[Cite as *State v. Landrum*, 2014-Ohio-5714.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA12
vs.	:	
JAMES D. LANDRUM,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT:	Carol Ann Curren, 330 Jefferson Street, P.O. Box 149, Greenfield, Ohio 45123
COUNSEL FOR APPELLEE:	Anneka P. Collins, Highland County Prosecuting Attorney, and Ross Greer, Highland County Assistant Prosecuting Attorney, 112 Governor Foraker Place, Hillsboro, Ohio 45133

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-15-14

ABELE, P.J.

{¶ 1} This is an appeal from a Highland County Common Pleas Court judgment of conviction and sentence. James D. Landrum, defendant below and appellant herein, pled guilty to burglary in violation of R.C. 2911.12(A)(2). Appellant assigns the following error for review:

> "THE COURT ERRED TO THE DETRIMENT OF THE DEFENDANT IN REFUSING TO GRANT DEFENDANT JAMES LANDRUM'S MOTION TO WITHDRAW HIS GUILTY PLEA."

{¶ 2} On February 3, 2014, the Highland County Grand Jury returned an indictment charging appellant with the aforementioned offense. He initially entered a plea of not guilty, but later agreed to plead guilty in exchange for he and the State to "argue [s]entencing." On March 21, 2014, appellant and his counsel both signed a "Plea of Guilty" form that acknowledged their acceptance of these terms. That same day, the matter came on for hearing at which time the trial court endeavored to assure that appellant knowingly waived his rights. Assured that this was the case, the trial court accepted appellant's plea, found appellant guilty and continued the matter for sentencing.

{¶ 3} On the day of the sentencing hearing, appellant filed a motion to withdraw his guilty plea. No memorandum was attached to the motion to explain the request, but the motion stated that his previous plea was "improvidently made."

{¶ 4} Not unexpectedly, the motion's merits were of primary importance for the sentencing hearing. As defense counsel did not offer an explanation for the motion in its written form, the trial court extended to him an opportunity to explain, which he did as follows:

> "Well, I heard some things this morning that I didn't know before. The fact that two of the three defendants in this case were offered polygraphs. The offer to

> [appellant] was to plead to the Indictment. We weren't offered the chance to take a polygraph. And I understand that one person, Mr. Johnson, took a polygraph, passed it, and the case was dismissed.
>
> So this information, I did not have. And from what I understand, you know, if we get to withdraw this plea, he'd take a polygraph."

{¶ 5} The trial court denied the motion and sentenced appellant to serve a three year term of incarceration. This appeal followed.

{¶ 6} Appellant asserts in his sole assignment of error that the trial court erred by not allowing him to withdraw his guilty plea. We, however, disagree with appellant. Although appellant was just moments away from being sentenced, a sentence had not yet been imposed. The law is well-settled that pre-sentence motions to withdraw a guilty plea should be freely granted. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). However, a defendant does not have an absolute right to withdraw his plea prior to sentencing. *State v. Lester*, 4th Dist. Vinton No. 12CA689, 2013-Ohio-2485, at ¶5.

{¶ 7} Regardless of the proposition that the withdrawal of a guilty plea should be freely allowed, we review a trial court's ruling on such matters under the abuse of discretion standard. *State v. Leonard*, 1st Dist. Hamilton No. C–130474, 2014-Ohio-3828, at ¶21; *State v. Stufflebean*, 4th Dist. Athens No. 97CA40, 1998WL319380 (Jun. 18, 1998). An abuse of discretion is more than an error of law or of judgment; rather, it implies that a court's attitude is unreasonable, arbitrary or unconscionable. See *In re Judicial Campaign Complaint Against O'Toole*, ___ Ohio St.3d ___, 2014 -Ohio-4046, ___ N.E.3d ____, at ¶61; *State v. Clark*, 71 Ohio St.3d 466, 470, 644 N.E.2d 331 (1994). Furthermore, under this standard reviewing, courts must not substitute their own judgment for that of the trial court. *State v. Darmond*, 135 Ohio St.3d 343,

2013-Ohio-966, 986 N.E.2d 97, at ¶34.

{¶ 8} In the case sub judice, defense counsel's request to the trial court was based on "things" that he had "heard" the morning of sentencing. The transcript is, admittedly, somewhat vague, but it appears from the record that counsel heard these "things" from his client, not from the state. These "things" may well have had significance to appellant, or even to his counsel, but we see no indication that these "things" are other than two suspects being permitted to take a polygraph exam.

{¶ 9} Second, polygraph test results are admissible into evidence only when the defense and prosecution agree to its admissibility. *State v. Dutiel*, 5th Dist. Perry No. 2012–CA–11, 2012-Ohio-5349, at ¶20; *State v. Wine*, 3rd Dist. Auglaize No. 2–12–01, 2013-Ohio-2837, at ¶23. Although the sentencing hearing transcript reveals that the prosecutor would have allowed appellant the same opportunity earlier in the proceedings, he did not request it. "All three of them had the same offer," the prosecutor explained to the court, but appellant chose to plead guilty to the offense instead, in what is described as a "take-it-or-leave-it" deal. Moreover, nothing in the transcript indicates that the prosecutor was willing to re-open that agreement. It logically follows that a retraction of appellant's guilty plea without the prosecutor's agreement to take a polygraph exam would be pointless.

{¶ 10} Third, appellant's most detailed argument comes in his brief in which he argues that the result might have been different had he been allowed to take a polygraph examination. It is interesting that his written argument does not contain any sort of assertion that he is innocent of the crime, but rather that he might have been able to escape culpability had he been allowed to take a polygraph examination. More important, however, and we stress again that the transcript

is a little unclear, the prosecutor explained to the trial court that one of appellant's co-perpetrators took the polygraph exam and pled guilty to the offense.[1] Thus, appellant's claim that the result of this case would have been otherwise had he too been allowed to take the polygraph is not persuasive.

{¶ 11} In sum, we find nothing arbitrary, unreasonable or remotely unconscionable in the trial court's rejection of appellant's last minute motion to withdraw his guilty plea. Thus, the trial court's decision does not constitute an abuse of its discretion.

{¶ 12} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed. Appellant to recover of appellee the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

[1] This co-perpetrator was identified only as "Mr. Penwell."

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.