

[Cite as *State v. Williams*, 2010-Ohio-1292.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	CASE NO. 09-MA-74
)	
TAWANA WILLIAMS,)	OPINION
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 08CR952

JUDGMENT: Affirmed

APPEARANCES:
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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: March 22, 2010

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DONOFRIO, J.

{¶1} Defendant-appellant Tawana Williams appeals her conviction in the Mahoning County Common Pleas Court following her guilty plea to burglary. She alleges: (1) her plea was not knowingly, intelligently, and voluntarily entered; (2) error in the denial of her motion to withdraw her guilty plea; and (3) ineffective assistance of trial counsel.

{¶2} On October 9, 2008, a Mahoning County grand jury indicted Williams on one count of burglary in violation of R.C. 2911.12(A)(1)(C), a second-degree felony. Williams pleaded not guilty, the trial court appointed Atty. Edward Carson as counsel, and the case proceeded to discovery and other pretrial matters.

{¶3} On January 20, 2009, the day of trial, the parties reached a plea agreement. Because Williams had no criminal record, the state agreed to amend the indictment from second-degree-felony burglary to fourth-degree-felony burglary in violation of R.C. 2911.12(A)(4) and recommend community control in exchange for Williams' guilty plea. The court conducted the Crim.R. 11 plea colloquy, accepted Williams' guilty plea, ordered a presentence investigation, and set the matter for sentencing on March 19, 2009.

{¶4} Two days prior to sentencing, Williams' counsel, Atty. Carson, required emergency heart surgery and sentencing was continued and reset for April 15, 2009.

{¶5} On April 15, 2009, prior to commencement of the sentencing hearing, substitute counsel for Williams, Atty. Renee M. LaCivita, informed the court of Williams' intention to withdraw her guilty plea. Essentially, according to Williams, she maintained her innocence and Atty. Carson was not prepared to take her case to trial on January 20, 2009. She claims that Atty. Carson advised her to plead guilty as a temporary measure to delay the trial and allow more time to investigate her case. All along, she believed the guilty plea was temporary and would later be withdrawn once her case was fully prepared for trial.

{¶6} The court then heard arguments from both parties relative to the presentence-motion-to-withdraw factors. The court overruled Williams' motion to withdraw after reviewing each of the factors. The court then sentenced Williams to a

two-year community control sanction, no fine, and court costs. This appeal followed.

{¶7} Williams' first assignment of error states:

{¶8} "MS. WILLIAMS'S GUILTY PLEA WAS NOT KNOWINGLY, INTELLIGENTLY, NOR VOLUNTARILY ENTERED."

{¶9} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle* (1996), 74 Ohio St.3d 525, 527, 660 N.E.2d 450. To that end, Crim.R. 11 requires the trial court to follow a certain procedure for accepting guilty pleas in felony cases. Before the court can accept a guilty plea to a felony charge, it must conduct a colloquy with the defendant to determine that they understand the plea they are entering and the rights being voluntarily waived. Crim.R. 11(C)(2).

{¶10} Crim.R. 11(C)(2)(c) sets forth the constitutional rights that the defendant waives by entering the guilty plea. "A trial court must strictly comply with Crim.R. 11(C)(2)(c) and orally advise a defendant before accepting a felony plea that the plea waives (1) the right to a jury trial, (2) the right to confront one's accusers, (3) the right to compulsory process to obtain witnesses, (4) the right to require the state to prove guilt beyond a reasonable doubt, and (5) the privilege against compulsory self-incrimination. When a trial court fails to strictly comply with this duty, the defendant's plea is invalid. (Crim.R. 11[C][2][c], applied.)" *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, syllabus.

{¶11} Crim.R. 11(C) also sets forth the nonconstitutional rights that a defendant must be informed of prior to the court accepting the plea. These rights are that: (1) a defendant must be informed of the nature of the charges; (2) the defendant must be informed of the maximum penalty involved; (3) the defendant must be informed, if applicable, that he is not eligible for probation or the imposition of community control sanctions, and (4) the defendant must be informed that after entering a guilty plea or a no contest plea, the court may proceed to judgment and

sentence. Crim.R. 11(C)(2)(a)(b); *State v. Philpott* (Dec. 14, 2000), 8th Dist. No. 74392, citing *McCarthy v. U.S.* (1969), 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418. For these nonconstitutional rights, the trial court must substantially comply with its mandates. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. Substantial compliance means that under the totality of the circumstances, the defendant subjectively understands the implications of their plea and the rights they are waiving. *Id.* Additionally, when nonconstitutional aspects of the Crim.R. 11 plea colloquy are at issue, the defendant must show prejudice before a plea will be vacated. *Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶17. “To demonstrate prejudice in this context, the defendant must show that the plea would otherwise not have been entered.” *Id.* at ¶15, citing *State v. Nero* (1990), 56 Ohio St.3d at 108, 564 N.E.2d 474.

{¶12} Under this assignment of error, Williams argues that she did not subjectively understand the implications of her guilty plea because of Atty. Carson’s representations to her that the plea was a temporary measure to delay trial since he had not yet fully investigated her case. Williams argues that this misunderstanding would have come to light had the trial court more sufficiently informed her that upon acceptance of her guilty plea the court could proceed to judgment and sentence. Williams also claims that her protestations of innocence would have been revealed to the court had it adequately informed her that her guilty plea was a complete admission of guilt.

{¶13} The state points to the Crim.R. 11 plea colloquy and illustrates how the trial court issued each of the required advisements. Regarding Williams’ argument that she understood the plea to be temporary, the state counters that there is no requirement that the trial court advise a defendant that the plea is not temporary. But, even so, the state notes that the court informed Williams that she would be returning for sentencing and the maximum penalties she would face at that sentencing. (01/20/09 Tr. 6.) As for her maintaining her innocence, the state stresses that the record shows that she did not reveal this until sentencing. And, based on the

totality of the circumstances, the state argues that Williams understood that her plea of guilty was a complete admission of guilt.

{¶14} In this case, the trial court strictly complied with Crim.R. 11's requirement concerning waiver of the enumerated constitutional rights. The court advised Williams that she was waiving: (1) the right to a jury trial (01/20/09 Tr. 4); (2) the right to confront her accuser(s) (01/20/09 Tr. 5); (3) the right to compulsory process to obtain witnesses (01/20/09 Tr. 4-5); (4) the right to require the state to prove guilt beyond a reasonable doubt (01/20/09 Tr. 3, 4); and (5) the privilege against compulsory self-incrimination (01/20/09 Tr. 5).

{¶15} The court more than substantially complied with the requirements relative to the nonconstitutional rights. The court advised Williams of the nature of the charge against her by reading the indictment to her which detailed the elements of the burglary charge (01/20/09 Tr. 3). The court told her the maximum sentence it could impose – 18 months in prison, \$5,000 fine, and three years of post-release control (01/20/09 Tr. 6-7). Williams was eligible for community control and community control was the state's recommended sentence as contained in the written plea agreement. Therefore, the requirement that a court inform a defendant that they are not eligible for probation or the imposition of community control sanctions is inapplicable in this case.

{¶16} Contrary to Williams' assertion, the trial court more than substantially complied with the requirement that it inform her that it could proceed to judgment and sentence. That part of the colloquy went as follows:

{¶17} "THE COURT: The sentencing is always up to the judge. It is not up to your lawyer or up to the prosecutor. And *I do want you to understand we could sentence you today.* We won't. What we'll do is order what's called a presentence report and come back later on for sentencing. When we do come back for sentencing, even with the amendment to a felony of the fourth degree, I do want you to understand the maximum, the most, penalty you can get is 18 months in the penitentiary and \$5,000 fine. *Do you understand that?*

{¶18} “THE DEFENDANT: *Yes, sir.*” (Emphasis added.) (01/20/09 Tr. 6.)

{¶19} Williams argues that the court did not adequately inform her of this right because it did not wait for her assent immediately after saying “we could sentence you today” and instead proceeded directly to the advisement about the maximum sentence. There is no requirement that the trial court elicit a response from the defendant after describing each of the rights. *State v. Benson*, 8th Dist. No. 83178, 2004-Ohio-1677; *State v. Hansbro* (Dec. 22, 2000), 2d Dist. No. 99-CA-93. Moreover, substantial compliance requires only that, under the totality of the circumstances, the defendant subjectively understands the implications of their plea and the rights they are waiving. *Nero*, supra. Here, Williams was represented by counsel, acknowledged that she went over the plea agreement with that counsel, and stated that she understood everything. (01/20/09 Tr. 7-8.) Therefore, based on the above quoted plea colloquy and the totality of the circumstances, it was apparent that Williams subjectively understood that the trial court could immediately proceed to judgment and sentence.

{¶20} Turning to Williams’ argument that the trial court failed to adequately inform her that her guilty plea was a complete admission of guilt, the Ohio Supreme Court addressed this issue in *State v. Griggs*, 103 Ohio St.3d 85, 814 N.E.2d 51, 2004-Ohio-4415. In that case, the defendant pleaded guilty to voluntary manslaughter and burglary. During the plea hearing, the court advised Griggs of potential sentencing consequences and of various rights, including the rights to have a jury trial, to have an attorney, to subpoena witnesses, to confront his accusers, and to avoid compulsory self-incrimination. The court did not inform the defendant that his guilty plea was a complete admission of guilt.

{¶21} The Ohio Supreme Court did not find that this was reversible error. “A defendant who has entered a guilty plea without asserting actual innocence is presumed to understand that he has completely admitted his guilt. In such circumstances, a court’s failure to inform the defendant of the effect of his guilty plea as required by Crim.R. 11 is presumed not to be prejudicial.” *Id.* at syllabus. The

court contrasted the facts of that case with those in *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162, where the defendant pled guilty even while maintaining his innocence. *Id.* at ¶13.

{¶22} In this case, Williams did not make an *Alford* plea. She did not give any indication that she was innocent of the charged offense when she was pleading guilty. Hence, this court must presume that Williams understood that she was admitting her guilt when she pleaded guilty to the charged offense and Williams' argument to the contrary is without support. *State v. Johnson*, 7th Dist. No. 07 MA 8, 2008-Ohio-1065, ¶¶16-18.

{¶23} Accordingly, Williams' first assignment of error is without merit.

{¶24} Williams' second assignment of error states:

{¶25} "THE TRIAL COURT ACTED UNJUSTLY AND UNFAIRLY WHEN FAILING TO GRANT MS. WILLIAMS'S ORAL MOTION TO WITHDRAW HER GUILTY PLEA."

{¶26} Crim.R. 32.1, which governs the withdrawal of a guilty plea, 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." This rule establishes a fairly strict standard for deciding a post-sentence motion to withdraw a guilty plea but provides no guidelines for deciding a presentence motion. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715.

{¶27} Generally, a decision on a presentence plea withdrawal motion is within the trial court's sound discretion. *Id.* at 526, 584 N.E.2d 715. However, the Ohio Supreme Court has stated that it should be "freely and liberally" granted. *Id.* at 527, 584 N.E.2d 715. The trial court must conduct a hearing on the motion to decide if there is a reasonable and legitimate basis for it and that the appellate court, although not reviewing *de novo*, can reverse if the trial court's decision is unfair or unjust. *Id.*

{¶28} This court has adopted various factors to weigh in considering a presentence motion to withdraw a plea: whether the state will be prejudiced by

withdrawal; the representation afforded to the defendant by counsel; the extent of the Crim.R. 11 plea hearing; whether the defendant understood the nature of the charges and potential sentences; the extent of the hearing on the motion to withdraw; whether the trial court gave full and fair consideration to the motion; whether the timing of the motion was reasonable; the reasons for the motion; and whether the accused was perhaps not guilty or had a complete defense to the charge. See, e.g., *State v. Thomas* (Dec. 17, 1998), 7th Dist. Nos. 96CA223, 96CA225, 96CA226, citing *State v. Fish* (1995), 104 Ohio App.3d 236, 240, 661 N.E.2d 788. Consideration of the factors is a balancing test and no one factor is conclusive. *Id.*

{¶29} A balancing of those factors reveals that the trial court did not abuse its discretion in denying the presentence motion to withdraw the guilty plea. The first factor is whether the state will be prejudiced by withdrawal. In this case, the state articulated good reason why it would be prejudiced by withdrawal. At the time Williams entered the plea agreement, the case had been called for jury trial and the state was prepared to go forward with that trial. (04/15/2000, Tr. 5). Witnesses who had been subpoenaed would have to be located again and re-subpoenaed. (04/15/2000, Tr. 5).

{¶30} The second factor is the representation afforded to the defendant by counsel. Williams' claim that Atty. Carson advised her to plead guilty as a temporary measure to more fully investigate her case seems suspect. The prosecuting attorney stated that there were extensive pretrial negotiations and that an experienced criminal lawyer (other than Atty. Carson) also went over the plea agreement with her in great detail. Also, as the transcript of the plea hearing reveals, Williams never indicated any dissatisfaction with her counsel. Moreover, it appears as though her counsel negotiated a good and reasonable plea bargain for her. Facing eight years in prison on the second-degree-felony burglary charge, Williams' counsel was able to negotiate a reduction to a fourth-degree-felony burglary charge in which she faced only eighteen months. Additionally, her counsel was able to get the state to recommend only a two-year community control sanction which the trial court

accepted and implemented.

{¶31} The third and fourth factors, the extent of the Crim.R. 11 plea hearing and whether the defendant understood the nature of the charges and potential sentences, were discussed under Williams' first assignment of error and for the same reasons mentioned there do not weigh in favor of withdrawal.

{¶32} Fifth, the trial court held a hearing on Williams' motion. Sixth, the trial court gave both parties the opportunity to address the factors and then carefully reviewed each of them on its own thus giving full and fair consideration to the motion.

{¶33} The seventh factor concerns whether the timing of the motion was reasonable. Here, the motion was not made until sentencing, approximately three months after the plea. This renders the timing unreasonable and does not weigh in favor of withdrawal. *State v. Scott*, 7th Dist. No. 08 MA 12, 2008-Ohio-5043, ¶22; *State v. Kennedy*, 7th Dist. No. 07 MA 9, 2008-Ohio-1538, ¶23.

{¶34} The eighth factor is the reasons for the motion. Williams contends that her counsel advised that her guilty plea was just a temporary measure to delay trial in order for him to more fully investigate her case. Williams' claim in that regard is unsubstantiated by the record. The oral plea colloquy and the signed, written plea agreement all reveal a calculated and informed decision to plead guilty to the lesser charge in order to avoid prison time.

{¶35} The last factor is whether the accused was perhaps not guilty or had a complete defense to the charge. While Williams asserted her innocence at sentencing, she offered nothing to show that she might not be guilty or had a complete defense to the charge. This court has recognized that the defendant must factually substantiate their claim of a meritorious defense or innocence. *State v. Gallagher*, 7th Dist. No. 08 MA 178, 2009-Ohio-2636, ¶38. Without more, this court will not find that this factor weighs against the trial court's decision denying the motion to withdraw. *Id.*

{¶36} In sum, the record reflects that Williams was represented by competent counsel who was involved in extensive plea negotiations with the state that resulted

in a favorable plea bargain resulting in no prison time. Williams entered her plea on the day set for trial. The state was fully prepared to go forward with that trial and had subpoenaed witnesses. The record also shows that Williams participated in the plea colloquy and understood the ramifications of her guilty plea. The court allowed Williams the opportunity to be heard on her motion to withdraw, and the record reflects that the court gave full and fair consideration to the motion. Moreover, as discussed under the first assignment of error, the trial court complied with Crim.R. 11's plea colloquy requirements.

{¶37} As this court has observed in the past, “[w]hen none of the *Fish* factors weigh heavily in the defendant’s favor regarding the presentence withdrawal of a guilty plea, a strong inference arises that the plea is being withdrawn merely because of a change of heart about entering the plea.” *State v. Moore*, 7th Dist. No. 06 CO 74, 2008-Ohio-1039, ¶13. It is axiomatic that a mere change of heart is an insufficient basis for granting a presentence motion to withdraw a plea. *Id.*, citing *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715. See, also, *State v. Johnston*, 7th Dist. No. 06 CO 64, 2007-Ohio-4620; *State v. Mace*, 7th Dist. No. 06 CO 25, 2007-Ohio-1113; *State v. Burton*, 7th Dist. No. 05-CO-29, 2006-Ohio-893; *State v. Kramer*, 7th Dist. No. 01-C.A.-107, 2002-Ohio-4176.

{¶38} Accordingly, Williams’ second assignment of error is without merit.

{¶39} Williams’ third assignment of error states:

{¶40} “MS. WILLIAMS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.”

{¶41} Under this assignment of error, Williams repeats the argument she advanced under the previous two assignments of error. She claims her counsel was ineffective for advising her to plead guilty as a ploy to delay the trial. She asserts that this advice rendered her guilty plea less than knowing, intelligent, and voluntary.

{¶42} In order to prove ineffective assistance of counsel, an appellant must satisfy a two-prong test. First, an appellant must establish that counsel’s performance was deficient, and second, the deficient performance prejudiced the

defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus.

{¶43} Counsel's effectiveness is "not defined in terms of the best available practice, but rather should be viewed in terms of the choices made by counsel." *State v. Wilkins* (1980), 64 Ohio St.2d 382, 390, 18 O.O.3d 528, 415 N.E.2d 303. The reasonableness of the attorney's decisions must be assessed at the time the decisions are made, and not at the time of a court's assessment. *Id.*

{¶44} Additionally, the Eleventh District has explained:

{¶45} "The mere fact that, if not for the alleged ineffective assistance of counsel, the defendant would not have entered a guilty plea is not sufficient to establish the requisite connection between the guilty plea and the ineffective assistance. Rather, ineffective assistance of trial counsel is found to have affected the validity of a guilty plea when it precluded a defendant from entering his plea knowingly and voluntarily." *State v. Madeline*, 11th Dist. No. 2000-T-0156, 2002-Ohio-1332. (Internal Citations Omitted). See, also, *State v. Mays*, 174 Ohio App.3d 681, 685, 2008-Ohio-128, at ¶9 (Eighth Appellate District adopting Eleventh Appellate District's rationale).

{¶46} The *Madeline* court explained that a guilty plea represents a break in the chain of events that preceded it in the criminal process. Consequently, a defendant who admits his guilt waives the right to challenge the propriety of any action taken by the court or counsel prior to that point in the proceedings unless it affected the knowing and voluntary nature of the plea. This court adopted this standard in *State v. Doak*, 7th Dist. Nos. 03CO15 and 03CO31, 2004-Ohio-1548, at ¶55. See, also, *State v. Fatula*, 7th Dist. No. 07BE24, 2008-Ohio-1544, at ¶¶9, 12.

{¶47} Pursuant to Crim.R. 11, the trial court entered a written journal entry approving Williams' guilty plea, which indicated that the court advised appellant of the effect of her plea, and found that the plea was entered "freely and voluntarily made with full knowledge of the consequences thereof." (Plea Tr. 8.) As explained under

Williams' first assignment of error, the plea hearing record further supports that a colloquy between the court and appellant took place in accordance with Crim.R. 11.

{¶48} Moreover, there is a lack of prejudice. As indicated earlier, her counsel negotiated a favorable and reasonable plea bargain for her. Facing eight years in prison on the second-degree-felony burglary charge, Williams' counsel was able to negotiate a reduction to a fourth-degree-felony burglary charge in which she faced only eighteen months. Additionally, her counsel was able to get the state to recommend only a two-year community control sanction which the trial court ultimately accepted and implemented.

{¶49} Accordingly, Williams' third assignment of error is without merit.

{¶50} The judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.