[Cite as *State v. Hobbs*, 2020-Ohio-680.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108367
v.	:	
KENNETH L. HOBBS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: February 27, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-629125-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Gittel L. Chaiko, Assistant Prosecuting Attorney, *for appellee.*

Patrick Dichiro, *for appellant*.

SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Kenneth Hobbs appeals his conviction for criminal nonsupport. Upon review, we affirm.

{¶ 2} On May 25, 2018, appellant was indicted on two counts of criminal nonsupport of a dependent in violation of R.C. 2919.21(B), each a felony of the fifth degree. Appellant was declared indigent and appointed counsel.

{¶ 3} On September 21, 2018, appellant filed a motion to dismiss the indictment. The motion was opposed by the state. Appellant indicates that he was advised by the trial court on October 29, 2018, which was the date set for trial, that his motion to dismiss was denied. This is not disputed by the state. Further, although no transcript was filed and there is no entry on or about October 29, 2018, reflecting the denial of the motion, the trial court denied all outstanding motions in the judgment entry entered on February 28, 2019.

{¶ 4} On October 29, 2018, appellant entered a plea of guilty to Count 2 as charged, and the remaining count was nolled. Subsequent to his plea, appellant's trial counsel filed a motion to withdraw plea pursuant to Crim.R. 32.1 and a motion to withdraw as counsel. Also, appellant filed his own pro se motion to withdraw plea. The trial court granted counsel's motion to withdraw as counsel, and appellant's newly retained counsel filed a notice of appearance. A hearing was set for January 23, 2019, at which time the trial court denied appellant's motion to withdraw plea.

{¶ 5} A sentencing hearing was held on February 27, 2019. The trial court sentenced appellant to five years of community control and imposed terms and conditions of probation.

{¶ 6} Appellant timely appealed.

{¶ 7} Under his first assignment of error, appellant claims the trial court erred by denying his motion to dismiss because he claims he was not under a current order of support at the time the indictment was filed due to the emancipation of his child, and that any obligation to pay was for an arrearage. His argument is misplaced.

{¶ 8} Appellant was charged with two counts of criminal nonsupport in violation of R.C. 2919.21(B). The offenses were alleged to have occurred "[o]n or about June 15, 2010 to June 14, 2012" and "[o]n or about June 15, 2012 to June 14, 2014." At the time of the charged offense, former R.C. 2919.21(B) provided:

> No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support.

{¶ 9} In his motion to dismiss, appellant argued that he had not violated the requirements of former R.C. 2919.21(B) because his child was emancipated before the date of a court order for an arrearage was entered. However, the arrearage order was not the basis of the indictment. In opposing the motion, the state argued that appellant was ordered to pay child support in 2007 for his then minor child, and that the charges in the indictment stemmed from his failure to provide support during time periods prior to the child's emancipation, when he was subject to a current order for support. The state indicated that a six-year statute of limitations applied, and that appellant was not indicted for a violation of an order occurring post-emancipation.

{¶ 10} On appeal, appellant argues that the trial court should have dismissed the indictment because at the time of the indictment, he was not under any present support order or obligation because the child was emancipated in 2014. In support of his argument, he cites *State v. Pittman*, 150 Ohio St.3d 113, 2016-Ohio-8314, 79 N.E.3d 531.

{¶ 11} Unlike this case, in *Pittman*, the defendant was charged with nonpayment of an arrearage order that was issued after his child-support order was terminated. The issue before the Supreme Court of Ohio was "whether, pursuant to R.C. 2919.21(B), the state may prosecute a person who failed to make the payments set forth in an arrearage-only order issued after the date of his children's emancipation." *Id.* at ¶ 16. Although the defendant had also been charged with nonsupport of his dependents for dates prior to emancipation, the trial court found those counts were barred by the six-year statute of limitations for felonies set forth in R.C. 2901.13(A)(1) and that those counts were not the subject of the appeal. *Id.* at ¶ 7.

{¶ 12} The Supreme Court of Ohio held in *Pittman* that the defendant was not subject to prosecution under former R.C. 2919.21(B) for the nonpayment of a child-support arrearage order established after the emancipation of his children because he "had no current legal obligation to support his emancipated children." *Id.* at ¶ 22. The court held as follows:

> R.C. 2919.21(B) is unambiguous. It criminalizes a person's failure to support—in the manner established by a court order—another person whom he is legally obligated to support. Because the statute uses the

> present tense in the phrase "is legally obligated to support," a person charged with a violation must be under a current obligation to provide support.

Id. at ¶ 18.

{¶ 13} In addressing the charges related to the nonpayment of an arrearage order, the court indicated that "Pittman's criminal liability for nonpayment of support ended on August 31, 2006, when his children were emancipated." *Id.* at ¶ 19. The court stated, "[t]he 2006 orders were not for support but instead granted judgments against Pittman for the arrearage amounts." *Id.* The court further found that "the state cannot, in effect, extend the statute of limitations indefinitely by memorializing in an arrearage order the previous failure to provide support and then seeking criminal charges on the arrearage order." *Id.* at ¶ 20.[1]

{¶ 14} The state argues that *Pittman* does not apply to this case because the charges brought against appellant alleged nonpayment of support for a period prior to the child's emancipation, when appellant was under an active and current child support order. Although we note some discrepancy in the pleadings as to whether appellant's daughter was emancipated in May or June 2014, Count 2 of the indictment charged criminal nonsupport with the date of offense occurring "[o]n or about June 15, 2012 to June 14, 2014." Count 1 involved a period prior to that. Thus,

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[1] Effective February 11, 2019, the General Assembly amended R.C. 2919.21(B) through 2018 Am.Sub.S.B. No. 70. The amendment clarifies that a person can still be prosecuted for criminal nonsupport of dependents under R.C. 2919.21(B) after the duty to pay current support terminated. R.C. 2919.21(B)(1)(b). However, the statute of limitations is not extended indefinitely; rather, it begins to run "on the date the person's duty to pay current support terminates." R.C. 2919.21(B)(2).

the nonpayment of support charged in the indictment involved periods prior to the child's emancipation, when appellant was subject to a current legal obligation to provide support and subject to criminal liability.

{¶ 15} That the indictment was not filed until after the child's emancipation is immaterial in this case. We recognize that in *State v. Hubbard*, 2018-Ohio-3627, 119 N.E.3d 798 (11th Dist.), the Eleventh District Court of Appeals concluded that the holding in *Pittman* was not limited to arrearage-only orders but, rather, applied to bar prosecution for criminal nonsupport following the emancipation of the child, regardless of whether the charge arose from a violation of a child-support order or an arrearage order. *Id.* at ¶ 15-16. However, the Second, Fifth, and Tenth Districts have all held that *Pittman* is limited to where the state is attempting to apply criminal penalties to the failure to pay an arrearage order, and does not preclude prosecution for the failure to pay a current support order during the time periods listed in the indictment, even though the indictment was filed after the child was emancipated. *State v. Cornwell*, 5th Dist. Holmes No. 19CA001, 2019-Ohio-4643, ¶ 19, citing *State v. Parr*, 10th Dist. Franklin No. 17AP-782, 2019-Ohio-4011; *State v. Winslow*, 2d Dist. Montgomery No. 28178, 2019-Ohio-2357, *motion to certify allowed*, 2019-Ohio-3797, 131 N.E.3d 955; *State v. Brown*, 2d Dist. Greene No. 2018-CA-29, 2019-Ohio-1666, *motion to certify allowed*, 2019-Ohio-3263, 129 N.E.3d 475.

{¶ 16} We acknowledge that the Supreme Court of Ohio has certified a conflict between the Second District's decision in *Brown* with the Eleventh District's

decision in *Hubbard*. *8/21/2019 Case Announcements*, 2019-Ohio-3263. Until the court declares otherwise, we shall follow the majority of districts that have addressed the issue and held that "*Pittman* does not preclude prosecution where, as here, there was a current support order during the time periods listed in the counts of the indictment, even though the indictment was filed after the dependent was emancipated." (Citations omitted.) *Parr* at ¶ 32.

{¶ 17} Accordingly, we affirm the trial court's denial of appellant's motion to dismiss.[2] Appellant's first assignment of error is overruled.

{¶ 18} We recognize that our decision is in conflict with the judgment of the Eleventh District Court of Appeals in *Hubbard* and that this issue is currently before the Supreme Court of Ohio in *Brown*. Therefore, we sua sponte certify a conflict to the Supreme Court of Ohio, pursuant to Article IV, Section 3(B)(4), Ohio Constitution, on the same question before the court in *Brown*:

> May a child support obligor be prosecuted for failure to pay child support under R.C. 2919.21(B) where a child support order was in place for the time period specified in the charging document, but the charging document was filed after the child for whom support was owed had been emancipated and the child support obligation had terminated?

{¶ 19} Under the second assignment of error, appellant claims the trial court erred in denying his presentence motion to withdraw his guilty plea. Appellant claims that he truly believed that he was innocent and had a defense, and that there

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[2] We note that Count 2 was filed within the six-year statute of limitations set forth under R.C. 2901.13(A)(1)(a). Although Count 1 was filed after the statute of limitations had run, appellant did not seek dismissal on that ground. Regardless, Count 1 was nolled by the trial court after defendant entered his guilty plea to Count 2.

were problems and irreconcilable differences between appellant and his initial counsel.

{¶ 20} A defendant does not have an absolute right to withdraw a plea prior to sentencing, and it is within the sound discretion of the trial court to determine what circumstances justify granting such a motion. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). "Unless it is shown that the trial court acted unreasonably, arbitrarily or unconscionably in denying a defendant's motion to withdraw a plea, there is no abuse of discretion and the trial court's decision must be affirmed." *State v. Sprachmann*, 8th Dist. Cuyahoga No. 108243, 2019-Ohio-5125, ¶ 14, citing *Xie* at 527. This court has previously stated:

> A trial court does not abuse its discretion in denying a motion to withdraw a guilty plea where the following occurs: (1) the accused is represented by competent counsel; (2) the accused was afforded a full hearing, pursuant to Crim.R. 11, before he entered the plea; (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion; and (4) the record reflects that the court gave full and fair consideration to the plea-withdrawal request. [*State v. Peterseim*, 68 Ohio App.2d 211, 428 N.E.2d 863 (8th Dist.1980)], paragraph three of the syllabus; *State v. King*, 8th Dist. Cuyahoga No. 106709, 2018-Ohio-4780, ¶ 13.

State v. Abercrombie, 8th Dist. Cuyahoga No. 108147, 2019-Ohio-4786, ¶ 11. Additional factors may also be considered. *Id*.

{¶ 21} Appellant entered a plea of guilty to Count 2 of the indictment, and Count 1 was nolled. Appellant's plea of guilty to Count 2 of the indictment was a complete admission of appellant's guilt to the offense. Crim.R. 11(B)(1). Because no transcript of appellant's plea hearing was filed, we must presume the requirements

of Crim.R. 11(C) were met and that appellant knowingly, intelligently, and voluntarily entered his plea. *State v. Spears*, 11th Dist. Ashtabula No. 2013-A-0027, 2014-Ohio-2695, ¶ 9; *State v. Vinson*, 8th Dist. Cuyahoga Nos. 87056, 87058, and 87060, 2006-Ohio-3971, ¶ 39; *see also Bakhtiar v. Saghafi*, 8th Dist. Cuyahoga No. 104204, 2016-Ohio-8052, ¶ 3. The record does not demonstrate that appellant was not represented by competent counsel. In fact, the record before us reflects that appellant's initial counsel filed a motion to dismiss on appellant's behalf and provided competent representation prior to withdrawing from the case. Also, the docket reflects that the parties filed briefs for the trial court's consideration and that the trial court set a hearing on the motion to withdraw. In light of our analysis under the first assignment of error, the trial court could have considered defendant was not "possibly not guilty" or did not have "a complete defense to the crime." *See Cornwell*, 5th Dist. Holmes No. 19CA001, 2019-Ohio-4643, at ¶ 20. Accordingly, we cannot find the trial court abused its discretion in denying appellant's presentence motion to withdraw his guilty plea. Appellant's second assignment of error is overruled.

{¶ 22} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

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

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SEAN C. GALLAGHER, JUDGE

EILEEN T. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR