, appellant contends that she maintained her innocence and only agreed to the plea to minimize time away from her family.

{¶46} "Because a no-contest or guilty plea involves a waiver of constitutional rights, a defendant's decision to enter a plea must be knowing, intelligent, and voluntary." Crim.R. 11, *State v. Dangler*, 162 Ohio St.3d 1, 2020-Ohio-2765, 164 N.E.3d 286, ¶ 10, citing *Parke v. Raley*, 506 U.S. 20, 28-29, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992). Thus, if the defendant did not enter the plea knowingly, intelligently, and voluntarily, enforcement of that plea is unconstitutional. *Id.*

{¶47} Appellate courts apply a de novo standard of review when evaluating a plea's compliance with Crim.R. 11(C). *State v. Nero*, 56 Ohio St.3d 106, 108-109, 564 N.E.2d 474 (1990). Moreover, evidence of a written waiver form signed by the accused is strong proof of the validity of the waiver. *State v. Clark*, 38 Ohio St.3d 252, 261, 527 N.E.2d 844 (1988). However, as indicated above, in

the case sub judice appellant does not challenge the trial court's compliance with Crim.R. 11, but rather argues that she did not enter a knowing, intelligent, or voluntary plea.

{¶48} Here, appellant's signed written guilty plea form is included in the record. At the change of plea hearing, although appellant may have been emotional and hesitant, appellant's counsel verified the accuracy of the state's recitation of the negotiated plea agreement and acknowledged that he had informed appellant of the elements of the amended offense, all relevant defenses, and her constitutional rights.

{¶49} Appellant responded to the question, "are you, in fact, guilty of this charge against you?" with, "I don't feel that I am, but I don't want to take the chance of getting a lot of time away from my family, so. . ." The trial court asked appellant to discuss her hesitation with counsel and the court went off the record. When the court came back on the record, the court asked, "Has everything that you've told me been of your own free will and accord?" Appellant replied, "Yes, Your Honor." The court asked again, "And are you, in fact, guilty of this charge against you?" Appellant replied, "Yes." After that, appellant withdrew her previous plea of not guilty and entered a plea of guilty to the amended charge.

{¶50} In *State v. Hughes*, 4th Dist. Adams No. 21CA1127, 2021-Ohio-3127, the defendant initially showed ambiguity about her guilt regarding child endangerment, but, after she consulted with her attorney and the proceedings resumed, she "clearly and unequivocally" pleaded guilty to the charges. *Id.* at ¶ 77. Relevant to the case at bar, we held that "[e]ven if Hughes believed she was innocent while pleading guilty, it would not require us to set aside her guilty plea. Persons who believe that they are innocent, but conclude the evidence is incriminating enough that a jury would find them guilty, may plead guilty with an *Alford* plea." *Hughes* at ¶ 78, citing *State v. Hughes,* 4th Dist. Highland No. 20CA2, 2021-Ohio-111. We noted in *Hughes* that the defendant did not argue that she intended to enter an *Alford* plea, and nothing in the record supported such a finding. *Id.*

{¶51} Similarly, in the case sub judice, we conclude that, although appellant initially expressed ambiguity about her guilt, the record demonstrates the trial court complied with Crim.R. 11 and conducted a thorough plea colloquy. *See, e.g., State v. Goode,* 2d Dist. Montgomery No. 25340, 2013-Ohio-2119, ¶ 4 (although defendant first reluctant to accept plea deal, court took considerable time and effort to ensure defendant fully aware of plea offer and its consequence, as well as alternatives available;

thus complete and thorough Crim. R. 11 dialogue ensured defendant entered knowing and voluntary plea free of any hesitation or objection.) Here, appellant made a reasonable and rational decision to accept the state's offer to conclude the case and forgo the risk of convictions for offenses that could result in decades of time in prison. Therefore, we believe that after our review, the record fully supports the conclusion that appellant properly entered her guilty plea and fully supports the trial court's conclusion that appellant entered a knowing, intelligent, and voluntary plea.

{¶52} Accordingly, we overrule appellant's second assignment of error.

III.

{¶53} In her third assignment of error, appellant asserts that the trial court erred when it failed to advise her at sentencing of the R.C. 2929.19(B)(2)(c) factors.

R.C. 2929.19(B)(2)(c) provides:

> (2) Subject to division (B)(3) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:
>
> (c) If the prison term is a non-life felony indefinite prison term, notify the offender of all of the following:

> (I) That it is rebuttably presumed that the offender will be released from service of the sentence on the expiration of the minimum prison term imposed as part of the sentence or on the offender's presumptive earned early release date, as defined in section 2967.271 of the Revised Code, whichever is earlier;
>
> (ii) That the department of rehabilitation and correction may rebut the presumption described in division (B)(2)(c)(I) of this section if, at a hearing held under section 2967.271 of the Revised Code, the department makes specified determinations regarding the offender's conduct while confined, the offender's rehabilitation, the offender's threat to society, the offender's restrictive housing, if any, while confined, and the offender's security classification;
>
> (iii) That if, as described in division (B)(2)(c)(ii) of this section, the department at the hearing makes the specified determinations and rebuts the presumption, the department may maintain the offender's incarceration after the expiration of that minimum term or after that presumptive earned early release date for the length of time the department determines to be reasonable, subject to the limitation specified in section 2967.271 of the Revised Code;
>
> (iv) That the department may make the specified determinations and maintain the offender's incarceration under the provisions described in divisions (B)(2)(c)(I) and (ii) of this section more than one time, subject to the limitation specified in section 2967.271 of the Revised Code;
>
> (v) That if the offender has not been released prior to the expiration of the offender's maximum prison term imposed as part of the sentence, the offender must be released upon the expiration of that term.

{¶54} Appellant contends that Ohio courts of appeal that have considered this issue found that the use of the term "shall" mandates that a trial court must explain each R.C. 2929.19(B)(2)(c)

factor to a defendant at sentencing, and the failure to do so requires a remand for resentencing. In support, appellant cites *State v. Long*, 4th Dist. Pickaway No. 20CA9, 2021-Ohio-2672, where we observed that appellate courts review felony sentences under the standard outlined in R.C. 2953.08(G)(2):

> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

{¶55} We further noted in *Long* that appellate courts may vacate or modify a felony sentence if the court clearly and convincingly finds that the record does not support the trial court's findings. *Long* at ¶ 26, *citing State v. Layne*, 4th Dist. Adams No. 20CA1116, 2021-Ohio-255, ¶ 6. " 'This is an extremely deferential standard of review.' " *Layne* at ¶ 8, quoting *State v. Pierce*, 4th Dist. Pickaway No. 18CA4, 2018-Ohio-4458, ¶ 8. Clear and convincing

evidence is proof that is more than a "mere preponderance of the evidence" but not of such certainty as "beyond a reasonable doubt," and produces in the mind a "firm belief or conviction" as to the facts sought to be established. *State v. Conant*, 4th Dist. Adams No. 20CA1108, 2020-Ohio-4319, ¶ 42; see also *Hughes* at ¶ 37-38.

{¶56} In *Long,* we concluded that the defendant's sentence was contrary to law because the trial court failed to provide notice at the sentencing hearing of ODRC's rebuttal of the presumption as required by subpart (B)(2)(c). *Long* at ¶ 29, citing *State v. Wolfe,* 5th Dist. Licking No. 2020CA00021, 2020-Ohio-5501, ¶ 33-37. We have held that "if a trial court fails to provide notice of all R.C. 2929.19(B)(2)(c) notifications at a sentencing hearing, the sentence is contrary to law." *State v. Bentley*, 4th Dist. Adams No. 21CA1147, 2022-Ohio-1914, ¶ 10. *See also State v. Jackson*, 1st Dist. Hamilton No. C-200332, 2022-Ohio-3449, ¶ 20 (trial court must advise defendant of all five notifications outlined in R.C. 2929.19(B)(2)(c)), *State v. Whitehead*, 8th Dist. Cuyahoga No. 109599, 2021-Ohio-847, ¶ 43-36; *State v. Gatewood*, 2d Dist. Clark No. 2021-CA-20, 2022-Ohio-2513, ¶ 1; *State v. Hodgkin*, 12th Dist. Warren No. CA2020-08-048, 2021-Ohio-1353, ¶ 24.

{¶57} These notifications also include the pertinent features

of the Reagan Tokes Law. Because the Reagan Tokes Law, when applicable, allows the Ohio Department of Rehabilitation and Correction to extend a defendant's sentence beyond the minimum term upon satisfaction of statutory criteria, trial courts must abide by R.C. 2929.19(B)(2)(c) and notify the defendant of the five notifications as it relates to their indefinite prison term. *State v. Greene*, 1st Dist. Hamilton No. C-220160, 2022-Ohio-4356, ¶ 11.

{¶58} In the case at bar, the trial court stated at the sentencing hearing that a prison term is necessary or required and issued a felony indefinite term of three to four and a half years. The trial court stated:

> "A felony of the second degree carries a presumption in favor of a term of imprisonment. The Court specifically finds that * * * prison is consistent with the purposes and principles of sentencing and, pursuant to the plea agreement, this is a lot lighter sentence than you may have gotten if you went to trial, a lot lighter. * * * we'll sentence you pursuant to the agreement to three years definite, uh, term of incarceration up to four and a half, uh, incarceration. The presumption would be that you get out at three, unless the prison determines that, based upon behaviors while in prison, that you need to stay for the tail or the next year and a half after the three years."

{¶59} While the trial court did advise appellant of some of the sentencing requirements, it did not advise her of all the R.C. 2929.19(B)(2)(c) notifications. As appellant notes, the court did not advise her of the presumption of release, ODRC's burden to

rebut the presumption, that the process may be repeated multiple times, or that she will be released at the end of the maximum term. R.C. 2929.19(B)(2)(c).

{¶60} Thus, we sustain appellant's third assignment of error and remand the matter for resentencing so that the trial court may comply with R.C. 2929.19(B)(2)(c).

IV.

{¶61} In her fourth assignment of error, appellant contends that the hearing provision in R.C. 2967.271 is vague and violates her due process rights. Specifically, appellant argues that R.C. 2967.271 fails to define any of the procedures to be used or rights that defendants would enjoy at a R.C. 2967.271 hearing.

{¶62} As appellee observes, appellant did not raise this particular argument during the trial court proceedings. In general, parties may not raise new arguments on appeal. Moreover, the "[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which is apparent at the time of trial, constitutes a waiver of such issue and a deviation from the state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Chapman*,

2022-Ohio-2853, 195 N.E.3d 178, ¶ 71 (4th Dist.), quoting *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus; *accord State v. Buttery*, 162 Ohio St.3d 10, 2020-Ohio-2998, 164 N.E.3d 294, ¶ 7. We may, however, consider forfeited constitutional errors under a plain-error analysis. *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 16, citing *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 377-378; *State v. Alexander*, 2022-Ohio-1812, 190 N.E.3d 651, ¶ 52 (4th Dist.).

{¶63} To establish plain error a defendant must show that (1) an error occurred, (2) the error was plain or obvious, (3) absent the error the outcome of the proceeding would have been otherwise, and (4) reversal is necessary to correct a manifest miscarriage of justice. *Quarterman* at ¶ 16, citing *State v. Davis*, 127 Ohio St.3d 268, 2010-Ohio-5706, 939 N.E.2d 147, ¶ 29; *Chapman* at ¶ 72.

{¶64} Recently, the Supreme Court of Ohio upheld the constitutionality of the Reagan Tokes Law in a facial challenge. *State v. Hacker*, __ Ohio St.3d __, 2023-Ohio-2535, __ N.E.3d __, ¶ 41. The court held that the Reagan Tokes Law (1) did not violate the separation of powers doctrine, (2) did not violate a defendant's right to jury trial, (3) did not violate a defendant's procedural due process rights, and (4) provided adequate notice of

what circumstances may result in Ohio Department of Rehabilitation and Correction (ODRC) maintaining a defendant's incarceration beyond the minimum prison term, and thus, is not void for vagueness. *Hacker, supra,* at ¶ 25, 27, 34, 40. Appellant did not argue plain error on appeal, and, even if she had, such an argument fails because appellant has not met her burden to establish beyond a reasonable doubt that the Reagan Tokes Law is unconstitutional. Thus, she cannot show that any error, much less plain error, occurred. *See Alexander*, *supra,* at ¶ 52; *State v. Drennen*, 4th Dist. Gallia No. 21CA10, 2022-Ohio-3413, ¶ 16.

{¶65} Accordingly, we overrule appellant's fourth assignment of error.

V.

{¶66} In her final assignment of error, appellant asserts that the Reagan Tokes Law is unconstitutional. Here, appellant argues that every aspect of the Reagan Tokes Law violates the United States Constitution. As noted above, however, the Supreme Court of Ohio recently upheld the constitutionality of the Reagan Tokes Law. *Hacker*, *supra.*

{¶67} Therefore, we overrule appellant's fifth assignment of error.

VI. Conclusion

{¶68} Accordingly, for all of the foregoing reasons, we affirm the trial court's judgment in part, reverse in part, and remand the matter for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part and cause remanded for further proceedings consistent with this opinion. Appellee 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 Meigs County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hess, J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, 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.