[Cite as *State v. Newton*, 2015-Ohio-2319.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

STATE OF OHIO,	:	
		CASE NO. CA2014-10-011
Plaintiff-Appellee,	:	
		O P I N I O N
	:	6/15/2015
- vs -		
	:	
RALPH D. NEWTON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 13-CR-11329

Martin P. Votel, Preble County Prosecuting Attorney, Gractia S. Manning, Preble County Courthouse, 101 East Main Street, Eaton, Ohio 45320, for plaintiff-appellee

Christopher A. Deal, 2541 Shiloh Springs Road, Dayton, Ohio 45426, for defendant-appellant

S. POWELL, P.J.

{¶ 1} Defendant-appellant, Ralph D. Newton, appeals from his conviction in the Preble County Court of Common Pleas after he pled guilty to two counts of domestic violence. For the reasons outlined below, we affirm.

{¶ 2} On September 3, 2013, a Preble County Grand Jury returned an indictment against Newton charging him with two counts of domestic violence in violation of R.C. 2919.25(A), both third-degree felonies, as well as one count of gross sexual imposition in

violation of R.C. 2907.05(A)(1), also a third-degree felony. According to the bill of particulars, the charges stemmed from allegations Newton physically abused his girlfriend, T.D., as well as physically and sexually abused his then 13-year-old daughter. With the assistance of his appointed counsel, Brian A. Muenchenbach, Newton entered a not guilty plea to all charges on September 6, 2013.

{¶ 3} After entering his not guilty plea, on October 17, 2013, Newton filed a motion to sever the two counts of domestic violence with the single count of gross sexual imposition. The trial court granted Newton's motion on November 8, 2013. Thereafter, on May 13, 2014, Newton entered into a plea agreement and a change of plea hearing was held. As part of this hearing, Newton pled guilty to both counts of domestic violence with an agreed four-year prison sentence that consisted of two consecutive two-year prison terms. In exchange for his guilty plea, the state agreed to dismiss the gross sexual imposition charge. It is undisputed that the trial court provided Newton a full Crim.R. 11 plea colloquy prior to him entering his guilty plea and that Newton signed a waiver acknowledging he had been "fully informed by my counsel and by the Court of the charges against [him], of the penalties provided by law, and of [his] Constitutional rights[.]"

{¶ 4} The parties reconvened for purposes of sentencing on July 29, 2014. At the sentencing hearing, the parties again noted on the record that Newton's plea deal included an agreed four-year prison sentence that consisted of two consecutive two-year prison terms. Ensuring that Newton understood the effect of his guilty plea, and providing Newton with an opportunity for allocution, the following exchange then occurred:

> THE COURT: Is there anything you want to say, sir?
>
> MR. NEWTON: Yes, sir. I know what I did was wrong, and I would like to apologize to you and to the Courts for dragging this out so long, but I would like to ask for your mercy in my sentencing, maybe to run things concurrent instead. I've got a very sick father, he is ready to die. And he is not going to make

> it a full four years. My mom may not either.
>
> I've got a son getting ready to go into foster care, and I'd like to spend as much short time as I can, and maybe get put back on paper, go and do the right thing, if possible.
>
> THE COURT: The problem with your request is when you entered the pleas of guilty, there was an agreement worked out. And the agreement was that you would plead to the two offenses that you plead to, and the Court would order a two year sentence on each to run consecutively to each other.
>
> Now, if you don't want to follow that agreement, this case could perhaps be put back on the trial docket. You would have to file a request to withdraw your pleas, and the State could argue either against it or maybe join in the request, who knows.
>
> But I can't sentence you to something other than what the agreement is. Do you understand all of that?
>
> Do you want to talk to him a little bit?
>
> MR. MUENCHENBACH: Yes.
>
> THE COURT: And while they are talking, the record should reflect I did get a letter from the Defendant's parents, essentially saying pretty much the same thing the Defendant said. Their health is an issue and so on. And my response to that is the same as what I have just indicated, my hands are pretty well tied.
>
> MR. NEWTON: Your Honor, I guess I'd like to take it to trial.
>
> MR. MUENCHENBACH: Your Honor, at this point I would ask to withdraw as counsel of record. Clearly, in my opinion, Mr. Newton has used my good will with the Court to drag this out as far as possible and then decide to go ahead and change his plea last minute.
>
> This is without my counsel, without my knowledge, and totally against what we have talked about for the past year.
>
> At this point it would appear that our communication has broken down to the point where I cannot be effective.

{¶ 5} After hearing arguments from the state, the trial court granted Muenchenbach's motion to withdraw as counsel and scheduled a hearing on Newton's motion to withdraw his guilty plea. The trial court then appointed Christopher Deal as Newton's counsel. However,

following the hearing on Newton's motion, the trial court denied Newton's motion to withdraw his guilty plea. In so holding, the trial court stated, in pertinent part, the following:

> The parties stipulated that the Rule 11 colloquy was proper and that there are no Rule 11 issues. The State presented the testimony of Defendant's prior counsel, Brian Muenchenbach and Allie Shafer, a Victim Witness Advocate.
>
> After considering the testimony and the stipulation, the Court overrules Defendant's motion for leave to withdraw his plea. The Court finds that the Defendant was represented by competent counsel up to the date he requested permission to withdraw his plea. Counsel had worked on the case for about a year, and according to his testimony, had several conferences with the Defendant regarding various plea offers. Mr. Muenchenbach visited the Defendant at jail at least 16 times and likely more than that. According to his testimony, he carefully explained to the Defendant the various options.
>
> The Defendant was not "under the gun" when he entered his plea. He had plenty of time to consider the offer and make a reasoned decision.
>
> In addition, it appears that the victim cannot be found. Ms. Shafer has made numerous efforts to contact the victim since July 29, 2014. She no longer knows the victim's address or phone number, although the file contains numerous phone numbers, none of which are viable any longer. Clearly, if the Defendant is allowed to withdraw his plea, and if the State could not thereafter find the alleged victim, the State would suffer significant prejudice.
>
> * * *
>
> The Defendant also testified, and after considering his testimony, it appears to the Court that the Defendant has simply had a change of heart.

{¶ 6} Following the denial of Newton's motion to withdraw his guilty plea, on August 27, 2014, the trial court held another sentencing hearing, wherein it imposed the previously agreed upon total aggregate four-year prison sentence. Newton now appeals, raising two assignments of error for review.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO WITHDRAW HIS FORMER PLEA OF GUILTY.

{¶ 9} In his first assignment of error, Newton argues the trial court erred by denying his motion to withdraw his guilty plea. We disagree.

{¶ 10} Pursuant to Crim.R. 32.1, a defendant is permitted to file a motion to withdraw his or her guilty plea prior to sentencing. Generally, a presentence motion to withdraw a guilty plea, such as the case here, "should be freely and liberally granted." *State v. Gabbard*, 12th Dist. Clermont No. CA2006-03-025, 2007-Ohio-461, ¶ 7, citing *State v. Xie*, 62 Ohio St.3d 521, 527 (1992). However, a defendant does not possess an absolute right to withdraw a plea prior to sentencing. *State v. Manis*, 12th Dist. Butler No. CA2011-03-059, 2012-Ohio-3753, ¶ 24. Rather, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. *State v. Witherspoon*, 12th Dist. Butler No. CA2010-01-025, 2010-Ohio-4569, ¶ 8.

{¶ 11} The decision to grant or deny a presentence motion to withdraw a guilty plea rests within the trial court's sound discretion. *State v. Rivera*, 12th Dist. Butler No. CA2013-05-072, 2014-Ohio-3378, ¶ 16. In turn, this court reviews a trial court's decision under an abuse of discretion standard. *State v. Ward*, 12th Dist. Clermont No. CA2008-09-083, 2009-Ohio-1169, ¶ 8, citing *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶ 32. An abuse of discretion connotes more than an error of law or judgment; it implies the trial court's attitude was arbitrary, unreasonable, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 130. In making this decision, this 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." *Xie* at 525, quoting *State v. Smith*, 49 Ohio St.2d 261, 264 (1977).

{¶ 12} In reviewing whether the trial court abused its discretion in denying a

defendant's presentence motion to withdraw a guilty plea, this court considers a number of factors. *State v. Osborne*, 12th Dist. Warren No. CA2006-01-008, 2007-Ohio-1794, ¶ 21, citing *State v. McNeil*, 146 Ohio App.3d 173, 176 (1st Dist.2001). These factors include, but are not limited to: (1) whether the defendant was represented by highly competent counsel; (2) whether the defendant was afforded a complete Crim.R. 11 hearing before entering the plea; (3) whether the trial court conducted a full and impartial hearing on the motion to withdraw the plea; (4) whether the trial court gave full and fair consideration to the motion; (5) whether the motion was made within a reasonable time; (6) whether the motion set out specific reasons for the withdrawal; (7) whether the defendant understood the nature of the charges and the possible penalties; (8) whether the defendant was possibly not guilty of the charges or had a complete defense to the charges; and (9) whether the state would have been prejudiced by the withdrawal. *State v. Snider*, 12th Dist. Clermont No. CA2012-10-075, 2013-Ohio-4641, ¶ 9. "No single factor is conclusive, and a reviewing court must apply a balancing test to the factors." *State v. Burris*, 10th Dist. Franklin No. 13AP-238, 2013-Ohio-5108, ¶ 11, citing *State v. Zimmerman*, 10th Dist. Franklin No. 09AP-866, 2010-Ohio-4087, ¶ 13.

{¶ 13} As noted above, Newton was represented by Muenchenbach, his appointed counsel, at all times prior to entering his guilty plea. During this time, Muenchenbach met with Newton on numerous occasions to discuss the various plea offers extended to him by the state. These negotiations ultimately led Newton to enter into a favorable plea deal that allowed him to plead guilty to two counts of domestic violence with an agreed aggregate four-year prison sentence. In exchange for his guilty plea, the state agreed to dismiss the gross sexual imposition charge. As Muenchenbach testified, this plea deal precluded Newton from registering as a sex offender, something Muenchenbach indicated was Newton's primary concern.

{¶ 14} Moreover, as the record makes clear, the trial court provided Newton with a full Crim.R. 11 plea colloquy prior to Newton entering his guilty plea. Newton also signed a waiver indicating he had been "fully informed by my counsel and by the Court of the charges against [him], of the penalties provided by law, and of [his] Constitutional rights[.]" In addition, as part of the hearing on his motion, Newton explicitly stated that he knew it was ultimately his decision to accept the state's plea agreement. Newton also testified he knew that there were photographs taken of the victims' injuries, a fact he acknowledged impacted his decision to enter his plea. In turn, just as the trial court found, Newton "was not 'under the gun' when he entered his plea. He had plenty of time to consider the offer and make a reasoned decision." Rather, Newton's attempt to withdraw his guilty plea was merely a change of heart. "We have consistently held that a change of heart is insufficient justification to withdraw a plea." *Manis*, 2012-Ohio-3743 at ¶ 31, citing *Witherspoon*, 2010-Ohio-4569 at ¶ 17.

{¶ 15} The record also makes clear that the state would have been prejudiced by Newton's withdrawal when considering it was now unable to locate one of the two victims, T.D., despite making numerous attempts to do so. As the record indicates, T.D. could not be reached at any of the six phone numbers she provided to the state. A letter sent to T.D.'s last known address was also returned undelivered with a note indicating T.D. no longer lived at this address. Nevertheless, Newton argues the state's claim is "a little premature" given the fact it never asked law enforcement or a private investigator for help in its search for T.D. However, there is no evidence to indicate those efforts would have proven any more successful. As the record indicates, T.D. had issues with homelessness, often moving from house to house or staying with friends, even going so far as to at one point live on a campground.

{¶ 16} In light of the foregoing, and while we may agree that Newton's attempts to

withdraw his guilty plea came in a relatively timely manner, based on the facts and circumstances of this case, we find the trial court did not abuse its discretion by denying Newton's presentence motion to withdraw his guilty plea. Simply stated, Newton failed to establish a reasonable and legitimate basis for the withdrawal of his guilty plea. Therefore, Newton's first assignment of error is without merit and overruled.

{¶ 17} Assignment of Error No. 2:

{¶ 18} THE TRIAL COURT ERRED WHEN IT FAILED TO AFFORD APPELLANT THE OPPORTUNITY TO SPEAK PRIOR TO SENTENCING, VIOLATING HIS RIGHT TO ALLOCUTION PURSUANT TO RULE 32(A)(1) OF THE OHIO RULES OF CRIMINAL PROCEDURE.

{¶ 19} In his second assignment of error, Newton argues the trial court erred by failing to provide him with yet another opportunity for allocution at the August 27, 2014 sentencing hearing after entering its decision denying his motion to withdraw his guilty plea. We disagree.

{¶ 20} Pursuant to Crim.R. 32(A)(1), before imposing a sentence in a criminal trial, "the trial court shall 'address the defendant personally' and ask whether he or she wishes to make a statement on her own behalf or present any information in mitigation of punishment." *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 166. "The purpose of allocution is to permit the defendant to speak on his own behalf or present any information in mitigation of punishment." *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, ¶ 85. Although not considered a constitutional right, the right of allocution is firmly rooted in the common-law tradition. *State v. Copeland*, 12th Dist. Butler No. CA2007-02-039, 2007-Ohio-6168, ¶ 6. As a result, this right is "'both absolute and not subject to waiver due to a defendant's failure to object.'" *State v. Haynes*, 12th Dist. Butler No. CA2010-10-273, 2011-Ohio-5743, ¶ 27, quoting *State v. Collier*, 2d Dist. Clark Nos. 2006 CA 102 and 2006 CA 104, 2007-Ohio-6349,

¶ 92. Therefore, in cases where the trial court imposes a sentence without first asking the defendant whether he wishes to exercise his right of allocution, "resentencing is required unless the error is invited error or harmless error." *State v. Campbell*, 90 Ohio St.3d 320 (2000), paragraph three of the syllabus.

{¶ 21} After a thorough review of the record, we find the trial court's failure to provide Newton with yet another opportunity for allocution at the August 27, 2014 sentencing hearing constitutes, at worst, harmless error. As the record indicates, the trial court already gave Newton an opportunity for allocution at the original July 29, 2014 sentencing hearing. In turn, we see no reason why Newton should have been provided with yet another such opportunity after his motion to withdraw his guilty plea had been denied. This is particularly true here considering the trial court did not receive any new evidence between the two sentencing hearings, and was merely imposing the previously agreed upon total aggregate four-year prison sentence as part of Newton's plea deal. In other words, any opportunity for allocution at the August 27, 2014 sentencing hearing would have had no impact on the sentence that was to be imposed. Therefore, because we find the trial court's failure to provide Newton with yet another opportunity for allocution at the August 27, 2014 sentencing hearing constitutes, at worst, harmless error, Newton's second assignment of error also lacks merit and is overruled.

{¶ 22} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.