[Cite as *State v. Krieger*, 2020-Ohio-6964.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

CHARLES THOMAS KRIEGER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 BE 0045

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 19 CR 0031

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Dan Fry, Belmont County Prosecuting Attorney and *Atty. Joseph A. Vavra*, Assistant Prosecuting Attorney, 147-A West Main Street, St. Clairsville, Ohio 43950, for Plaintiff-Appellee

Atty. Steven A. Stickles, 500 Market Street, Suite #10, Steubenville, Ohio 43952, for Defendant-Appellant.

Dated: December 18, 2020

WAITE, P.J.

{¶1} Appellant Charles Thomas Krieger appeals the September 10, 2019, Belmont County Common Pleas Court judgment entry sentencing him to maximum consecutive prison terms on two counts of unlawful sexual conduct with a minor. Appellant also appeals the August 19, 2019 judgment entry denying his motion to withdraw his guilty plea. Based on the following, the trial court did not abuse its discretion in denying Appellant's motion to withdraw his guilty plea. Moreover, Appellant's sentence is not contrary to law. Appellant's assignments of error are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} On April 4, 2019, Appellant was indicted on one count of rape in violation of R.C. 2907.02(A)(1)(b), a first-degree felony, and two counts of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A) and (B)(3), both third-degree felonies. The charges arose after Appellant had sexual contact with a family member. The contact began in 2014 when the victim was twelve years old and continued until 2016, when she was fourteen.

{¶3} On July 15, 2019, after plea negotiations, Appellant entered a plea of guilty to the two counts of unlawful sexual conduct with a minor. The state dismissed the count of rape as part of the plea agreement. Prior to sentencing on August 16, 2019, Appellant filed a motion to withdraw his guilty plea. In his motion Appellant asserted that he was

not fully aware of the consequences of his plea and that it essentially should be considered as an *Alford* plea, in that he contended he was innocent but agreed to plead guilty to the two counts of unlawful sexual conduct with a minor in exchange for the dismissal of the rape charge which carried the potential for a much longer sentence. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). That same day a hearing was held on Appellant's motion. At the conclusion of the hearing the trial court overruled Appellant's motion.

{¶4} A sentencing hearing was held on September 9, 2019. The trial court stated:

> THE COURT: This Court has reviewed the entire file in this matter. This Court has reviewed the Motion to Withdraw; the documentation in support. This Court has reviewed the Ohio Revised Code 2929.11, 2929.12, the overriding purposes, principles and factors of sentencing. This Court has reviewed the Presentence Report. I'd like to read a few comments to you from that report.
>
> "The defendant is alleged to have stuck his hands down her pants and inserted his finger into her vagina; stopped and left the room briefly, and upon return, stuck his quote" -- I'll eliminate that word-- "inside of her."
>
> Then thereafter in the report, "Mr. Krieger admitted on several occasions having digitally penetrated the have [sic] victim. * * * "where the victim age was only 12. And the last time, approximately one year ago" -- the location is irrelevant. "Victim's age being 15["].

> "Krieger admitted to four encounters total with the victim, all being digital penetration of the victim's vagina, with two of those encounters ending with vaginal intercourse."
>
> * * *
>
> This Court sentences the defendant to the maximum of five years on each one of the subject counts. Then the issue becomes whether they are to run concurrent or consecutively.
>
> If this Court reviews the statute, which I have, this Court rules that the consecutive service is necessary to protect the public from future crime and to punish the offender. Consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public.
>
> This Court rules that the offender's conduct and history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime from the offender.

(9/9/2019 Sentencing Tr., pp. 10-11.)

{¶5} The trial court sentenced Appellant to the maximum term of five years in prison for each count of unlawful sexual conduct with a minor to be served consecutively, for a total stated prison term of ten years.

{¶6} Appellant filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

> THE COURT'S DENIAL OF THE DEFENDANT'S MOTION TO WITHDRAW/VACATE HIS PLEA WAS CONTRARY TO LAW AND CRIMINAL RULE 32.1.

{¶7} In his first assignment of error, Appellant contends the trial court abused its discretion in denying his motion to withdraw his guilty plea.

{¶8} The decision on whether to grant a motion to withdraw a guilty plea is within the sound discretion of the trial court. *State v. Ocel,* 7th Dist. Jefferson No. 08 JE 22, 2009-Ohio-2633 citing *State v. Xie,* 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992). "An abuse of discretion implies more than an error of judgment; it connotes that the trial court's attitude was unreasonable, arbitrary or unconscionable. *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 5, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983)." *State v. Tonkinson*, 7th Dist. Columbiana No. 19 CO 0016, 2020-Ohio-3623, ¶ 18.

{¶9} Crim.R. 32.1 governs motions to withdraw a guilty plea and provides:

> 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.

{¶10} When determining whether a trial court abused its discretion in denying a pre-sentence motion to withdraw a guilty plea, the reviewing court must consider nine factors:

> (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. Mahoning No. 18 MA 0012, 2008-Ohio-5043, ¶ 13.

{¶11} A motion to withdraw a guilty plea made prior to sentencing should be freely allowed and liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). However, there is no absolute right to withdraw a guilty plea. *Id.* The record must show there is "a reasonable and legitimate basis for the withdrawal of the plea." *Id.*

{¶12} No one particular factor is determinative as to whether the motion should be granted; all required factors should be weighed and other factors that are deemed relevant may be considered as well. *State v. Lundy,* 7th Dist. Mahoning No. 07 MA 82, 2008-Ohio-1535, ¶ 18 citing *State v. Cuthbertson,* 139 Ohio App.3d 895, 899, 746 N.E.2d 197 (7th Dist.2000). Importantly, this Court has long held that a mere change of heart does not form a sufficient basis for granting withdrawal of a guilty plea. *State v. Johnston,* 7th Dist. Columbiana No. 06 CO 64, 2007-Ohio-4620, ¶ 32.

{¶13} The first factor to consider is prejudice to the state. The state conceded at the hearing that there would be very little prejudice. The trial court, however, recognized that the victim was a juvenile and a family member of the Appellant, and that the "weight

lifted from that child's shoulders when Appellee [sic] entered a plea and she knew she would not have to testify cannot be cast aside." (Appellee's Brf., p. 5.)

{¶14} While Appellant is correct the state conceded there would be very little prejudice to its presentation of this case, the age and familial relationship with the victim could potentially hamper the state's ability to call her as a witness in this matter. However, considering the speculative nature of the impact of testifying and the availability of this witness, this factor weighs in Appellant's favor.

{¶15} The second factor is counsel's representation. Both the state and Appellant agree that counsel provided competent counsel. Therefore, this factor weighs in the state's favor.

{¶16} The third factor is the adequacy of the Crim.R. 11 plea hearing. Appellant contends he did not receive a full and fair hearing, because the trial court failed to fully advise him of the effect of his guilty plea. The state argues the trial court fully complied with Crim.R. 11 in providing Appellant a full and fair hearing.

{¶17} The right to be informed of the effect of the guilty plea, that it is a complete admission of guilt, is a nonconstitutional right and is thus subject to a review under a standard of substantial compliance. *State v. Griggs,* 103 Ohio St.3d 85, 814 N.E.2d 51, 2004-Ohio-4415, at ¶ 12, citing *State v. Nero,* 56 Ohio St.3d 106, 107, 564 N.E.2d 474 (1990). Failure to comply with a nonconstitutional right will not invalidate a guilty plea unless the defendant can demonstrate he suffered prejudice. *Nero,* at 108. The test for prejudice is "whether the plea would have otherwise been made." *Id.* This Court must review the totality of the circumstances surrounding the plea and determine whether the

defendant subjectively understood that a guilty plea was a complete admission of guilt. *Id.*

{¶18} In order to satisfy Crim.R. 11(C)(2)(b)'s requirement that the defendant understands the effect of the guilty plea, the trial court must inform the defendant, either orally or in writing, of the language set forth in Crim.R. 11(B) which defines the effect of a guilty plea as "a complete admission of the defendant's guilt." Crim.R. 11(B); see *State v. Jones,* 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, paragraph two of the syllabus.

{¶19} At the Crim.R. 11 hearing the trial court asked the following:

> THE COURT: Do you understand that by pleading guilty, you are admitting the facts as stated in the Indictment as to Counts II and III; you're admitting those?
>
> THE DEFENDANT: Yes.

(7/15/19 Change of Plea Hrg. Tr., p. 5.) We note the trial court did not use the specific language contained in Crim.R. 11(B) at the hearing. However, that specific language was included in the written plea agreement signed by Appellant and his counsel. (7/17/19 Guilty Plea.) This clearly complies with Crim.R. 11(C)(2)(b). Moreover, pursuant to *Griggs,* a defendant who has entered a guilty plea without asserting his innocence is presumed to understand that he has admitted guilt, and a court's failure to directly inform the defendant is presumed not to be prejudicial. *Griggs* at ¶ 19. Notwithstanding his current posture, Appellant made no assertion of innocence at the plea hearing and affirmed that he understood the effect of his plea. Accordingly, because the trial court

substantially complied with Crim.R. 11(C) and Appellant cannot establish prejudice, this factor weighs in the state's favor.

{¶20} The fourth factor involves the adequacy of the plea withdrawal hearing. Appellant concedes that a hearing was held on his motion, that he testified, and the parties presented arguments. Appellant now contends he maintained at the hearing that he was innocent, and only entered a guilty plea based on his "need and belief that I'd be home to my family quicker." (8/16/19 Motion to Withdraw Guilty Plea Hrg. Tr., p. 21.) Appellant argues that the trial court relied on statements he made in the presentence investigation ("PSI") report regarding his sexual conduct with the minor, but ignored his testimony at the withdrawal hearing that he lied during the PSI in order to return home to his family more quickly.

{¶21} A review of the transcript of the hearing reveals that Appellant had an opportunity to testify and the parties presented arguments. Appellant's assertion that the trial court disregarded his belated testimony that he was actually innocent and considered only his statements during preparation of the PSI lacks merit. There is nothing in the transcript to indicate that the trial court disregarded his testimony, although the court may have found it lacked credibility. Appellant testified on cross-examination that he was out on bond during all of the pending proceedings, and so was "home" with his family. He conceded that to go to trial instead of pleading guilty would have been the quickest way to permanently remain with his family, should he be proven innocent. Moreover, the trial court recited Appellant's own statements from the PSI wherein he described his sexual conduct with the minor in detail. At the conclusion of the hearing the trial court stated that

it had considered all of the evidence, including Appellant's testimony, and overruled his motion to withdrawal his plea. This factor weighs in the state's favor.

{¶22} The fifth factor is whether the trial court gave full and fair consideration to the motion. Appellant raises the identical arguments he used for the fourth factor. His argument fails for the reasons previously stated. This factor weighs in the state's favor.

{¶23} The sixth factor regards the timing of the motion. The motion to withdraw was filed on August 16, 2019, approximately one month after his guilty plea was entered. The motion was filed prior to sentencing in the matter. For these reasons, the timing of the motion was not unreasonable and this factor weighs in Appellant's favor.

{¶24} The seventh factor examines Appellant's reasons for filing the motion. Appellant contends he did not fully understand the effect of his plea and that he lied during the preparation of the PSI, admitting to the sexual acts only in order to get home to his family. Appellant now contends he is innocent of all charges. The record reveals that Appellant was advised of the effect of his plea at the hearing and in the written plea agreement. He cannot show that he was prejudiced as he never once asserted to the trial court prior to entering his plea that he was innocent. Instead, he described the acts committed in some detail to the investigators preparing the PSI, as stated by the trial court at the withdrawal hearing. Given the evidence in the record, it appears Appellant based his motion to withdraw solely on the fact that he had a change of heart because he faced incarceration, especially since he had remained out on bond throughout the proceedings in this matter. This is an insufficient basis to withdraw a guilty plea, despite the fact that the request to withdraw was made prior to sentencing. *State v. Hill,* 7th Dist. Carroll No. 12CA881, 2013-Ohio-2552, ¶ 30. This factor weighs in the state's favor.

{¶25} The eighth factor is Appellant's understanding of the nature of the charges and the potential sentence. Appellant was fully advised of his charges and the potential sentence. (7/15/19 Change of Plea Hrg. Tr., p. 6.) Appellant acknowledged several times that he was entering into the plea freely, voluntarily and with knowledge of the consequences. (7/15/19 Change of Plea Hrg. Tr., pp. 4-6.) This factor weighs in Appellant's favor.

{¶26} The final factor is whether Appellant is not guilty or has a meritorious defense to the charges. Appellant admitted to and described the sexual acts as reflected in the PSI. Appellant testified at the plea hearing that he admitted to all of the facts stated in the indictment. (7/15/19 Change of Plea Hrg. Tr., p. 5.) Although he asserted (for the first time) during his hearing on the motion to withdraw that he was innocent, the trial court acknowledged at the hearing that Appellant had earlier admitted to the conduct. The trial court was not persuaded by his testimony that he lied during preparation of the PSI in order to get home to his family. This factor does not weigh in Appellant's favor.

{¶27} Considering these factors in their totality, they do not weigh in Appellant's favor. The trial court did not abuse its discretion when it denied his presentence motion seeking to withdraw his guilty plea. Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE IMPOSITION OF MAXIMUM AND CONSECUTIVE SENTENCES WAS CONTRARY TO LAW.

{¶28} In his second assignment, Appellant takes issue with his sentence, asserting imposition of maximum consecutive sentences is contrary to the law.

{¶29} Pursuant to the Ohio Supreme Court's holding in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1, "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.*

{¶30} Pursuant to *Marcum,* the standard of review applied to findings required under particular statutory provisions, including consecutive sentencing as well as the trial court's consideration of sentencing factors set forth in R.C. 2929.11 and R.C. 2929.12, is clear and convincing. Clear and convincing evidence "is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Id*. at ¶ 22, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph one of the syllabus.

{¶31} A sentence is considered to be clearly and convincingly contrary to law if it falls outside of the statutory range for the particular degree of offense; if the trial court failed to properly consider the purposes and principles of felony sentencing enumerated in R.C. 2929.11 and the seriousness and recidivism factors of R.C. 2929.12; or if the trial court orders consecutive sentences and does not make the necessary findings. See *State v. Collins,* 7th Dist. Noble No. 15 NO 0429, 2017-Ohio-1264, ¶ 9; *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 30.

{¶32} Pursuant to R.C. 2929.11, when sentencing a felony defendant a court is guided by these overriding sentencing purposes: (1) protecting the public from future crime by the offender and others; and (2) punishing the offender using the minimum sanctions the court determines will accomplish those purposes without imposing unnecessary burden on state or local government resources. R.C. 2929.11(A). To achieve these goals the trial court must consider the need for: incapacitating the offender; deterring the offender and others from future crime; rehabilitating the offender; and making restitution to the victim, the public, or both. R.C. 2929.11(A). Further, R.C. 2929.11(B) provides:

> A sentence imposed for a felony shall be reasonably calculated to achieve the three overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

{¶33} Finally, a sentencing court has the discretion to determine the most effective way to comply with the principles and purposes of sentencing. In so doing, the court must consider the statutory seriousness and recidivism factors set forth in R.C. 2929.12(B), (C), (D) and (E) as well as any other relevant factors. The trial court is not required to state its findings regarding the principles and purposes of sentencing in R.C. 2929.11 or the seriousness or recidivism factors of R.C. 2929.12 on the record. *State v. Henry,* 7th Dist. Belmont No. 14 BE 40, 2015-Ohio-4145, ¶ 22-24.

{¶34} However, if ordering consecutive sentences, a trial court must make the statutory findings required by R.C. 2929.14(C)(4), which provides:

> 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.

{¶35} The trial court need not provide reasons in support of its consecutive sentence findings and need not quote the statute verbatim in making these findings. *Bonnell*, ¶ 27, 29. However, the court must find consecutive sentences are necessary to protect the public from future crime or to punish the offender; consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and one of the three alternative findings in subdivisions (a), (b) or (c). R.C. 2929.14(C)(4).

{¶36} In this case, the court determined at the sentencing hearing that Appellant's history of criminal conduct demonstrated consecutive sentences were necessary to protect the public pursuant to subdivision (c) of R.C. 2929.14(C)(4). In addition, in the sentencing entry, the trial court stated the two offenses caused harm to the juvenile victim that was so great a single term would not adequately reflect the seriousness of Appellant's conduct pursuant to subdivision (b). Importantly, a finding pursuant to only one of the subdivisions was sufficient. Appellant does not contest the facts supporting these findings, but argues only that none of the factors in subdivisions (a), (b) or (c) apply. While it is true the acts were not committed while Appellant was awaiting trial, prior to sentencing, or while under post release control, Appellant committed multiple offenses over a period of three years and the record supports the trial court's findings regarding the severity of the harm to the juvenile victim such that consecutive sentences were warranted. The record also reveals Appellant's history of criminal conduct, including multiple domestic violence convictions. Therefore, the trial court's imposition of consecutive sentences is supported by clear and convincing evidence in the record and

is not contrary to law. Appellant's second assignment of error is without merit and is overruled.

{¶37} Based on the foregoing, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.