

[Cite as *State v. Goney*, 2009-Ohio-4326.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22753
v.	:	T.C. NO. 06 CR 3686
	:	
THOMAS B. GONEY	:	(Criminal appeal from Common Pleas Court)
	:	
Defendant-Appellant	:	

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OPINION

Rendered on the 21st day of August, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Thomas B. Goney, filed May 14, 2008. Goney appeals from the denial of a pre-sentence motion to withdraw his guilty plea.

{¶ 2} On September 5, 2006, Goney was indicted on one count of rape (by force or threat of force), in violation of R.C. 2907.02(A)(2), a felony of the first degree. Goney pled not

guilty. Trial was originally set for November 27, 2006, but it was reset to December 5, 2006. On November 27, 2006, Goney waived his right to be tried by a jury. On December 5, 2006, Goney entered a negotiated plea of guilty. Pursuant to the plea agreement, the court agreed to cap Goney's mandatory sentence at eight years, less than the maximum ten year sentence possible, and to conduct a sentencing hearing during which Goney could present evidence in mitigation of an eight year sentence.

{¶ 3} The record establishes that Goney was previously convicted, following a jury trial in 1991, of the rape of a family member, and he was released from prison for that offense in March of 2003.

{¶ 4} On January 30, 2007, Goney filed his Motion to Vacate Plea. Attached to the Motion is Goney's affidavit which claims that he is innocent, that his plea was not voluntary, and that he pled guilty because his former attorney did not prepare for trial and failed to subpoena witnesses to testify on his behalf. Goney's affidavit further states that his attorney did not ask for a witness list until less than seven days before trial.

{¶ 5} On February 16, 2007, the matter was transferred to another judge for a hearing on the motion to withdraw. On April 23, 2007, following an evidentiary hearing, the trial court overruled Goney's motion. According to the trial court, Goney understood that he could be sentenced to a maximum of eight years. The court found that defense counsel "testified credibly" that Goney believed that his sentence should be less than eight years, despite his previous conviction. The trial court determined that Goney was represented by highly competent counsel, and that Goney knew and understood his rights and the effect of his plea. Finally, the court concluded that Goney's motion to vacate his plea was "based solely on his change of heart

about his sentence.”

{¶ 6} On May 23, 2007, Goney was sentenced to seven years in prison, and he was classified as a Habitual Sex Offender.

{¶ 7} The events giving rise to this matter occurred on August 27, 2006, after Goney, Donnie Harlow, Matt Morris, and the victim, N.S., went out bar-hopping. Goney met the group at the Green Leaf bar on North Dixie Drive, and then they all proceeded to a bar called Dixie Cowgirls, and then to the Dixie Lounge. After the four returned to Goney’s home, Harlow and Morris departed, allegedly to buy drugs, according to Goney. N.S., according to her victim impact statement, “passed out,” and then “woke up to Tom on top of me. I woke up with him inside me, and then he was kissing on me.” N.S. could not push Goney off of her. Finally, when Goney got off of N.S., he “freaked out,” and he locked the door to the residence so that she could not leave. N.S. went to the door and unlocked it, and she sat on the porch. When she looked back and did not see Goney, she ran to the end of the street, where she encountered a security guard in a parking lot. The guard called 911 for N.S., and she was taken to the hospital.

{¶ 8} Goney’s sole assignment of error is as follows:

{¶ 9} “THE TRIAL COURT IMPROPERLY DENIED GONEY’S MOTION TO WITHDRAW HIS PLEA.”

{¶ 10} According to Goney, he did not voluntarily enter his plea but was compelled to plead guilty due to his counsel’s failure to subpoena witnesses and prepare for trial. Further, according to Goney, his counsel “acknowledged that he did not provide a defense witness list to the State until the day of trial.” Goney maintains that he was originally offered a five year cap on his sentence, and the “fact that Goney pled to a possible 8 year sentence instead of a previous

offer of five years shows that he was under duress.”

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

{¶ 12} ““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.*

{¶ 13} ““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.*

{¶ 14} ““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.

{¶ 15} Goney's argument is addressed to the first of the *Peterseim* factors, and we initially note that the record reflects that defense counsel made multiple discovery requests, filed a motion to suppress (which was later withdrawn), and interviewed witnesses. Defense counsel testified at the hearing that he also met with Goney more than ten times prior to the plea hearing.

{¶ 16} Defense counsel also testified that he played a recording of the victim's 911 call for Goney and indicated to him that it would be admitted into evidence. Counsel told Goney, "there would be somewhat of an emotional response from regular people upon hearing that. And we would have to attempt to overcome that." Defense counsel testified that he received and discussed with Goney recordings of conversations from the jail between Goney and one of their "major witnesses," Goney's nephew, Rich Cantrell, in which Goney admitted that he did not remember what happened on the night of the incident due to his intoxication. According to defense counsel, the "telephone calls wipe out a potential defense." Counsel also discussed Goney's prior conviction for rape, advising him that if he took the stand, it would come in, and "that is a very hard sell with a jury, if you have a prior rape to indicate that this was something different." Defense counsel stated that Goney understood his advice.

{¶ 17} Goney's witness list, time stamped November 27, 2006, contains the names of his nephew, Cantrell, and Cathy Meyers and Jennifer Meyers, both of whom worked at the Green Leaf bar. Defense counsel testified that he interviewed several witnesses for Goney's case but stated some were not included on the witness list because they were not going to be helpful. Regarding defense counsel's failure to subpoena witnesses, he stated that the three people on Goney's witness list had agreed to appear voluntarily.

{¶ 18} As to Goney's assertion that defense counsel did not provide a defense witness list

to the State until the day of trial, as noted earlier, the record reveals that the trial was originally scheduled for November 27, 2006. Counsel testified that he visited Goney on November 20th, and as of that date, the deadline for filing his witness list (See Loc.Crim.R. 3.03), counsel did not have the names Cathy and Jennifer. Regarding the change of trial date, defense counsel testified, “on the eve of trial or very shortly before trial” he received from the State “CD’s with like fifteen, fifteen minute phone calls,” and that he did not have time to review the CD’s in time for trial. Defense counsel stated he received a continuance of the trial until December 5th so that he could review the CD’s. There is no indication that Goney’s witnesses would have been excluded on December 5th if they had appeared to testify.

{¶ 19} Defense counsel described the “significant negotiations” between himself, the State and the trial court regarding the plea agreement. While Goney argues that he was offered a cap of five years, defense counsel testified that, although the court made “a suggestion” of a five year cap, that suggestion was “an offer very much not accepted by the State.” The record shows the ultimate agreement was for a cap of eight years, and Goney “would have an opportunity to present mitigating factors.” Counsel testified that Goney agreed to accept the plea bargain on December 4th, the day before the second trial date.

{¶ 20} Defense counsel indicated his belief that the negotiated plea agreement was in his client’s best interest. Counsel testified that there were several “emotional issues that were present,” and that he wanted to emphasize mitigation so that the trial court would sentence Goney to less than eight years. Our review of the sentencing hearing establishes that defense counsel in fact succeeded in obtaining a sentence for his client that was less than the eight year cap. The sentencing judge remarked, “I also have a note on this file that prior to defendant’s request to

withdraw his plea, Judge Gowdown was going to sentence the defendant to seven years. Having reviewed everything in front of me, I am at this time prepared to impose that sentence.”

{¶ 21} Having reviewed the record, we agree with the trial court that Goney was represented by highly competent counsel. At his plea hearing, Goney himself indicated that he was satisfied with his counsel’s representation. As the State asserts, the absence of witnesses on the day of trial, including all of the 28 witnesses on the State’s witness list, belies Goney’s assertion that he did not agree to the plea agreement on the eve of trial but instead intended to go to trial on the 5th. The record is clear that defense counsel was mindful of the evidence against Goney and the lack of a viable defense, and that he communicated those concerns to Goney. Defense counsel diligently negotiated for a plea agreement on Goney’s behalf. In the absence of an agreement, Goney faced a maximum sentence of 10 years, and defense counsel negotiated a sentence for him, despite his previous rape conviction, that was capped below the maximum available sentence. Further, Goney was allowed to present mitigating evidence which apparently operated to his advantage in securing a sentence of less than eight years.

{¶ 22} As to the second of the *Peterseim* factors, our review of the transcript of the plea hearing reveals that the trial court carefully fulfilled its duties pursuant to Crim.R. 11, and that Goney entered his pleas freely and voluntarily, with an understanding of the potential sentence he faced in doing so. As the trial court noted, “the transcript of Defendant’s plea demonstrates that he was repeatedly asked by the Court whether he understood what was going on and if he was entering into the plea voluntarily.”

{¶ 23} Following the thorough Crim.R. 11 colloquy, and after Goney entered his plea, the victim made a statement, and then Goney offered a statement in mitigation pursuant to the

plea agreement. According to Goney, he was divorced in 1973. He had two children, Tina Marie Goney, who died when she was six weeks old, and Thomas Burton Goney, Jr., who died in April, 2006, after becoming ill while incarcerated. Goney stated that his son was initially denied treatment while in jail but was eventually taken to the hospital where he remained on life support for 18 days. Goney stated that he had his own business installing floor coverings, and that his son used to work with him. He testified that he served 11 years in prison for his previous rape conviction.

{¶ 24} Regarding the third of the *Peterseim* factors, the record reveals that Goney received a complete and impartial hearing on his motion to vacate his plea, and Goney does not assert otherwise. His brief provides that he “testified *extensively* about *all* of the reasons why he wanted to withdraw his plea.” (Emphasis added). Goney also admitted that he received discovery from defense counsel, that they discussed the recorded calls from the jail, that defense counsel played the 911 call for him, and that he understood that his DNA had been found on the victim’s throat.

{¶ 25} Regarding the fourth *Peterseim* factor, the record is clear that the trial court gave full and fair consideration to the plea withdrawal request, determining that Goney merely had a change of heart. In the course of our appellate review, we defer to the factfinder’s assessment of credibility¹, and the trial court expressly found defense counsel to be credible in his testimony that Goney believed his sentence should be less than eight years.

{¶ 26} Finally, while Goney argued that he was compelled to plead guilty in the absence of witnesses to testify on his behalf, there is nothing in the record to suggest that there were any

¹See *State v. Hixson*, Montgomery App. No. 19868, 2004-Ohio-1308, ¶10.

witnesses who could provide exculpatory evidence. At the hearing on the motion to vacate, the trial court also heard the testimony of Detective John Clymer of the Montgomery County Sheriff's Office, who testified that he was the lead detective on the matter, and that he interviewed Cathy Meyers, Jennifer Meyers and Cantrell. He testified that Cathy indicated that she observed a group of people, including Cantrell and N.S., in the Green Leaf bar between 8:30 and 9:30 p.m., on the date of the incident, and that they were later joined by Goney. She indicated that the men in the group were drinking beer, but that she did not serve N.S. any alcoholic beverages. Jennifer Myers had seen Goney and N.S. together on another evening. Cantrell told Clymer that he was drinking with the group at the Green Leaf but later returned to his residence. None of Goney's witnesses were at Goney's home when the rape occurred and they could not provide testimony regarding the rape.

{¶ 27} Since Goney did not demonstrate a reasonable and legitimate basis to withdraw his plea, we see no abuse of discretion. The judgment of the trial court is affirmed.

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

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