

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio

Court of Appeals No. OT-12-028

Appellee

Trial Court Nos. CRB 1000942 A
CRB 1000942 C

v.

Christopher Posey

DECISION AND JUDGMENT

Appellant

Decided: May 9, 2014

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney, and
Emily M. Gerber, Assistant Prosecuting Attorney, for appellee.

Ron Nisch, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Municipal Court, which resentenced defendant-appellant, Christopher Posey, following its denial of appellant's motion to withdraw his no contest plea. Appellant now challenges that judgment through the following assignment of error:

The trial court abused its discretion in denying appellant's motion to withdraw his plea, by not properly applying the permissive pre-sentence standards of *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992) for withdrawal of a plea.

{¶ 2} The relevant facts of this case are as follows. On July 12, 2010, appellant was charged with three counts of misdemeanor assault in violation of R.C. 2903.13(A). He initially pled not guilty to all charges, but on October 4, 2010, when the case was set for trial, the parties notified the court that they had reached an agreement. Appellant then withdrew his not guilty plea and pled no contest to two counts, with the state dismissing the third count. During the colloquy, the court ascertained that by entering the no contest plea, appellant understood that on each count he was facing up to six months in jail and up to a \$1,000 fine. The court found appellant guilty on both counts and ordered a presentence investigation ("PSI") report. At sentencing, under the court's "standard" procedure, it did not permit appellant or his counsel to view that report. The court then imposed a fine and sentenced appellant to 180 days in jail, with 90 days suspended, as to each count, with the terms to run consecutively.

{¶ 3} Appellant appealed that judgment to this court on the ground that the trial court erred in sentencing him without providing him or his attorney access to the PSI report. We agreed, and in a decision of March 16, 2012, we reversed the trial court's judgment and remanded the case for re-sentencing consistent with our decision. *State v. Posey*, 6th Dist. Ottawa No. OT-10-044, 2012-Ohio-1108.

{¶ 4} Following our remand, appellant filed a motion for leave to withdraw his no contest plea in the court below. Appellant asserted that because his former counsel misrepresented the terms of the negotiated plea agreement, he should be permitted to withdraw his plea. On June 8, 2012, the lower court held a hearing on appellant's motion. During that hearing, appellant testified that on the day that his case was set for trial, he met his prior attorney for the first time. Appellant stated that he stayed in the hall while his attorney conducted negotiations in a room off the hall with someone appellant could not see. He testified that his attorney then told him if he was willing to change his plea to no contest and pay the maximum fines, he would not serve any jail time. Appellant stated that he agreed to those terms and changed his plea. When he returned to court to be sentenced, however, the sentence imposed did not correspond with the sentence his attorney represented to him. He further testified that if his case were to proceed to trial, he would claim self-defense. The state objected to the motion and asserted that given the amount of time that had transpired, the state would be prejudiced if the plea were vacated because there could be an issue with regard to the accuracy of witnesses' testimony. In addition, the state asserted that appellant failed to show that his plea was not knowing and voluntary and questioned appellant's credibility.

{¶ 5} On July 5, 2012, the lower court issued a decision and judgment denying appellant's motion for leave to withdraw his plea. The court applied the standards applicable to presentence motions, as set forth in *Xie, supra*, and concluded that appellant had failed to show a reasonable and legitimate basis for withdrawal of the plea.

Specifically, the court noted that appellant was notified by the court at both the arraignment and the change of plea hearing, of the potential penalties he faced. Additionally, the court stated that the case was set for trial on October 4, 2010, at which time appellant could have confronted his accusers and presented his defense. Instead, appellant chose to enter the no contest plea. Subsequently, the lower court resentenced appellant in compliance with our mandate.

{¶ 6} In his sole assignment of error, appellant asserts that the lower court erred in denying his motion to withdraw his plea by failing to properly apply the permissive presentence standards set forth in *Xie, supra*.

{¶ 7} Generally, a Crim.R. 32.1 presentence motion to withdraw a guilty plea or plea of no contest is to be freely and liberally granted, although there is no absolute right to withdraw a plea prior to sentencing. *Xie, supra*, at paragraph one of the syllabus. In *Xie*, the Supreme Court of Ohio directed that a trial court conduct a hearing on such a motion “to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.” *Id.* A trial court’s decision granting or denying a presentence motion to withdraw a no contest plea is within the court’s sound discretion and will not be reversed on appeal absent an abuse of that discretion. *Id.* at paragraph two of the syllabus. The term “abuse of discretion” implies that the trial court’s attitude in reaching its decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 8} In determining whether a trial court abused its discretion in denying a presentence motion to withdraw a no contest plea, a reviewing court weighs a list of factors, including:

(1) whether the prosecutor would be prejudiced if the plea was vacated;
(2) whether the accused was represented by highly competent counsel;
(3) whether the accused was given a full Crim.R. 11 hearing; (4) whether a full hearing was held on the motion; (5) whether the trial court gave full and fair consideration to the motion; (6) whether the motion was made within a reasonable time; (7) whether the motion set forth specific reasons for the withdrawal; (8) whether the accused understood the nature of the charges and possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense to the crime. *State v. Eversole*, 6th Dist. Erie Nos. E-05-073, E-05-074, E-05-075, and E-05-076, 2006-Ohio-3988, ¶ 13, citing *State v. Fish*, 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1st Dist.1995).

{¶ 9} Finally, a change of heart or mistaken belief about pleading guilty or no contest is not a reasonable basis that requires a trial court to permit the defendant to withdraw his plea. *State v. Lambros*, 44 Ohio App.3d 102, 103, 541 N.E.2d 632 (8th Dist.1988).

{¶ 10} Appellant asserts that because he was not provided with adequate representation with regard to his plea of no contest and because he had a defense to the

charges of assault, the lower court erred in denying his motion. Essentially, appellant contends that the lower court did not afford these factors proper weight.

{¶ 11} Reviewing the record in its entirety, however, we cannot say that the lower court abused its discretion in denying appellant's motion to withdraw his plea. The motion was filed nearly two years after appellant was first charged with the assaults and approximately one year after appellant entered his plea. As the state asserted at the full hearing on appellant's motion, and as the court acknowledged, over that time period, witnesses' memories have likely faded, thereby prejudicing the state's case. While appellant did set forth specific reasons for the withdrawal, he did not make his request until after his case was remanded back to the trial court from this court, despite the fact that he learned on November 22, 2010, that his sentence included jail time. That delay in filing the motion does not weigh in his favor.

{¶ 12} Appellant focuses primarily on the second factor, that he was not represented by competent counsel in the negotiations that led him to enter the no contest plea. The crux of his ineffective assistance argument, however, is that his counsel misrepresented the nature of the plea agreement and did not adequately investigate appellant's defense of self-defense. Regardless of what appellant's counsel may have told him, the record reveals that the lower court twice informed appellant of the possible penalties he was facing and that by entering a no contest plea, he was waiving his right to a trial and all that entailed. Indeed, appellant does not assert that he was not provided with a full Crim.R. 11 hearing when he entered his plea.

{¶ 13} As to appellant’s assertion that he had a defense to the assault charges, the record only includes appellant’s claim of self-defense. This court has consistently held that it will not accept a defendant’s claim of innocence without an offer of evidence to support the claim. *State v. Richey*, 6th Dist. Sandusky No. S-09-028, 2011-Ohio-280, ¶ 63, *State v. Scott*, 6th Dist. Sandusky No. S-05-035, 2006-Ohio-3875, ¶ 13. This case differs markedly from *State v. Kutnyak*, 6th Dist. Wood No. WD-11-038, 2012-Ohio-3410, upon which appellant relies for his assertion that because he has asserted a defense to the charges, the lower court erred in denying his motion to withdraw. In *Kutnyak*, the defendant sought to withdraw a guilty plea to a charge of gross sexual imposition. He asserted that he had discovered evidence, which he listed, to support his defense of consent, and discovered witnesses who could impeach the victim’s testimony. The trial court denied the motion and the defendant appealed. Upon review, we determined that the defendant’s presentation of evidence in support of his defense of consent required a reversal. In particular, we held that appellant demonstrated that his motivation for withdrawing his plea was based on more than a change of heart because he identified evidence and witnesses which, if believed, would enable him to obtain an acquittal.

{¶ 14} In the present case, appellant did not provide the lower court with evidence or information that it did not have prior to its initial sentencing of appellant. As such, the court was left with evaluating the credibility of one witness, appellant. The court found that because appellant was either mistaken or willfully not forthcoming on matters which were a matter of record, his testimony was “none too reliable.” We cannot say that the

court erred in reaching this conclusion and, therefore, cannot find that this factor weighs in appellant's favor.

{¶ 15} Contrary to appellant's assertion, the lower court treated his motion as a presentence motion to withdraw pursuant to *Xie*, and gave full and fair consideration to that motion. Having reviewed the record in this case in light of the nine factors set forth in *Fish*, 104 Ohio App.3d 236, 661 N.E.2d 788, we conclude that the lower court did not abuse its discretion in denying appellant's motion to withdraw his no contest plea. The sole assignment of error is not well-taken.

{¶ 16} On consideration whereof, the court finds that the judgment of the Ottawa County Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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