

[Cite as *State v. Barlow*, 2019-Ohio-4384.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:
Plaintiff-Appellee,	: Case No. 16CA3772
vs.	:
SHEREE M. BARLOW,	: DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:

APPEARANCES:

Steven H. Eckstein, Washington Court House, Ohio, for appellant.¹

Shane A. Tieman, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED: 10-11-19

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment of conviction and sentence. Sheree M. Barlow, defendant below and appellant herein, pleaded guilty to (1) one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2) and 2925.03(C)(4), and (2) one count of trafficking in heroin in violation of R.C. 2925.03(A)(2) and 2925.03(C)(6)(d).

{¶ 2} Appellant assigns one error for review:

ASSIGNMENT OF ERROR:

“DEFENDANT-APPELLANT WAS DEPRIVED OF HER RIGHT

¹ Different counsel represented appellant during the trial court proceedings.

TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN THE TRIAL COURT ACCEPTED AN UNKNOWNING, UNINTELLIGENT, AND INVOLUNTARY GUILTY PLEA.”

I.

{¶ 3} In January 2016, a Scioto County Grand Jury returned an indictment that charged appellant with (1) one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2) and 2925.03(C)(4)(f), a first-degree felony, (2) one count of possession of cocaine in violation of R.C. 2925.11(A) and 2925.11(C)(4)(2), a first-degree felony, (3) one count of trafficking in heroin in violation of R.C. 2925.03(A)(2) and 2925.03(C)(6)(e), a second-degree felony, (4) one count of possession of heroin in violation of R.C. 2925.11(A) and 2925.11(C)(6)(d), a second-degree felony, (5) one count of tampering with evidence in violation of R.C. 2921.12(A)(1) and 2921.12(B), a third-degree felony, (6) one count of possessing criminal tools in violation of R.C. 2923.24(A) and 2923.24(C), a fifth-degree felony, and (7) one count of conspiracy in violation of R.C. 2923.01(A)(2) and 2923.01(J)(2), a second-degree felony.

{¶ 4} Subsequently, and pursuant to a negotiated plea agreement, appellant pleaded guilty to (1) one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2) and 2925.03(C)(4)(f), a first-degree felony, and (2) one count of trafficking in heroin in violation of R.C. 2925.03(A)(2) and 2925.03(C)(6)(d), a third-degree felony. At the June 28, 2016 hearing, after the trial court acknowledged the negotiated plea and fully apprised appellant of the various rights that she would be waiving by pleading guilty, the court sentenced appellant to serve an agreed six year prison term.

{¶ 5} On September 19, 2016, appellant filed a pro se motion for leave to file a delayed

appeal. Appellant, however, did not perfect the appeal. The trial court then appointed counsel who remedied the deficiency, and, on January 24, 2017, this court granted appellant's motion. After review, appellant's counsel stated that no arguable, non-frivolous issues of reversible error exist in this case and counsel moved to withdraw from representation citing *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

{¶ 6} Subsequently, appellee discovered that the trial court's Waiver and Maximum Penalty Forms, which had been reviewed and signed at the plea hearing, had been scanned into the state's case management system (Matrix), but had not been filed with the Clerk of Courts. Thus, to clarify the record, appellee requested the trial court accept and file with the clerk as original the Waiver and Maximum Penalty forms, executed June 28, 2016. On May 3, 2017, the trial court found that appellant had signed the two forms that the state had submitted (and her counsel and trial court had reviewed with appellant on June 27, 2016). Thus, the trial court ordered that the Waiver and Maximum Penalty forms be filed with the clerk and accepted as originals.

{¶ 7} On May 4, 2017, appellant filed a "motion for postconviction relief to withdraw guilty plea," and argued that, even though "evidence was entered on behalf of defendant that would prove her innocence in this case," and "two codefendants that wrote statements and were willing to testify to these same statements that defendant was not involved in the alleged crime that was committed," * * * "[d]efense counsel stated to defendant that the evidence in the case was overwhelming and that defendant would receive 42 years in jail even though this evidence was present." Appellant also argued that defense counsel erroneously evaluated various information, and those actions resulted in an induced or coerced plea. At this point, the trial

court ordered the codefendants and appellant be brought to court for a hearing.

{¶ 8} On July 17, 2017, appellee filed a memorandum contra appellant's motion to withdraw and a motion to strike appellant's brief. First, appellee argued that appellant did not serve the *Anders* brief on the appellee. Second, appellee asserted that the *Anders* brief should be stricken pursuant to *State v. Wilson*, 4th Dist. Lawrence Co. 16CA12, 2017-Ohio-5772. On July 31, 2017, this court granted counsel's request for leave to withdraw and appointed a new attorney to prosecute the appeal.

{¶ 9} On September 26, 2017, appellant filed a motion to remand for determination of the pending motion to withdraw appellant's guilty plea. On October 4, 2017, this court granted appellant's motion and remanded the matter to the trial court for the "limited purpose of ruling on the motion to withdraw guilty plea filed May 4, 2017." After this court's prompting, on March 5, 2018 appellant filed a status report and indicated that the trial court had held two hearings (in November 2017 and January 2018), with one more hearing necessary prior to the trial court making a decision.

{¶ 10} Appellant's second status report, filed November 2, 2018, stated that the trial court had replaced the attorney of record and set the matter for a full hearing on November 11, 2018. On March 28, 2019, appellant filed a third status report and stated that the hearing noted in the second status report was held on November 9, 2018 and that no substantive entry had been filed subsequent to that date. On April 22, 2019, appellant filed a "Notice of Trial Court's Denial of Motion to Withdraw Guilty Plea" and "Motion to Reinstate Appeal and Set Scheduling Order." This appeal followed.

II.

{¶ 11} In her sole assignment of error, appellant asserts that she was deprived of her right to due process under the Fourteenth Amendment and Article I, Section 10 of the Ohio Constitution. In particular, appellant argues that because her plea and written acknowledgment of the maximum penalty were not filed at the time of her plea, the “[f]ailure to obtain a written plea and acknowledgment of the maximum penalty is violative of Crim.R. 11,” and renders her plea unknowing, unintelligent, and involuntary.

{¶ 12} Generally, the ultimate inquiry when reviewing a trial court’s acceptance of a guilty plea is whether the defendant entered the plea in a knowing, intelligent, and voluntary manner. *State v. Coleman*, 4th Dist. Ross Nos. 16CA3555, 16CA3556, 16CA3557 & 16CA3558, 2017-Ohio-2826, ¶ 6, citing *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 7. A defendant enters a knowing, intelligent, and voluntary plea when the trial court fully advises the defendant of all the constitutional and procedural protections set forth in Crim.R. 11(C) that a guilty plea waives. *Coleman, supra*. Crim.R. 11 provides in pertinent part:

(A) Pleas. A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant’s attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of Guilty or No Contest Pleas. With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant’s guilt.

* * *

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim.R. 32.

(C) Pleas of Guilty and No Contest in Felony Cases.

* * *

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

* * *

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

* * *

(F) Negotiated Plea. When a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court. * * *

{¶ 13} As the state indicates, Crim.R. 11 allows a guilty plea to be made orally. In the case sub judice, appellant entered an oral guilty plea and also signed a written Waiver and Maximum Penalty Form. Our review of the hearing transcript reveals that, the trial court, inter alia, prior to accepting appellant's plea, thoroughly reviewed all rights pursuant to Crim.R. 11, obtained an oral waiver of those rights, and explained the maximum penalty for each offense. Months later, the appellee discovered that the Waiver and Maximum Penalty forms had not been filed with the clerk. Thus, appellee argues, because it cannot be established that the trial court fully complied with the Crim.R. 11 requirements or that appellant actually timely signed the forms, appellant's rights have been violated.

{¶ 14} Our review of the record reveals, however, that appellee sought to remedy the oversight by filing a motion with the court to accept the signed Waiver and Maximum Penalty forms as if they were original. The trial court granted the appellee's request and, in the trial court's entry on appellant's motion, the court stated:

"Ms. Barlow testified. Her demeanor and testimony were credible. * * * She acknowledges that she knew when she entered the plea that she would be receiving a sentence for six years, 3 of which was mandatory. She acknowledged that she had a time period between her plea and the sentencing in which she was released and told to come back, and that when she came back the sentence imposed was exactly what she had agreed to.

* * *

Ms. Barlow testified that she felt under pressure. The Court does not disbelieve her. The pressure of making a decision of whether to take a plea deal or go to trial is often a difficult decision for a defendant. * * * The most honest, and most important, statement Ms. Barlow made in the entire hearing was, 'Six years sounds better than forty two.' The Court believes that this statement is honest and persuasive as to why Ms. Barlow made the decision she made. The statement, though, also reveals that she made an informed decision based on what

she thought was in her and her family's best interest.

Thus, the trial court found that this situation "simply is not a manifest injustice" and denied appellant's post-sentence motion to withdraw her guilty plea.

{¶ 15} Crim.R. 32.1 provides that after a defendant's conviction and sentence, in order to correct a manifest injustice a court may set aside the judgment of conviction and permit the defendant to withdraw his or her plea. Generally, a trial court's decision in these matters lies in the court's sound discretion and will not be reversed absent an abuse of that discretion. *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715, at paragraph two of the syllabus (1992). An abuse of discretion implies that a court's attitude was unreasonable, arbitrary or unconscionable. *State v. Clark*, 71 Ohio St.3d 466, 644 N.E.2d 331 (1964).

{¶ 16} After our review of the record and counsels' arguments, we agree with the trial court's conclusion concerning the appellant's knowing, voluntary and intelligent guilty plea. At the change of plea hearing, the trial court fully reviewed all of the appellant's various rights and the consequences of entering a guilty plea. Moreover, appellant was also informed of these same rights and consequences through the written Waiver and Maximum Penalty Form, regardless of when the form was actually filed with the clerk. Thus, we believe that appellant failed to establish that her guilty plea constitutes a manifest injustice and we conclude that the trial court did not abuse its discretion by denying appellant's request.

{¶ 17} Accordingly, based on the foregoing reasons, we overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.