[Cite as *State v. Patt,* 2004-Ohio-2601.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2002-L-073**
- vs -	:	
THOMAS E. PATT,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 01 CR 000555.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Brian L. Summers,* Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Thomas E. Patt, pro se, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This appeal arises from the Lake County Court of Common Pleas. On January 4, 2002, appellant, Thomas E. Patt ("Patt"), was indicted on two counts of assault on a peace officer, felonies of the fourth degree. The charges arose from an incident where it was alleged Patt physically assaulted Patrolman Gunton and

Patrolman Bruening of the Mentor Police Department as they were attempting to arrest him for violating a restraining order involving Patt's ex-wife.

{¶2} Patt pled not guilty at his arraignment and the matter was set for trial on March 18, 2002. On March 18, 2002, the date at which trial was to commence, Patt withdrew his not guilty plea and pled guilty to both counts on the indictment. A sentencing hearing was scheduled for April 25, 2002.

{¶3} Patt subsequently discharged his attorney, Russell Kubyn and, on April 16, 2002, the trial court granted Kubyn's motion to withdraw from representation. Attorney Morse filed an entry of appearance in the case as new counsel on April 19, 2002. Patt filed a motion to withdraw his guilty plea on that same date. On April 25, 2002, the date of the sentencing hearing, the trial court continued the matter until April 30, 2002, to allow Attorney Morse time to prepare for the hearing. The trial court indicated that it would rule on the Crim.R. 32.1 motion on that date, and if the motion was overruled, the matter would proceed directly to sentencing. In the alternative, if the motion was granted and the guilty plea was withdrawn, the matter would be set for a new trial date.

{¶4} The hearing on the Crim.R. 32.1 motion was held on April 30, 2002. Patt was present and represented by Attorney Morse. Attorney Kubyn was also present, as he was subpoenaed as a witness. Both Patt and Kubyn testified at the hearing. The trial court subsequently denied Patt's motion to withdraw the guilty plea and proceeded to the sentencing. Patt was sentenced to fifteen months on each count, to be served consecutively, for a total of thirty months imprisonment.

{¶5} Patt presents three assignments of error on appeal. The first assignment of error is:

{¶6} "The trial court abused its discretion when it denied appellant his pre-sentence motion to withdraw his guilty plea."

{¶7} Crim.R. 32.1 provides;

{¶8} "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."

{¶9} In *State v. Xie*, the Supreme Court of Ohio held that "a presentence motion to withdraw a guilty plea should be freely and liberally granted."[1] However, it has also recognized, "[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. A trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea."[2] We review the trial court's determination on withdrawal of a guilty plea for abuse of discretion.[3]

{¶10} This court has applied the factors set forth by the Eighth Appellate District in *State v. Peterseim* when determining whether a trial court abused its discretion in overruling a presentence motion to withdraw a guilty plea.[4] Pursuant to *Peterseim*, "the trial court does not abuse its discretion in denying the motion where: (1) the trial court, following the mandates of Crim.R. 11, ensured the defendant understood his rights and

1. *State v. Xie* (1992), 62 Ohio St.3d 521, 527.
2. Id., paragraph one of the syllabus.
3. Id., paragraph two of the syllabus.
4. *State v. Gomez* (Dec. 5, 1997), 11th Dist. No. 97-L-021, 1997 Ohio App. LEXIS 5450; *State v. Ready*, 11th Dist. No. 2001-L-150, 2002-Ohio-7138 at ¶35.

voluntarily waived those rights by entering the guilty plea; (2) the defendant was represented by highly competent counsel; (3) the defendant was given adequate opportunity to be heard, by way of a hearing wherein he could assert all arguments in support of his motion to withdraw the plea; and (4) the trial court gave careful consideration to the merits of the defendant's motion to withdraw the plea."[5]

{¶11} In the instant case, Patt takes issue with each of the *Peterseim* factors.

{¶12} Regarding the first *Peterseim* factor, Patt contends that he was denied a full and fair Crim.R. 11 hearing. Before accepting a guilty plea, the trial court must inform the defendant that by pleading guilty, the defendant is waiving the rights enumerated in Crim.R. 11(C)(2)(c). Moreover, "[t]he waiver must be voluntary, intelligently, and knowingly made and the defendant must understand the nature of the charges against him and the consequences of his plea of guilty. Otherwise, it is in violation of due process and is therefore void."[6]

{¶13} The record reveals, and Patt concedes, that he was advised of his rights at the plea hearing. However, Patt argues that, although he was advised of his rights, he noted several times during the colloquy his apprehension and his feeling that, although he did not want to plead guilty, he felt that he was left with no other option. On the morning of March 18, 2002, the date trial was set to commence, Patt filed a motion for a continuance. Patt asserted in his motion that a continuance was necessary because he had been incarcerated and had not been able to adequately prepare his defense and because he had sought out other counsel, namely Attorney Spellacy and

5. (Emphasis omitted.) *Gomez,* at 6, citing *State v. Peterseim* (1979), 68 Ohio App.2d 211, 214.
6. *State v. Buchanan* (1974), 43 Ohio App.2d 93, 96.

additional time was needed for Attorney Spellacy to prepare for trial. The trial court refused to grant a continuance of the trial date and Patt proceeded with Attorney Kubyn as trial counsel.

{¶14} Attorney Spellacy was present in the event the motion for a continuance was granted. However, the trial court denied the motion for the continuance and Patt then opted to change his plea and enter a plea of guilty. The trial court conducted a lengthy hearing, which began with the trial court informing Patt of the rights he was waiving as a result of entering a plea of guilty. When the trial court asked Patt if he understood these rights, the following exchange occurred:

{¶15} "PATT: There is no way of pleading no contest to this charge?

{¶16} "COURT: No.

{¶17} "PATT: Could I just ask that you explain why that—that's the provision?

{¶18} "COURT: Because that's a longstanding rule that I've had, all the other judges have, and this does not meet any criteria for allowing a no contest plea. What would you plead no contest for?

{¶19} "PATT: So that I could retain other counsel to retry the case, a proper—to have a trial.

{¶20} "COURT: Well, if you want a trial, I have the jury here.

{¶21} "PATT: I understand that.

{¶22} "COURT: We're ready to proceed with trial.

{¶23} "PATT: I understand. But my attorney's—you know, his mother's terminally ill and he explained to me that he wasn't able to focus on the case to properly defend me.

{¶24} "COURT: Well, this case has been pending since the first week of November of 2001; correct?

{¶25} "PATT: I understand that.

{¶26} "COURT: It's been pending for over five months.

{¶27} "PATT: But this—

{¶28} "COURT: You've had access and you've had a copy of the police report—

{¶29} "PATT: Right.

{¶30} "COURT: --for that period of time.

{¶31} "PATT: But this just came in light to me last week."

{¶32} Patt alleges that his plea was not voluntary and he communicated to the court that his attorney never discussed any strategy with him and would not be able to provide adequate counsel because of his personal affairs. The court reiterated that the case had been pending for a time period that was long enough to allow Patt to ensure he had proper counsel. Moreover, the record reveals that Patt had consulted with another attorney approximately two months before the date the trial was to commence but had opted to continue with Attorney Kubyn.

{¶33} A review of the record in this case reveals that the trial court conducted a thorough and complete Crim.R.11 hearing. The court noted that Patt had been aware of the upcoming trial date and had ample opportunity to secure counsel prior to the date

the trial was to commence. Moreover, Patt ultimately confirmed his desire to enter the guilty plea and forego proceeding to trial. Thus, based on the record, we conclude that the trial court satisfied the first *Peterseim* factor when it adhered to the mandates of Crim.R. 11, and ensured that Patt fully understood his rights and waived them by entering his guilty plea.

{¶34} Turning to the second *Peterseim* factor and the competence of Patt's counsel, Attorney Kubyn, Patt asserts that he has "no opinion concerning the 'competence level' of [Kubyn]" but argues that Kubyn did not address Patt's concerns prior to entering the plea as well as throughout the plea hearing.

{¶35} This court has recognized the longstanding principle that a licensed attorney practicing in Ohio is presumed to be competent.[7] A review of the record reveals that Attorney Kubyn performed in a competent manner upon appearing as counsel for Patt. He filed numerous motions, subpoenas and discovery materials on behalf of Patt. The transcript from the plea hearing reveals statements by Patt concerning whether Attorney Kubyn was too preoccupied with his personal life, specifically his terminally ill mother, to provide adequate counsel.

{¶36} However, the record is replete with evidence that Attorney Kubyn had provided more than adequate representation for the several months prior to the plea hearing and that he was prepared and ready to go to trial. The court inquired as to Attorney Kubyn's readiness to proceed with the trial. Attorney Kubyn confirmed that,

7. (Citation omitted.) *State v. Kerns* (July 14, 2000), 11th Dist. No. 99-T-0106, 2000 Ohio App. LEXIS 3202, at *7.

whether or not the continuance had been granted, he was prepared to go to trial either alone or with Attorney Spellacy as co-counsel.

{¶37} At the hearing the court noted:

{¶38} "[E]very lawyer has a lot of things going on in his personal life. Mr. Kubyn is a very competent attorney, he has been in practice for a large number of years in Lake County, I know him personally, and I know that he has the ability to concentrate on his client matters. And he's been around long enough that he knows he has to do a competent job for the client, because the client comes first, even over his personal life."

{¶39} Although the better practice would be not to include the court's personal opinion regarding Attorney Kubyn's competence, we conclude that the record itself contains sufficient indicia that Attorney Kubyn provided competent counsel.

{¶40} Thus, we conclude that Patt was represented by competent counsel and Patt has not demonstrated that the second *Peterseim* factor has not been satisfied.

{¶41} We now turn to the third and fourth *Peterseim* factors, and address them in tandem. Pursuant to the third *Peterseim* factor, the Supreme Court recognized that, "prior to ruling upon a motion to withdraw, a 'trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.'"[8] In the instant case, the trial court conducted a complete hearing on Patt's motion to withdraw. Both Patt and his trial counsel, Attorney Kubyn, testified at that hearing. At the hearing on the Crim.R. 32.1 motion, Patt testified that he had entered the guilty plea only because he felt he had no other alternative, as Attorney Kubyn was

8. *State v. Haney* (Sept. 8, 1995), 11th Dist. No. 95-L-001, 1995 Ohio App. LEXIS 3914, at *5, quoting *Xie* at 527.

too preoccupied with his personal situation to provide adequate counsel, and the trial court had denied his motion for a continuance to allow Patt's counsel of choice to prepare for trial. He also noted that Attorney Spellacy had been present at the change of plea hearing to provide sworn testimony regarding Patt's desire to retain him as new counsel.

{¶42} Attorney Kubyn testified that he had been representing Patt in his domestic case and had informed Patt, sometime in advance of the trial date, that perhaps he should find someone who was more experienced in criminal matters to represent him on this case. However, Attorney Kubyn also testified that he was not concerned that Patt was trying to retain other counsel on the day of the trial. He noted, "I would have done the case if there had been one to do, trial that day. I could have done it, Mr. Spellacy could have done it, we could have done it—whatever the combination was, it was Mr. Patt's call." Thus, Attorney Kubyn made it clear at the hearing that he was prepared to go forward with the trial on the day it was set to commence.

{¶43} Moreover, at the conclusion of the hearing, the trial court reviewed the *Peterseim* factors, including the substance of the Crim.R. 11 hearing, the competency of Patt's counsel and the hearing on the motion to withdrawal. The court noted that it had given careful consideration to Patt's motion and concluded that the guilty plea was voluntary and Patt had not provided a reasonable and legitimate basis for withdrawal.

{¶44} It is well-settled that "the right to counsel of choice, unlike the right to counsel, however, is not absolute."[9] Although Patt contends that he had no other option but to plead guilty after the trial court denied his continuance to allow his counsel of choice to prepare for a trial, we conclude that Patt did not demonstrate that his trial counsel was not prepared and ready to go forward with trial on the day it was scheduled to commence. The record reveals that Attorney Kubyn had provided more than adequate counsel throughout the case. Moreover, Attorney Kubyn testified that he was ready to proceed to trial in lieu of the denial of the motion for continuance but Patt opted to plead guilty. Thus, based on the record before us, we cannot conclude that the trial court abused its discretion in overruling Patt's Crim. R. 32.1 motion.

{¶45} Patt's first assignment of error is without merit.

{¶46} Patt's second assignment of error is:

{¶47} "Defendant was denied the effective assistance of counsel at critical stages of litigation, including, but not limited to counsel's failure to represent defendant in his attempt to withdraw his guilty plea prior to sentencing."

{¶48} In his second assignment of error, Patt contends that he was denied effective assistance of counsel when Attorney Kubyn failed to adequately represent him in Patt's attempt to withdraw his guilty plea.

{¶49} In order to demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*.[10] First, pursuant to *Strickland*, the defendant must show that counsel's performance was deficient in that

9. *State v. Ellis* (June 14, 1996), 2d Dist. No. 15444, 1996 Ohio App. LEXIS 2403, at *10, quoting United *States v. Iles* (C.A.6, 1990), 906 F.2d 1122, 1130.
10. *Strickland v. Washington* (1984), 466 U.S. 668.

the representation fell below the objective standard of reasonableness.[11] Second, the defendant must show that counsel's deficient performance prejudiced the defendant, meaning that, but for counsel's errors, the outcome of the proceeding would have been different.[12] This court has adopted the *Strickland* standard for ineffective assistance of counsel.[13]

{¶50} In the case sub judice, Patt contends that he was deprived the effective assistance of counsel when his original counsel, Attorney Kubyn, failed to file a Crim.R. 32.1 motion to withdraw guilty plea on his behalf prior to sentencing. Patt asserts that when a sound basis exists, counsel must file the motion. We are not persuaded by Patt's argument for several reasons. First, Patt discharged Attorney Kubyn shortly after the Crim.R. 11 hearing, thus precluding Attorney Kubyn from filing a motion on Patt's behalf. Second, Patt retained new counsel, Attorney Morse, who immediately filed the Crim.R. 32.1 motion prior to the sentencing proceeding. Thus, Patt did not suffer any harm as the motion was still filed prior to sentencing.

{¶51} Moreover, as noted above, Attorney Kubyn provided more than adequate counsel throughout the case, including filing numerous motions, subpoenas and discovery materials. Therefore, we find that Patt was not deprived the effective assistance of counsel and his second assignment of error is without merit.

{¶52} Patt's third assignment of error is:

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11. Id.
12. Id.
13. *State v. Beesler*, 11th Dist. No. 2002-A-0001, 2003 Ohio App. LEXIS 2532, 2003-Ohio-2815.

{¶53} "The trial court improperly sentenced Mr. Patt to a term of incarceration far exceeding the shortest prison term available despite Mr. Patt having never previously served a prison term."

{¶54} Patt pled guilty to assault on a peace officer in violation of R.C. 2903.13(A). Because the assault occurred during performance of the peace officers' official duties, the offenses constituted felonies in the fourth degree.[14] The potential prison term for a felony in the fourth degree is six to eighteen months.[15] The trial court imposed fifteen-month prison terms for the assault convictions, to be served consecutively, for a total of thirty months imprisonment. Thus, although Patt did not receive the minimum sentence, he also did not receive the maximum potential sentence.

{¶55} R.C. 2929.14, governing sentencing in the instant case provides, in pertinent part:

{¶56} "[I]f the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender and if the offender previously has not served a prison term, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others."

{¶57} Thus, the trial court was required to make a finding on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not

14. See R.C. 2903.13(C)(3).
15. See R.C. 2929.14(A)(4).

adequately protect the public from future crime by the offender or others. The trial court is not required to state on the record the underlying reasons in support of its decision to impose other than the shortest prison term.[16] However, the court must make its statutorily sanctioned findings on the record at the sentencing hearing.[17]

{¶58} In the instant case, the trial court clearly stated on the record that more than the minimum prison term was necessary for the offenses as the shortest term would demean the seriousness of his conduct and were not adequate to protect the public from future crime committed by Patt.

{¶59} Thus, we conclude that the trial court properly adhered to the statute and to the holdings in *Edmonson* and *Comer*, when it imposed more than the minimum sentence. The third assignment of error is without merit.

{¶60} Based on the foregoing, the first, second and third assignments of error are without merit and the judgment of the Lake County Court of Common Pleas is affirmed.

Judgment affirmed.

DONALD R. FORD, P.J., concurs.

WILLIAM M. O'NEILL, J., dissents with dissenting opinion.

WILLIAM M. O'NEILL, J., dissenting.

16. *State v. Edmonson* (1999), 86 Ohio St.3d 324.
17. *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, at ¶26.

{¶61} For the reasons that follow, I respectfully dissent from the majority opinion, which concludes that the trial court did not err in denying Patt's presentence motion to withdraw his guilty plea.

{¶62} This court has long recognized, and the majority in this case acknowledges, that Crim.R. 32.1 permits a criminal defendant to request the withdrawal of a guilty plea prior to sentencing. Although not automatic, it should be "freely and liberally granted."[18] However, the majority reaches the ultimate conclusion that the trial court did not err in denying Patt's Crim.R. 32.1 motion as Patt did not demonstrate that his trial counsel was not prepared to go forward with trial. I respectfully disagree.

{¶63} The substance and quality of Patt's motion is that the trial court erred in accepting the guilty plea when it was not voluntarily made. Patt clearly desired alternative counsel and, through the denial of the motion for continuance, such was not obtained. Patt also expressed continued misgivings regarding his desire to plead guilty but yet felt, without new counsel, he had no other option. This violates the basic tenets of due process. That is not a voluntary plea.

{¶64} Similarly, under the third and fourth prongs of the *Peterseim* test, it is not clear that the trial court conducted a complete and impartial hearing on the Crim.R. 32.1 motion, followed by full and fair consideration of the request. Although a hearing was conducted, the trial court did not adequately assess Patt's initial plea according to the knowing, intelligent, and voluntary standard. Attorney Morse, Patt's new counsel, again reiterated Patt's feeling that new counsel was needed because of Attorney Kubyn's

18. *State v. Xie* (1992), 62 Ohio St.3d 521, 527; *State v. Green* (Oct. 27, 1995), 11th Dist. No. 94-T-5103, 1995 Ohio App. LEXIS 4768; *State v. Stubbs* (Mar. 24, 1995), 11th Dist. No. 93-T-4986, 1995 Ohio App. LEXIS 1103.

situation. Attorney Morse stressed that, had the continuance been granted, the matter could have proceeded to trial, but, rather, Patt entered the guilty plea as a result of having no other options. Attorney Spellacy was present at the change of plea hearing to provide sworn testimony regarding Patt's desire to retain him as new counsel. The trial court maintained that the plea hearing was adequate, stating:

{¶65} "Okay. The--the Court has followed Criminal Rule 11. The colloquy was, approximately, 45 minutes to take the plea. In most circumstances it's a 15 minute proposition. However, based upon what occurred, I wanted to make sure that Mr. Patt knowingly, voluntarily, and intelligently entered that plea and, when I accepted that plea, I knew that the Defendant understood his rights and--and waived them voluntarily. There is a presumption of voluntariness within these proceedings and I'm assuming that Mr. Patt was not lying to me in his answers in the colloquy. If he was lying to me in the colloquy, then shame on him, and then that's his fault. But I have to, when I'm taking a plea colloquy, I have to assume that the answers I'm getting are being--are given truthfully."

{¶66} The trial court stated that Patt received an adequate Crim.R. 11 hearing and reaffirmed that at the Crim.R. 32.1 hearing. However, it is clear from the plea hearing transcript that Patt's statements were inconsistent with a knowing, intelligent, and voluntary plea of guilty. Patt consistently expressed doubt and concern over whether his attorney would be able to adequately represent him through trial. The denial of the motion for continuance further eliminated Patt's opportunity to seek new counsel for trial. Thus, the trial court abused its discretion in denying Patt's presentence motion to withdraw his guilty plea.

{¶67} For these reasons, I respectfully dissent.