

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

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-G-3010
DALE P. FIELD, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Geauga County Court of Common Pleas, Case No. 10C000087.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Matthew J. Greenway*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Matthew C. Bangerter, 1360 West 9th Street, Suite 200, Cleveland, OH 44113 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Dale P. Field, Jr., appeals from the judgments of the Geauga County Court of Common Pleas denying his motion for withdrawal of guilty plea and sentencing him for unlawful sexual conduct with a minor.

{¶2} Appellant was indicted on one count of unlawful sexual conduct with a minor, a felony of the third degree, in violation of R.C. 2907.04(A) and (B)(3). The charge stems from appellant's sexual involvement with a 14-year-old girl. Appellant

was 30 years old at the time of the offense. Appellant, with counsel present, entered a not guilty plea. Thereafter, appellant withdrew his not guilty plea and pleaded guilty pursuant to a plea agreement with the state to the sole count as charged in the indictment. Following a hearing, the trial court accepted appellant's guilty plea, ordered a presentence investigation report, and deferred sentencing.

{¶3} Immediately before sentencing, appellant submitted a letter to the court indicating that he had retained new counsel and requesting a continuance due to new counsel's inability to be present at the sentencing hearing. The court granted a continuance, and appellant's original attorneys withdrew from the case.

{¶4} Subsequently, appellant, by and through new counsel, filed a motion to withdraw his guilty plea. As grounds for the motion, appellant claimed there existed evidence unknown to him that mitigated and nullified his guilt. Appellant also averred that he was improperly advised of all of his rights and the evidence against him prior to changing his plea. Appellant further maintained that his original counsel refused to discuss the facts of the case, take the matter to trial, or negotiate a plea unless he provided them with more money. Following a full hearing, the trial court denied appellant's motion as having been based on a mere "change of heart" and a desire to avoid the consequences of his conduct.

{¶5} The trial court sentenced appellant to three years in prison and found him to be a Tier II sex offender, subjecting him to the registration and verification provisions of R.C. Chapter 2950. Appellant filed a timely appeal, asserting the following assignments of error:

{¶6} “[1.] The trial court erred to the prejudice of the defendant-appellant by denying his pre-sentence motion to withdraw his plea in violation of his due process rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

{¶7} “[2.] The trial court erred by sentencing the defendant-appellant to a term of imprisonment where its findings were not supported by the record.”

{¶8} In his first assignment of error, appellant argues that the trial court erred by denying his presentence motion to withdraw his guilty plea.

{¶9} Crim.R. 32.1 governs the withdrawal of a guilty plea prior to sentencing and provides: “[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.” “However, the rule itself gives no guidelines for a trial court to use when ruling on a presentence motion to withdraw a guilty plea.” *State v. Xie*, 62 Ohio St.3d 521, 526 (1992).

{¶10} A motion to withdraw a guilty plea filed before sentencing should be freely and liberally granted. *Xie* at 526. However, there is no absolute right to withdraw a guilty plea. *Id.* “Appellate review of a trial court’s denial of a motion to withdraw is limited to a determination of abuse of discretion, regardless whether the motion to withdraw is filed before or after sentencing.” *State v. Peterseim*, 68 Ohio App.2d 211, paragraph two of the syllabus (8th Dist. 1980). An abuse of discretion is the trial court’s ““failure to exercise sound, reasonable, and legal decision-making.”” *State v. Sawyer*, 11th Dist. No. 2011-P-0003, 2011-Ohio-6098, ¶72, quoting *State v. Beechler*, 2d Dist.

No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶11} In evaluating presentence motions to withdraw guilty pleas, this court has generally applied the four-prong test set forth by the Eighth Appellate District in *Peterseim* rather than the nine-factor test cited by the parties which originated from the First Appellate District in *State v. Fish*, 104 Ohio App.3d 236 (1st Dist. 1995). See also *State v. Prinkey*, 11th Dist. No. 2010-A-0029, 2011-Ohio-2583, ¶28. Also, we note that in its judgment denying appellant's motion to withdraw his guilty plea, the trial court cited to a decision from this court, *State v. Curd*, 11th Dist. No. 2003-L-030, 2004-Ohio-7222, ¶107, where we applied the *Peterseim* factors. The trial court stated that it considered those factors before rendering its judgment. Therefore, we will apply the *Peterseim* factors here in order to determine whether the trial court erred in denying appellant's motion. In *Peterseim*, the court held:

{¶12} "A trial court does not abuse its discretion in overruling a motion to withdraw: (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." *Peterseim*, at paragraph three of the syllabus.

{¶13} With respect to the first *Peterseim* factor, we note that "[g]enerally, a properly licensed attorney practicing in this state is presumed to be competent." *State v. Brandon*, 11th Dist. No. 2009-P-0071, 2010-Ohio-6251, ¶19, citing *State v. Lytle*, 48

Ohio St.2d 391, 397 (1976). The record reflects that appellant was unhappy with his original attorneys based on a fee dispute. We note that fee disputes in the context of permitting a more extensive investigation or a possibly better defense do not establish an ineffective assistance of counsel claim. *State v. Brewer*, 10th Dist. No. 78AP-749, 1979 Ohio App. LEXIS 12392, *4 (Mar. 29, 1979). Furthermore, appellant's mere unhappiness with counsel, standing alone, does not support a claim of incompetence.

{¶14} Moreover, at the plea hearing, appellant stated the following: that he felt that he had been well represented by his original attorneys; he did not have any problems with his original attorneys; he was given enough time to discuss the plea agreement with his original representatives; no threats, promises or inducements were made in order to get him to plead guilty; and he was not coerced by his original representatives into entering a guilty plea. Thus, appellant did not rebut the presumption that counsel was competent, nor did he demonstrate that he was not properly represented at the plea hearing. Furthermore, appellant failed to affirmatively show that his original attorneys' representation was deficient, or that such deficiency resulted in prejudice to him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (counsel's representation must fall below an objective standard of reasonableness and, but for counsel's unprofessional errors, the result of the proceeding would have been different.)

{¶15} Regarding the second *Peterseim* factor, Crim.R. 11(C)(2)(c) requires the trial court to inform the defendant and determine that he understands that by entering a plea he is waiving the right to a jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the state prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify

against himself. *State v. Griffey*, 11th Dist. No. 2009-P-0077, 2010-Ohio-6573, ¶25. At the plea hearing, appellant was informed of the foregoing rights and indicated he understood them. Appellant then expressly waived those rights. The trial court accepted appellant's guilty plea only after concluding, with the agreement of appellant's counsel, that the plea was entered knowingly, intelligently, and voluntarily.

{¶16} The trial court also inquired about appellant's educational background, mental state, and whether he was under the influence of any drugs or alcohol to ensure that he understood the proceedings. Appellant informed the trial court that he had an Associate's Degree, had no problem reading the English language, had a clear mind, and was not under the influence of drugs or alcohol. Appellant also stated that he understood the effect of his guilty plea and its consequences.

{¶17} Based on the foregoing, this court concludes that appellant was afforded a full hearing pursuant to Crim.R. 11 before entering his plea. The trial court conducted a thorough colloquy with appellant, determining that he understood that by entering into a plea agreement he was surrendering certain constitutional and statutory rights. Thus, the plea hearing was fully compliant with the constitutional requirements of Crim.R. 11.

{¶18} We turn now to the third and fourth *Peterseim* factors. In appellant's written motion to withdraw his plea filed by new counsel, he alleged that he was improperly advised of all of his rights and the evidence against him prior to changing his plea from not guilty to guilty. Appellant also maintained that his original attorneys refused to discuss the facts of the case, take the matter to trial, or negotiate a more favorable plea unless he provided them with more money. Appellant further argued that

prior counsel failed to investigate potentially exculpatory evidence and fully prepare the case as a means of coercing appellant to pay their fee. This court disagrees.

{¶19} The record establishes that the trial court gave the withdrawal of plea motion full and fair consideration. In its order denying the motion to withdraw, the trial court expressly found the following: that appellant was represented at each stage of the proceedings; his original attorneys did not prevent appellant from securing other counsel; at the arraignment, the judge advised appellant of his right to be represented by counsel and that if he could not afford their fees, he could request that new counsel be appointed to represent him at the state's expense; prior to entering his guilty plea, appellant claims he argued with his original attorneys, however, he did not discharge them at that time nor did his original attorneys withdraw; appellant accepted his original attorneys' continued representation of him; appellant was afforded an extensive plea hearing; appellant did not mention any "argument" he had with his original attorneys at the plea hearing; appellant stated at the plea hearing that he felt that he had been well represented, that counsel answered all his questions, he was given enough time to discuss the plea agreement with counsel, and no one made any threat, applied pressure, or offered any inducement in order to get him to plead guilty.

{¶20} Furthermore, the court found that appellant's termination of his original attorneys more than six weeks after his guilty plea and immediately before he was to be sentenced suggests that appellant had a "change of heart" in an effort to avoid being sentenced for his actions. This court has recognized that a "change of heart" is an insufficient basis for permitting a defendant to withdraw his or her guilty plea. See *State v. Miller*, 11th Dist. No. 2009-P-0090, 2011-Ohio-1161, ¶28. The trial court also found

that appellant did not maintain he had any defenses to the charge or that he did not commit the crime. This court has previously held that “[w]here a defendant attempting to withdraw a guilty plea fails to present evidence in support of an alleged defense, the trial court does not abuse its discretion in denying the motion.” *Griffey*, 2010-Ohio-6573, at ¶34.

{¶21} Based on the foregoing, the record establishes that appellant was given a complete and impartial hearing on the motion to withdraw his plea and that the trial court gave full and fair consideration to the plea withdrawal request. Accordingly, pursuant to the *Peterseim* factors, the trial court did not abuse its discretion in denying appellant’s presentence motion to withdraw his guilty plea. Appellant’s first assignment of error is without merit.

{¶22} In his second assignment of error, appellant contends that the trial court erred by sentencing him to a term of imprisonment where its findings under R.C. 2929.12 were not supported by the record and where it failed to give careful and substantial deliberation to the relevant statutory considerations.

{¶23} In striking down parts of Ohio’s sentencing scheme, the Ohio Supreme Court in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, held: “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *Id.* at paragraph seven of the syllabus. Thus, pursuant to *Foster*, R.C. 2929.11 and R.C. 2929.12 do not mandate judicial fact-finding. Rather, “[t]he court is merely to ‘consider’ the statutory factors.” *Id.* at ¶42. “[I]n exercising its discretion, a court is merely required to ‘consider’ the purposes of

sentencing in R.C. 2929.11 and the statutory guidelines and factors set forth in R.C. 2929.12.” *State v. Lloyd*, 11th Dist. No. 2006-L-185, 2007-Ohio-3013, ¶44.

{¶24} The Court in *Foster* also held that R.C. 2929.11 and R.C. 2929.12 still “apply as a general judicial guide for every sentencing.” *Foster*, at ¶36. In sentencing an offender for a felony conviction pursuant to R.C. 2929.11(A), a trial court must be guided by the overriding purposes of felony sentencing, which are “to protect the public from future crime by the offender * * * and to punish the offender.” *Id.*

{¶25} R.C. 2929.11(B) provides that a felony sentence must be reasonably calculated to achieve the two purposes set forth under R.C. 2929.11(A), commensurate with and not demeaning to the seriousness of the crime and its impact on the victim, and consistent with sentences imposed on similarly-situated offenders. The court must also consider the seriousness and recidivism factors under R.C. 2929.12.” *State v. Alsina*, 11th Dist. No. 2011-A-0016, 2011-Ohio-6692, ¶10.

{¶26} Subsequent to *Foster*, the Ohio Supreme Court established a two-step analysis for an appellate court reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. In *Kalish*, the Court held:

{¶27} “First, [appellate courts] must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.” *Id.* at ¶26.

{¶28} The *Kalish* Court affirmed the sentence of the trial court as not being contrary to law because the trial court expressly stated that it had considered the R.C.

2929.11 and R.C. 2929.12 factors, postrelease control was applied properly, and the sentence was within the statutory range. *Kalish* at ¶18.

{¶29} Here, appellant pleaded guilty to one count of unlawful sexual conduct with a minor, a felony of the third degree. For felonies of the third degree, the prison term includes a range between one and five years. R.C. 2929.14(A)(3). The trial court sentenced appellant to a three year prison term. Thus, appellant's sentence was within the statutory range for the offense. The trial court also properly applied postrelease control. In addition, the trial court stated on the record and in its sentencing entry that it considered the record, oral statements, any victim impact statement and presentence investigation report as well as the principles and purposes of felony sentencing under R.C. 2929.11, and balanced the seriousness and recidivism factors under R.C. 2929.12.

{¶30} Before imposing a more than the minimum sentence, the court considered the following: appellant's lengthy criminal record, which involved some child pornography; appellant was 30 years old and the victim was 14; appellant was in a position of trust with respect to the victim; the victim is the younger sister of appellant's fiancé with whom he was residing; appellant's actions were not the result of an "impulsive, impromptu" occurrence; appellant shows little empathy for the harmful effects on the victim; and appellant's expressions of remorse appear "shallow." The trial judge found the nature of the offense so "despicable" that a more than the minimum sentence was warranted.

{¶31} Based on the foregoing, our review of the record reveals that the trial court carefully considered the relevant statutory considerations, the principles and purposes of sentencing under R.C. 2929.11, and balanced the seriousness and recidivism factors

under R.C. 2929.12 before imposing appellant's more than the minimum sentence pursuant to *Foster*. The trial court's decision to impose a more than the minimum sentence on appellant was not unreasonable, arbitrary, or unconscionable under the abuse of discretion standard set forth in *Kalish*. Appellant's second assignment of error is without merit.

{¶32} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Geauga County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.