[Cite as *State v. Dezanett*, 2015-Ohio-1263.]

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

State of Ohio — Court of Appeals No. WD-14-024

Appellee — Trial Court No. 2013CR0312

v.

Lucas T. Dezanett — **DECISION AND JUDGMENT**

Appellant — Decided: March 31, 2015

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Aram M. Ohanian and David T. Harold, Assistant Prosecuting Attorneys, for appellee.

Joanna M. Orth, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Defendant-appellant, Lucas T. Dezanett, appeals the March 24 and April 14, 2014 judgments of the Wood County Court of Common Pleas denying his motion to withdraw his plea of guilty under Crim.R. 32.1 and sentencing him to consecutive prison

terms following his conviction of sexual battery and rape. For the reasons that follow, we affirm as to Dezanett's first assignment of error, and reverse and remand as to his second assignment of error.

I. Background

{¶ 2} Dezanett was indicted on three counts of rape and one count of gross sexual imposition for allegedly engaging in sexual conduct with his stepdaughter between October 31, 2010 and October 30, 2011. She was under age 13 at the time of the offenses. A second indictment was filed, charging Dezanett with an additional count of rape. The two indictments were merged on July 17, 2014, and Dezanett entered pleas of not guilty as to all counts. Dezanett was represented by the Wood County public defender's office, however, the first public defender assigned to the case withdrew and the case was reassigned within that office to attorney Kathleen Hamm.

{¶ 3} After a number of pretrials and negotiations, a plea agreement was reached on January 10, 2014, pursuant to which Dezanett would enter a plea of guilty under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), to one count of rape, a violation of R.C. 2907.02(A)(1)(b), and an amended charge of sexual battery, a violation of R.C. 2907.03(A)(5). The remaining counts would be dismissed. It was agreed that a sentence of 14 years would be recommended and Dezanett would be subject to the requirements of Tier III sex offender classification, as well as a period of postrelease control.

{¶ 4} At the plea hearing, the court engaged in a colloquy with Dezanett during which it advised Dezanett of the constitutional rights he was waiving by entering a plea. The court determined that Dezanett was entering his plea knowingly, voluntarily, and intelligently, and accepted the plea.

{¶ 5} A sentencing hearing was scheduled for February 21, 2014, on which date Dezanett requested new counsel and sought to withdraw his guilty plea. New counsel was appointed and a hearing on the motion to withdraw the guilty plea was scheduled. On March 13 and 19, 2014, hearings were held at which Dezanett and Hamm testified, and the parties made closing arguments. Dezanett testified that he was sleep-deprived on the day he entered the plea and that he had entered the plea under the duress of his attorney, who made him feel that he had no choice but to enter the plea. The trial court denied Dezanett's motion on March 24, 2014.

{¶ 6} On April 8, 2014, the trial court sentenced Dezanett to a five-year prison term on the sexual battery conviction and eleven years on the rape conviction, to be served consecutively. Dezanett appealed and assigns the following errors for our review:

> DEFENDANT/APPELLANT'S PLEA SHOULD BE VACATED AS THE COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT/APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA.

DEFENDANT/APPELLANT'S SENTENCE SHOULD BE VACATED AS THE TRIAL COURT FAILED, AS A MATTER OF LAW, TO MAKE SPECIFIC FINDINGS OF FACT BEFORE IMPOSING CONSECUTIVE SENTENCES PURSUANT TO OHIO REVISED CODE §2929.14(C)(4).

II. Law and Analysis

A. Motion to Withdraw a Guilty Plea

{¶ 7} In his first assignment of error, Dezanett claims that the trial court abused its discretion when it denied his motion to withdraw his guilty plea. Dezanett correctly observes that under Crim.R. 32.1, a presentence motion to withdraw a guilty plea should be freely and liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992), citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). Having said this, a defendant does not have an absolute right to withdraw a plea prior to sentencing. *Id*. Moreover, a defendant may not withdraw his plea merely because he has a change of heart or a mistaken belief about pleading guilty. *State v. Posey*, 6th Dist. Ottawa No. OT-12-028, 2014-Ohio-1994, ¶ 9.

{¶ 8} The trial court, therefore, must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. In making that determination, there are a number of factors that the trial court should consider:

> (1) whether the state would be prejudiced by withdrawal; (2) the representation afforded to the defendant by counsel; (3) the extent of the

> Crim.R. 11 plea hearing; (4) the extent of the hearing on the motion to withdraw; (5) whether the trial court gave full and fair consideration to the motion; (6) whether timing of the motion was reasonable; (7) the reasons for the motion; (8) whether the defendant understood the nature of the charges and potential sentences; and (9) whether the accused was perhaps not guilty or had a complete defense to the crime. *State v. Richey*, 6th Dist. Sandusky No. S-09-028, 2011-Ohio-280, ¶ 42, citing *State v. Fish*, 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1995).

{¶ 9} We review the trial court's decision for an abuse of discretion. *Xie* at 527. Absent an abuse of discretion on the part of the trial court in making the ruling, its decision must be affirmed. *Id.* An abuse of discretion is more than an error of judgment. It suggests that the trial court's ruling was "unreasonable, arbitrary or unconscionable." *Id.* Further, in determining whether a trial court abused its discretion, we, like the trial court, should weigh the *Fish* factors. *Posey* at ¶ 8.

{¶ 10} At the March 13, 2014 hearing on his motion, Dezanett claimed that other than showing him a letter that he had written to the victim, Hamm failed to provide him with the discovery she received from the state, "dodged" his questions, gave him no copies of court filings, and interviewed no witnesses, deeming them "irrelevant." He testified that on the day he entered his plea, he worked from 10:00 p.m. the night before until 6:30 a.m. that morning. He stated that he had gotten only a few hours of sleep, was worn out, and was not thinking clearly. He called Hamm at 8:00 a.m. that morning to tell

her that he did not want to accept the state's offer and she told him to come in at 1:00 p.m. so they could talk before the 3:00 p.m. hearing.

{¶ 11} Dezanett alleged that when they met, Hamm again showed him the letter and told him that his defense was hopeless and that a jury would convict him. He said that under the "duress" of his lack of sleep and the grim outlook provided by his attorney, he entered the plea. He admitted that he and Hamm went over the paperwork for one and one-half hours before he entered the plea and that he asked "two or three" questions of Hamm during that time, however, he claimed not to recall her answers. He insisted that on the first business day following the entry of his plea, he called Hamm and told her that he wished to withdraw the plea. He complained that he did not have all the information he needed to make an informed choice about whether to enter the plea.

{¶ 12} In response to the state's questions, Dezanett—who testified that he has two associate degrees in electrical robotics and industrial electricity—conceded that Hamm presented the state's offers to him, talked to him at least twice about the potential penalties he faced if convicted, and discussed the consequences of entering a plea. He estimated that he talked to Hamm once a month between the time of his June 2013 arraignment and his January 10, 2014 plea. He also spoke to the public defender's investigator once or twice. He said that he maintained his innocence at all times. He recalled that Hamm did interview one witness, talked about the anticipated evidence, discussed with him her assessment of how the jury would view the state's evidence, and told him of various motions she filed. He admitted that he signed the paperwork, asked

some questions that were answered by the trial court, and ultimately told the judge that he understood the consequences of his plea.

{¶ 13} Hamm, who has been with the Wood County public defender's office for 30 years and is currently the chief public defender, provided a timeline of her contacts with Dezanett based on notes kept by her and others in her office. Their contacts included office meetings, pretrials, and phone contact. On one occasion in September of 2013, she met with him for approximately two hours at which time she reviewed the state's discovery with him. She said they discussed the evidence and potential witnesses. In particular, she recalled that they discussed a letter he wrote to the victim which she explained was an essential piece of evidence.[1] She said that they would have discussed this letter every time they met. She acknowledged that it was not her practice to provide her clients with copies of research, motions, or the state's discovery unless they specifically requested copies. Hamm said Dezanett never requested copies until after he entered the plea.

{¶ 14} Hamm recalled that Dezanett had questions at all stages of the proceedings and she answered those questions. In her view, he seemed satisfied with her answers. She shared her opinions and assessment of the evidence. She kept him informed of anticipated legal arguments and motions filed, including to appoint an investigator, compel more specific bill of particulars, compel compliance with Crim.R. 16, order a

[1] At the January 10, 2014 hearing, the state indicated that it was this letter that first led to concerns about the nature of Dezanett's relationship with his stepdaughter.

competency evaluation, require the prosecutor to provide notice of "other bad acts" evidence, suppress statements, appoint an expert witness, and dismiss one count of the indictment. Hamm also requested enhancement of an audio recording. Hamm provided Dezanett with her best estimation of the chances of success on each motion.

{¶ 15} Hamm described that she had a four-hour meeting with Dezanett's wife and also spoke to Dezanett's brother. At some meetings, she spoke with Dezanett alone and then brought his wife in to participate in the discussions. There were meetings between Dezanett and the private investigator and Hamm's office's investigator as well.

{¶ 16} The state originally extended an offer that included a recommendation of a 16-year prison term. Hamm said that she discussed this with Dezanett at a December 13, 2013 pretrial, but Dezanett needed time to think about it. They met on January 9, 2014, to discuss it—the offer had a deadline of January 10, 2014, which was also the date the court would be hearing Dezanett's pending motions. Hamm met with Dezanett for two hours to discuss the value of and the problems with each witness and to go through the evidence piece-by-piece and how it would be perceived by a jury. They discussed Dezanett's right to trial and the consequences of accepting a plea agreement. She described that Dezanett was still not comfortable making a decision right away so she asked him to call her by the end of the day. She denied that she told him that he had to accept the plea agreement. He left her a message that he was declining the offer.

{¶ 17} Hamm said that the January 10, 2014 hearing was scheduled for 3:00 p.m. She asked Dezanett to meet with her at 1:30. Although he complained of being tired, he

seemed to have his faculties about him. The prosecutor presented another offer which included a recommended 14-year prison term. This offer would allow Dezanett to enter an *Alford* plea instead of a plea of guilty—she testified that this was not something that was routinely permitted in Wood County. She believed she told the prosecutor that the *Alford* plea was necessary to Dezanett accepting its offer because he had always maintained his innocence. Hamm explained the *Alford* plea to Dezanett and answered other questions he had. She discussed with him his right to go to trial. Hamm gave him her opinion that he would likely be convicted on the evidence the state intended to present. She said that he appeared satisfied with her responses to his questions except that he seemed skeptical about whether the state of Ohio was authorized to prosecute criminal proceedings in the first place. (This was a question he ultimately posed to the trial judge when he entered his plea.) Hamm showed him research that she believed answered this question for him.

{¶ 18} Dezanett eventually agreed to accept the state's offer. Hamm went over the paperwork with him. She described that the first set of paperwork she received from the state was "a mess," replete with errors. They had to be corrected and she went over the paperwork with Dezanett paragraph by paragraph. She recalled that the court and the state were very patient during this process. She testified that Dezanett signed the papers and that she did not force him to do so. He entered the *Alford* plea. She was comfortable with his making this decision because he seemed to understand what he was doing.

{¶ 19} Hamm was not aware that Dezanett called her office on the next business day to express his desire to withdraw his plea. It was her recollection that he left her a message about withdrawing his plea on the day before the sentencing hearing. She did recall that before and shortly after entering the plea, he asked her what would be involved in withdrawing his plea and to "look into" it, but he did not actually state that he wanted to withdraw his plea until the day before sentencing. She prepared a written motion for him, but the court allowed her to withdraw from the case and appointed substitute counsel, so she did not file the motion.

{¶ 20} The trial court denied Dezanett's motion, finding that Dezanett's motion was premised on a mere change of heart. It summarized the thorough plea hearing it conducted at which Dezanett knowingly, intelligently, and voluntarily entered his plea. It recognized the high caliber of representation he was afforded and found that the state would be prejudiced if the motion was granted because one of its key witnesses had retired and moved out of state.[2]

{¶ 21} Dezanett argues that the trial court abused its discretion in denying his motion. Despite Hamm's testimony and the court's findings, he maintains that counsel did not adequately represent him by failing to provide him with copies of discovery, court filings, and research. He claims that the Crim.R. 11 hearing demonstrates that he was confused and did not understand the nature and penalties of his plea. Dezanett also

[2] The state represented this to the court in its closing argument at the March 19, 2014 hearing.

maintains his innocence and urges that the state would not be prejudiced if he is permitted to withdraw the plea.

{¶ 22} The state responds that the trial court did not abuse its discretion because all the *Fish* factors weigh in favor of denying his motion. It claims that Dezanett was represented by highly competent counsel who filed a number of motions on Dezanett's behalf, reviewed pretrial discovery with Dezanett, answered his questions, and reviewed with him the terms of the plea agreement for the hour and one-half before the plea hearing. He was afforded a full Crim.R. 11 hearing at which he never indicated that he was confused and affirmatively answered questions regarding his waiver of rights. This demonstrates, the state argues, that Dezanett fully understood the nature of the charges and the potential penalties. The state also argues that Dezanett was given a full hearing on his motion to withdraw and that the trial court gave full and fair consideration in reaching its decision. The state concludes that these factors weigh in favor of finding that the trial court's decision was reasonable and that it did not abuse its discretion.

{¶ 23} We agree with the state and with the trial court's conclusion. As the court recognized, Dezanett was afforded a full Crim.R. 11 hearing before entering his plea. At that hearing, he was represented by experienced, competent counsel who advised him and answered his questions. Dezanett assured the court that he was unimpaired and understood what he was doing. Although Dezanett required clarification as to whether there was a distinction between "the prosecutor" and "the state," and asked what the terms of postrelease control would be—a question the trial judge told Dezanett he was

unable to answer— the trial court observed nothing to suggest that Dezanett was confused in acknowledging the rights he would be waiving by entering a guilty plea.

{¶ 24} In addition to the thorough plea hearing, the trial court conducted an extensive hearing on Dezanett's motion and heard testimony from both Dezanett and Hamm. The record demonstrates that the court gave full consideration to Dezanett's motion and found no merit to his claim of "duress" caused by a lack of sleep or pressure by Hamm. It also found that the state would be prejudiced due to the retirement and relocation of one of its key witnesses. We find no abuse of discretion in the trial court's conclusions. Accordingly, we find that the court properly denied Dezanett's motion to withdraw his guilty plea and we find Dezanett's first assignment of error not well-taken.

B. Consecutive Sentences

{¶ 25} In his second assignment of error, Dezanett argues that the trial court failed to make the required factual findings under R.C. 2929.14(C)(4) before imposing consecutive sentences.

{¶ 26} As an appellate court, we review felony sentences under R.C. 2953.08(G)(2). *State v. Goings*, 6th Dist. Lucas No. L-13-1103, 2014-Ohio-2322, ¶ 20. We may increase, modify, or vacate and remand a judgment only if we clearly and convincingly find that: (1) "the record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14, * * *" or (2) "the sentence is otherwise contrary to law." *Id.*, citing R.C. 2953.08(G)(2). "Notably, we do not review the trial

court's sentence for an abuse of discretion." R.C. 2953.08(G)(2); *State v. Washington*, 6th Dist. Lucas No. L-13-1201, 2014-Ohio-2565, ¶ 6.

{¶ 27} R.C. 2929.14 (C)(4) provides as follows:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 28} The Supreme Court of Ohio recently held that "a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29. It further stated that "a trial court's inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law; rather, such a clerical mistake may be corrected by the court through a *nunc pro tunc* entry to reflect what actually occurred in open court." *Id.* at ¶ 30.

{¶ 29} Here, the trial court detailed the harm caused by Dezanett's conduct and noted his failure to take responsibility for his actions. It specifically found at the sentencing hearing "that any single sentence would not sufficiently punish the offender or protect the public in this case." It failed, however, in either the sentencing entry or at the sentencing hearing, to make any of the findings set forth in R.C. 2929.14(C)(4)(a), (b), or (c). As to provision (a), the court made no finding that the offense occurred while Dezanett was awaiting trial or sentencing, was under postrelease control, or was subject to any other sanction described in that provision. As to (b), the court made no finding

that Dezanett's multiple offenses were committed as part of one or more courses of conduct, and that the harm caused was so great or unusual that no single prison term adequately reflects the seriousness of his conduct. And as to (c), while the court did find that "that any single sentence would not sufficiently punish the offender or protect the public in this case," the record is silent as to whether Dezanett had a criminal history.

{¶ 30} Because it is not clear from either the sentencing entry or the transcript of the sentencing hearing that the court found any of the statutory factors set forth in R.C. 2929.14(C)(4) necessary in imposing consecutive sentences, we must remand this matter to the trial court for resentencing. Dezanett's second assignment of error is, therefore, well-taken.

IV. Conclusion

{¶ 31} We find Dezanett's first assignment of error not well-taken; however, we find his second assignment of error well-taken. We affirm the March 24, 2014 judgment of the Wood County Court of Common Pleas, but we reverse its April 14, 2014 judgment and remand the matter to the trial court for resentencing. The costs of this appeal are to be shared equally by the parties under App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

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