[Cite as *State v. Haskell*, 2015-Ohio-1885.]

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

STATE OF OHIO,

CASE NO. 13-14-42

PLAINTIFF-APPELLEE,

v.

NATHAN S. HASKELL, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Seneca County Common Pleas Court
Trial Court No. 14-CR-0111

Judgment Affirmed

Date of Decision: May 18, 2015

APPEARANCES:

Scott B. Johnson **for Appellant**

Stephanie J. Reed **for Appellee**

WILLAMOWSKI, J.

{¶1} Defendant-appellant, Nathan S. Haskell ("Haskell"), brings this appeal from the judgment of the Common Pleas Court of Seneca County, Ohio, denying his motion to withdraw a plea of guilty and sentencing him to twelve months in prison for one count of possession of cocaine and one count of assault. Haskell demands reversal of his convictions alleging that the trial court erred in denying his motion to withdraw his guilty pleas and that his trial counsel was ineffective. For the reasons that follow, we affirm the trial court's judgment.

Relevant Background and Procedural History

{¶2} On June 12, 2014, a two-count indictment was filed against Haskell. Count one charged Haskell with possession of cocaine, a felony of the fifth degree in violation of R.C. 2925.11(A), (C)(4)(a). Count two charged him with assault of a peace officer while in the performance of his official duties, a felony of the fourth degree in violation of R.C. 2903.13(A), (C)(5). (R. at 2.) Attorney Kent Nord ("attorney Nord"), was appointed to represent Haskell. (R. at 8.) Haskell initially pled not guilty to the charges and a jury trial was scheduled to commence on September 11, 2014. (R. at 13, 16.) On August 21, 2014, however, Haskell indicated his desire to enter pleas of guilty to both charges. (Tr. of Proceedings, at 3, Aug. 21, 2014.) As part of the plea agreement, the State agreed "to argue for no more than nine months' prison in Count 1 and 12 months' prison in Count 2, to be served concurrently to each other." (*Id.* at 4.) After conducting a plea

colloquy, the trial court accepted Haskell's guilty pleas, found Haskell guilty, and continued the matter for sentencing pending a presentence investigation. (*Id.* at 4-13.)

{¶3} On October 16, 2014, the date scheduled for sentencing, attorney Nord moved to withdraw as Haskell's counsel. (R. at 26.) The judgment entry journalizing this fact does not indicate attorney Nord's reasons for withdrawal. The trial court found that there were no objections from the State or Haskell to attorney Nord's withdrawal. Therefore, the trial court granted attorney Nord's motion, appointed new counsel for Haskell, and continued the sentencing date. (*Id.*)

{¶4} On October 21, 2014, through his new counsel, Haskell moved to withdraw his guilty pleas. (R. at 28.) No reasons were stated for the motion to withdraw the guilty pleas. The trial court held a hearing on the motion. One witness testified at the hearing—Haskell, who described the reasons for his request to withdraw the pleas. He started with recalling weather conditions on the date of his plea hearing, stating that it was "[e]xtremely hot, miserable, very irritating, very uncomfortable." (Tr. of Proceedings, at 5, Nov. 3, 2014.) These conditions, together with his low blood sugar caused him to be not "in the right statement [sic] at the time." (*Id.*) Haskell testified that he and attorney Nord had "several disagreements towards things," but Haskell eventually "went on his advice." (*Id.* at 7-8.) Then, "after it sunk in, it wasn't well taken." (*Id.* at 9.) Haskell testified

that he was "mistaken" when believing that attorney Nord was representing him properly at the plea hearing. (*Id.* at 7.) Although Haskell admitted that he had signed the guilty pleas "freely" upon his attorney's advice, he claimed that he was innocent and he was "under the impression" that attorney Nord was going to argue for lesser included offenses, pursuant to a promise allegedly made to him. (*Id.* at 9, 18.) Haskell also asserted that there existed a witness to the events surrounding his arrest, but attorney Nord was unable to get a hold of that witness. (*Id.* at 18-19.) Haskell did not claim, however, that he would be able to provide the witness if the trial court granted his motion to withdraw. At the end of the hearing, Haskell added for the record that he was on a medication for panic attacks, which caused mouth dryness. (*Id.* at 19-20.) The trial court denied Haskell's motion to withdraw his guilty pleas, determining that Haskell failed to present legitimate reasons for the request. (R. at 31.)

{¶5} On November 26, 2014, the trial court sentenced Haskell to nine months in prison on count one and twelve months in prison on count two, to be served concurrently, for a total of twelve months in prison. Haskell filed this timely appeal in which he raises two assignments of error, as follows.

ASSIGNMENT OF ERROR ONE

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA IN THAT HIS PLEA WAS NOT KNOWINGLY PROFFERED.

ASSIGNMENT OF ERROR TWO

THE COUNSEL FOR THE DEFENDANT PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

We elect to address the assignments of error out of order.

Second Assignment of Error—Ineffective Assistance of Counsel

{¶6} Haskell alleges that attorney Nord provided ineffective assistance to him prior to and at the plea stage of the proceedings. In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must first show that the counsel's performance was deficient in that it fell "below an objective standard of reasonable representation." *State v. Keith*, 79 Ohio St.3d 514, 534, 684 N.E.2d 47 (1997). Second, the defendant must show "that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *Id.*, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to demonstrate prejudice, the defendant must prove a reasonable probability that the result of the trial would have been different but for his or her counsel's errors. *Id.*

{¶7} A claim of ineffective assistance of counsel is waived by a guilty plea, unless the counsel's conduct affected the voluntary nature of the plea. *State v. Mata*, 3d Dist. Allen No. 1-04-54, 2004-Ohio-6669, ¶ 13, citing *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130, 595 N.E.2d 351 (1992).

> "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he

> may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [*v. Richardson* (1970), 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763]."

Spates at 272, quoting *Tollet v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602 (1973). Based on this standard, we must determine whether attorney Nord's assistance was indeed deficient, so as to result in Haskell's plea not being voluntary or intelligent. In reviewing Haskell's allegations we must, however, "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 108, quoting *Strickland* at 669. Thus, we must be highly deferential in our scrutiny of attorney Nord's performance. *See State v. Walker*, 90 Ohio App.3d 352, 359, 629 N.E.2d 471 (3d Dist.1993), quoting *Strickland* at 689.

{¶8} Haskell alleges that attorney Nord acted below an objective standard of reasonable representation when he gave Haskell "faulty advice upon which he relied in making his plea change." (App't Br. at 13-14.) Haskell particularly complains about the fact that attorney Nord told him to take the plea offer because he had a slim chance of prevailing at trial. (App't Br. at 5.) In support of this claim Haskell provided the trial court with a letter in which attorney Nord explains his predictions as to the result of the trial . (Def.'s Ex. A.)

{¶9} While Haskell now complains about his attorney's advice, he does not allege that this advice was erroneous. We have no reason to doubt a competent counsel's evaluation of the case where, as here, nothing in the record indicates that the trial counsel failed to fully investigate the case prior to advising his client to plead guilty in exchange for a reduced sentence. "A lawyer's mistaken prediction about the likelihood of a particular outcome after correctly advising the client of the legal possibilities is insufficient to demonstrate ineffective assistance of counsel." *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, 884 N.E.2d 607, ¶ 10 (8th Dist.), citing *State v. Creary*, 8th Dist. Cuyahoga No. 82767, 2004-Ohio-858, 2004 WL 351878, ¶ 10, *United States v. Sweeney*, 878 F.2d 68, 70 (2d Cir.1989), and *State v. Williams*, 8th Dist. Cuyahoga No. 88737, 2007-Ohio-5073, ¶ 34; *see also State v. Boysel*, 3d Dist. Van Wert No. 15-10-09, 2011-Ohio-1732, ¶ 11 (" 'an attorney's "mere inaccurate prediction of a sentence" does not demonstrate the deficiency component of an ineffective assistance of counsel claim.' "), quoting *U.S. v. Martinez*, 169 F.3d 1049, 1053 (7th Cir.1999).

{¶10} Haskell also alleges that attorney Nord "told him that he was going to argue for 'less [sic] included offenses,' " but he did not do that at the plea hearing. (App't Br. at 9.) Nothing in the record supports this allegation, apart from Haskell's self-serving testimony at the hearing. "[W]here nothing in the record supports a defendant's claim that his plea was not knowingly and voluntarily made other than his own self-serving affidavit or statement, the record

is insufficient to overcome the presumption that the plea was voluntary." *State v. Laster*, 2d Dist. Montgomery No. 19387, 2003-Ohio-1564, ¶ 8.

{¶11} Furthermore, nothing indicates that when making his decision to plead guilty Haskell relied on attorney Nord's alleged promise to argue for lesser included offenses. In fact, the record contradicts this claim. At the plea hearing, Haskell attested that no promises have been made to him "other than that which are contained in the sentence recommendation." (Tr. of Proceedings, at 10, Aug. 21, 2014.) Haskell confirmed his willingness to plead guilty to the two offenses in his indictment and he did not request that the charges be reduced. (*Id.* at 3-4.) Further, Haskell waited three months, until November, to even assert a claim that at the plea hearing his attorney had failed to fulfill his promise, even though this failure would have been apparent at the plea hearing when Haskell was pleading guilty to the offenses as stated in the indictment. Yet, despite that, Haskell stated that he was satisfied with his attorney when he pled guilty to the offenses in the indictment rather than to lesser included offenses. (*Id.* at 6.) Accordingly, the unsupported assertions of unfulfilled promises could not form a basis for ineffective assistance of counsel that would result in Haskell's guilty plea being involuntary.

{¶12} Haskell's next allegation is that "he felt coerced to plea according to the advice of this court-appointed attorney." (App't Br. at 9.) In fact, in spite of the use of the word coercion in Haskell's brief and at the motion to withdraw,

there are no claims that anyone forced Haskell to plead guilty against his will or that Haskell was entering the pleas under duress. At the plea hearing, the trial court asked, "Are you entering these pleas voluntarily and of your own free will?" Haskell responded, "Yes, I am, Your Honor." The trial court then asked, "Has anybody threatened you?" Haskell responded, "No, sir." (Tr. of Proceedings, at 9-10, Aug. 21, 2014.) At the hearing on the motion to withdraw, Haskell reaffirmed that he had entered the guilty pleas "freely." (Tr. of Proceedings, at 9, Nov. 3, 2014.) Accordingly, the claims of coercion are not supported by the record.

{¶13} Based on the foregoing, we cannot conclude that attorney Nord was ineffective so as to result in Haskell's pleas being involuntary. Therefore, we overrule the second assignment of error.

First Assignment of Error—Denial of Haskell's Motion to Withdraw Guilty Pleas

{¶14} Haskell alleges that he should have been allowed to withdraw his guilty pleas and that the trial court erred in finding otherwise because a presentence motion to withdraw guilty plea should be freely granted. *See State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992). The Ohio Supreme Court held, however, that under Crim.R. 32.1 "[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing." *Id.*, at paragraph one of the syllabus. Instead, it is within the sound discretion of the trial court to determine,

upon a hearing, "whether there is a reasonable and legitimate basis" for the pre-sentencing withdrawal of the plea. *Id.* at paragraphs one and two of the syllabus. Accordingly, our review of the trial court's judgment in this case is under an abuse of discretion standard. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 32; *State v. Maney*, 2013-Ohio-2261, 993 N.E.2d 422, ¶ 17 (3d Dist.).

{¶15} Because "[a]n abuse of discretion is more than an error in judgment;" we will not substitute our judgment for that of the trial court, and will only reverse the trial court's decision if it was "unreasonable, arbitrary, or unconscionable." *Maney* at ¶ 17, citing *State v. Adams*, 62 Ohio St.2d 151, 157-158, 404 N.E.2d 144 (1980); *State v. Liles*, 3d Dist. Allen No. 1-10-28, 2010-Ohio-5799, ¶ 17, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Under this standard, appellate courts in Ohio look at the following, nonexclusive, list of factors in their review of the trial court's decision on a motion to withdraw a plea:

> (1) whether the withdrawal will prejudice the prosecution; (2) the representation afforded to the defendant by counsel; (3) the extent of the hearing held pursuant to Crim.R. 11; (4) the extent of the hearing on the motion to withdraw the plea; (5) whether the trial court gave full and fair consideration of the motion; (6) whether the timing of the motion was reasonable; (7) the stated 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 charges.

Maney at ¶ 18, citing *State v. Griffin*, 141 Ohio App.3d 551, 554, 752 N.E.2d 310 (7th Dist.2001), and *State v. Fish*, 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1st Dist.1995); *Liles* at ¶ 16. None of the factors is determinative on its own and there may be numerous additional aspects "weighed" in each case. *Griffin* at 554; *accord Fish* at 240. Therefore, we look at the totality of the circumstances presented in this case when arriving at our decision today.

{¶16} We review each of the nine elements outlined above as they pertain to the instant case.

(1) Prejudice to the Prosecution

{¶17} Neither party addressed prejudice to the prosecution at the hearing on the motion to withdraw. Although the trial court discussed this factor, no finding was made regarding whether it would favor Haskell's position.

(2) Representation Afforded by Counsel

{¶18} Haskell's claim of ineffective assistance is analyzed in our discussion of the second assignment of error above, where we found no evidence that attorney Nord's performance was deficient so as to affect the voluntary nature of Haskell's plea. The trial court, having had an opportunity to observe attorney Nord's conduct, found that he had "zealously represented" his client. (R. at 31.) Furthermore, the trial court noted that "[a]t the time of entering his guilty pleas, Defendant advised the Court that he was satisfied with Mr. Nord's representation and never voiced any complaint or dissatisfaction with his attorney's

representation until October 16, 2014." (*Id.*) Although during the hearing Haskell claimed that after he had thought about it, he realized that he was not satisfied with attorney Nord's advice, at no point did he point to any specific facts that would indicate that attorney Nord's performance was deficient. Accordingly, this factor was properly analyzed as weighing against granting Haskell's motion to withdraw.

(3) and (4) Crim.R. 11 Hearing and Hearing on the Motion to Withdraw Plea

{¶19} These two elements are not challenged by Haskell. We concur with the trial court's finding that "Defendant's rights and the ramifications of entering a plea were discussed thoroughly with Defendant during the Crim.R. 11 hearing." (R. at 31.) Likewise, we agree with Haskell's statement in his brief that "every opportunity was given to the Defendant to present any evidence or witnesses to buttress his claims." (App't Br. at 9.) Accordingly, these two factors weigh against reversing the trial court's denial of Haskell's motion to withdraw.

(5) Trial Court's Consideration of the Motion to Withdraw

{¶20} Haskell points out that the trial court's judgment entry does not expressly mention his testimony about the missing witness or his professed innocence. He does not allege, however, that the trial court failed to consider the full extent of his testimony at the hearing. Having reviewed the hearing transcript and the six-page judgment entry, we conclude that the trial court fully considered Haskell's motion. The judgment entry specifically addresses Haskell's claim of innocence, rejecting it because of lack of support for "why he is innocent of the

charges for which he entered guilty pleas." (R. at 31.) The judgment entry analyzes, in separate sections, the prejudice to the prosecution, Crim.R. 11 hearing and the representation afforded to Haskell at the hearing, the timing of his motion to withdraw, as well as the evidence of guilt. (*Id.*) The trial court noted that Haskell's reasoning and justification for his desire to withdraw the pleas were "extremely limited." (*Id.*) In sum, the trial court's consideration of the motion to withdraw does not appear to be deficient, so as to require reversal of its decision.

(6) Timing of the Motion

{¶21} The trial court found that the delay in filing of the motion to withdraw was unreasonable considering the fact that Haskell entered his guilty pleas on August 21, 2014, and waited until October 21, 2014, to file his motion. The sentencing was initially scheduled for October 16, 2014. At no time between the entry of the guilty pleas and the scheduled sentencing date did Haskell indicate his desire to withdraw the pleas. Haskell stated no reasons for his delay in requesting withdrawal. Therefore, the trial court's finding that the delay was unreasonable is not an abuse of discretion.

(7) Reasons for the Motion

{¶22} The trial court found that Haskell's "extremely limited reasoning and justification" for his desire to withdraw the plea "indicate[d] he likely ha[d] merely had a 'change of heart,' " which is " 'insufficient grounds for allowing the withdrawal of a guilty plea.' " (R. at 31, quoting *State v. Broderdorp*, 3d Dist.

Seneca No. 13-11-11, 2011-Ohio-4894, ¶ 25.) We agree. Although Haskell complains about weather conditions and mouth dryness, there is no indication that these factors affected the voluntary nature of his plea. Crim.R. 11 does not require that the defendant be comfortable in the courtroom when entering his guilty plea. Additionally, it appears that the decision to plead guilty was made prior to the hearing in the hot courtroom, because at the beginning of the hearing on August 21, 2014, the trial court stated, "Mr. Haskell, I have in front of me a proposed plea of guilty, which would seem to indicate the issues have been resolved; is that correct?" Haskell responded, "That's correct, Your Honor." (Tr. of Proceedings, at 3, Aug. 21, 2014.)

{¶23} The testimony at the hearing on the motion to withdraw supports the trial court's finding that Haskell had merely had a change of heart. Haskell testified that even though he was satisfied with his attorney at the plea hearing and he entered his guilty pleas "freely," "after it sunk in" he realized that he did not like his attorney's advice. (Tr. of Proceedings, at 9, 18, Nov. 3, 2014.) He testified that at the time of entering his guilty pleas he was aware of all the facts that gave him basis for his later claim of innocence. (*Id.* at 19.) He did not discover any new evidence since then; it was "just the stuff that I've kind of gone over and that's it." (*Id.* at 18.) Accordingly, the trial court's analysis of Haskell's reasons for the motion was not an abuse of discretion and does not warrant reversal.

(8) Understanding the Nature of the Charges and Potential Sentences

{¶24} Haskell does not allege that he did not have a full understanding of the nature of the charges or the potential sentences that he was facing when he entered the plea of guilty. The record supports the trial court's finding that during the Crim.R. 11 hearing, the "rights and the ramifications of entering a plea were discussed thoroughly," and Haskell "repeatedly affirmed his understanding of his rights and ramifications," as well as "indicated he understood the rights available to him [and] the possible consequences of entering a guilty plea." (R. at 31; *see also* Tr. of Proceedings, at 9-12, Aug. 21, 2014.) Therefore, this element does not weigh in favor of reversing the trial court's decision and granting the motion to withdraw.

(9) Claim of Innocence or a Complete Defense

{¶25} Haskell did claim innocence at the plea withdrawal hearing, asserting that he was not guilty of the crimes with which he was charged. (Tr. of Proceedings, at 8, 16, 18, Nov. 3, 2014.) We have repeatedly held that a mere claim of innocence, without any offer of evidence to support it, is not sufficient to warrant withdrawal of a plea knowingly entered. *State v. Hill*, 3d Dist. Henry No. 7-12-11, 2013-Ohio-3873, ¶ 16, citing *State v. Scott*, 6th Dist. Sandusky No. S-05-035, 2006-Ohio-3875, ¶ 13, *State v. Powers*, 4th Dist. Pickaway No. 03CA21, 2004-Ohio-2720, ¶ 18, and *State v. Striblin*, 5th Dist. Muskingham No. CT2009-0036, 2010-Ohio-1915, ¶ [15] (stating that "the trial judge must determine whether

the claim of innocence is anything more than the defendant's change of heart about the plea agreement"); *State v. Streeter*, 3d Dist. Allen No. 1-08-52, 2009-Ohio-189, ¶ 17; *State v. Vogelsong*, 3d Dist. Hancock No. 5-06-60, 2007-Ohio-4935, ¶ 18. "All defendants who request a withdrawal of their plea base their request upon some claim of innocence." *Powers* at ¶ 18, citing *State v. McGowan*, 8th Dist. Cuyahoga No. 68971, 1996 WL 563618, *5 (Oct. 3, 1996).

{¶26} While Haskell alluded to a witness who could possibly support his version of the events surrounding his arrest, he did not claim that he would be able to provide this witness to the trial court. He confirmed that attorney Nord attempted to locate the witness and was unable to do so. No allegations are made that attorney Nord was deficient in this respect. Without any offer of evidence, Haskell's claim of innocence is not sufficient to warrant withdrawal of his pleas.

{¶27} In sum, out of the nine elements that we consider in reviewing the trial court's decision on a motion to withdraw a plea, we might possibly construe one in Haskell's favor—the fact that the trial court did not find prejudice to the prosecution. Many courts have recognized that "[l]ack of prejudice to the state as a result of plea withdrawal is an important factor." *Griffin*, 141 Ohio App.3d at 554-555, 2001-Ohio-3203, 752 N.E.2d 310 (7th Dist.); *accord State v. Littlefield*, 4th Dist. No. 03CA2747, 2004-Ohio-5996, ¶ 12; *Fish*, 104 Ohio App.3d at 239-240, 661 N.E.2d 788 (1st Dist.1995). Nevertheless, "[n]one of the factors is determinative on its own." *State v. Rickman*, 3d Dist. Seneca No. 13-13-15, 2014-

Ohio-260, ¶ 13. "Where, as here, the trial court finds that the defendant was aware of a possible defense at the time he entered his guilty plea, it is not an abuse of discretion for the trial court to find that a reasonable and legitimate basis did not exist on which to grant a motion to withdraw the plea even though the state would not be prejudiced if the motion were granted." *Littlefield* at ¶ 12.

{¶28} Concluding, the analysis of the nine factors does not show that Haskell had a reasonable and legitimate basis for the plea withdrawal. Therefore, the trial court did not abuse its discretion in overruling his motion. Haskell's first assignment of error is overruled.

Conclusion

{¶29} Having reviewed the arguments, the briefs, and the record in this case, we find no error prejudicial to Appellant in the particulars assigned and argued. The judgment of the Common Pleas Court of Seneca County, Ohio is therefore affirmed.

Judgment Affirmed

ROGERS, P.J. and PRESTON, J., concur.

/hlo