[Cite as *State v. Moll*, 2015-Ohio-926.]

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

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 4-14-17**

v.

TIMOTHY J. MOLL, **O P I N I O N**

DEFENDANT-APPELLANT.

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 4-14-18**

v.

TIMOTHY J. MOLL, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeals from Defiance County Common Pleas Court
Trial Court Nos. 13-CR-11817 and 14-CR-11954

Judgments Affirmed

Date of Decision: March 16, 2015

APPEARANCES:

Timothy C. Holtsberry **for Appellant**

Russell R. Herman **for Appellee**

ROGERS, P.J.

{¶1} Defendant-Appellant, Timothy Moll, appeals the judgment of the Court of Commons Pleas of Defiance County convicting him of burglary and felonious assault and sentencing him to a four year prison term and five years of community control. On appeal, Moll argues that the trial court erred when it accepted his guilty pleas that were not knowingly, intelligently, and voluntarily made, and when it denied his motions to withdraw his guilty pleas. For the reasons that follow, we affirm the trial court's judgment.

{¶2} This matter implicates two separate prosecutions, 13CR11817 and 14CR11954. We will address the procedural histories of both cases together, as they are intertwined.

{¶3} On December 4, 2013, in 13CR11817, the Defiance County Grand Jury indicted Moll on one count of aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree. On June 10, 2014, a bill of information was filed as case number 14CR11954, charging Moll with one count of felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree.

{¶4} Also on June 10, the trial court conducted a change of plea hearing. Pursuant to a plea agreement, the State agreed to amend count one of the indictment in 13CR11817 to robbery in violation of R.C. 2911.02(A)(1), a felony

of the second degree. In exchange, Moll pled guilty to the amended charge of robbery in 13CR11817 and to one count of felonious assault in 14CR11954. The plea agreement also required Moll to stipulate that both offenses were committed with a separate animus and that the offenses would not merge as allied offenses.

{¶5} Moll filed a motion to withdraw his guilty plea on July 30, 2014, in 14CR11954, and on August 7, 2014, in 13CR11817. The reason stated for the motions was because Moll had "reservations concerning the recommended seven years of prison time to be reserved on the felonious assault charge." (13CR11817 Docket No. 30, p. 1); (14CR11954 Docket No. 4, p. 1).

{¶6} A hearing was held on Moll's motions on August 12, 2014. At the hearing, Moll's defense counsel told the court that Moll had changed his mind about the plea agreement and that there was no newly discovered evidence in the case. The trial court then denied Moll's motions. The court proceeded to sentence Moll to a prison term of four years on the robbery count and five years of community control on the felonious assault count. Moll was advised that if he violated his community control the court would impose a seven year sentence for the felonious assault.

{¶7} Moll filed this timely appeal, presenting the following assignments of error for our review.

Assignment of Error No. I

THE APPELLANT'S GUILTY PLEA WAS NOT MADE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY DUE TO THE TRIAL COURT'S LACK OF A COLLOQUY REGARDING THE ALLIED OFFENSES.

Assignment of Error No. II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

Assignment of Error No. I

{¶8} In his first assignment of error, Moll argues that his plea was not knowingly, intelligently, and voluntarily made due to the trial court's failure to engage in a colloquy regarding allied offenses. We disagree.

{¶9} All guilty pleas must be made knowingly, voluntarily, and intelligently. *State v. Engle*, 74 Ohio St.3d 525, 527 (1996). "Crim.R. 11(C) is intended to ensure that guilty pleas are entered knowingly, intelligently, and voluntarily." *State v. Cortez*, 3d Dist. Hancock Nos. 5-07-06, 5-07-07, 2007-Ohio-6150, ¶ 15, citing *State v. Windle*, 4th Dist. Hocking No. 03CA16, 2004-Ohio-6827, ¶ 7. Crim.R. 11(C) requires the trial judge, before accepting a guilty plea in a felony case, to inform the defendant of several rights enumerated under the rule, making sure the defendant understands the nature of those rights. *State v. Stewart*, 51 Ohio St.2d 86, 88 (1977). Specifically, the trial judge must determine that the defendant is making the plea voluntarily; that he understands the nature of

the charges and the maximum punishment; if applicable, that he understands he is not eligible for probation or community control; that he understands the effect of a guilty plea; and, that he understands by pleading guilty, he is waiving the right to a jury trial, to confront witnesses, to have compulsory process in obtaining witnesses, and to have the State prove his guilt beyond a reasonable doubt at a trial where he is not required to testify against himself. Crim.R. 11(C). A trial court's failure to ensure that a plea has been entered knowingly, voluntarily, and intelligently renders the plea unconstitutional. *Engle* at 527, citing *Kercheval v. United States*, 274 U.S. 220, 223, 47 S.Ct. 582, 71 L.Ed. 1009 (1927); *Mabry v. Johnson*, 467 U.S. 504, 508-509, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984); Crim.R. 11(C).

{¶10} In determining whether the trial court has correctly followed the requirements of Crim.R. 11(C), the reviewing court must find substantial compliance. *Stewart* at 92. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Nero*, 56 Ohio St.3d 106, 108 (1990), citing *State v. Carter*, 60 Ohio St.2d 34, 38 (1979). In order to prevail on a claim that a plea was not made knowingly, voluntarily, and intelligently, the defendant must demonstrate a prejudicial effect. *Stewart* at 93. In order to demonstrate

prejudice, the defendant must show that the plea would not have been otherwise made. *Id.*

{¶11} Here, Moll does not argue that he was afforded an insufficient Crim.R. 11 colloquy, only that the trial court erred in discussing whether his two offenses were allied offenses. In support of his position that his plea was not knowingly, voluntarily, and intelligently made, Moll relies on *State v. Rogers*, 8th Dist. Cuyahoga Nos. 98292, 98584, 98585, 98586, 98587, 98588, 98589, 98590, 2013-Ohio-3235, which held that "[w]here a *facial question* of allied offenses of similar import presents itself, a trial court judge has a duty to inquire and determine under R.C. 2941.25 whether those offenses should merge." (Emphasis added.) *Id.* at ¶ 63. However, *Rogers* is inapplicable because Moll stipulated that the two offenses were not allied offenses and that he committed each with a separate animus.

{¶12} "It is well established that there may only be one conviction for allied offenses of similar import, and thus, allied offenses must be merged at sentencing." *State v. Donaldson*, 2d Dist. Montgomery No. 24911, 2012-Ohio-5792, ¶ 23, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1. A trial court is prohibited from imposing individual sentences for counts that constitute allied offenses, and a defendant's plea of guilty, or no contest, to multiple counts does not affect the court's duty to merge those counts at sentencing. *Id.* "Even if

a sentence is jointly recommended by the parties and imposed by the court, an appellate court is not precluded from reviewing it if a sentence is imposed on multiple counts that are allied offenses, because such a sentence is unauthorized by law." *Id.*

{¶13} To find that the sentence is not contrary to law, a reviewing court must find something in the record that affirmatively establishes that the offenses are not allied. *State v. Biondo*, 11th Dist. Portage No. 2012-P-0043, 2013-Ohio-876, ¶ 10. "This could be done a number of ways, including stipulations that the offenses were committed with a separate animus, as in *Donaldson, supra,* ¶ 25; or by establishing the offenses occurred on different dates or by separate and distinct conduct; or that the commission of one offense clearly could not result in the commission of the other." *Id.*

{¶14} At the change of plea hearing, the State warned that "[Moll's two] offenses would be sentenced separately. That the parties agree that the offenses are of a separate animus *and are not allied for purposes of sentencing* and that in order to effectuate this plea agreement they are filed in separate cases." (Emphasis added.) Change of Plea Hearing Tr., p. 3. Further, the trial court had the following relevant exchange:

> Trial Court: And specifically it's the Defendant's willing – is willing to stipulate that the offense charged in the original indictment and the offense charged in the bill of information are *not*

> *to be considered allied offenses of similar import such that separate sentences can be imposed for each of those?*
>
> Defense Counsel: That's correct, Your Honor.
>
> * * *
>
> Trial Court: * * * If you're convicted of both offenses *pursuant to your stipulation that they're not allied offenses*, you could be – the prison terms could be imposed either concurrently that is running at the same time, or consecutively that is one after the other. * * * Do you understand that those are possible penalties?
>
> Moll: Yes, Sir, I do.

(Emphasis added.) *Id.* at p. 6, 11-12.

{¶15} The Ohio Supreme Court has addressed the court's obligation to analyze allied offenses when a defendant enters into a plea agreement:

> *[W]e note that nothing in this decision precludes the state and a defendant from stipulating in the plea agreement that the offenses were committed with separate animus, thus subjecting the defendant to more than one conviction and sentence*. When the plea agreement is silent on the issue of allied offenses of similar import, however, the trial court is obligated under R.C. 2941.25 to determine whether the offenses are allied, and if they are, to convict the defendant of only one offense. Nevertheless, if a trial court fails to merge allied offenses of similar import, the defendant merely has the right to appeal the sentence.

(Emphasis added.) *Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, at ¶ 29.

{¶16} Moll's case differs from *Underwood* and *Rogers* in that the parties expressly stipulated that Moll's commission of felonious assault and robbery were committed with a separate animus and that they were not allied offenses.

Therefore, since the parties stipulated that the offenses were not allied, the trial court was under no obligation to determine whether the offenses were allied pursuant to R.C. 2941.25. *See State v. Torres*, 8th Dist. Cuyahoga No. 100106, 2014-Ohio-1622, ¶ 11 ("Because the parties stipulated that the offenses were not allied offenses, the trial court was not obligated under R.C. 2941.25 to determine whether the offenses charged * * * were allied offenses.").

{¶17} Accordingly, we overrule Moll's first assignment of error.

Assignment of Error No. II

{¶18} In his second assignment of error, Moll argues that the trial court erred when it denied his motions to withdraw his guilty pleas. We disagree.

{¶19} 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 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. Boles,* 187 Ohio App.3d 345, 2010–Ohio–278, ¶ 16–18 (2d Dist.).

{¶20} There are several factors that have been delineated by this court, 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 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. *State v. Prince,* 3d Dist. Auglaize No. 2–12–07, 2012–Ohio–4111, ¶ 22; *State v. Leffler,* 3d Dist. Hardin No. 6–07–22, 2008–Ohio–3057, ¶ 11; *State v. Fish,* 104 Ohio App.3d 236, 240 (1st Dist.1995).

{¶21} Upon examination of these factors, we note that the first and sixth factors weigh in Moll's favor. The State did not present any argument, at the

hearing or on appeal, as to why it would be prejudiced if Moll were allowed to withdraw his guilty pleas. Some courts have stated that the lack of prejudice to the State is one of the most important factors to consider. *See State v. Cuthbertson*, 139 Ohio App.3d 895, 899 (7th Dist.2000); *Fish* at 240. Generally, prejudice occurs when "one or more witnesses becom[e] unavailable due to the delay in the trial resulting from the withdrawal." *State v. Boyd*, 10th Dist. Franklin No. 97APA12-1640, 1998 WL 733717, *6 (Oct. 22, 1998). Here, the victim actually spoke at the sentencing hearing, which shows that she would have been available had the parties gone to trial.

{¶22} We also note that the timing of Moll's motions to withdraw were not unreasonable. While Moll filed his motions almost two months after the change of plea hearing, his motions were filed nearly a week before his sentencing hearing. *Compare State v. Keehn*, 3d Dist. Henry No. 7-14-05, 2014-Ohio-3872, ¶ 15 (finding that the filing of a motion to withdraw plea one week prior to scheduled sentencing hearing was reasonable) *with State v. Gallagher*, 7th Dist. Mahoning No. 08 MA 178, 2009-Ohio-2636, ¶ 37 (finding that appellant's timing was unreasonable when motion to withdraw was made the same day as sentencing).

{¶23} The trial court held a hearing on Moll's motions to withdraw his guilty pleas, but it was brief. However, the trial court allowed both the State and Moll the opportunity to present arguments regarding the motions. While the court

permitted Moll to testify on his own behalf, Moll chose not to present any witnesses, evidence, or affidavits at the hearing to support his motions. Therefore, it cannot be said that the trial court did not engage in a full and fair consideration of Moll's motions. The trial court expressly considered the fact that it afforded Moll with an extensive Crim.R. 11 hearing, and that every aspect of the plea agreement was fully explained to Moll. *See* Sentencing Hearing Tr., p. 6-7. Thus, the trial court believed that Moll understood the plea agreement and was simply having a change of heart.

{¶24} The remaining factors all weigh in favor of the trial court's decision to deny Moll's presentence motions to withdraw his guilty pleas. While Moll argues on appeal that the trial court did not engage in an adequate Crim.R. 11 colloquy, for the reasons stated supra, we find the opposite to be true. The trial court did warn Moll that as a result of the agreement, he would be sentenced separately on both offenses, as they were not allied offenses. The court also warned that he could serve these sentences concurrently or consecutively. Thus, it is hard to believe Moll's assertion that he did not understand the plea agreement. Further, Moll makes no argument that he was denied competent counsel or that he was unduly influenced into pleading guilty. *Compare Cuthbertson*, 139 Ohio App.3d at 897 (appellant alleged that he was pressured to plead guilty by his mother).

{¶25} Finally, Moll does not assert that he is innocent of the charges, but only that it was not "in [his] best interest to take [the plea agreement]." Sentencing Hearing Tr., p. 6. The reason for the desire to withdraw a guilty plea is only one factor out of many to consider. *Fish*, 104 Ohio App.3d at 240. However, when this factor is combined with all the other factors that weigh in favor of denying Moll's motions, we cannot say that the trial court abused its discretion when it denied Moll's motions to withdraw his guilty pleas.

{¶26} Accordingly, we overrule Moll's second assignment of error.

{¶27} Having found no error prejudicial to Moll in the particulars assigned and argued, we affirm the judgments of the trial court.

Judgments Affirmed

SHAW and PRESTON, J.J., concur.

/jlr