[Cite as *State v. Chavez*, 2009-Ohio-3758.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22892
v.	:	T.C. NO. 2008-CR-1162
JOSEPH R. CHAVEZ	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 31st day of July, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Joseph R. Chavez, filed August 14, 2008. Also before us is the State's October 7, 2008, Motion to Dismiss for Failing to Cause the Record to be Transmitted in a Timely Manner, and Chavez's October 10, 2008, Motion for Leave to File Transcript out of Time. The State's motion to dismiss is overruled, and Chavez's

motion for leave is sustained. The complete record is before us, and we will address the merits of Chavez's assigned errors.

{¶ 2} On March 31, 2008, Chavez was indicted on two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), felonies of the third degree. The victim herein, A.M., was less than 13 years of age. The victim's aunt and Chavez have a child together, and the victim was acquainted with Chavez. Chavez pled not guilty on April 3, 2008. A trial was scheduled for July 21, 2008, and on that date, after initially declining to accept the plea bargain offered by the State, and after further plea discussions, Chavez entered a plea of guilty to one count of gross sexual imposition, and in exchange the State dismissed the remaining count.

{¶ 3} On July 23, 2008, at his sentencing hearing, Chavez orally moved the Court for leave to withdraw his guilty plea. Chavez's counsel advised the court that Chavez's parents had produced new evidence, viewed by Chavez for the first time that day, and that Chavez maintained his innocence. According to Chavez's counsel, he had been aware of the evidence and previously unable to obtain it despite his efforts to do so. Counsel stated that the plea process "showed perhaps a lack of reflection and opportunity of reflection on that switch of position which was less than a minute or two apart from where he was not going to plea and then he did plea."

{¶ 4} The following day, a hearing was held on Chavez's motion to withdraw his plea. Chavez's counsel introduced the new evidence, a "book" that had been prepared by A.M., along with another child, for A.M.'s "Uncle [T.]." The "book" is in the nature of a homemade get well card, but it contains several sexually suggestive magazine photographs of topless women, along with magazine photos of motorcycles and automobiles that have been glued into the "book." One of the partial photographs is of a woman wearing panties emblazoned with the slogan, "Eat Pussy - It's

Good for You." Counsel for Chavez argued that the "book" was indicative of the victim's "state of mind" when she implicated Chavez in the crimes.

{¶ 5} On August 5, 2008, the trial court issued a Judgment Entry overruling Chavez's motion to withdraw his plea. In doing so, the trial court determined as follows:

{¶ 6} "1. The defendant entered his plea after a complete hearing which complied with Criminal Rule 11. This judge conducted said plea hearing and reviewed the recording of the plea as part of the hearing to withdraw the guilty plea.

{¶ 7} "2. The defendant understood the nature of the charges and potential sentences.

{¶ 8} "3. The Court finds there is no legitimate or reasonable basis upon which to withdraw the plea. The 'book,' a handmade get-well card to the victim's uncle contained a number of magazine photographs of bare breasted women and motorbikes. In spite of defendant's characterization of them as obscene they are mild by today's standards. The defense argues the 'book' is relevant to the victim's state of mind; that she lived in a home where her father had been the victim of sexual abuse by his adopted father and this is all somehow relevant. The Court finds that the get-well card and the victim's state of mind have limited relevance and are not a complete defense to the charge.

{¶ 9} "4. Defense counsel was competent and effective.

{¶ 10} "5. The State will be prejudice [sic] by the withdrawal.

{¶ 11} "The Court further concludes that defendant's motion was timely, but reflects a change of heart, rather than being based upon evidence that would provide a complete defense."

{¶ 12} Chavez was sentenced to one year of imprisonment on August 12, 2008, and he was designated "a Tier 2 sex offender/child victim offender." Chavez was also sentenced to a period of

five years of post-release control.

{¶ 13} Chavez asserts two assignments of error. His first assignment of error is as follows:

{¶ 14} "THE TRIAL COURT ERRED BY DIRECTLY PARTICIPATING IN THE PLEA BARGAIN NEGOTIATIONS UNDERMINING THE VOLUNTARINESS OF DEFENDANT'S GUILTY PLEA."

{¶ 15} "The Fifth Amendment states that no person 'shall be compelled * * * to be a witness against himself.' This clause was held applicable to the states through the Fourteenth Amendment's Due Process Clause in *Malloy v. Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. Section 10, Article I of the Ohio Constitution, in the same language, provides the same guarantee." *State v. Byrd* (1980), 63 Ohio St.2d 288, 291.

{¶ 16} "'[A] trial judge's participation in the plea bargaining process must be carefully scrutinized to determine if the judge's intervention affected the voluntariness of the defendant's guilty plea. Ordinarily, if the judge's active conduct could lead a defendant to believe he cannot get a fair trial because the judge thinks that a trial is a futile exercise or that the judge would be biased against him at trial, the plea should be held to be involuntary and void under the Fifth Amendment and Section 10, Article I of the Ohio Constitution.' (Quoting *Byrd*, at 293) .

{¶ 17} "In *Byrd*, a trial judge presiding in a capital case, who probably wanted to avoid having to impose capital punishment, met with the defendant without his lawyer present and urged him to enter a guilty plea. The judge told Byrd that evidence which would come out at trial would determine whether 'you go to the electric chair.' The judge also urged members of Byrd's family, and a deputy sheriff who was a family friend, to prevail on Byrd to enter a guilty plea. When Byrd then entered a guilty plea his trial counsel was not present, though counsel's law partner was there.

{¶ 18} "*Byrd* stands for the proposition that a plea of guilty or no contest will be presumed to be coerced if the trial judge takes a partisan position in support of the plea." *State v. Chenoweth* (Sept. 19, 1997), Montgomery App. No. 15846.

{¶ 19} The following exchange occurred prior to Chavez's plea of guilty:

{¶ 20} "THE JUDGE: This is the case of State of Ohio vs. Joseph R. Chavez. We are here in chambers outside the hearing of the jury. Mr. Chavez and his attorney are present, Mr. Vic Hodge. Representing the State of Ohio is Eric Michener. * * *

{¶ 21} "* * *

{¶ 22} "MR. MICHENER: Judge, just to put on the record what the offer was. The way I understand it was the defendant doesn't want to take the plea offer. Just so that is clear on the record, the State had been offering if the defendant pled to one count of gross sexual imposition, we would dismiss the other count and agree to stand silent in sentencing. The Court can explain its usual practice in cases like this is to give a three year sentence but after six months allow defendant to be released on probation. Is that correct, Your Honor?

{¶ 23} "THE COURT: That's correct. The other stipulation as I understood it was that it would be stipulated that there was no corroborating evidence so this would not be a mandatory sentence.

{¶ 24} "MR. MICHENER: That is correct, Your Honor.

{¶ 25} "THE COURT: But there is a presumption in favor of the prisoner. [sic]

{¶ 26} "MR. HODGE.: That's correct, Your Honor. I would just like to expand on it. I explained to my client that, we are talking probabilities here, that the Court has indicated that a three year sentence with judicial release can be done in six months at the correctional institution and that

the Court was willing to forego a PSI so he could be sentenced this week to save two weeks if you will at the end. I told him that we cannot absolutely guarantee judicial release because if he got into an institution with a total screw up or kill somebody, then the Court would (inaudible). But assuming that he does not get into any significant problems in the institution, the probabilities are for a short release and he has no record at all.

{¶ 27} "MR. MICHENER: What I understand as well, Your Honor, is that obviously if this goes to trial, then the sentence could be anywhere from probation to ten years.

{¶ 28} "THE COURT: That's true.

{¶ 29} "MR. HODGE: We discussed that also, Your Honor. And I did also discuss the different time frames for judicial release, if you will, five year sentence is important. Ten is the maximum years. And Joe and I have discussed it all.

{¶ 30} "THE COURT: Mr. Chavez do you have any question about what the attorneys are saying here.

{¶ 31} "THE DEFENDANT: Sir, my six months will start when I get to CRC?

{¶ 32} "THE JUDGE: Yes.

{¶ 33} "THE DEFENDANT: As long as I don't get into trouble with the first judicial release type deal?

{¶ 34} "THE JUDGE: Yes.

{¶ 35} "THE DEFENDANT: I don't have any questions I guess.

{¶ 36} "THE JUDGE: That would be the Court's stance if you plead. If you don't plead, then the Court will order presentence investigation and I will sentence you according to what I find in the investigation.

{¶ 37} "THE DEFENDANT: And if I do plead, I'll get sentenced by Friday or so?

{¶ 38} "THE COURT: Yes.

{¶ 39} "THE DEFENDANT: Then if I get guilty, it's just really what you find in the presentence investigation what you would find in your judgment?

{¶ 40} "THE COURT: Right.

{¶ 41} "MR. HODGE: He'll (inaudible) presumption of sentencing and consideration of (inaudible).

{¶ 42} "THE DEFENDANT: And how long is probation when I get out of judicial release?

{¶ 43} "MR. HODGE: Sir, the maximum is five years.

{¶ 44} "MR. MICHENER: That's correct.

{¶ 45} "THE JUDGE: It depends how you do on that five years; that frequently if you are doing well, the probation staff will recommend maybe after you've done fifty percent of the time, will recommend that you be terminated. It is also, I understand, that you have family out in another state and most states have agreements back-and-forth that they will supervise each others [sic] probationers and it is possible, I'm not guaranteeing you, that they may allow you to go to the other state while you are on probation.

{¶ 46} "MR. HODGE: That's fairly common.

{¶ 47} "MR. MICHENER: Yes the other state has to agree to it.

{¶ 48} "THE DEFENDANT: Well, I guess I'll take your plea. I'll accept it.

{¶ 49} "THE JUDGE: Do you want any additional time? Do you usually do a plea petition, a written plea petition?

{¶ 50} "MR. MICHENER: Yes, Your Honor. We do a plea form.

{¶ 51} "THE JUDGE: Okay.

{¶ 52} "MR. MICHENER: Do you want to give him one and have him take a look at it and have him decide?

{¶ 53} "THE JUDGE: Yes, let's do the written plea form and then we'll come back on the record."

{¶ 54} Having reviewed the above exchange, it is clear that the trial court did not take a "partisan position" in support of Chavez's plea or pressure Chavez to enter a plea of guilty. The trial court did not initiate the plea bargaining process but the process was begun by the parties. The above exchange does not indicate that Chavez's free will was compromised such that his plea was not voluntary in a constitutional sense. In other words, this record does not reveal a degree of participation in the plea bargaining process akin to the coercive tactics disfavored in *Byrd*. Rather, the trial court's participation was in the nature of clarifying Chavez's options. The trial court did not cast doubt upon Chavez's right to a fair trial, and the court offered Chavez "additional time" to speak with his attorney alone prior to entering his plea. The record reveals that Chavez and his attorney discussed the plea form and Chavez's plea before proceeding to a complete and thorough Crim.R. 11 colloquy.

{¶ 55} Since the trial court did not coerce an involuntary plea, Chavez's first assignment of error is overruled.

{¶ 56} Chavez's second assignment of error is as follows:

{¶ 57} "THE TRIAL COURT ERRED IN ITS DENIAL OF DEFENDANT'S REQUEST TO WITHDRAW HIS GUILTY PLEA AFTER APPELLANT OFFERED NEW EVIDENCE OF HIS INNOCENCE."

{¶ 58} "In *State v. Minkner*, Champaign App. No.2006CA32, 2007-Ohio-5574, at ¶ 7-9, this Court stated:

{¶ 59} "'A defendant's motion to withdraw a guilty plea, made before sentencing, should be freely and liberally granted, provided the movant demonstrates a reasonable and legitimate basis for the withdrawal. *State v. Xie* (1992), 62 Ohio St.3d 521, * * * . However, a defendant does not have an absolute right to withdraw his plea prior to sentencing. *Id.* A trial court must hold a hearing on the motion to determine if a reasonable and legitimate basis exists for the withdrawal. *Id.*

{¶ 60} "'The decision whether to grant or deny a presentence request to withdraw a guilty plea is a matter resting within the trial court's sound discretion. *Id.* Such decisions will not be disturbed on appeal absent a showing that the trial court abused its discretion; that is, acted in an unreasonable, arbitrary, unconscionable manner. *Id.*

{¶ 61} "'No abuse of discretion in denying a presentence motion to withdraw a plea is demonstrated where: (1) the accused is represented by highly competent counsel, (2) the accused was afforded a full hearing, pursuant to Crim.R. 11, before entering the plea, (3) after the motion to withdraw is filed the accused is given a complete and impartial hearing on the motion, and (4) the record reveals that the trial court gave full and fair consideration to the plea withdrawal request. *State v. Peterseim* (1980), 68 Ohio App.2d 211, * * *. A 'change of heart' is not sufficient justification to permit withdrawal of a guilty plea. *State v. Lambrose* (1988), 44 Ohio App.3d 102, * * *; *State v. Landis* (Dec. 6, 1995), Montgomery App. No. 15099.'" *State v. Flowers*, Montgomery App. No. 22751, 2009-Ohio-1945, ¶ 11-14.

{¶ 62} At the hearing on the motion to withdraw his guilty plea, the following exchange occurred on direct examination:

{¶ 63} "Q. * * * After entering your plea on Monday, did you have further reflection, what happened to make you change you mind?

{¶ 64} "A. Further reflection and I got to talk to my mother and father and that too helped me. I mean you are in there all by yourself in that cell and don't really have nobody to turn to, you know. I would like to talk to them Monday when they were supposed to be here, but after talking to them, they said I should have stuck with my innocence no matter guilty or what. If I am going to be guilty in the end, I should have stuck with my innocence and pushed it further out and went through a trial.

{¶ 65} "Q. In your own words, why do you believe that you should be allowed to withdraw your guilty plea? Summarize for us, not me saying it, but you saying it.

{¶ 66} "A. Well, sir, I was really scared when I took the plea. I mean I had never been in trouble, had never been through nothing like this, and I have had a lot of stress and didn't get much sleep the day before trial whatsoever stressing through it all. I mean my lawyer, he did a lot of pushing to take the plea, I mean the first pleas, since the beginning and with the emphasis on I am probably going to lose if I, the most probability that I will lose if I go to trial.

{¶ 67} "I have never been through anything like this. There was a lot of pressure on me. I didn't have a chance to talk to my mother and father which would have helped me out a little bit on giving me some kind of comfort and letting me know. But other than that I just broke down that day. I didn't have anything else to turn to.

{¶ 68} "I don't know how to explain it all the way, just kind of the stress and everything combined just kind of broke me Monday.

{¶ 69} "Then with my lawyer pushing that the probability that I would get a harsher sentence

if I go to trial and it didn't look like much of chance of me winning just on he said she said stuff from what the evidence that we had and what was going on before.

{¶ 70} "MR. HODGE: Judge, as I indicated before, I don't want to get too far into attorney client discussion, but I would submit to the Court that I suggested to him probable conviction outcome and I did suggest a, [sic] I told him that a full sentence of one to ten year sentence if we break down both counts.

{¶ 71} "THE DEFENDANT: Most likely I would get a harsher sentence if I go to trial.

{¶ 72} "MR. HODGE: We could expect something like three-to-seven or possibly more if the Judge wanted or possibly less, but that was my estimates.

{¶ 73} "Q. Anything else you want the Judge to know about why he should -

{¶ 74} "A. My lawyer stated that the prosecutor said he was sure he could make both at three stick. So, I would be looking at a little bit harsher sentence. That's what I have been told from the beginning about the plea, that it would be better if I took one plea because for sure he could make both of them stick."

{¶ 75} During cross-examination, the following exchange occurred:

{¶ 76} "Q. Are you suggesting then that book is the reason that you changed your mind?

{¶ 77} "A. Well, not really that, sir.

{¶ 78} "Q. The book is not what made you change your mind?

{¶ 79} "A. That was part of it. That was part of my reasoning, a lot of it, because that book brings a lot to my case from what I've said from the beginning that there is other issues going on, dreams, and everything that I have said from the beginning so that book just helps a lot of my case.

{¶ 80} "* * *

{¶ 81} "Q. You knew of the existence of that book when you pled guilty, isn't that correct?

{¶ 82} "A. Yes, sir.

{¶ 83} "Q. As I remember, the Judge specifically asked you after I had recounted the facts whether that is in fact what happened here. And you did say I guess so. Isn't that right?

{¶ 84} "A. Yes, I said I guess so.

{¶ 85} "Q. So, you were lying to the Judge then?

{¶ 86} "A. Well, I said I guess so. That's really indecisive isn't it? I mean because I was under emotional stress. I wasn't at my right frame of mind."

{¶ 87} On redirect, the following exchange occurred:

{¶ 88} "Q. Just to give this book a little bit of perspective, there was also events going on that culminated in a sentencing back in February, which is a month before this charge against you came up, that dealt with [A.M's] afro I believe she called him.

{¶ 89} "A. Yes, sir.

{¶ 90} "Q. It was [H. V. V.]?"

{¶ 91} The trial court then sustained the State's objection, and Chavez made the following proffer:

{¶ 92} "MR. HODGE: This book is the new evidence. This book, actually seeing it, the nature of it, the new evidence, would this book fit into the fact pattern which was pertinent to this case State v. [E. V. V.] which was, I believe, in Logan County and child abuse with this child's grandfather."

{¶ 93} The mother of the victim testified that A.M and another child, when they were approximately 10-11 years old, decided to "make a get well card to Uncle [T.] to boost his morale

because he was really down and out after his heart surgery and they did exactly, as Joe said, they went through a box of old magazines that belonged to another uncle that was deceased, as well as some of [T.]'s magazines and [A.M.'s] dads [sic] and put together this book and then came downstairs and showed everybody, look, look what we've made for Uncle [T.]." The victim's mother testified the book was made in September, 2007, which is around six months prior to Chavez's commission of the offense, according to his indictment.

{¶ 94} Having reviewed the record, we see no abuse of discretion in the trial court's decision denying Chavez's motion to withdraw his plea. Chavez was represented by highly competent defense counsel. In fact, counsel for Chavez attested to his education and experience on the record, revealing significant expertise in evaluating cases.

{¶ 95} The record further reveals that the trial court thoroughly complied with the provisions of Crim.R. 11(C)(2). Chavez indicated that he was satisfied with his representation and had sufficient time to discuss the matter with his lawyer. Chavez stated that he was 25 years old and had completed his junior year in high school. He testified that he had not been threatened or promised anything other than the terms of the plea agreement in exchange for his plea. Chavez stated his health was good and he was not under the influence of drugs or alcohol. He did not indicate to the court that he was "under emotional stress." He stated that he entered his plea voluntarily. He indicated that he understood the nature of the charge against him. The trial court went over the maximum penalties of the charge, judicial release, and post release control. The court explained the rights Chavez waived by entering a guilty plea, and explained that he had a right to remain silent at trial. Chavez pled guilty and signed the plea form.

{¶ 96} Additionally, Chavez was given a complete and impartial hearing regarding the

withdrawal of his plea, and he was given ample opportunity to explain his reasons for seeking withdrawal. Chavez's testimony, however, as the trial court noted, merely suggests a change of heart on his part. While Chavez had not seen the "book" until July 23, 2008, he testified that he knew of its existence before he entered his plea. In other words, Chavez presented nothing at the hearing that was not already known to him when he pled. Although Chavez argues that the "book" represents "new evidence of his innocence," we agree with the trial court that it is of limited relevance. While the record before us suggests that the young victim had access to sexually oriented material, access which was apparently condoned, and that she perhaps had a heightened sexual awareness in light of her tender years, Chavez failed to establish the exculpatory value of the "book" to his defense.

{¶ 97} Finally, the trial court's Judgment Entry, quoted above, reveals that it gave full and fair consideration to Chavez's motion. There being no abuse of discretion, Chavez's second assignment of error is overruled.

{¶ 98} The judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

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