

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
DEFIANCE COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 4-14-12

v.

BRIAN P. SCHLEGEL,

OPINION

DEFENDANT-APPELLANT.

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 4-14-13

v.

BRIAN P. SCHLEGEL,

OPINION

DEFENDANT-APPELLANT.

Appeals from Defiance County Common Pleas Court
Trial Court Nos. 14-CR-11824 and 13-CR-11769

Judgments Affirmed

Date of Decision: March 30, 2015

APPEARANCES:

John P. Goldenetz for Appellant

Russell R. Herman for Appellee

SHAW, J

{¶1} Defendant-appellant Brian P. Schlegel (“Schlegel”) appeals the September 10, 2014, judgments of the Defiance County Common Pleas Court sentencing Schlegel to an aggregate prison term of 28 months after Schlegel pled guilty to Deception to Obtain a Dangerous Drug in violation of R.C. 2925.22(A)/(B)(1), a felony of the fourth degree, and Obstructing Justice, in violation of R.C. 2921.32(A)(1), a felony of the fifth degree.

{¶2} The facts relevant to this appeal are as follows. On October 3, 2013, Schlegel was indicted for two counts of Deception to Obtain a Dangerous Drug in violation of R.C. 2925.22(A)/(B)(1), both felonies of the fourth degree.

{¶3} On October 16, 2013, Schlegel was arraigned and pled not guilty to the charges.

{¶4} On January 10, 2014, a second indictment was filed against Schlegel charging him with two counts of Obstructing Justice in violation of R.C. 2921.32(A)(1), both felonies of the fifth degree.

{¶5} On January 13, 2014, Schlegel was arraigned on the second indictment and he pled not guilty to the new charges.

{¶6} On June 12, 2014, the case was scheduled for a pre-trial hearing and Schlegel did not attend that hearing despite being required to do so. A bench warrant was then issued for Schlegel.

{¶7} On June 24, 2014, a hearing was held initially to determine the issue of Schlegel's bond; however, the trial court was informed at that time that the parties had reached a plea agreement. (June 24, 2014 Tr. at 2). The court was informed that Schlegel wished to withdraw his previously tendered pleas of not guilty and enter pleas of guilty to one count of Deception to Obtain a Dangerous Drug in violation of R.C. 2925.22(A)/(B)(1), a felony of the fourth degree, and one count of Obstructing Justice in violation of R.C. 2921.32(A)(1), a felony of the fifth degree. In exchange, the State agreed to dismiss the remaining charges against Schlegel at sentencing and recommend that Schlegel be placed on community control. As part of Schlegel's community control sanctions the State recommended that Schlegel be placed into a residential treatment facility.

{¶8} After being informed of the proposed plea agreement, the court engaged in a full Criminal Rule 11 colloquy with Schlegel and also had the State recite a factual basis for the crimes into the record. Following the colloquy, the court determined that Schlegel had knowingly, intelligently, and voluntarily entered his guilty pleas. The court then accepted Schlegel's pleas, found Schlegel guilty, and ordered a pre-sentence investigation. Defense counsel requested that while the PSI was being done, Schlegel go directly to the residential drug treatment program "FRESH Start" so that he would not have to sit in jail pending the PSI. (*Id.* at 5). The State did not oppose defense counsel's request and the

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court permitted Schlegel to begin his rehabilitation program by attending FRESH Start while sentencing was pending.

{¶9} Schlegel then entered the FRESH Start program; however, on July 15, 2014, the State filed a motion to revoke Schlegel's bond arguing that according to FRESH Start, Schlegel had not been participating in the program. That same day, the court revoked Schlegel's bond.

{¶10} On August 26, 2014, the matter came on for a sentencing hearing. At the hearing, the trial court recounted that it had been contacted by FRESH Start and that FRESH Start requested that Schlegel be removed from its treatment program for various incidents of misconduct. The State then expressed to the trial court that due to the issues with Schlegel being removed from the residential treatment program, the State no longer found Schlegel amenable to community control.

{¶11} At that time, Schlegel made an oral motion to withdraw his guilty plea, which was opposed by the State. After hearing the arguments of the parties, Schlegel's motion was denied.

{¶12} The court then proceeded to sentence Schlegel. Schlegel was ordered to serve 17 months in prison on the Deception to Obtain a Dangerous Drug charge, and 11 months in prison on the Obstructing Justice charge. Those prison terms were ordered to be served consecutively for an aggregate prison term

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of 28 months. Judgment Entries reflecting this sentence were filed September 10, 2014.

{¶13} It is from these judgments that Schlegel appeals, asserting the following assignments of error for our review.

**ASSIGNMENT OF ERROR 1
THE TRIAL COURT COMMITTED PREJUDICIAL ERROR
IN DENYING DEFENDANT’S PRE-SENTENCE MOTION TO
WITHDRAW HIS GUILTY PLEA.**

**ASSIGNMENT OF ERROR 2
THE TRIAL COURT COMMITTED PREJUDICIAL ERROR
BY BASING DEFENDANT’S SENTENCE IN PART ON NON-
TENDERED UNSWORN HEARSAY EVIDENCE.**

**ASSIGNMENT OF ERROR 3
THE TRIAL COURT COMMITTED PREJUDICIAL ERROR
BY REJECTING A FORMULATED PLAN OF DRUG
REHABILITATION IN FAVOR OF A JAIL TERM.**

First Assignment of Error

{¶14} In Schlegel’s first assignment of error he argues that the trial court erred by denying his oral motion to withdraw his guilty plea. Specifically, Schlegel contends that when the State changed its position at the sentencing hearing regarding its sentencing recommendation Schlegel should have been allowed to withdraw his plea.

{¶15} Crim.R. 32.1 provides in pertinent part that “[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

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conviction and permit the defendant to withdraw his or her plea.” While the general rule is that motions to withdraw guilty pleas, made before sentencing, are to be freely granted, the right to withdraw a guilty plea is not absolute. *State v. Xie*, 62 Ohio St.3d 521 (1992), paragraph one of the syllabus. The trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. *Id.* The decision to grant or deny a motion to withdraw a guilty plea is within the sound discretion of the trial court and will not be disturbed on appeal, absent an abuse of discretion. *Id.* at paragraph two of the syllabus. “A trial court will be found to have abused its discretion when its decision is contrary to law, unreasonable, not supported by the evidence, or grossly unsound.” *State v. Nisley*, 3d Dist. Hancock No. 5-13-25, 2014-Ohio-1137, ¶ 18 citing *State v. Boles*, 187 Ohio App.3d 345, 2010-Ohio-278, ¶ 16-18 (2d Dist.).

{¶16} There are several factors that have been delineated by this and other courts to assist in our review of the trial court’s determination to grant or deny a motion to withdraw a guilty plea, including: (1) whether the State will be prejudiced by withdrawal; (2) the representation afforded to the defendant by counsel; (3) the extent of the Crim.R. 11 hearing; (4) the extent of the hearing on the motion to withdraw; (5) whether the trial court gave full and fair consideration of the motion; (6) whether the timing of the motion was reasonable; (7) the

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reasons for the motion; (8) whether the defendant understood the nature of the charges and potential sentences; and (9) whether the accused was perhaps not guilty or had a complete defense to the charge. *Nisley* at ¶ 19 citing *State v. Prince*, 3d Dist. Auglaize No. 2-12-07, 2012-Ohio-4111, ¶ 22; *State v. Lefler*, 3d Dist. Hardin No. 6-07-22, 2008-Ohio-3057, ¶ 11; *State v. Fish*, 104 Ohio App.3d 236, 240 (1st Dist.1995).

{¶17} In this case the record reveals that Schlegel was afforded a full hearing, pursuant to Crim.R. 11, before he entered his plea. In fact, on appeal, Schlegel does not even argue that the trial court did not follow Crim.R. 11 when conducting his change of plea hearing. Nevertheless, the record is very clear that Schlegel was aware of the rights he was waiving when entering his plea. After the prosecutor and defense counsel informed the trial court of the plea agreement, the following conversation was held.

THE COURT: * * * Mr. Schlegel, do you understand what's being said on your behalf there?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is that what you want to do?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you satisfied with [your attorney's] legal services in these matters?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand what these two different charges are about; and what the State would have to prove to convict you of those?

THE DEFENDANT: Yes, Your Honor.

[The Court then recites the potential penalties for the two crimes]

THE COURT: * * * Do you understand that these are possible penalties here?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You would be eligible for community control, * * *
* The State makes that recommendation. *You should understand that the State's sentence recommendation is not binding on the Court.* The Court's not required to follow that. You have no guarantee that that is what will happen. Further, even if you're even granted community control, the Court could require you to serve up to six months local jail time as a condition of community control. Do you understand that?

THE DEFENDANT: Yes, Your Honor.

* * *

[The court then engages in further colloquy with Schlegel about whether he understands that by pleading guilty he is giving up his right to go to trial, his right to a jury trial where a unanimous guilty verdict would be required, his right to have the State prove his guilt beyond a reasonable doubt, his right to confront his accusers, and his right to testify on his own behalf.]

* * *

THE COURT: Other than what's been said in open court about the plea agreement, has anyone made any promises to you or made any threats against you to get you to enter these pleas?

THE DEFENDANT: No, Your Honor.

THE COURT: In light of all the things I've told you about. All those rights you give up by entering guilty pleas, the possible penalties * * *, *the fact that the Court again, is not required to go along with the sentence recommendation*, taking all those things into account; do you believe the pleas here to be in your best interest?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are those pleas then of your own free will?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Did anybody tell you how to answer the questions I've asked here today?

THE DEFENDANT: No Your Honor.

* * *

THE COURT: Are you under the influence right now of alcohol, drugs, medication anything like that?

THE DEFENDANT: No, Your Honor.

THE COURT: Are you clear in your own mind as to the effect of entering these pleas?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are there any questions you want to ask me about these plea proceedings.

THE DEFENDANT: No, Your Honor.

* * *

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[At that time the court then has the prosecutor read a factual basis into the record for the two crimes.]

THE COURT: Mr. Schlegel, do you understand what the State says you did that amounts to each of these two crimes[?]

THE DEFENDANT: Yes, Your Honor.

THE COURT: You heard what [the prosecutor] said?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is that what happened?

THE DEFENDANT: Yes, Your Honor.

(Emphasis added) (June 24, 2014, Tr. at 6-16).

{¶18} Following this dialogue with Schlegel, the trial court accepted Schlegel's pleas, found Schlegel guilty, ordered a PSI, and set the matter for sentencing. At that time, the court again specifically informed Schlegel, "I will caution you, your behavior between now and [the] time of sentencing, is something the Court will take into account in deciding what a proper sentence is, whether, for example, to follow the recommendation." (*Id.* at 17-18). The court added, "If you go to treatment and screw it up, you're going to prison. If you run off from treatment, you're going to prison. Plus the State will probably file a bond skip or an escape charge against you, 'cause the only way that you're not in jail is if you're in the in-patient treatment. You follow me?" (*Id.* at 18). Schlegel responded to this with, "Yes, Your Honor." (*Id.*)

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{¶19} The preceding dialogue establishes that there was a complete Criminal Rule 11 hearing wherein Schlegel indicated that he understood the nature of the charges and the possible penalties. The plea hearing also established that there was a factual basis for the crimes and that Schlegel fully admitted to his culpability for those crimes.

{¶20} It was not until the sentencing hearing that Schlegel made an oral motion to withdraw his guilty plea—no written motion was ever filed. At the sentencing hearing, after the State indicated that it would no longer be recommending community control, defense counsel and the court engaged in the following discussion.

THE COURT: [Defense counsel], you wish to be heard?

[DEFENSE COUNSEL]: Your Honor, at this time I would request on behalf of the Defendant that his pleas of guilty be withdrawn. And that he have his cases set for trial.

THE COURT: Why?

[DEFENSE COUNSEL]: The options are increasingly more limited apparently, Your Honor. And we feel that the –

THE COURT: What do you mean the options are increasingly more limited?

[DEFENSE COUNSEL]: The options for Mr. Schlegel have obviously been extremely limited. And we feel that the plea tendered, was tendered in error and should not have been made, and we're asking that inadvertent plea of guilty be withdrawn and the matter tried.

THE COURT: Mr. Murray, State's position regarding that?

[DEFENSE COUNSEL]: Your Honor, I think the case law in this regard would be that the Court would need to find that there was some legal flaw in the proceeding or in some other way – some other basis to withdraw his plea other than he doesn't like the possible outcomes of the sentencing at this point. So, we would object.

THE COURT: When he was in – I would note that these matters had been pending – the first case from October of 2013 and second case from January 2014. They were pending months and months and my recollection is there were issues regarding his attendance at various pre-trials and the like, and counsel has requested continuance for various reasons and the like. And the matters [did] not result in a plea until late June. Um, at that time [a] complete full Rule 11 Inquiry was conducted. Based on that the Court concluded the pleas were knowingly, intelligently, [and] voluntarily being entered. The Court accepted those pleas. The fact that Defendant, subsequently, violated a bond condition by getting thrown out of in-patient treatment, which results in the State now taking a different position regarding the appropriate sentences, is no reason to invalidate the plea. The motion to withdraw the plea is denied. * * * [Defense Counsel], you wish to be heard as to sentence?

[DEFENSE COUNSEL]: Your Honor, we'll proceed with that. We'll take exception to the Court's ruling regarding the withdraw. I think that the law indicates that the – that prior to sentencing the Court will fully and freely allow the motion to withdraw the plea. It's after sentencing that there are conditions, as expressed by Mr. Murray. But I believe before sentencing that is a different matter. If that's –

THE COURT: It's not automatic, it never has been automatic. It certainly – leave to withdraw plea is more readily granted prior to sentencing than after sentencing, but simply because he wants to apparently try to avoid the consequences of his subsequent behavior after getting the plea. As I said, he gets booted from in-patient treatment so that the State now takes the

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**position he's not amenable to treatment or further treatment.
That doesn't give rise –**

[DEFENSE COUNSEL]: Well, I understand that –

THE COURT: So, in any event the ruling is the ruling.

(Tr. at 4-7).

{¶21} The discussion between the court and defense counsel indicates that Schlegel's primary reasoning for withdrawing his plea was because the State was no longer recommending community control due to Schlegel being removed from his treatment facility. In the dialogue at the plea hearing, the trial court made clear to Schlegel *multiple times* that it was not bound by the State's recommendation of community control and Schlegel indicated that he understood. In addition, the trial court also clearly warned Schlegel at the plea hearing that if he went to the treatment facility and "screw[ed] it up" prior to sentencing, the court would likely be sentencing Schlegel to prison. None of the trial court's statements to Schlegel at the plea hearing regarding Schlegel's potential sentences prompted Schlegel to file a motion to withdraw his plea. It was only at the sentencing hearing, after Schlegel had been removed from FRESH Start, that he attempted to withdraw his plea. The trial court clearly took issue with both the reasoning and the timing for Schlegel's motion, and we cannot find that the trial court abused its discretion in making those findings.

{¶22} Moreover, Schlegel made no argument at the plea hearing, at the sentencing hearing, or on appeal that he had a complete defense to the charge. He was also represented throughout these proceedings by counsel, and specifically stated at the plea hearing that he was satisfied with his representation.

{¶23} Thus on the basis of the record before us, we find that Schlegel has not demonstrated that any of the factors to be considered when evaluating a motion to withdraw a guilty plea weigh in his favor. As a result, we cannot find that the trial court abused its discretion in denying Schlegel's oral motion to withdraw his plea, particularly given Schlegel's understanding of the potential consequences of his pleas, the timing of his motion, and the lack of reasoning to support it. For all of these reasons, Schlegel's first assignment of error is overruled.

Second Assignment of Error

{¶24} In his second assignment of error, Schlegel argues that the trial court erred by "basing [Schlegel's] sentence in part on non-tendered unsworn hearsay evidence." (Appt's Br. at 11).

{¶25} At the outset, we would note that, "[t]he Ohio Rules of Evidence do not apply in sentencing proceedings." *State v. Hammons*, 12th Dist. Clermont No. CA97-02-007, 1997 WL 779085, *2 (Dec. 15, 1997) citing *State v. Wackenthaler*, Butler App. No. CA88-01-007, unreported, (Sept. 6, 1988). "Instead, such

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proceedings are governed by ‘simple notions of due process’ and, as such, evidence is properly considered ‘when the defendant is afforded an opportunity to respond to it.’ ” *Id.* quoting *Wackenthaler*, unreported, at 5; *see also State v. Bene*, 12th Dist. Clermont No. CA2005-09-090, 2006-Ohio-3628, ¶ 21; Evid.R. 101(c).

{¶26} In this assignment of error Schlegel objects to the trial court reading a report it had received from the FRESH Start program indicating that Schlegel had been removed from the program and further indicating why Schlegel had been removed from the program. The report indicated that Schlegel was removed from FRESH Start for multiple smoking violations and the attempted manipulation of FRESH Start staff to receive prescription medications. (Tr. at 10-11).

{¶27} First, we would point out that Schlegel did not object to the trial court reading the information it had obtained from FRESH Start at the sentencing hearing and therefore Schlegel has waived all but plain error. Second, the trial court was not bound by the rules of evidence at the sentencing hearing so Schlegel’s arguments regarding hearsay are inapplicable to the case before us. *See Hammons, supra.*

{¶28} Moreover, Schlegel cannot maintain an argument that he was unprepared to rebut the information contained in the FRESH Start report. Schlegel’s own attorney admitted at the sentencing hearing that Schlegel had violated the rules at FRESH Start. “He’s an addict, he needs help. Yes, he did

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mess up the chance the Court gave him, Your Honor. He violated the rules of Fresh Start. And therefore he was kicked out of Fresh Start.” (Aug. 26, 2014, Tr. at 8). In addition, the prosecutor at the beginning of the sentencing hearing also indicated that Schlegel was removed from FRESH Start for various violations. The State had also filed a motion with the court prior to sentencing to revoke Schlegel’s bond on the basis that Schlegel was removed from FRESH Start and the trial court’s PSI contained all of the information that was alleged to be improperly read at the sentencing hearing. Both Schlegel and the trial court were thus fully aware of Schlegel’s removal from FRESH Start even if the “unsworn” statement was somehow improperly read by the trial court at the sentencing hearing.¹

{¶29} Furthermore, Schlegel seems to suggest that the report from FRESH Start detailing his removal from the program was the reason he was sent to prison. However, a review of the sentencing transcript makes clear that the trial court was concerned with Schlegel’s history as a drug addict and his criminal history. The court recited the fact that Schlegel had been to in-patient treatments multiple times and that Schlegel had been “a constant criminal since he was sixteen.” (*Id.* at 12).

¹ To be clear, we are not making a finding that it was improper.

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The court then enumerated Schlegel's lengthy criminal history,² and took issue with Schlegel as "a danger to everybody" who "has no real interest in getting sober. He[] knows what the rules are and he intends to keep getting high as long as he can get high[.]" (*Id.* at 12-13).

{¶30} The trial court was clearly concerned with Schlegel's criminal history and his history as an addict. Schlegel's arguments are thus not well-taken, and his second assignment of error is overruled.

Third Assignment of Error

{¶31} In Schlegel's third assignment of error he contends that the trial court erred by sending him to prison rather than drug rehabilitation. Specifically, Schlegel argues in favor of a "paradigm shift" where courts should send offenders to rehabilitation rather than to prison.

² The court narrated Schlegel's criminal history as follows:

As a juvenile: three counts Forgery, Theft, four probation violations while on juvenile probation. As an adult: Criminal Trespass, Assault, Criminal Damaging, Criminal Endangerment, Driving Under Suspension, Reckless Operation, Unauthorized Use of a Motor Vehicle, Driving Under Suspension, Drug Abuse, Drug Paraphernalia, Alcohol Consumption in a Motor Vehicle, Drug Abuse, Drug Paraphernalia, Underage Consumption, No License, Trafficking in Drugs, Drunk Driving, Drug Paraphernalia, Drug Abuse, Drunk Driving, Driving Under Suspension, Drunk Driving, Driving Under Suspension, Disorderly Conduct, Disorderly Conduct, Obstructing Official Business, Criminal Damaging or Endangering, Passing Bad Checks, Passing Bad Checks, Drunk Driving, DUS, Disorderly Conduct, Drunk Driving as a Felony, DUS, DUS, Dangerous Drugs, Unauthorized Use of a Motor Vehicle, DUS, DUS, Theft, Deception to Obtain Dangerous Drugs, Obstructing Official Business. Those offenses were alleged to occur in October and December of 2013, respectively. Subsequently, March of '14: Disorderly Conduct which was amended from Assault.

(Tr. at 12-13).

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{¶32} Schlegel cites no support for his position and he also does not claim that the trial court lacked authority to sentence Schlegel to prison in this case. Rather, he contends that the trial court “abused [its] discretion by taking the easy way out” in choosing to send Schlegel to prison rather than rehabilitation. (Appt’s Br. at 12). We would note that the trial court *did* give Schlegel an opportunity to go to a treatment facility and Schlegel did not make use of that opportunity. Nevertheless, Schlegel’s argument is perhaps better suited for the legislature than an appellate court. Our function as an appellate court is to review the decisions made by lower courts, and, in circumstances such as this one, give particular deference to the trial court if the court’s findings and its sentence are supported by the record. The court’s findings were, in fact, supported by the record and Schlegel cites nothing factually or legally to the contrary. Accordingly, Schlegel’s argument is not well taken, and his third assignment of error is overruled.

{¶33} For the foregoing reasons Schlegel’s assignments of error are overruled and the judgments of the Defiance County Common Pleas Court are affirmed.

Judgments Affirmed

ROGERS, P.J. and WILLAMOWSKI, J., concur.

/jlr