

[Cite as *State v. Christian*, 2017-Ohio-9373.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 16 MA 0148
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
TERRIAN CHRISTIAN)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 15 CR 1118A
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JUDGMENT:	Affirmed.
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APPEARANCES:

For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6 th Floor Youngstown, Ohio 44503
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For Defendant-Appellant:	Atty. Edward A. Czopur DeGenova & Yarwood, Ltd. 42 North Phelps Street Youngstown, Ohio 44503
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JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: December 22, 2017

{¶1} Appellant Terrian Christian appeals an August 30, 2016 decision of the Mahoning County Common Pleas Court finding him guilty of felonious assault, having a weapon while under disability, and a firearm specification. Appellant argues that the trial court did not strictly comply with the advisement of his right to compulsory process, thus his plea was not made knowingly, intelligently, and voluntarily. Appellant also argues that the court abused its discretion when it denied his pre-sentence motion to withdraw the plea. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On December 3, 2015, Appellant was indicted on one count of felonious assault, a felony of the second degree in violation R.C. 2903.11(A)(2), (D), one count of having a weapon while under a disability, a felony of the third degree in violation of R.C. 2923.13(A)(2), (B), a firearm specification in violation of R.C. 2941.145(A), and a repeat violent offender specification in violation of R.C. 2941.149(A) and R.C. 2929.01(CC). The charges stem from a dispute that resulted in a shooting. Also charged were Appellant's two codefendants.

{¶3} On July 11, 2016, the state made a "global offer" to all three defendants. The offer was conditioned on acceptance by all three. The state agreed to dismiss the violent offender specification and recommend an aggregate sentence of seven years of incarceration. Appellant and his codefendants each accepted the offer. In accordance with Crim.R. 11, the trial court entered into a colloquy with each defendant before accepting their guilty pleas.

{¶4} On August 25, 2016, the trial court held a sentencing hearing. On the morning of the sentencing hearing, Appellant and one of his codefendants orally moved to withdraw their pleas. Immediately after these motions were made, the trial court held a hearing. Appellant, for the first time, asserted his innocence and requested to withdraw his plea. After the hearing, the court denied both defendants' motions and immediately proceeded to sentencing. The trial court acknowledged that Appellant was less culpable than a codefendant and sentenced him to a lesser sentence. In the aggregate, Appellant received the minimum sentence: six years of incarceration. The trial court credited him with 305 days of jail time served, which the court applied to the mandatory firearm specification. This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT DID NOT COMPLY WITH CRIM. R. 11(C)(2)(C) IN THAT IT DID NOT INFORM APPELLANT OF HIS RIGHT TO COMPULSORY PROCESS, THEREFORE, THE PLEA WAS NOT MADE KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY REQUIRING REVERSAL.

{¶5} Appellant argues that his plea was not entered into knowingly, voluntarily, and intelligently because the trial court failed to strictly comply with the notification of his right to compulsory process. Appellant argues that the court's advisement that "if you wish, [you can] bring witnesses into court if you believe that helps your case" did not strictly comply with Crim.R. 11. (7/11/16 Plea Hrg. Tr., pp. 25-26.)

{¶16} In response, the state cites to several cases where similar language has been found to comply with Crim.R. 11, including this Court's Opinion in *State v. Jenkins*, 7th Dist. No. 15 MA 0202, 2016-Ohio-8563. The state also argues that the written plea agreement can be used to resolve any ambiguity about whether a defendant was notified of his rights.

{¶17} Before a trial court may accept a defendant's guilty plea, the court must inform the defendant of his constitutional and nonconstitutional rights. *State v. Rowbotham*, 173 Ohio App.3d 642, 2007-Ohio-6227, 879 N.E.2d 856, ¶ 7 (7th Dist.), citing *State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981), paragraph one of the syllabus. A defendant's constitutional rights include a privilege against compulsory self-incrimination, right to a jury trial, right to confront his accusers, and right to compulsory process. *Id.* A trial court must strictly comply with the advisement of a defendant's constitutional rights, however, the court need not recite the exact language of Crim.R. 11. *State v. Wheeler*, 7th Dist. No. 08 MA 53, 2009-Ohio-2647, ¶ 23, citing *Ballard, supra*, at paragraph two of the syllabus.

{¶18} A defendant's nonconstitutional rights include: (1) the nature of the charges, (2) the maximum penalty involved, (3) whether the defendant is eligible for probation, and (4) that the court may immediately proceed to sentencing after accepting the plea. *Rowbotham, supra*, at ¶ 18. The court's advisement of a defendant's nonconstitutional rights is reviewed for substantial compliance. *Id.*

{¶19} Appellant solely contests whether the trial court strictly complied with the requirement to notify him of his right to compulsory process. At the plea hearing,

the trial court stated: “You have a right also, if you wish, to bring witnesses into court if you believe that helps your case,” which Appellant argues did not strictly comply with Crim.R. 11. (7/11/16 Plea Hrg. Tr., pp. 25-26.) In *Jenkins*, we held that the following advisement was fully compliant with Crim.R. 11: “[a]nd if you wanted to, you can bring witnesses in on your own behalf; although, you have no obligation to do or say anything.” *Id.* at ¶ 10. The advisement given to Appellant in the instant case is virtually identical to that given in *Jenkins*.

{¶10} Further, according to the Ohio Supreme Court, other portions of the record, such as the written plea agreement, can be reviewed when resolving any ambiguity. *State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 25. Here, Appellant’s written plea agreement stated: “I WAIVE CERTAIN FUNDAMENTAL CONSTITUTIONAL AND STATUTORY RIGHTS, NAMELY * * * TO HAVE COMPULSORY SUBPOENA PROCESS FOR OBTAINING WITNESSES IN MY FAVOR.” (7/12/16 Plea Agreement, p. 4.) Pursuant to *Barker*, this language can be used to show that Appellant was adequately informed of his right to compulsory process.

{¶11} In accordance with *Jenkins* and *Barker*, the trial court strictly complied with the advisement of Appellant’s right to compulsory process. As such, Appellant’s first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING
APPELLANT’S PRE-SENTENCE MOTION TO WITHDRAW HIS PLEA

WHEN A MAJORITY OF THE *FISH* FACTORS SUPPORTED
WITHDRAWAL.

{¶12} Pursuant to Crim.R. 32.1, “[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.”

{¶13} A pre-sentence motion to withdraw a guilty plea should be freely and liberally granted. *State v. Ocel*, 7th Dist. No. 08 JE 22, 2009-Ohio-2633, ¶ 21, citing *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). “A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court.” *Ocel* at ¶ 22, citing *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1997), paragraph two of the syllabus.

{¶14} Appellant argues that the trial court abused its discretion when it denied his pre-sentence motion for a new trial. Appellant argues that a pre-sentence motion to withdraw a plea should be liberally granted. He also contends that the nine *Fish* factors weigh in favor of granting his motion. See *State v. Fish*, 104 Ohio App.3d 236, 661 N.E.2d 788 (1st Dist.1995).

{¶15} When determining whether a trial court abused its discretion in denying a pre-sentence motion to withdraw a plea, we must look to:

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

the Crim.R. 11 plea hearing; (4) whether the defendant understood the nature of the charges and potential sentences; (5) the extent of the hearing on the motion to withdraw; (6) whether the trial court gave full and fair consideration to the motion; (7) whether the timing of the motion was reasonable; (8) the reasons for the motion; and (9) whether the accused was perhaps not guilty or had a complete defense to the charge.

State v. Scott, 7th Dist. No. 08 MA 12, 2008-Ohio-5043, ¶ 13, citing *Fish*, *supra*. No one factor is conclusive for the determination of whether the trial court should have granted the motion to withdraw. *State v. Morris*, 7th Dist. No. 13 MA 19, 2014-Ohio-882, ¶ 22, citing *State v. Leasure*, 7th Dist. No. 01BA42, 2002-Ohio-5019, ¶ 19.

Whether the State Will Be Prejudiced by Withdrawal

{¶16} The state concedes that this factor weighs in favor of Appellant.

The Representation Afforded to the Defendant by Counsel

{¶17} Appellant concedes that this factor weighs in favor of the state.

The Crim.R. 11 Plea Hearing

{¶18} Appellant repeats his argument that the trial court failed to properly notify him of his right to compulsory process. As we have overruled Appellant's first assignment of error, this factor weighs in favor of the state.

Whether Appellant Understood the Nature of the Charges and Potential Sentence

{¶19} Appellant argues that he was confused as to his possible sentence and that this is shown by the record in this case. He also argues that he accepted the

plea deal because of pressure from his family and his belief that he was facing the possibility of twenty-four years of incarceration.

{¶20} The state responds by arguing that Appellant was informed that the maximum penalty he faced was an aggregate total of fourteen years of incarceration.

{¶21} At the plea hearing, the trial court informed Appellant that he was subject to the following maximum penalty: eight years of incarceration for felonious assault, three years for the firearm specification, and three years for having a weapon while under a disability. This totals fourteen years. Appellant asked the trial court if he could be sentenced to a period of time beyond the maximum. The court stated that he could not. The court also informed Appellant that he would not be sentenced to the maximum penalty. The trial court specifically asked Appellant if his plea was the result of coercion and Appellant stated that it was not. Accordingly, this factor weighs in favor of the state.

The Extent of the Hearing on the Motion to Withdraw

{¶22} Appellant argues that his trial counsel failed to file a written motion, limiting his ability to present his case. He also complains that his arguments were presented along with one of his codefendant's arguments. Unlike Appellant, this defendant did not claim innocence.

{¶23} In response, the state argues that the trial court held a hearing where Appellant was given the opportunity to not only have trial counsel argue his case, but also to speak on his own behalf.

{¶24} While trial counsel did not file a written motion, it appears that Appellant did not inform his counsel of his intent to withdraw his plea until the morning of the sentencing hearing. Immediately after the motion was made, the trial court conducted a hearing and gave both counsel and Appellant an opportunity to speak. In fact, Appellant was given multiple opportunities to speak during the hearing.

{¶25} Even though Appellant claimed his innocence at the hearing, the trial court read from a letter Appellant had sent to the court: “I understand someone has to be punished for what happened. But, Your Honor, I openly would ask that you don’t punish me and give me seven years, You Honor. I fully understand that I have to go away for some time, so I ask Your Honor that you be lenient.” (8/25/16 Sentencing Hrg. Tr., p. 5.) The trial court interpreted Appellant’s letter as Appellant taking responsibility for his actions. Based on the letter, the trial court construed Appellant’s attempt to withdraw his plea as mere displeasure with his impending sentence.

{¶26} Appellant did not inform the trial court of his wish to withdraw his plea until the morning of his sentencing hearing. Despite the short notice, the trial court afforded Appellant with ample opportunity to present his arguments. The court gave Appellant a hearing that consisted of twenty-four pages of transcripts and Appellant was given the opportunity to speak on several occasions throughout the hearing. As such, this factor weighs in favor of the state.

Whether the Trial Court Gave Full and Fair Consideration to the Motion

{¶27} Appellant repeats arguments made regarding the previous factor. In summation, he believes that the trial court did not give full and fair consideration to his motion due to lack of a written motion combined with the lack of opportunity to fully present his arguments at the hearing.

{¶28} In response, the state also repeats its previous arguments and relies on the fact that the trial court held a hearing and allowed Appellant and his counsel to speak.

{¶29} As previously stated, the trial court's hearing consists of twenty-four pages of transcripts. The trial court's explanation of its decision to deny Appellant's motion to withdraw his plea consists of five pages of transcript. The trial court weighed each *Fish* factor on the record and acknowledged each of Appellant's arguments. Notably, as later discussed, the trial court expressly considered Appellant's claim of innocence and his assertion that he had a defense. Based on this record, the trial court gave full and fair consideration to Appellant's arguments. As such, this factor weighs in favor of the state.

Whether the Timing of the Motion was Reasonable

{¶30} Appellant argues that he made his motion only six weeks after entering his plea, which he contends was within a reasonable time. In support of his argument, Appellant points to caselaw from this Court holding that a motion to withdraw a plea made eighteen months after the plea was timely. See *State v. Peck*, 7th Dist. No. 14 MA 56, 2015-Ohio-1279.

{¶31} In response, the state argues that a motion to withdraw a plea on the day of sentencing has been found to be unreasonable by this Court. See *State v. Gallagher*, 7th Dist. No. 08 MA 178, 2009-Ohio-2636.

{¶32} Appellant's argument regarding *Peck* is somewhat misleading. In *Peck*, we explained that whether the timing of a motion to withdraw a plea is reasonable depends on the facts of each case. In *Peck*, we held that eighteen months was reasonable considering that the case had been appealed and then remanded to the trial court for resentencing. *Id.* at ¶ 44. We explained that the appeal would have likely stripped the trial court of its jurisdiction to rule on the motion to withdraw his plea, thus *Peck's* delay was reasonable under the circumstances of the case. *Id.*

{¶33} In *Gallagher*, we held that a motion to withdraw a plea made at a sentencing hearing was unreasonable, particularly as six weeks had passed since the appellant pleaded guilty and there was no reason why the motion could not have been filed earlier. *Id.* at ¶ 37. See also *State v. Calloway*, 7th Dist. No. 10 MA 147, 2011-Ohio-4257 (motion to withdraw a plea made two months after the plea and on the day of sentencing was unreasonable); *State v. Williams*, 7th Dist. No. 09-MA-74, 2010-Ohio-1292 (motion to withdraw a plea made three months after the plea and on the day of sentencing was unreasonable).

{¶34} The instant case is similar to *Gallagher*. In both cases, six weeks had passed between the plea hearing and the motion to withdraw the plea. Also in both cases, the motion was made at the sentencing hearing. Here, the trial court was informed of Appellant's motion to withdraw his plea at the time the sentencing

hearing was slated to begin. There is nothing within this record to suggest that Appellant was unable to file the motion prior to the day of the sentencing hearing. Accordingly, this factor weighs in favor of the state.

The Reasons for the Motion

{¶35} Appellant contends that he was pressured into accepting the plea by members of his family, including his mother and fiancée. He also argues that he is innocent and has a defense to the charges.

{¶36} In response, the state argues that a claim of innocence is not a reasonable basis for the withdrawal of a guilty plea. While Appellant claims he has a defense, he has failed to assert a specific defense. The state also cites to the letter Appellant sent to the court where he appears to take responsibility for his role in the offense.

{¶37} The arguments regarding Appellant's claim of innocence and his defenses are addressed within the next factor. As to the pressure Appellant allegedly faced from his family, family pressure is generally insufficient to show coercion, particularly when the defendant was capable of making his own decision. *State v. Slater*, 8th Dist. No. 101358, 2014-Ohio-5552, ¶ 13, citing *State v. Westley*, 8th Dist. No. 97650, 2012-Ohio-3571. No case can be found where a plea was permitted to be withdrawn due to family pressure. As such, this factor weighs in favor of the state.

Whether Appellant was Not Guilty or Had a Complete Defense to the Charge

{¶38} Appellant argues that he is innocent and has a defense to the charges. Appellant does not enlighten us about his specific defense, however, Appellant did allege at the motion hearing that another person involved fired the shots and that Appellant was merely a bystander.

{¶39} The state again argues that Appellant has not specified a defense and admitted guilt in his letter to the court.

{¶40} At the motion hearing, the trial court addressed the possibility of Appellant may have a defense. The trial court acknowledged Appellant's contention that someone else shot the victim. However, the court noted that complicity would likely apply if that were true, thus, it would not provide a complete defense. The court also stated that there are witnesses who would testify about Appellant's involvement and that there was no evidence to support a self-defense claim.

{¶41} The trial court's analysis is correct. Even if Appellant did not shoot the victim, he would likely be found guilty under a complicity theory. While we do not take Appellant's claim of innocence lightly, we note that several witnesses were expected to testify that Appellant was actually involved with the shooting. Additionally, Appellant did take some responsibility for this incident in his letter to the trial court.

{¶42} As only one factor weighs in favor of Appellant, the trial court did not abuse its discretion in denying his motion to withdraw his plea. Accordingly, Appellant's second assignment of error is without merit and is overruled.

Conclusion

{¶43} Appellant argues that his plea was not knowingly, intelligently, and voluntarily entered because the trial court did not strictly comply with the advisement of his right to a compulsory process. Appellant also argues that the trial court abused its discretion when it denied his pre-sentence motion to withdraw the plea. Pursuant to *Jenkins* and *Fish*, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

DeGenaro, J., concurs.

Robb, P.J., concurs.