

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

:
C.A. CASE NO.
2008 CA 51

v.

: T.C. NO. 08
CR 66

JOHN SALAH

:

(Criminal appeal from
Common Pleas Court)

Defendant-Appellant

:

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OPINION

Rendered on the 9th day of April, 2010.

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DONOVAN, P.J.

{¶ 1} Defendant-appellant John Salah appeals from a decision of the Clark County Court of Common Pleas, which denied his pre-sentence motion to withdraw his guilty pleas to

three counts of gross sexual imposition and seven counts of illegal use of a minor in nudity oriented material. One of the seven counts to which Salah plead guilty was a felony of the second degree, while the remaining six counts of illegal use of a minor in nudity oriented material were felonies of the fifth degree. A hearing was held on Salah's motion to withdraw his pleas on May 28, 2008. On May 30, 2008, the trial court overruled the motion in an entry filed on May 30, 2008. On the same day, the court proceeded to sentence Salah to an aggregate sentence of 25 years in prison.

I

{¶ 2} According to the record, on January 28, 2008, Salah was indicted for three counts of gross sexual imposition, in violation of R.C. § 2907.05(A)(4), all felonies of the third degree; one count of rape, in violation of R.C. § 2907.02(A)(1)(b), a felony of the first degree; one count of illegal use of a minor in nudity oriented material, in violation of R.C. 2907.323(A)(1), a felony of the second degree; seven counts of illegal use of a minor in nudity oriented material, in violation of R.C. § 2907.323(A)(3), all felonies of the fifth degree; and three counts of possession of criminal tools, in violation of R.C. § 2923.24(A), all felonies of the fifth degree. The indictment was based upon the State's allegations that Salah had been engaged in an inappropriate relationship with a female born on February 19, 1995. During the course of the relationship which lasted from June 1, 2005, to January 13, 2008, Salah allegedly had sexual contact with the victim, photographed the victim while she was naked, and was in possession of photographs of the victim wherein she was nude. On February 11, 2008, the State dismissed one count of illegal use of a minor in nudity oriented material, in violation of R.C. § 2907.323(A)(3).

{¶ 3} On May 9, 2008, Salah pled guilty to three counts of gross sexual imposition

and seven counts of illegal use of a minor in nudity oriented material. In return, the State agreed to dismiss the rape charge, as well as the three counts of possession of criminal tools. The trial court ordered a pre-sentence investigation and scheduled Salah's sentencing hearing for May 30, 2008, at 8:30 a.m.

{¶ 4} Shortly after the plea hearing, Salah drafted a letter to the trial court in which he asked to withdraw his guilty pleas. As a basis for the request, Salah stated that he received "incorrect and missing information" regarding the charge of illegal use of a minor in nudity oriented material, in violation of R.C. § 2907.323(A)(3). Specifically, Salah stated that he believed that section of the statute was a second degree felony, rather than a fifth degree felony. Salah also stated in the letter that prior to the plea hearing, his attorney failed to review all of the charges against him.

{¶ 5} After retaining new counsel, Salah filed a motion to withdraw his guilty pleas on May 21, 2008. Attached to the motion was an affidavit executed by Salah which essentially stated his guilty pleas were not knowingly, intelligently, nor voluntarily made. As previously noted, the trial court held a hearing on Salah's motion to withdraw his guilty pleas on May 28, 2008. The trial court subsequently denied Salah's motion in a judgment entry filed on May 30, 2008.

{¶ 6} It is from this judgment that Salah now appeals.

II

{¶ 7} Salah's sole assignment of error is as follows:

{¶ 8} "THE TRIAL COURT ABUSED ITS DISCRETION [sic] WHEN IT DENIED APPELLANT'S PRE-SENTENCE MOTION TO WITHDRAW HIS GUILTY PLEA."

{¶ 9} In his sole assignment of error, Salah claims that the trial court erred in overruling his motion to withdraw his no contest pleas.

{¶ 10} A motion to withdraw a plea of guilty or no contest is governed by Crim.R. 32.1, which states:

{¶ 11} “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.”

{¶ 12} The Ohio Supreme Court has ruled that a trial court should “freely and liberally grant” a pre-sentence motion to withdraw a guilty plea, provided that the defendant provides a reasonable and legitimate basis for the withdrawal. *State v. Xie* (1992), 62 Ohio St.3d 521, 526-27. However, “[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing.” *Id.* at paragraph one of the syllabus. A decision to allow the withdrawal of a guilty plea before sentencing is within the sound discretion of the trial court. *Id.* at paragraph two of the syllabus.

{¶ 13} In reviewing whether the trial court abused its discretion, we apply the following factors: “(1) whether the accused was represented by highly competent counsel; (2) whether the accused was given a full Crim.R. 11 hearing before entering the plea; (3) whether a full hearing was held on the withdrawal motion; and (4) whether the trial court gave full and fair consideration to the motion.” *State v. McNeil* (2001), 146 Ohio App.3d 173, 176, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 214. A defendant generally is not allowed to withdraw his plea prior to sentencing just because he is made aware that a subjectively unexpected sentence is going to be imposed. *State v. Uribe* (Mar. 5, 1999), Montgomery App. No. 17044, citing *State v. Peterseim* (1980), 68 Ohio App.2d at 213.

{¶ 14} On appeal, Salah argues that the trial court failed to give full and fair consideration to his motion, and that no evidence was adduced which demonstrated that the State would suffer prejudice as a result of the withdrawal. Salah points out that the trial court was or, at least, should have been aware that during the plea hearing he exhibited “confusion over certain Discovery Discrepancies.” Salah also argues that a pre-sentence motion to withdraw a plea should be freely and liberally granted. In his appellate brief, Salah compares his decision to plead guilty and his subsequent decision to withdraw his pleas to an individual suffering from buyer’s remorse attempting to void a commercial transaction during the “cooling off” period as permissible under Ohio’s consumer protection laws.

{¶ 15} We note that the trial court thoroughly complied with the provisions of Crim.R. 11(C)(2) during the plea hearing. Salah indicated that he was satisfied with his representation and had sufficient time to discuss the matter with his lawyer. Salah stated that he had received his GED and that he had completed approximately two years of college. Salah acknowledged that he had not been threatened or promised anything other than the terms of the plea agreement in exchange for his plea. Salah stated he was not under the influence of drugs or alcohol. Salah did not indicate to the court that he was under any emotional stress. Salah indicated that his plea was voluntary and acknowledged that he understood the nature of the charges against him. The trial court explained the maximum penalties, judicial release, and post release control. The court thoroughly explained the rights Salah waived by entering a guilty plea. Salah acknowledged all of his rights, indicated that he understood them, and signed the plea form.

{¶ 16} Upon review of the record, we find no error in the trial court’s ruling. Salah was given a complete and impartial hearing regarding the withdrawal of his pleas, and he

was given ample opportunity to explain his reasons for seeking withdrawal. Salah's testimony, however, as the trial court noted, revealed only a change of heart. The court provided Salah a hearing on his motion to withdraw his pleas and listened to his lengthy testimony regarding his state of mind during and after the plea hearing. The record also reflects that Salah was represented by highly competent counsel at the plea hearing.

{¶ 17} Simply put, there is no indication from the record that Salah's decision to file a motion to withdraw his pleas was anything other than a mere "change of heart," which is not a sufficient basis upon which a defendant can rely in order to successfully withdraw his guilty pleas. Under these circumstances, the trial court did not abuse its discretion in denying Salah's motion to withdraw his guilty pleas.

{¶ 18} During oral argument in the instant case, Salah's appellate counsel argued that the State should have produced the incriminating tapes of Salah's conversations at an earlier date. Since he did not receive the tapes until May 8, 2008, Salah argues that he was forced to make a decision regarding his guilty pleas in a short time, and as a result, essentially made the decision to plead guilty under duress. Salah's appellate counsel also argued that the State was threatening to take the plea deal off the table if Salah did not make a decision on May 9, 2008, which allegedly resulted in further pressure upon Salah. This assertion, however, is undermined by the following excerpt from the hearing on Salah's motion to withdraw his plea held on May 28, 2008:

{¶ 19} "Defense Counsel: Now, related to that as you were wrapping up the motion to continue with this Court, did the Court order anyone – Did the prosecutor or anyone indicate at the conclusion of that hearing that the offer would be revoked if you went forward and met with your attorney on the following Monday for the time period that was set forth by the Judge

to review the tape?

{¶ 20} “John Salah: At that time no one did. No one suggested that.”

{¶ 21} In light of Salah’s testimony, we find no merit to counsel’s argument that Salah was forced by the State or the trial court to plead guilty to the instant charges. There is no indication in the record that the State ever threatened to take away the plea deal if Salah did not decide to agree to the plea immediately. Additionally, the record does not support Salah’s oral argument that he was prejudiced by the State’s failure to produce the taped conversations at an earlier date. In the future, however, the State should be mindful of the rules regarding reciprocal discovery in criminal cases. It is incumbent upon the State, as well as defense counsel, to turn potentially incriminating evidence over to the opposing party as soon as possible exercising due diligence so that both parties have sufficient time to review said evidence.

{¶ 22} Lastly, we reject Salah’s comparison of the request to withdraw a guilty plea to an individual suffering from buyer’s remorse over a commercial transaction. The differences between one’s decision to forego his constitutional right to due process and second guessing an impulse buy are simply too many to elaborate.

{¶ 23} Salah’s sole assignment of error is overruled.

III

{¶ 24} Salah’s only assignment of error having been overruled, the judgment of the trial court is affirmed.

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

Copies mailed to:

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Hon. Douglas M. Rastatter