

[Cite as *State v. Green*, 2009-Ohio-4585.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

C.A. CASE NO. 22942

v.

:

T.C. NO. 2008 CR 730/2

SHAWN P. GREEN

:

(Criminal appeal from
Common Pleas Court)

Defendant-Appellant

:

:

.....

OPINION

Rendered on the 4th day of September, 2009.

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Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant

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FROELICH, J.

{¶ 1} Shawn Green appeals from a judgment of the Montgomery County Court of Common Pleas, which convicted him of felonious assault of a peace officer based upon his guilty plea. After entering his plea but before he was sentenced, Green had attempted to withdraw his plea. He appeals from the trial court's denial of his motion to withdraw his plea.

{¶ 2} For the reasons that follow, we conclude that the trial court did not abuse its discretion in denying Green's motion to withdraw his plea.

I

{¶ 3} On February 15, 2008, a Dayton police officer observed behavior at a BP gas station that he believed to be indicative of drug activity. After following two vehicles a short distance, he attempted to thwart a suspected drug transaction involving the two vehicles, one of which was driven by Green. The cars fled when the police officer approached them, and one of the vehicles hit the officer's knee. Green was arrested later the same night.

{¶ 4} On March 10, 2008, Green was indicted for felonious assault of a police officer in violation of R.C. 2903.12(A) and (C)(3) (Case No. 2008-CR-730/2). He filed a motion to suppress evidence and, after a hearing, the trial court overruled the motion. On July 1, 2008, a second indictment (in the same case number) was filed which charged Green with one count each of felonious assault of a police officer, tampering with evidence, possession of cocaine, and failure to comply with an order or signal of a peace officer. Green entered into a plea agreement whereby he pled guilty to felonious assault of a peace officer, as charged in the second indictment, in exchange for which all other counts in Case No. 2008-CR-730/2 were to be dismissed.

{¶ 5} Green entered his plea in Case No. 2008-CR-730/2 on July 10, 2008. At the same time, he also entered a guilty plea to one count of trafficking in marijuana, a fifth degree felony, in Case No. 2008-CR-924. The trial court ordered pre-sentence investigations in both cases. At his sentencing hearing on July 24, 2008, Green orally moved to withdraw his plea on the felonious assault charge. The trial court denied the motion and sentenced him to three years in prison on that offense. Green did not attempt to withdraw his plea to trafficking in marijuana, and he was sentenced separately. He did not appeal from that conviction.

{¶ 6} Green raises two assignments on appeal from the trial court's denial of his motion to withdraw his plea.

II

{¶ 7} Green's first assignment of error states:

{¶ 8} "THE TRIAL COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO WITHDRAW HIS GUILTY PLEA PRIOR TO SENTENCING WHERE A REASONABLE BASIS FOR WITHDRAWAL WAS PRESENTED."

{¶ 9} Green claims that he should have been allowed to withdraw his guilty plea because he had been unable to fully discuss his plea with his attorney, because he had not realized that the plea meant he could no longer appeal, especially from the denial of his motion to suppress evidence, and because the multiple indictments and charges had caused him to be confused about the offenses to which he pled guilty. The trial court found that the record belied these claims.

{¶ 10} 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, 526. 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.* A trial court may satisfy the requirement for a full and fair hearing on a motion to withdraw a plea by allowing the defendant and his attorney to speak at a sentencing hearing and to explain the basis for the motion. *State v. Burnett*, Montgomery App. No. 20496, 2005-Ohio-1036, at ¶20-21. 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. *Xie*, 62 Ohio St.3d at 526. Such decisions will not be disturbed on appeal absent a showing that the trial court abused its discretion by acting in an unreasonable, arbitrary, or unconscionable manner. *Id.*

{¶ 11} “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. Chavez*, Montgomery App. No. 22892, 2009-Ohio-3758, at ¶61, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211. A “change of heart” is not sufficient justification to permit withdrawal of a guilty plea. *Id.*, citing *State v. Lambrose* (1988), 44 Ohio App.3d 102 and *State v. Flowers*, Montgomery App. No. 22751, 2009-Ohio-1945, at ¶11-14.

{¶ 12} Green claimed that he had made some unsuccessful attempts to contact his attorney while the charges against him were pending, which caused him to feel that he had “[become] a victim of ineffective assistance of counsel.” He also claimed that counsel had “missed” three or four court appearances with him. At the sentencing hearing, counsel admitted

that he had been hospitalized the previous month and was “unavailable” to Green a couple of times, but counsel did not state that he had missed court dates, and the record does not reflect any missed court dates.

{¶ 13} Green was represented by counsel at the plea hearing. At the hearing, the trial court asked Green whether he was satisfied with his counsel’s representation, and Green answered affirmatively. The court further stated: “It sounds like he [counsel] spent quite a bit of time talking with you about these cases or at least the assault case?” and Green agreed. At that time, Green did not claim that counsel had been unavailable to him or that counsel’s medical issues had had any adverse effect on Green’s ability to understand his plea or to make a decision about the plea agreement.

{¶ 14} When he was questioned about the basis for his motion to withdraw his plea, Green also claimed that he had been unaware that a guilty plea affected his ability to appeal, particularly with respect to the denial of his motion to suppress. At the plea hearing, however, the trial court had expressly informed Green that he “[gave] up [his] right to appeal any and all pre-trial rulings” by entering a guilty plea. Green indicated that he had not previously been aware of this fact, but “I am now.” The trial court then emphasized, specifically, that a guilty plea would prevent Green from appealing the decision on the motion to suppress and, after consultation with counsel, Green indicated that he understood.

{¶ 15} In *State v. Jackson*, Adams App. No. 01CA730, 2003-Ohio-1201, the defendant alleged ineffective assistance of counsel, arguing that he would not have entered a guilty plea if his counsel had advised him that such a plea waived his right to appeal the trial court’s denial of his motion to suppress, and also asked to withdraw his plea, partly for the same reason. The court denied the motion to withdraw the guilty plea since a complete Crim.R. 11 colloquy had

taken place and found that any claim of ineffective assistance, especially considering the strong presumptions present, could not be considered on direct appeal.

{¶ 16} Moreover, Green's trial judge wisely went beyond both the constitutional and statutory minimums of Crim.R. 11 and specifically informed him that he was giving up his right to appeal any pre-trial rulings by entering a guilty plea – and Green acknowledged his awareness of this consequence prior to entering his plea.

{¶ 17} Finally, Green claimed that the two indictments in Case No. 2008-CR-730/2 had confused him and that he had believed he was pleading guilty to fourth and fifth degree felonies, not first and fifth degree felonies (the fifth degree felony being the trafficking in marijuana count from the other case). In other words, Green claimed that, in Case No. 730/2, he had thought he was pleading to a felony of the fourth degree, rather than a felony of the first degree. At the plea hearing, however, the trial court stated three times that Green was pleading to a felony of the first degree. The written plea agreement in Case No. 2008-CR-730/2 also clearly stated that the offense was a "Felony - 1st degree;" Green indicated that he had reviewed the plea agreement with his attorney and that he understood the agreement.

{¶ 18} Although Green claims that he asked questions at the plea hearing that demonstrated his failure to understand the plea, the record shows that Green's questions related to when he would be eligible for judicial release; they did not demonstrate confusion about the plea.

{¶ 19} The trial court reasonably concluded that Green's claims were refuted by the record of the plea hearing. At the plea hearing, the trial court thoroughly discussed with Green the terms and ramifications of his plea agreement, the degree of the offense and the possible sentence, and his satisfaction with his counsel. Based on this discussion, the trial court could

have reasonably concluded that Green had been represented by highly competent counsel and had been afforded a full hearing pursuant to Crim.R.11 before entering his plea. The record also demonstrates that Green had a hearing on his motion to withdraw the plea and that the trial court gave full and fair consideration to his request to withdraw the plea. The trial court did not abuse its discretion in overruling Green's motion to withdraw his plea.

{¶ 20} The first assignment of error is overruled.

III

{¶ 21} Green's second assignment of error states:

{¶ 22} "DEFENDANT'S TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO DISCUSS DEFENDANT'S DEFENSES AND THE EVIDENCE AGAINST DEFENDANT IN ARTICULATING AND PRESENTING HIS MOTION TO VACATE HIS GUILTY PLEA."

{¶ 23} Green contends that "Counsel negotiated a plea for his client without discussing the charges against him and all the possible options." Green also claims, as he did under the first assignment of error, that counsel missed court appearances because of illness and was "therefore unable to be effective."

{¶ 24} As we stated under the first assignment of error, there is no evidence in the record that counsel missed court dates, as Green alleges, although counsel admitted being unavailable to talk with Green "a couple of *** times ." Moreover, Green acknowledged during his plea colloquy that he had had extensive discussions with counsel about his plea and that he had been satisfied with counsel's performance. Based on its prior proceedings, the trial court could have reasonably rejected Green's claim at the sentencing hearing that counsel had not been effective

in representing him in the plea negotiations. The trial court did not abuse its discretion in refusing to allow a withdrawal of Green's plea on the basis of ineffective assistance of counsel.

{¶ 25} The second assignment of error is overruled.

IV

The judgment of the trial court will be affirmed.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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Sha D. Hinds-Glick
Hon. Mary L. Wiseman