

**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-0097
ROBERT A. DYE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2011 CR 0331.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Leonard J. Breiding, II, 4825 Almond Way, Ravenna, OH 44266 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Robert A. Dye, appeals from the Portage County Court of Common Pleas' judgments denying his presentence motion to withdraw his plea of guilty as well as the court's judgment on sentence. For the reasons below, we affirm.

{¶2} The Portage County Grand Jury issued a two-count indictment charging appellant with aggravated burglary, in violation of R.C. 2911.01(A)(1), a felony of the first degree, and kidnapping, in violation of R.C. 2905.01(A)(2) and (3), also a felony of

the first degree. The charges arose from crimes allegedly committed against appellant's former girlfriend.

{¶3} After entering a plea of not guilty, a trial date was set. On the day the jury trial was scheduled to commence, appellant changed his plea to and entered a plea of guilty to one count of burglary, a felony of the second degree. After conducting a plea colloquy, the trial court accepted appellant's plea, nolle the remaining charges in the indictment, and ordered a presentence investigation report. Prior to sentencing, however, appellant changed defense counsel and moved to withdraw his plea of guilty. The trial court denied appellant's motion and, after a sentencing hearing, ordered appellant to serve six years in prison. He now appeals alleging two assignments of error. Appellant's assigned errors will be addressed out of order for ease of discussion.

{¶4} For his second assignment of error, appellant alleges:

{¶5} "The trial court erred in overruling appellant's pre-sentence motion to withdraw his guilty plea."

{¶6} Crim.R. 32.1 provides: "A motion to withdraw a plea of guilty or no contest may be made only before sentencing 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."

{¶7} In this case, appellant filed his motion to withdraw the guilty plea prior to sentencing. Although a defendant does not have an unconditional right to withdraw his or her plea of guilty before sentencing, such motions should be freely allowed. *State v. Prinkey*, 11th Dist. No. 2010-A-0029, 2011-Ohio-2583, ¶5, citing *State v. Xie*, 62 Ohio St.3d 521, 526 (1992). The decision to grant or deny a presentence motion to withdraw

a guilty plea is within the trial court's sound discretion. *Id.* In the context of such a motion, this means a trial court does not abuse its discretion unless an appellant is able to demonstrate the court's actions were unjust or unfair. *Id.*

{¶8} In *State v. Peterseim*, 68 Ohio App.2d 211 (8th Dist.1979), the Eighth Appellate District set forth a four-factor test that this court routinely utilizes in reviewing whether a trial court properly exercised its discretion in denying a presentence motion to withdraw a guilty plea. See e.g. *Prinky*, *supra*, at ¶28-29. Pursuant to *Peterseim*, a trial court does not abuse its discretion in denying a presentence motion to vacate:

{¶9} (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. *Id.* at paragraph three of the syllabus.

{¶10} Appellant first contends that the trial court, in accepting his guilty plea, failed to go to "unusual lengths" to make certain he fully understood the nature and consequences of his guilty plea. We do not agree.

{¶11} The transcript of the plea hearing demonstrates the trial court afforded appellant over two hours to consult his attorney and decide whether he wished to accept the state's plea offer or move forward with the scheduled jury trial. After vacillating on record several times, appellant entered his plea, apparently against his trial counsel's advice. Prior to accepting the plea, however, the trial court engaged appellant in a full and complete plea colloquy. In so doing, the court made certain that

appellant was thoroughly aware of the constitutional and non-constitutional rights he was waiving by entering the plea. Appellant represented on record that he understood his waiver and was knowingly and voluntarily entering the plea.

{¶12} Although the court did not do anything “unusual” to ensure appellant was knowingly and voluntarily entering the plea, the law neither requires nor expects a trial court to go to unusual lengths to establish the sufficiency of a defendant’s understanding. Here, the court fully apprised appellant of the rights he was waiving and appellant represented he completely understood the import and consequences of his decision. The court’s actions in accepting appellant’s plea of guilty were more than adequate to establish that appellant was knowingly and voluntarily accepting the plea. Appellant’s conclusory assertions to the contrary are unavailing.

{¶13} Next, appellant asserts his guilty plea was more a function of his trial counsel’s ineffectiveness than a product of his informed volition and, as a result, he was not represented by “highly competent” counsel. As a basis, appellant cites trial counsel’s failure to subpoena any witnesses, counsel’s failure to file a discovery demand, as well as his failure to produce any materials pursuant to the state’s reciprocal discovery demand. According to appellant, this demonstrated that his trial counsel would have been prevented from presenting any specific evidence in his defense that had not been already disclosed by the state.

{¶14} Initially, it was unnecessary for counsel to file a discovery demand as the Portage County Prosecutor’s Office has an open-discovery policy of which defense counsel was sent notice. Additionally, we fail to see how trial counsel’s decision not to subpoena any materials in discovery suggests a lack of preparation or a lack of

competence. In many cases, the strongest defense to a charge is requiring the state to meet its burden of proof beyond a reasonable doubt. Under such circumstances, a defense attorney makes a strategic decision to challenge the state's evidence as it is presented, without producing any affirmative evidence in support of a defendant's innocence.

{¶15} Furthermore, and most significantly, a review of the pre-plea hearing, on-record statements of counsel demonstrate he was ready and willing to try the case if appellant decided to exercise his right to be tried. Consequently, nothing in the record suggests or implies counsel was not prepared to defend appellant. We therefore reject appellant's argument that he was not represented by "highly competent" counsel as contemplated by *Peterseim*.

{¶16} Appellant was afforded a full hearing on his motion and, in denying appellant's motion the court explained:

{¶17} [T]his matter was set several times for pretrial. Each and every time [defense counsel] was here and anxious to go to trial.

{¶18} On August 17 we were set for a jury trial. I had 45 jurors ready to go.

{¶19} And, again, we went back into the Jury Room, everything was done on the record with my Court Reporter present.

{¶20} As far as my conversations with the Defendant, everything was on the record, and the Defendant each and every time that I indicated that we would go into the Court and start the trial asked for time to speak to his Attorney and I gave him that time.

{¶21} And [the prosecutor] is correct, I would normally not allow a two and a half hour delay with jurors sitting in here anxious to participate in a trial.

{¶22} [Defense counsel] is a very skillful defense Attorney. He has won as many cases as any defense Attorney in this Court. I am not going to second guess his strategy nor should anyone.

{¶23} ***

{¶24} [Defense Counsel] continuously throughout this entire time, from early on in July until the plea, indicated that this matter would go forward to Jury and so he was prepared. He had his strategy. And, again, I'm not going to second guess his strategy.

{¶25} The Defendant, in our Jury Room, on the record, I went over each and every one of his Constitutional Rights.

{¶26} I went over it with him, he understood those rights. He also indicated to the Court, that since the - - I'm paraphrasing, that the victim was present, that I think at one juncture he indicated that the Jurors would believe her over him. And he enter a plea. He entered the plea knowingly, intelligently and voluntarily and without coercion at all.

{¶27} A review of the foregoing demonstrates the trial court gave due consideration to appellant's motion. There is no indication the trial court's decision was unjust, unfair, or unreasonable. We therefore hold the court did not abuse its discretion in denying appellant's motion to withdraw his plea.

{¶28} Appellant's second assignment of error is without merit.

{¶29} For his first assignment of error, appellant alleges:

{¶30} "The trial court erred in sentencing the appellant by imposing more than the minimum sentence and by imposing an improper sentence."

{¶31} Appellant contends the trial court erred as a matter of law and abused its discretion when it imposed a six-year term of imprisonment for appellant's plea of guilty to burglary, a second degree felony. We do not agree.

{¶32} Appellate courts review a felony sentence under the test announced in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-491. In *Kalish*, the Ohio Supreme Court established a two-step analysis for considering the propriety of a felony sentence. Under the first step, an appellate court considers whether the trial court "adhered to all applicable rules and statutes in imposing the sentence." *Id.* at 25. "As a pure legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." *Id.* Next, a reviewing court considers, with reference to the general principles of felony sentencing and the seriousness and recidivism factors set forth in R.C. 2929.11 and 2929.12, whether the trial court abused its discretion in selecting the defendant's sentence. *Id.* at 27.

{¶33} With respect to the first prong of *Kalish*, the Supreme Court did not provide specific guidance regarding the "laws and rules" an appellate court must consider to ensure sentencing clearly and convincingly conforms with Ohio law. *State v. Burrell*, 11th Dist. No. 2009-P-0033, 2010-Ohio-6059, ¶17. Thus, "if a sentence falls within the statutory range for the felony of which a defendant is convicted, it will be

upheld as clearly and convincingly consistent with the law.” *State v. Kozel*, 11th Dist. No. 2011-L-044, 2011-Ohio-4306, ¶5. “If the sentence is within the purview of the applicable ‘laws and rules,’ we then consider whether the trial court acted within its discretion in fashioning the sentence at issue.” *Id.*

{¶34} This court has held that, while a trial court must consider the seriousness and recidivism factors set forth under R.C. 2929.12, it is not required to make factual findings pursuant to those factors. See *e.g. State v. O'Neill*, 11th Dist. No. 2010-P-0041, 2011-Ohio-2202, ¶34. In fact, absent some evidence to the contrary, a reviewing court will presume all statutory standards were met even if the record is silent. See *e.g. State v. Kish*, 11th Dist. No. 2010-L-138, 2011-Ohio-4172, ¶8. In this case, the trial court met its obligations under the law.

{¶35} In this case, appellant was sentenced to six years for felony-two burglary. Statutorily, an offender convicted of a second degree felony is subject to between two and eight years in prison. Appellant’s sentence falls within this statutory range and is therefore clearly and convincingly consistent with the law.

{¶36} Furthermore, the trial court explicitly stated, at both the sentencing hearing as well as in its judgment entry, that it had considered the purposes and principles of felony sentencing. And, while we acknowledge the court did not discuss any particular seriousness or recidivism factors, there is nothing in the record to suggest the court did not consider R.C. 2929.12. We therefore presume the court met its obligation under *Kalish* and discern no abuse of discretion. As a result, we hold the trial court did not err in sentencing appellant to six years imprisonment for felony-two burglary.

{¶37} Appellant’s first assignment of error is without merit.

{¶38} For the reasons discussed in this opinion, the judgments of the Portage County Court of Common Pleas are affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.