

[Cite as *State v. Furguson*, 2004-Ohio-1718.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLINTON COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2003-04-008
 :
 -vs- : O P I N I O N
 : 4/5/2004
 :
 CHUCK FURGUSON, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI2002-5166

William E. Peelle, Clinton County Prosecuting Attorney, Deborah
S. Quigley, 103 E. Main Street, Wilmington, OH 45177, for
plaintiff-appellee

Rose & Dobyys Co., L.P.A., J. Michael Dobyys, 97 N. South
Street, Wilmington, OH 45177, for defendant-appellant

POWELL, P.J.

{¶1} Defendant-appellant, Chuck Furguson, appeals the deci-
sion of the Clinton County Court of Common Pleas denying his
motion to withdraw his guilty plea after he pled guilty to two
counts of rape. We affirm the common pleas court's decision.

{¶2} In October 2002, appellant was indicted for five counts of rape in violation of R.C. 2907.02(A) (1) (b). The indictment stemmed from appellant's alleged sexual conduct with two minors under the age of 13. On December 10, 2002, appellant entered a plea of "not guilty" and the case was set for trial on February 5, 2003. However, on January 28, 2003, appellant changed his plea and entered a plea of "guilty" to two of the rape counts. The state agreed to dismiss the three remaining counts. At the conclusion of a plea hearing, the common pleas court determined that appellant had knowingly, voluntarily, and intelligently entered his guilty plea. The common pleas court subsequently convicted appellant of two counts of rape. On February 18, 2003, the common pleas court ordered that appellant undergo a psychological evaluation, and set a hearing date to determine whether it should classify appellant as a sexual predator.

{¶3} On February 27, 2003, appellant filed a motion to vacate his guilty plea. In that motion, appellant asserted that he was innocent and that there was no forensic evidence to prove the charges. Appellant also stated that he had been having "health problems which affect his mind and thinking." The common pleas court set a hearing date of March 5, 2003 for the motion. On the date of the hearing, appellant withdrew his motion both orally and in writing. Appellant also reaffirmed his guilty plea at that time. The court then proceeded to conduct a

sexual predator hearing. Appellant conceded that he was a sexual predator and the court made that finding.

{¶4} On March 6, 2003, appellant, acting pro se, filed another motion to withdraw his guilty plea. In that motion, appellant asserted that he was not aware of the possible penalties he would receive, and that his attorney failed to provide him with the state's "discovery package" upon his request. On March 7, 2003, appellant filed a pro se motion for new counsel. After a hearing on March 18, 2003, the court denied both of appellant's motions. The court subsequently sentenced appellant to two, concurrent seven-year prison terms for the two rape counts.

{¶5} Appellant now appeals the common pleas court's decision denying his motion to withdraw his guilty plea and his motion for new counsel. Appellant assigns two errors.

{¶6} Assignment of Error No. 1:

{¶7} "THE COURT ABUSED ITS DISCRETION TO THE PREJUDICE OF THE APPELLANT BY REFUSING TO GRANT HIS PRE-SENTENCE MOTION TO WITHDRAW HIS GUILTY PLEA."

{¶8} In this assignment of error, appellant argues that the common pleas court should have granted his pro se motion to withdraw his guilty plea filed March 6, 2003. Appellant argues that the common pleas court did not conduct a proper hearing on his motion, and that he had a "reasonable and legitimate reason" to withdraw his guilty plea.

{¶9} Crim.R. 32.1 provides as follows:

{¶10} "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."

{¶11} Generally, a motion to withdraw a guilty plea, filed before sentencing, should be freely and liberally granted. State v. Xie (1992), 62 Ohio St.3d 521, 526. Nevertheless, a defendant does not have "an absolute right to withdraw a guilty plea prior to sentencing." *Id.* at paragraph one of the syllabus. Rather, the trial court must conduct a hearing to determine whether there is a "reasonable and legitimate basis for the withdrawal of the plea." *Id.*

{¶12} The decision to grant or deny a presentence motion to withdraw a guilty plea rests within the trial court's discretion. Xie, 62 Ohio St.3d at paragraph two of the syllabus. A reviewing court defers to the judgment of the trial court because "the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *Id.* at 525, quoting State v. Smith (1977), 49 Ohio St.2d 261, 264. Absent an abuse of discretion, the trial court's decision to grant or deny a motion to withdraw a guilty plea must be affirmed. Xie at 527. An abuse of discretion implies that the trial court's ruling was "unreasonable, arbitrary, or unconscionable." *Id.*, quoting State v. Adams (1980), 62 Ohio St.2d 151, 157.

{¶13} In determining whether to grant a motion to withdraw a guilty plea, the trial court should consider the circumstances surrounding the defendant's plea, including whether the defendant was represented by competent counsel at a full hearing and voluntarily waived his right to a trial. See State v. Hamblin (Mar. 26, 2001), Butler App. No. CA2000-07-154. In addition, the court should examine whether the withdrawal of the plea will prejudice the prosecution, the timing of the motion, the reasons given for the withdrawal, the defendant's understanding of the charges and penalties, and the existence of a meritorious defense. State v. Fish (1995), 104 Ohio App.3d 236, 240.

{¶14} We first examine the circumstances surrounding appellant's guilty plea. The record shows that the common pleas court properly conducted a plea hearing in accordance with Crim.R. 11. The court took great care in advising appellant of the rights he was waiving by pleading guilty, including the right to a jury trial. Appellant indicated that he did not have any questions for the court about the rights he was waiving or the consequences of his plea. He also indicated that he was satisfied with the performance of his attorney. Further, appellant stated that the prescription drug he was taking did not affect his ability to understand the proceedings. The court read aloud the facts of the offenses, and appellant stated that he was admitting to those facts. Shortly before the court asked appellant how he wanted to plead, the court asked appellant the following: "Do you understand you still don't have to do this

unless you really want to?" Appellant stated that he understood. In addition to orally pleading guilty, appellant signed a written guilty plea, which stated the facts of the crimes and the precise rights he was waiving. At the conclusion of the hearing, the court found that appellant had knowingly, voluntarily, and intelligently pled guilty to the first two rape counts in the indictment.

{¶15} We now examine appellant's interaction with the court on March 5, 2003, when he withdrew his motion to vacate his guilty plea and reaffirmed his guilty plea. Appellant faxed a letter to the common pleas court judge on March 4, 2003, which stated the following: "I Chuck Ferguson want to keep my guilty plea of 3-20 years. I can't take a chance of not seeing my kids again. I am sorry for all the confusion, but I've been really mixed up." At the hearing on March 5, 2003, appellant indicated to the court that he had discussed the matter with his attorney and that his attorney had answered all his questions regarding the matter. Appellant told the court that it was his intention to withdraw his motion to vacate his guilty plea, and that he still wanted to plead guilty. Appellant signed a written waiver indicating that, after discussions with his attorney, he was voluntarily consenting to the withdrawal of his motion to vacate his guilty plea. The waiver further stated that appellant understood that, by withdrawing his motion, he was re-affirming his guilty plea entered on January 28, 2003.

{¶16} After examining the circumstances surrounding the entering of appellant's guilty plea and his later re-affirmance of that plea, it is clear from the record that appellant voluntarily waived his right to a trial. The record shows that the common pleas court took great care in explaining to appellant the rights he was waiving, ensuring that appellant understood the nature of the proceedings and the consequences of his plea. The record further shows that the court conducted the plea hearing in accordance with Crim.R. 11. Additionally, nothing in the record indicates that appellant's counsel at the January 28, 2003 plea hearing and the March 5, 2003 hearing was not competent.

{¶17} We now examine the legitimacy of the reasons appellant asserted in his March 6, 2003 motion to vacate his guilty plea. In the motion, he stated that though the common pleas court judge had advised him that his sentence could exceed seven years, he had not agreed to that possibility in his negotiated plea with the state. Appellant also asserted in the motion that his attorney had not provided him with his "discovery package." Appellant stated that he should have been allowed to review the discovery package in deciding whether or not to enter a guilty plea. Therefore, appellant argued, the court should allow him to withdraw his plea.

{¶18} Appellant's assertion that he was not aware that his sentence could be greater than seven years is without merit. While the state had recommended a total of seven years for both

counts, the court made very clear to appellant at the January 28, 2003 hearing and the March 5, 2003 hearing that it could impose more or less than that sentence if the court thought a different sentence was justified. Further, appellant's faxed letter of March 4, 2003 indicates that appellant was aware that the possible penalty for both counts was three to 20 years. In that letter, appellant stated, "I *** want to keep my guilty plea of 3-20 years." Further, the written guilty plea that appellant signed on January 28, 2003 indicates that the possible penalty for each rape count was three to ten years. Finally, at the January 28, 2003 hearing, appellant stated that he did not have any questions as to the maximum penalty possible. We note that appellant ultimately received the seven-year sentence the state recommended.

{¶19} With regard to the "discovery package," appellant's attorney stated at the March 18, 2003 hearing that the only discovery received from the state was the names and addresses of the state's witnesses, as well as appellant's criminal history. The state's witnesses included the victims, the mothers of the victims, police officials, and two other witnesses who were to testify as to prior bad acts. Appellant's attorney stated that he explained to appellant the discovery received from the state, but that appellant believed he was withholding additional material.

{¶20} At the March 18, 2003 hearing on appellant's motion to vacate his guilty plea, appellant presented additional reasons

for withdrawing his guilty plea. Appellant told the court that he wanted to withdraw his plea because he was "messed up" on his prescription medication, and that he "never understood the law." Appellant also asserted that his attorney talked him into pleading guilty, and that his attorney was "working for the state."

{¶21} Appellant's claim that his prescription medication affected his ability to knowingly, voluntarily, and intelligently enter a plea is contradicted by evidence in the record. Appellant stated at his January 28, 2003 plea hearing that his prescription medication did not affect his mental processes or his ability to think clearly. Appellant also stated that he believed his head was clear and that he understood why he was at the plea hearing. At the March 18, 2003 hearing, a prison official testified that appellant had been receiving the prescribed amount of insulin for his diabetic condition.

{¶22} The record is also inconsistent with appellant's claim that he "never understood the law." Appellant repeatedly indicated that his attorney had answered all of his questions, and nothing in the record indicates that appellant's attorney was incompetent. Further, the court clearly explained to appellant both orally and in writing the criminal conduct for which he was being convicted. We similarly find no support in the record for appellant's assertions that his attorney talked him into pleading guilty and that his attorney was "working for the state." As we have noted, appellant clearly stated that it was his intention to plead guilty, after having been thoroughly informed

of the consequences. Appellant stated at the January 28, 2003 hearing that no one had threatened him to make him plead guilty, or induced him into pleading guilty through promises.

{¶23} With regard to meritorious defenses, appellant did not present one. With regard to prejudice to the state, while testifying at trial would obviously have been difficult for the victims, we find nothing in the record indicating that the state's witnesses or evidence would no longer be available. With regard to appellant's understanding of the charges, it is apparent that appellant had a clear understanding of the charges against him and the possible penalties.

{¶24} After reviewing the entire record, we find no abuse of discretion by the common pleas court in denying appellant's motion to vacate his guilty plea. The court provided appellant with a full and fair hearing on the motion, and properly determined that there was not a reasonable and legitimate basis to allow the withdrawal of the plea. Accordingly, appellant's first assignment of error is overruled.

{¶25} Assignment of Error No. 2:

{¶26} "THE COURT ABUSED ITS DISCRETION TO THE PREJUDICE OF THE DEFENDANT/APPELLANT BY DENYING HIS PRE-SENTENCE MOTION FOR NEW COUNSEL."

{¶27} In this assignment of error, appellant argues that the common pleas court should have appointed him new counsel as sought in his March 7, 2003 motion. Appellant argues that com-

munication with his attorney had completely broken down and that his attorney could no longer effectively represent him.

{¶28} An indigent defendant, such as appellant, has a right to competent counsel, not a right to counsel of his own choosing. State v. Blankenship (1995), 102 Ohio App.3d 534, 558, citing Thurston v. Maxwell (1965), 3 Ohio St.2d 92, 93. An indigent defendant is entitled to the appointment of substitute counsel only upon a showing of good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust result. State v. Pruitt (1984), 18 Ohio App.3d 50, 57.

{¶29} We find no indication in the record that appellant's attorney performed negligently or incompetently. Appellant himself indicated at the January 28, 2003 plea hearing that he was satisfied with his counsel. Appellant also indicated at the March 5, 2003 hearing that his counsel had answered all his questions pertaining to the withdrawal of his motion to vacate the guilty plea. It was not until March 6, 2003, after he had pled guilty and reaffirmed his intent to plead guilty, and while awaiting sentencing, that appellant expressed dissatisfaction with his attorney.

{¶30} Contrary to appellant's argument, we find that he was not deprived of "his right to have counsel appointed by the court," nor was his attorney "left out of the [March, 18, 2003] hearing." The attorney originally appointed by the court continued to represent appellant at the March 18, 2003 hearing and

presented argument on his behalf at that hearing. The court did communicate directly with appellant at different points during the March 26, 2003 hearing. However, we find nothing improper about such conduct, given that appellant himself filed the March 6, 2003 motion to vacate the guilty plea. The court simply wanted to pinpoint the exact reasons why appellant wished to withdraw his plea, and give appellant the opportunity to further explain those reasons.

{¶31} We find no error in the common pleas court's decision denying appellant's motion for new counsel. A review of the entire record indicates that fundamental fairness was provided at every stage of the proceedings, and that there was not good cause to appoint new counsel. While there may have been some miscommunication between attorney and client, refusing to appoint new counsel was not improper. "There exist points at which the process of administering justice must be balanced with the defendant's right to counsel." State v. Edsall (1996), 113 Ohio App.3d 337, 340. We find that the court appropriately balanced the two in this case. Accordingly, appellant's second assignment of error is overruled.

{¶32} The judgment is affirmed.

Judgment affirmed.

WALSH and VALEN, JJ., concur.

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