

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 11AP-548
	:	(C.P.C. No. 09CR-12-7672)
Jamal H. West,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on May 10, 2012

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*Ron O'Brien*, Prosecuting Attorney, and *Sheryl L. Prichard*,  
for appellee.

*Moore & Yaklevich*, and *W. Jeffrey Moore*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Jamal H. West ("appellant"), appeals from a judgment entered by the Franklin County Court of Common Pleas in which the trial court sentenced appellant to a 33-year term of incarceration after denying appellant's pre-sentence motion to withdraw guilty plea. For the reasons that follow, we affirm.

{¶ 2} On December 23, 2009, an 11-count indictment was filed against appellant for charges involving aggravated burglary, kidnapping, aggravated robbery, gross sexual imposition, rape, and possession of criminal tools. Ten of the 11 counts also included firearm specifications. All of the crimes were alleged to have occurred out of a single incident involving a home invasion in Franklin County, Ohio on September 28, 2008.

{¶ 3} On January 11, 2010, appellant was arraigned and the Franklin County Public Defender was appointed to represent him. Attorney Mahlon Nowland was

assigned to represent appellant. This representation was ongoing until April 5, 2011, at which time appellant retained private defense counsel, specifically, attorneys Christopher Cooper and Crysta Pennington.

{¶ 4} On May 9, 2011, a plea hearing was held. Appellant entered a plea of guilty to one count of aggravated burglary (Count 1 of the indictment), one count of aggravated robbery (Count 5 of the indictment) with a three-year firearm specification, and one count of rape (Count 7 of the indictment). During the plea hearing, the trial court personally addressed appellant and discussed the consequences of appellant changing his not guilty pleas to guilty pleas, as well as the rights he would be giving up by pleading guilty, rather than going to trial and requiring the State to prove his guilt beyond a reasonable doubt. Specifically, the trial court confirmed appellant understood he was giving up the right to: have a jury trial; confront witnesses; use compulsory process to obtain and/or compel witnesses and present evidence on his own behalf; testify on his own behalf or not testify if he so chose; and appeal any decisions made by the trial court to a higher court.

{¶ 5} Appellant confirmed he had read the guilty plea form and discussed it with Attorney Pennington. The trial court also discussed the elements of the offenses to which appellant was pleading guilty and how the elements related to his conduct, as well as the court's ability to proceed to judgment and sentencing. Finally, the trial court determined appellant was making the pleas knowingly, voluntarily, and intelligently with full understanding of: the nature of the charges; the maximum penalty involved; the effect of the plea; and the mandatory prison term at issue as a result of the firearm specification.

{¶ 6} Following this colloquy, the trial court accepted appellant's pleas. The remaining eight counts were dismissed. The trial court then requested a pre-sentence investigation report ("PSI") and scheduled the matter for sentencing on May 25, 2011.

{¶ 7} Appellant was interviewed by the PSI writers on May 16, 2011 to provide his version of the events surrounding the crimes at issue. On May 20, 2011, appellant, through counsel, filed a motion to withdraw guilty plea pursuant to Crim.R. 32.1. Appellant's motion stated, in relevant part, "the [appellant], after giving much thought to the facts of the case, including grasping a better understanding of DNA/forensic science, decided that he did not want to proceed with sentencing, and, in the alternative, would like to proceed with trial."

{¶ 8} On May 25, 2011 (the date appellant was scheduled for sentencing), the trial court conducted an oral hearing to address the motion to withdraw guilty plea. At the hearing, appellant informed the trial court he had entered his plea without a sufficient understanding of DNA, but since entering the guilty plea, appellant participated in a discussion with two family members who had consulted with unnamed individuals familiar with DNA evidence. Following that discussion, during which his family members better explained DNA evidence to him, appellant claimed he gained a clearer understanding of DNA evidence and the evidence in this case. As a result of his improved understanding, appellant advised the trial court he now believed the DNA evidence was actually more favorable to him than he had originally thought. Because the report stated he could not be *excluded* as a contributor, rather than stating he was *included* as a contributor, appellant believed the evidence was actually favorable to him and, therefore, he wanted to go to trial on the matter, rather than proceed with sentencing.

{¶ 9} Attorney Cooper, lead trial counsel for appellant at the time of the hearing, advised the trial court he had explained "ad nauseam" the results of the DNA analysis to appellant prior to the plea. (Tr. 21.) Attorney Cooper asserted he had explained to appellant that the probability that another person's DNA (other than appellant's) was a match to the DNA found on the hammer was *extremely* unlikely, given the numerical ratio used by the DNA experts (which involved a number larger than the number of people living in the world), and that the results of the DNA analysis essentially meant appellant was included as a contributor to the DNA located on the hammer.

{¶ 10} Appellant's brother, Wayland Stewart, testified at the hearing on appellant's behalf. Mr. Stewart testified he called and spoke with a person at The Ohio State University, whose name he could not recall, and asked some questions about DNA and the terms "included" and "excluded." Mr. Stewart testified he also spoke to other individuals about DNA throughout the time his brother had been incarcerated on these charges. Mr. Stewart shared the information he learned with appellant and helped appellant to understand the science of DNA. Mr. Stewart testified this conversation took place after appellant had already entered his guilty pleas.

{¶ 11} The State presented appellant's original trial counsel, Attorney Nowland, as a witness at the hearing. Attorney Nowland testified he reviewed all of the discovery

received from the State regarding the DNA analysis conducted in this case. Attorney Nowland then retained a DNA expert to review the protocol and procedures followed by the DNA technicians at the Columbus police crime lab in order to ensure that the proper procedures were followed and that the conclusions were sound. The independent lab found no problems. Attorney Nowland testified he explained the DNA results and the scientific process involved with DNA to appellant in "layman's terms," which included explaining the significance of the results. The most significant discussion about DNA occurred in the late summer or fall of 2010, at which time Attorney Nowland used various charts to explain the DNA results to appellant. Attorney Nowland further testified he explained to appellant what the report meant where it stated appellant could not be excluded as a contributor, and he had no indication that appellant did not understand the DNA evidence. Attorney Nowland did not recall appellant having many questions about DNA. In response to questioning from the court, Attorney Nowland confirmed he clearly explained to appellant there was no question that if the jury believed the DNA evidence, they would believe the DNA on the hammer belonged to him. (Tr. 84.) Attorney Nowland described the DNA evidence on the hammer as "very strong evidence." (Tr. 66.)

{¶ 12} Following the hearing, the trial court overruled appellant's motion to withdraw guilty plea and proceeded to sentencing. Appellant received a sentence of ten years as to each of the three counts, which were ordered to run consecutively, plus three years for the firearm specification, for a total sentence of 33 years. Appellant was also informed he would be subject to five years of post-release control and he would be required to register as a Tier III sex offender upon his release from prison.

{¶ 13} Appellant now files this timely appeal in which he asserts a single assignment of error:

I. The Trial Court erred in refusing to allow the Defendant to withdraw his plea[.]

{¶ 14} A defendant may seek to withdraw his guilty plea pursuant to CrimR. 32.1. The rule provides as follows:

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.

{¶ 15} "[A] presentence motion to withdraw a guilty plea should be freely and liberally granted." *State v. Xie*, 62 Ohio St.3d 521, 527 (1992). "Nevertheless, it must be recognized that a defendant does not have an absolute right to withdraw a plea prior to sentencing." *Id.* Prior to ruling on the motion to withdraw, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal. *Id.* A trial court's decision on a pre-sentence motion to withdraw is reviewed under an abuse of discretion standard. *Id.* An abuse of discretion means the trial court is " 'unreasonable, arbitrary or unconscionable' in reaching its decision." *State v. Porter*, 10th Dist. No. 11AP-514, 2012-Ohio-940, ¶ 20, quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Unless it is shown that the trial court acted unfairly or unjustly, there has not been an abuse of discretion. *Xie* at 526; *State v. Peterseim*, 68 Ohio App.2d 211, 213-14 (8th Dist.1980). It is within the sound discretion of the trial court to decide what circumstances justify the granting of a motion to withdraw guilty plea. *Xie* at 526; *Peterseim* at 213-14. "What constitutes an abuse of discretion with respect to denying a motion to withdraw a guilty plea necessarily is variable with the facts and circumstances involved." *State v. Walton*, 2 Ohio App.3d 117, 119 (10th Dist.1981).

{¶ 16} In reviewing a trial court's decision on a pre-sentence motion to withdraw guilty plea, we must weigh several nonexhaustive factors. These include: (1) whether the prosecution would be prejudiced if the plea were withdrawn; (2) whether the defendant was represented by highly competent counsel; (3) whether the defendant received a full Crim.R. 11 hearing prior to entering the plea; (4) whether there was a full hearing on the motion to withdraw; (5) whether the trial court gave full and fair consideration to the motion to withdraw; (6) whether the motion was filed within a reasonable time period; (7) whether the motion put forth specific reasons for the withdrawal; (8) whether the defendant understood the nature of the charges and the possible penalties; and (9) whether the defendant had a complete defense to the crime or perhaps was not guilty. *State v. Jones*, 10th Dist. No. 09AP-700, 2010-Ohio-903, ¶ 10, citing *State v. Fish*, 104 Ohio App.3d 236, 240 (1st Dist.1995); *State v. Zimmerman*, 10th Dist. No. 09AP-866, 2010-Ohio-4087, ¶ 13; and *State v. Harris*, 10th Dist. No. 09AP-1111, 2010-Ohio-4127, ¶

25. "Consideration of the factors is a balancing test, and no one factor is conclusive." *Zimmerman* at ¶ 13, citing *Fish* at 240.

{¶ 17} In the instant case, a review of the record demonstrates the trial court considered these factors in reaching its decision to deny the motion to withdraw guilty plea. The trial court specifically found: (1) the prejudice to the State was minimal; (2) appellant was represented by three highly competent attorneys, and advised by a fourth highly competent attorney, each of whom discussed the DNA evidence with appellant; (3) the Crim.R. 11 hearing was more than adequate; (4) a full hearing was held on the motion to withdraw; (5) fair consideration was given to the motion to withdraw; (6) the motion to withdraw was made within a reasonable time; (7) the nature of the charges and the possible penalties were fully and adequately explained; and (8) there was no evidence presented which would raise a complete defense, as the DNA evidence and appellant's admissions were overwhelming.

{¶ 18} The trial court further stated it believed appellant, at the time he entered the plea, had adequate knowledge of the significance of the evidence, as the evidence was fully explained to him on more than one occasion and he was advised as to the compelling nature of that evidence. In addition, the trial court determined there was "absolutely no reasonable and legitimate basis for the withdrawal of this plea in this case." (Tr. 105.)

{¶ 19} Appellant now challenges both the plea hearing as well as the hearing on the motion to withdraw guilty plea. First, appellant argues, in essence, that the trial court failed to conduct a proper plea colloquy with him in compliance with Crim.R. 11, claiming his answers were simply a robotic "yes." Appellant also claims he was merely following the advice of his attorneys, rather than really understanding the nature and consequences of his plea, particularly since he pled guilty to the rape charge, yet continued to deny that he committed rape. Second, appellant submits he filed the motion to withdraw guilty plea because he did not understand everything regarding the DNA testimony in this case as it applied to him, and after learning more about DNA, he believed he had a valid defense. Although not specifically stated, appellant seems to assert his plea was not knowingly, intelligently, and voluntarily entered, and he did not receive a full hearing pursuant to Crim.R. 11, since he did not understand all of the DNA evidence.

{¶ 20} We reject appellant's arguments and find no abuse of discretion involving the trial court's decision to deny appellant's motion to withdraw guilty plea for the following reasons.

{¶ 21} First, we find that the prejudice to the State was minimal. The State asserted the case had dragged on for many months, due to appellant's numerous requests for continuances, thereby causing memories to fade. The State also argued the victims in the case were very likely to move out of state in the near future, thereby making it more difficult to secure their appearance for trial. However, the State has not asserted that the victims would in fact become unavailable. This type of prejudice is minimal and not significantly out of the ordinary in cases involving the withdrawal of a plea. The withdrawal would not significantly affect the State's prosecution and its impact is in-line with the expected impact on the prosecution's case any time an offender subsequently withdraws a guilty plea.

{¶ 22} Second, it is readily apparent appellant had competent counsel who advised him about the DNA evidence and its significance on several occasions. As the trial court noted, during the time period this matter was pending, appellant received representation from three attorneys, as well as consultation from a fourth, all of whom discussed the DNA evidence with appellant in detail. As explained below, appellant indeed received counsel from highly competent attorneys.

{¶ 23} Attorney Nowland, who had more than 31 years of experience and was familiar with DNA, testified he had the results reviewed by an independent lab and thoroughly discussed DNA with appellant on more than one occasion, and even used a chart to help explain the process and the results. Attorney Nowland testified he explained DNA in layman's terms and believed appellant understood his explanation. He also believed the DNA evidence on the hammer was strong evidence and, therefore, he thoroughly discussed it with appellant. Attorney Nowland admitted that during plea discussions in February and March 2011, appellant took the position he had been present during the crime, but he had only watched the rape and failed to stop it. Thus, appellant had claimed he was not guilty of physically committing the rape, but he did not dispute

the DNA evidence or results at that time.<sup>1</sup> Additionally, Attorney Nowland testified another attorney, W. Jeffrey Moore, was familiar with appellant's family and had also assisted in explaining and discussing the case.

{¶ 24} Furthermore, Attorney Cooper stated he and Attorney Pennington had discussed the DNA evidence "ad nauseam" with appellant. These attorneys explained that the probability that the DNA at issue on the hammer would match the DNA of a person other than appellant was essentially nil, given that those chances were one and some number that was larger than the number of people currently living on Earth. Additionally, Attorney Pennington stated she had also explained the "included" versus "excluded" terms to appellant prior to the date of the plea.

{¶ 25} Next, we look at the extent of the CrimR. 11 hearing, as well as whether appellant understood the nature of the charges and the possible penalties. We dispute appellant's claim that his answers to the trial court's inquiries were simply robotic yeses. The trial court held an extensive, full, and thorough hearing and personally addressed appellant. For example, when the trial court reached the issue of the guilty plea on the rape charge, the trial court inquired further into appellant's specific conduct relating to that charge and acknowledged that appellant was pleading as an aider and abettor who failed to stop the rape, rather than as someone who physically participated in the act. Appellant provided much more than a robotic yes and the trial court was very thorough in discussing this. The trial court made additional inquiries and asked appellant to describe his conduct with respect to the other offenses as well. The trial court also thoroughly discussed the rights appellant was giving up by pleading guilty, as well as the effect and consequences of the plea, including the possible penalties, and found the plea was entered knowingly, voluntarily, and intelligently.

{¶ 26} In looking at the fourth and fifth considerations referenced above, a review of the transcript from the hearing on the motion to withdraw guilty plea demonstrates a full hearing was held on the motion and the trial court gave full and fair consideration to the motion. Counsel for both parties provided arguments, counsel for appellant provided

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<sup>1</sup> Significantly, as previously noted, the DNA at issue involved DNA retrieved from a hammer used during the attack and located inside the house. The record does not reveal any DNA recovered from the actual rape, presumably because the rapists wore condoms, per statements from the victim.



additional information, and two witnesses in addition to appellant were called to provide testimony. The trial court asked numerous questions and frequently asked for clarification. It is readily apparent counsel for appellant was given a full opportunity to argue his motion, to state his basis for the motion, and to support his arguments. Additionally, the trial court explained in detail the reasons why it was denying the motion. We find nothing to suggest that the trial court failed to give full and fair consideration to the motion.

{¶ 27} Regarding the sixth factor, we believe the motion was made within a reasonable time. Although the motion was not made until after appellant had been interviewed by the PSI writer, the motion was filed 11 days after the plea and five days prior to the sentencing date. Such a time period is reasonable under the circumstances of this case.

{¶ 28} Next, we consider whether the motion to withdraw set forth specific reasons for the withdrawal of the guilty plea. Although appellant's written motion is somewhat vague, it was clear at the hearing that appellant's reason for wanting to withdraw his guilty plea was based upon the DNA evidence and his claim that he did not fully comprehend the DNA evidence prior to pleading guilty. Appellant asserted that because he developed a more complete understanding of the DNA evidence after he pled guilty, and because he now believed the DNA evidence was not as strong as he originally thought, he wanted to take the case to trial. Nevertheless, as shall be explained more fully in our analysis of the ninth consideration, we find appellant's claimed basis to be without merit.

{¶ 29} Finally, with respect to the ninth consideration, we find appellant lacked a complete defense to the crime and there was nothing to suggest that appellant was not guilty of these offenses. As the trial court found, the DNA evidence against appellant was extremely compelling. The possibility that there is another person besides appellant whose DNA would match that found on the hammer is virtually nonexistent, according to the statistical probabilities asserted at the hearing. There is a plethora of evidence in the record to demonstrate that appellant's attorneys explained DNA evidence and the significance of the DNA evidence in this particular case to him on numerous occasions using various methods. Furthermore, appellant admitted at the plea hearing and to the PSI writer what his role was in these crimes. Appellant admitted to breaking into the

residence and searching for valuables and to assisting in robbing the victims of cash. Although appellant denied physically raping the female victim, he acknowledged that he did not stop his co-defendant(s) from raping the female victim. The evidence linking appellant to these crimes is significant.

{¶ 30} After considering the factors set forth above, we find the trial court did not abuse its discretion in denying appellant's motion to withdraw guilty plea. The most pertinent factors in this case weigh in favor of denying appellant's motion to withdraw guilty plea. It is readily apparent that appellant had highly competent counsel who discussed the most significant and compelling evidence with him on numerous occasions. It is also apparent that the trial court more than adequately complied with Crim.R. 11. Appellant should have been acutely aware of the nature of the charges and the possible penalties. The trial court carefully considered appellant's motion and all of the circumstances surrounding his guilty plea. The trial court provided appellant with a full hearing on the motion to withdraw guilty plea and gave full and fair consideration to that motion. Furthermore, the evidence against appellant in this case is compelling. A defendant is not entitled to withdraw his guilty plea simply because he has changed his mind. *See Porter* at ¶ 30.

{¶ 31} Because we find no abuse of discretion on the part of the Franklin County Court of Common Pleas in making its ruling denying the motion to withdraw guilty plea, its decision must be affirmed. Accordingly, appellant's single assignment of error is overruled.

*Judgment affirmed.*

SADLER and DORRIAN, JJ., concur.

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