

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-P-0017
SLY E. PARHAM,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2010 CR 0675.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Theresa M. Scahill*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Judith M. Kowalski, 333 Babbitt Road, #323, Euclid, OH 44123 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Sly Parham, appeals from the Judgment Entry of the Portage County Court of Common Pleas, denying Parham's Motion to Vacate Guilty Plea and ordering him to be placed on probation for a total of 60 months for one count of Burglary. The issue to be determined by this court is whether a defendant can withdraw his guilty plea when he asserts that he pleaded guilty due to pressure from the court and to protect his family members from prosecution. For the following reasons, we affirm the decision of the trial court.

{¶2} On October 12, 2010, Parham was indicted by the Portage County Grand Jury on one count of Aggravated Burglary, a felony of the first degree, in violation of R.C. 2911.11(A)(1); one count of Intimidation of a Victim, a felony of the third degree, in violation of R.C. 2921.04(B); and one count of Complicity to Intimidation of a Victim, a felony of the third degree, in violation of R.C. 2923.03 and 2921.04(B).

{¶3} The matter was scheduled for a trial on December 7, 2010. On that date, the trial court discussed a proposed plea agreement, in which the State offered to reduce the Burglary charge to a fourth degree felony. Defense counsel stated that he presented the offer to Parham the previous day and that he informed Parham that the offer was “a very good offer.” The court asked Parham if he would like to take the deal and Parham stated that he was “innocent” and wanted to proceed to trial. The court stated: “That’s fine. Then we will go. We will do a trial. * * * I just want you to make sure, think about it, okay.” The court then allowed Parham twenty minutes to discuss the matter with counsel and consider the offer prior to commencing the trial.

{¶4} After the twenty minute recess, Parham returned and agreed to accept a plea agreement offered by the State. The State explained that it would move to amend the count of Burglary to a fourth degree felony, would dismiss the remaining charges, and would also move to enter a Nolle Prosequi on charges against certain individuals related to Parham, named A.J. Brumley and Franchesca Davis. Parham entered a plea of guilty to one count of Burglary, as amended. The trial court asked Parham if he had been advised of the Crim.R. 11 Plea negotiations and whether he was pleading guilty of his own will, to which he responded affirmatively. He was informed of his various trial rights and stated that he understood these rights and waived them. He was also asked

if his attorney had reviewed his rights, to which he also responded affirmatively. Parham entered a Written Plea of Guilty to the reduced charge of Burglary, a felony of the fourth degree, in violation of R.C. 2911.12(A)(4).

{¶5} On the same date, the trial court issued a Judgment Entry, accepting the written plea of guilty and entering a Nolle Prosequi on the remaining counts of the indictment. The trial court referred the matter to the probation department for a presentence investigation.

{¶6} On February 7, 2011, the trial court issued a Judgment Entry granting Parham leave to file a motion to withdraw his plea of guilty and ordering that the matter be scheduled for a hearing. On February 14, 2011, Parham filed a Motion to Vacate Guilty Plea, asserting that he should be allowed to withdraw his guilty plea because he did not understand his rights prior to entering the plea.

{¶7} A hearing was held on February 14, 2011, at which time the court addressed Parham's Motion to Vacate his plea. Parham testified that he wanted to withdraw his guilty plea because "after going to school and thinking, I would be throwing my life away, I wouldn't be able to get a job." He explained that he also accepted the plea agreement because "[t]hey were going to dismiss the charges on my brother and mother." He admitted that he was advised of his rights when he entered the plea and that he had stated that he was not coerced into pleading guilty. After this testimony, the trial court denied the Motion to Vacate, and stated that the court had gone through Parham's rights in a thorough manner at the change of plea hearing and that Parham was given "a great deal of consideration in reducing the charges" in exchange for the plea. The trial court then proceeded to hold the sentencing hearing.

{¶8} On February 15, 2011, the trial court issued a Judgment Entry, memorializing its finding that Parham's Motion to Vacate was overruled. The court placed Parham on nine months of intensive supervision probation and fifty-one additional months of general probation. Parham was also ordered to pay a \$300 fine and costs.

{¶9} On May 26, 2011, Parham filed a Motion for Leave to File a Delayed Appeal, which this court granted on September 1, 2011.

{¶10} On appeal, Parham raises the following assignments of error:

{¶11} "[1.] The trial court abused its discretion to the prejudice of the Appellant by denying the Motion to Withdraw Defendant's guilty plea, in that testimony showed the plea was not voluntary, since it was a condition imposed by the State in order to obtain a dismissal of charges against Appellant's family members.

{¶12} "[2.] The trial court erred to the prejudice of Appellant in not allowing him to withdraw his guilty plea as the motion was made prior to imposition of sentence, and as the Appellant had indicated prior to pleading guilty that he had grave misgivings about doing so.

{¶13} "[3.] The trial court erred to the prejudice of Appellant by not inquiring of the State as to the factual basis for the plea, especially given the Appellant's protestations of innocence at both hearings concerning the plea agreement."

{¶14} As they both relate to the trial court's denial of the motion to withdraw and the voluntariness of Parham's plea of guilty, we will address Parham's first and second assignments of error in a consolidated fashion.

{¶15} Parham argues that his plea was not given voluntarily and that it was a product of coercion. He asserts that the court's denial of his motion to withdraw his plea was not in compliance with the tests for evaluating the withdrawal of a plea found in *State v. Peterseim*, 68 Ohio App.2d 211, 428 N.E.2d 863 (8th Dist.1980) and *State v. Piacella*, 27 Ohio St.2d 92, 271 N.E.2d 852 (1971).

{¶16} Crim.R. 32.1 provides that “[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her guilty plea.”

{¶17} Presentence motions to withdraw a plea should be granted liberally. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). The Supreme Court has also recognized, however, that “[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing,” but, instead, “[a] trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.” *Id.* at paragraph one of the syllabus.

{¶18} “The decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court.” (Citation omitted.) *State v. Holin*, 174 Ohio App.3d 1, 2007-Ohio-6255, 880 N.E.2d 515, ¶ 15 (11th Dist.).

{¶19} This court has often applied the four-factor test set forth in *Peterseim* to determine whether a trial court has abused its discretion in denying a motion to withdraw a plea. *Id.* at ¶ 16; *State v. Humr*, 11th Dist. No. 2010-P-0004, 2010-Ohio-5057, ¶ 15; *State v. Prinkey*, 11th Dist. No. 2010-A-0029, 2011-Ohio-2583, ¶ 28. Under *Peterseim*, a trial court does not abuse its discretion in denying a motion to withdraw a

plea: “(1) where the accused is represented by highly competent counsel, (2) where 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) where the record reveals that the court gave full and fair consideration to the plea withdrawal request.” 68 Ohio App.2d 211, 428 N.E.2d 863, at paragraph three of the syllabus.

{¶20} In the present matter, all of the foregoing factors were met. With regard to the first factor, Parham was represented by highly competent counsel. It is well-settled that “a properly licensed attorney practicing in this state is presumed to be competent.” *Prinkey* at ¶ 30, citing *State v. Lytle*, 48 Ohio St.2d 391, 397, 358 N.E.2d 623 (1976).

The record establishes that counsel conferred with Parham about the plea agreement on at least two occasions, exploring the consequences and benefits of the plea. In addition, no statements were made by Parham that counsel was incompetent or failed to advise him of his rights.

{¶21} Regarding the second factor, there is nothing in the record to indicate that the guilty plea was not made knowingly, intelligently, and voluntarily. The trial court conducted a thorough colloquy when accepting the plea, determining that Parham understood each right that he was waiving. The trial court explained to Parham the maximum sentence he could receive, as well as the potential term of postrelease control. The record does not indicate that Parham had a cognitive disability that would prevent him from entering a knowing, intelligent, and voluntary plea. At the time of the plea hearing, Parham indicated that he understood the effect of his guilty plea. Such circumstances indicate that the plea hearing was compliant with the requirements of

Crim.R. 11. See *Humr* at ¶ 20 (finding the second *Peterseim* factor to be met in similar circumstances).

{¶22} As to the third and fourth *Peterseim* factors, once the trial court was informed that Parham wished to withdraw his plea, it granted Parham leave to file his motion. A hearing was then held, prior to the sentencing hearing, on February 14, 2011. At that hearing, Parham's attorney questioned him about his reasons for wishing to withdraw the plea. Parham was also questioned by counsel for the State. Upon being questioned, he offered several explanations for wishing to withdraw his plea, including that he felt he was "throwing his life away" and felt pressured to plead guilty for the benefit of his family. However, he admitted that he was advised of his rights when he entered the plea and that he had stated that he was not coerced into pleading guilty. We find, therefore, that Parham was given a full and impartial hearing on his motion to withdraw his plea agreement. See *State v. Greenleaf*, 11th Dist. No. 2005-P-0017, 2006-Ohio-4317, ¶ 78 ("[i]nviting and hearing oral arguments on a motion to withdraw a guilty plea at the sentencing hearing can constitute a full and fair hearing on that motion"). Additionally, the record indicates that the trial court, after hearing Parham's assertions, gave them full and fair consideration and discussed on the record its reasons for denying the motion. Consequently, the third and fourth *Peterseim* factors were met.

{¶23} Parham argues that even if the *Peterseim* factors were met, he was coerced into entering his plea, in violation of *Piacella*.

{¶24} Under *Picaella*, "[w]here the record affirmatively discloses that: (1) defendant's guilty plea was not the result of coercion, deception or intimidation; (2)

counsel was present at the time of the plea; (3) his advice was competent in light of the circumstances surrounding the indictment; (4) the plea was made with the understanding of the nature of the charges; and, (5) defendant was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both, the guilty plea has been voluntarily and intelligently made.” 27 Ohio St.2d 92, 271 N.E.2d 852, at the syllabus.

{¶25} Parham argues that his plea was made as a result of coercion, was not voluntarily and intelligently made, and therefore, the trial court should have allowed him to withdraw it under *Piacella*. Parham first asserts that his plea was coerced because he felt pressure to consider its impact on his family and since his plea of guilty was necessary in order for the State to dismiss certain criminal charges against his brother and mother.

{¶26} A review of the record indicates that the State did agree to dismiss charges against Parham’s mother and brother as a term of his plea bargain. We cannot find, however, that this renders his plea coerced or involuntary. Regarding the pressure he felt from his family, this court has found that family pressure “does not necessarily show coercion,” especially when there is no evidence showing that the defendant was incompetent or incapable of making his own decision. *State v. Mitchell*, 11th Dist. No. 94-P-0070, 1995 Ohio App. LEXIS 2803, *5 (June 30, 1995). Other appellate courts have also found that a plea is not coerced when a defendant pleads guilty in exchange for the dismissal of charges against his family members. *State v. Kesterson*, 2nd Dist. No. 95 CA 39, 1996 Ohio App. LEXIS 2209, *11 (May 24, 1996) (holding that, although the defendant “may have been given a choice between cooperating with the authorities

or seeing his wife arrested,” this did not raise an issue as to whether his plea was voluntary); *State v. Vild*, 8th Dist. No. 69574, 1996 Ohio App. LEXIS 3657, *15-16 (Aug. 29, 1996) (no coercion was found where appellant’s plea was made in exchange for the dismissal of charges against his family members). The record in the present matter does not show that Parham was incapable of making his own decision, but instead that he was concerned with the impact of his plea on his family. This does not render his plea involuntary or coerced.

{¶27} Parham also argues that he was coerced into pleading guilty due to pressure from the trial court.

{¶28} The record shows that the trial court did not coerce or pressure Parham into pleading guilty. The court noted, on the record, that Parham had been presented the State’s offer on the prior day and stated that it would give Parham twenty additional minutes to consider the offer presented. The court stated that if Parham did not want to accept the offer, the matter would go forward to trial and that would be “fine.” The fact that the trial court gave Parham additional time to consider the offer and told him to consult with his attorney to make sure he made the right decision does not constitute coercion. See *State v. Burton*, 9th Dist. No. 22707, 2006-Ohio-391, ¶ 17 (where the trial court made statements to the appellant that if he did not plead guilty, the matter would continue to trial, along with trial court’s thorough explanation of appellant’s rights and appellant’s failure to state during the plea hearing that he was coerced, the appellate court concluded that the plea was not coerced).

{¶29} Finally, Parham asserts that his plea was not given voluntarily and was coerced because it was given in exchange for being released from jail. However, as

discussed above, there is no evidence that Parham did not make this choice of his own free will. Although he may have chosen to plead guilty partially because he did not want to remain in jail, it does not follow that he was forced into making the choice to plead guilty. See *Kesterson*, 1996 Ohio App. LEXIS 2209, at *11 (“[t]he difficulty of decisions defendants must often make in criminal cases does not necessarily render those decisions involuntary” or coerced).

{¶30} The first and second assignments of error are without merit.

{¶31} In his third assignment of error, Parham asserts that the trial court erred by failing to conduct a factual inquiry into the basis for his change of plea and cites this court’s holding in *State v. Al-Jumalee*, 11th Dist. No. 2006-P-0037, 2007-Ohio-2061, to support this argument.

{¶32} In *Al-Jumalee*, this court stated that “the *Alford* decision requires a factual basis when a defendant pleads guilty at the same time as he is protesting his innocence, so that the trial court can assure itself that the defendant is entering his guilty plea voluntarily and intelligently.” *Id.* at ¶ 24, citing *North Carolina v. Alford*, 400 U.S. 25, 38, fn. 10, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) (“pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea * * *; and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence”).

{¶33} We initially note that *Al-Jumalee*’s factual basis requirement specifically refers to *Alford* pleas. “An *Alford* plea is a plea of guilty with a contemporaneous protestation of innocence.” *State v. White*, 11th Dist. No. 2002-L-146, 2004-Ohio-6474, ¶ 44; *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 13 (an

Alford plea is a plea “whereby a defendant pleads guilty yet maintains actual innocence of the charges”). “[F]or a valid *Alford* plea to take place, appellant must enter a guilty plea and at the same time protest innocence.” (Citation omitted.) *State v. Horton-Alomar*, 10th Dist. No. 04AP-744, 2005-Ohio-1537, ¶ 7.

{¶34} Parham asserts that since he maintained his innocence, the trial court erred by failing to require a factual basis before accepting his plea. However, Parham’s plea was not an *Alford* plea, and he did not maintain his innocence at the time of the plea, so that *Al-Jumailee* would be applicable.

{¶35} Although it is not required for a defendant to state on the record that he is making an *Alford* plea, we do note that at no time did Parham or his counsel state on the record that he was entering such a plea, nor did the written plea of guilty he signed contain such a notation. In addition, Parham made no statements during the plea colloquy asserting his innocence, but instead, when asked how he pleaded, he stated only “guilty.”

{¶36} Parham asserts that he maintained his innocence prior to accepting the plea negotiations. Parham did state to the trial court, prior to the twenty minute recess during which he conferred with his counsel about the plea agreement, that he was “innocent.” However, after returning from the recess and during the plea colloquy, he made no statements asserting his innocence. Although Parham may have stated earlier that he was innocent, his actions at the time he entered his plea showed that the guilty plea was not made “contemporaneous with” or at the “same time” that he protested his innocence. See *State v. Gibson*, 2nd Dist. No. 7195, 1981 Ohio App. LEXIS 11783, *9-10 (Oct. 2, 1981) (where the defendant, when initially addressed by

the court, stated that he was innocent, his subsequent change of mind and entry of a guilty plea, coupled with no statement of innocence and when viewed in light of the court's thorough plea colloquy, he did not enter an *Alford* plea); *State v. Carey*, 3rd Dist. No. 14-10-25, 2011-Ohio-1998, ¶ 8 (the appellant's denial of her acts prior to an acknowledgement of guilt, when accompanied with no representation to the court of her intention to enter an *Alford* plea, "was not sufficient to characterize her plea as an *Alford* plea").

{¶37} Based on the foregoing, we cannot find *Al-Jumaillee* to apply or that a factual basis for the plea was required, since Parham did not plead guilty at the same time as he was protesting his innocence. However, we would note that it would be a better practice for the State to place on the record the factual basis for the plea in cases similar to the present matter.

{¶38} The third assignment of error is without merit.

{¶39} For the foregoing reasons, the Judgment Entry of the Portage County Court of Common Pleas, denying Parham's Motion to Vacate Guilty Plea, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.