

[Cite as *State v. Withrow*, 2020-Ohio-3543.]

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 20CA0016-M

Appellee

v.

CHRISTOPHER WITHROW

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 19CR0961

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 30, 2020

CALLAHAN, Presiding Judge.

{¶1} Appellant, Christopher Withrow, appeals an order that denied his presentence motion to withdraw a guilty plea. This Court affirms.

I.

{¶2} Mr. Withrow pleaded guilty to trespass in a habitation, vandalism, and two counts of assault. On the date that his case was scheduled for sentencing, Mr. Withrow’s counsel informed the trial court that Mr. Withrow wanted to withdraw his plea. The trial court scheduled the motion for a hearing one week later. On that date, trial counsel had a medical conflict and, according to the State, Mr. Withrow refused to be transported to the hearing. Three days later, the trial court conducted a hearing on the motion. The trial court allowed counsel for Mr. Withrow and the State to review portions of his presentence investigation (“PSI”) that included medical records and to make arguments based on the contents of those records.

{¶3} The trial court ultimately denied the motion, concluding that Mr. Withrow did not demonstrate a reasonable and legitimate basis for withdrawing a plea and noting that a change of heart does not justify doing so. Mr. Withrow appealed.

II.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN OVERRULING THE MOTION TO VACATE [THE] NO CONTEST PLEA OF APPELLANT, CHRISTOPHER WITHROW.

{¶4} In his first assignment of error, Mr. Withrow argues that the trial court abused its discretion by denying his motion to withdraw his plea.¹ This Court disagrees.

{¶5} Crim.R. 32.1 provides that “[a] motion to withdraw a plea of guilty * * * 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.” There is no “absolute right” to withdraw a guilty plea before sentencing. *State v. Xie*, 62 Ohio St.3d 521 (1992), paragraph one of the syllabus. Nevertheless, motions filed before sentencing should be granted “freely and liberally.” *Id.* at 527. A trial court must conduct a hearing to determine whether the defendant has demonstrated a “reasonable and legitimate basis” to withdraw the plea, but it is within the trial court’s discretion to determine the nature and scope of that hearing. *State v. Benson*, 9th Dist. Summit Nos. 28527, 28577, 28578, 28579, 2017-Ohio-8150, ¶ 7, quoting *Xie* at paragraph one of the syllabus and *Lorain v. Price*, 9th Dist. Lorain No. 96CA006314, 1996 WL 556916, *2 (Oct. 2, 1996).

{¶6} In every case, the defendant bears the burden of demonstrating that there is a reasonable and legitimate basis for withdrawing the plea. *State v. Jones*, 9th Dist. Wayne No.

¹ Throughout his brief, Mr. Withrow references a no-contest plea. The record is clear, however, that Mr. Withrow pleaded guilty.

12CA0024, 2012-Ohio-6150, ¶ 37, citing *State v. DeWille*, 9th Dist. Medina No. 2101, 1992 WL 323896, *1 (Nov. 4, 1992). The determination of whether to grant a presentence motion to withdraw a guilty plea is entrusted to the discretion of the trial court, and this Court reviews that decision for an abuse of discretion. See *Xie* at paragraph two of the syllabus. An abuse of discretion is present when a trial court’s decision “‘is contrary to law, unreasonable, not supported by evidence, or grossly unsound.’” *Menke v. Menke*, 9th Dist. Summit No. 27330, 2015-Ohio-2507, ¶ 8, quoting *Tretola v. Tretola*, 3d Dist. Logan No. 8-14-24, 2015-Ohio-1999, ¶ 25.

{¶7} This Court has concluded that a trial court does not abuse its discretion by denying a presentence motion to withdraw a guilty plea when:

(1) the defendant is represented by competent counsel; (2) the trial court provides the defendant with a full hearing before entering the guilty plea; and (3) the trial court provides the defendant with a full hearing on the motion to withdraw the guilty plea, where the court considers the defendant’s arguments in support of his motion to withdraw the guilty plea.

State v. Pamer, 9th Dist. Medina No. 04CA0027-M, 2004-Ohio-7190, ¶ 10, citing *State v. Rosemark*, 116 Ohio App.3d 306, 308 (9th Dist.1996). Our review is also guided by considering prejudice that may be suffered by the State, the adequacy of representation afforded to the defendant, the character of the underlying plea hearing, the scope of the trial court’s consideration of the motion to withdraw, the timing of the motion, the reasons articulated in the motion to withdraw, the defendant’s understanding of the nature of the charges and the potential sentences, and whether the defendant may have been not guilty of the offense or had a complete defense. *State v. Wheeland*, 9th Dist. Medina No. 06CA0034-M, 2007-Ohio-1213, ¶ 12, quoting *State v. Fulk*, 3d Dist. Van Wert No. 15-04-17, 2005-Ohio-2506, ¶ 13, quoting *State v. Lewis*, 3d Dist. Allen No. 1-02-10, 2002-Ohio-3950, ¶ 11. This Court has consistently noted that “[a] mere change of heart” does not justify the withdrawal of a guilty plea. *State v. West*, 9th Dist. Summit No.

28668, 2017-Ohio-8474, ¶ 7, citing *State v. Brown*, 9th Dist. Summit No. 23759, 2007-Ohio-7028, ¶ 23.

{¶8} On the date that Mr. Withrow was scheduled to be sentenced, his attorney informed the trial court that he wanted to withdraw his plea because “he [was] not taking responsibility for * * * the offenses * * * [and] he only pled in this case to secure a bond and get out * * * from his incarceration.” During the hearing on the motion, Mr. Withrow’s attorney reiterated Mr. Withrow’s position that he “felt pressured by the bond and the desire to get out” and, consequently, “he doesn’t feel that he was thinking clearly.” He also explained that after his release from jail, Mr. Withrow’s medication was increased and that, in retrospect, Mr. Withrow believed he might not have been “clear minded” when he pleaded guilty.

{¶9} During the plea hearing, the trial court conducted a full colloquy with Mr. Withrow pursuant to Crim.R. 11. During that colloquy, Mr. Withrow acknowledged the range within which his potential sentences would fall, which was also set forth in the written plea agreement that he signed. When questioned by the trial court, Mr. Withrow expressed his understanding of the nature of the charges against him. Although at one point in the proceedings the trial court noted that Mr. Withrow seemed to frame his response as a question, the trial court conducted further inquiry, and Mr. Withrow’s responses indicate that he understood the charges. The trial court asked whether Mr. Withrow suffered from mental illness and, when he responded affirmatively, inquired about Mr. Withrow’s medications. Mr. Withrow responded that he had taken his medication in the previous twenty-four hours and denied that there was anything about the nature of his diagnoses or his medication that would interfere with his ability to enter a knowing, voluntary, and intelligent plea. Mr. Withrow agreed that he had sufficient opportunity to discuss the plea with trial counsel, and he stated that he was satisfied with the representation that trial counsel provided. The record

supports the conclusion that he received adequate representation from his attorney during the plea proceedings.

{¶10} Mr. Withrow's argument was twofold: that he was motivated to change his plea by a desire to be released from jail and that subsequent changes to his medications led him to conclude that he may not have been thinking clearly during the plea hearing. Neither the State nor Mr. Withrow introduced evidence during the hearing on Mr. Withrow's motion to withdraw. Instead, counsel reviewed portions of Mr. Withrow's medical records contained in his PSI and provided argument to the trial court on the basis of that review. Although the arguments made by counsel are reflected in the record, the PSI, including any relevant medical records, has not been made part of the record. To the extent that Mr. Withrow's arguments rely on information contained in the PSI, therefore, this Court must presume regularity in the trial court's decision. *See State v. Finklea*, 9th Dist. Summit No. 29069, 2019-Ohio-2199, ¶ 22, citing *State v. Jalwan*, 9th Dist. Medina No. 09CA0065-M, 2010-Ohio-3001, ¶ 12, citing *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980).

{¶11} The record demonstrates that Mr. Withrow pleaded guilty with a complete understanding of the nature of the charges against him and the penalties that he might face. The trial court conducted a thorough plea colloquy, and Mr. Withrow received adequate representation by trial counsel during the proceedings. The essence of his motion to withdraw his guilty plea is that he had a change of heart, and such a change does not justify withdrawing a plea. *West*, 2017-Ohio-8474, at ¶ 7, citing *Brown*, 2007-Ohio-7028, at ¶ 23. Given these circumstances, this Court cannot conclude that the trial court abused its discretion by denying Mr. Withrow's motion to withdraw his guilty plea.

{¶12} Mr. Withrow's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

APPELLANT, CHRISTOPHER WITHROW, WAS DENIED HIS RIGHT TO DUE PROCESS AND OF ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION BECAUSE HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

{¶13} Mr. Withrow’s second assignment of error is that he received ineffective assistance of counsel. He did not argue in the trial court—and has not argued on appeal—that his plea was involuntary because he received ineffective assistance during the plea proceedings. Instead, he has argued that trial counsel’s performance in connection with his motion to withdraw his guilty plea was ineffective. *Compare Jones*, 2012-Ohio-6150, at ¶ 61.

{¶14} This Court must analyze claims of ineffective assistance of counsel under a standard of objective reasonableness. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 142 (1989). Under this standard, a defendant must show (1) deficiency in the performance of counsel “so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” and (2) that the errors made by counsel were “so serious as to deprive the defendant of a fair trial[.]” *Strickland*, 466 U.S. at 687. A defendant must demonstrate prejudice by showing that, but for counsel’s errors, there is a reasonable possibility that the outcome of the trial would have been different. *Id.* at 694. In applying this test, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance[.]” *Id.* at 689.

{¶15} Mr. Withrow has argued that trial counsel was ineffective because he failed to call witnesses or introduce documents related to his mental illness during the hearing on the motion to withdraw his guilty plea. In a direct appeal, however, it is “impossible to determine whether [an] attorney was ineffective in his representation * * * where the allegations of ineffectiveness are

based on facts not appearing in the record.” *State v. Cooperrider*, 4 Ohio St.3d 226, 228 (1983). Consequently, because Mr. Withrow’s argument necessarily relies on proof outside the record, it is not appropriately raised in a direct appeal. *See State v. Madrigal*, 87 Ohio St.3d 378, 390-391 (2000).

{¶16} Mr. Withrow has also argued that trial counsel was ineffective because he did not appear for the first scheduled hearing on the motion to withdraw the plea. The record does not support this assertion. Instead, it appears that trial counsel had a conflict in his schedule because of a medical appointment and arranged for another attorney to appear in his place. In any event, however, the record also reflects that Mr. Withrow also did not attend that hearing—a circumstance that the State attributed to his refusal to be transported from the jail. Finally, Mr. Withrow has argued that trial counsel was ineffective because he was unprepared for the hearing that ultimately occurred on the motion to withdraw. Specifically, he maintains that trial counsel failed to review the pertinent documents so that he could prepare and call witnesses. As noted above, the PSI is not part of the record, so this Court’s ability to review this argument is limited. Nonetheless, the record belies Mr. Withrow’s assertion. During the hearing, the trial court referenced portions of the PSI to which the attorneys did not have access. The trial court provided counsel with an hour to review those documents and to proceed accordingly, and counsel did so. There is no deficiency in trial counsel’s performance apparent from the record in this regard.

{¶17} Mr. Withrow’s second assignment of error is overruled.

III.

{¶18} Mr. Withrow’s assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

LYNNE S. CALLAHAN
FOR THE COURT

CARR, J.
TEODOSIO, J.
CONCUR.

APPEARANCES:

JOCELYN STEFANCIN and KIMBERLY STOUT-SHERRER, Attorneys at Law, for Appellant.

S. FORREST THOMPSON, Prosecuting Attorney, and VINCENT V. VIGLUICCI, Assistant Prosecuting Attorney, for Appellee.