

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

SHAWN MICHAEL SMITH

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. William B. Hoffman, J.

Case No. 15CA20

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Guernsey County Court of
Common Pleas, Case No. 14-CR-234

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

February 4, 2016

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Shawn M. Smith appeals the July 31, 2015 Judgment Entry of Conviction entered by the Guernsey County Court of Common Pleas denying his motion to withdraw plea. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On July 14, 2015, Appellant entered a negotiated plea of guilty to one count of Illegal Manufacture of Drugs, in violation of R.C. 2925.04, a second degree felony; one count of Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs, in violation of R.C. 2925.041, a felony of the third degree; and one count of Aggravated Possession of Drugs, in violation of R.C. 2925.11, a felony of the first degree.

{¶3} During the July 14, 2015 Plea Hearing, Appellant admitted the Guernsey County Sheriff's Office received a call from an informant that Appellant was "cooking" methamphetamines in a camper in Buffalo, Ohio. Officers responded to the area and observed what they believed to be a "one pot" methamphetamine "cooker" in the camper occupied by Appellant when Appellant himself answered the door.

{¶4} After officers advised Appellant of his Miranda rights, Appellant admitted to "cooking" methamphetamines in the camper and there was an active cooking vessel inside. The substance found in the camper later tested positive for the presence of methamphetamines.

{¶5} It was agreed, pursuant to the negotiated plea agreement, Counts 1 and 2 would merge at sentencing. The State agreed to recommend the sentences run concurrently, with the term of imprisonment left to the discretion of the trial court.

{¶6} Two days prior to sentencing, Appellant moved to withdraw his guilty plea through a letter submitted to the trial court. The letter indicated Appellant had no confidence in his trial counsel, and he did not commit the offense as alleged.

{¶7} On July 30, 2015, the trial court conducted a sentencing hearing. Prior to the sentencing hearing, the trial court heard Appellant's motion to withdraw plea. The trial court denied Appellant's motion to withdraw his plea, and then proceeded to sentence Appellant to four years in prison.

{¶8} Appellant appeals, assigning as error:

{¶9} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA."

{¶10} Ohio Criminal Rule 32.1 states, "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."

{¶11} In *State v. Xie*, 62 Ohio St. 3d 521, 527, 584 N.E.2d 715, 719 (1992), the Ohio Supreme Court held,

We agree that a presentence motion to withdraw a guilty plea should be freely and liberally granted. Nevertheless, it must be recognized that a defendant does not have an absolute right to withdraw a plea prior to sentencing. Therefore, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. In this case, the trial court held such a hearing, at which it carefully considered Xie's motion and all the circumstances surrounding the entering

of the plea. Absent an abuse of discretion on the part of the trial court in making the ruling, its decision must be affirmed. For us to find an abuse of discretion in this case, we must find more than an error of judgment. We must find that the trial court's ruling was "unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 173, 404 N.E.2d 144, 149.

{¶12} This Court set forth the factors to be considered in withdrawing a plea made before sentencing in *State v. Suntoke*, Muskingum Co. No. CT2013-032, 2014-Ohio-1431, holding,

The factors to be considered when making a decision on a presentence motion to withdraw a guilty plea are as follows: (1) prejudice to the state; (2) counsel's representation; (3) adequacy of the Crim.R. 11 plea hearing; (4) extent of the plea withdrawal hearing; (5) whether the trial court gave full and fair consideration to the motion; (6) timing; (7) the reasons for the motion; (8) the defendant's understanding of the nature of the charges and the potential sentences; and (9) whether the defendant was perhaps not guilty or has a complete defense to the charge. *State v. Cuthbertson*, 139 Ohio App.3d 895, 898–899, 746 N.E.2d 197 (7th Dist.2000), citing *State v. Fish*, 104 Ohio App.3d 236, 661 N.E.2d 788 (1st Dist.1995). No one *Fish* factor is absolutely conclusive. *Cuthbertson, supra*.

{¶13} Here, the State concedes two of the factors to be considered weigh in favor of granting Appellant's motion to withdraw plea. Specifically, there was no evidence of

prejudice to the State, and the motion was made just seven days after the plea and prior to sentencing.

{¶14} Appellant stated at the plea hearing his reason for withdrawal of the plea was he did not commit the offenses and he was “scared by threatening” [comments] made by his attorney indicating he would receive a much harsher sentence if he went to trial. Appellant informed the trial court he had reconsidered his guilty plea and he had no confidence in his trial attorney.

{¶15} Pursuant to the third factor set forth in *Fish*, supra, we look to the adequacy of the plea withdrawal hearing. Upon review of the July 14, 2014 Plea Hearing transcript, we note Appellant stated prior to entering his plea he was satisfied with the representation of his counsel. He stated no one had threatened him into entering his plea. The trial court reviewed each count and the maximum penalty the court could impose on each count. The trial court reviewed the terms of post-release control and the penalties for violation thereof. Further, the trial court informed Appellant the maximum possible sentencing range was three to eleven years. Appellant then admitted to taking alcohol and/or drugs while in jail. The trial court adequately reviewed Appellant’s rights in waiving his jury trial, and the court engaged Appellant in a lengthy colloquy to ensure Appellant knowingly voluntarily and intelligently entered his plea.

{¶16} Appellant's only argument presented in his July 28, 2015 Letter to the trial court to withdraw his plea was the deficient performance of trial counsel. The letter was sent to the trial court two days prior to his July 30, 2015 sentencing hearing.

{¶17} At the July 30, 2015 sentencing hearing, the trial court considered Appellant's request to withdraw his plea. The trial court considered the benefit Appellant

received as a result of the plea bargain, including the merger of the offenses. The trial court stated on the record,

MR. BIEGLER: Seems to be understood well, and contrary to what the defendant has said, he did get quite a benefit from Mr. Mooney's negotiations in this case.

THE COURT: All right. Explain that, please.

MR. BIEGLER: Your Honor, we agreed to concurrent time.

THE COURT: Yes.

MR. BIEGLER: That is, quite honestly, in this case a huge concession from the State of Ohio.

THE COURT: And explain what that means for the record, please.

MR. BIEGLER: Your Honor, concurrent time means that it would be served at the same time. When we agreed that the merger occurred, but then we have the possession, and we have the manufacturing, and we agreed that those - -

THE COURT: And the maximum sentence for the manufacture could be?

MR. BIEGLER: Eight years.

THE COURT: And the eight years and the maximum term for the possession could be 11, so that would be 19 years possible sentence.

MR. BIEGLER: Yes.

THE COURT: Maximum.

MR. BIEGLER: And based upon our negotiations in this case, although we did not agree on a set amount of time, we did agree that it was going to be concurrent time.

THE COURT: Which would mean that - -

MR. BIEGLER: The maximum that he could receive would be eight years. Well, 11 years I guess.

THE COURT: 11 years, I believe.

MR. BIEGLER: All right. So he did get a benefit. And, finally, although it's not part of his motion, the defendant was going to be sentenced the day that he entered his plea.

THE COURT: Yes.

MR. BIEGLER: Except that he asked the Court can I wait a week or so so that my father can be there.

Tr. 16 -17.

{¶18} The trial court found Appellant received the benefit of trial counsel's representation at the plea hearing and did not have deficient trial representation. Appellant received a four year prison sentence as a result of his plea. The trial court could have sentenced Appellant on the day he entered the plea, but Appellant asked for time to allow his family to be present.

{¶19} Appellant raises as a defense to the charges the sample weight of the evidence used by the State in prosecuting the offenses. The State and Appellant's counsel discussed the case law with regard to weight and testing of the methamphetamine seized. The methamphetamine at issue was in the liquid form or in

water at the time of seizure; therefore, the full weight of the water/liquid was weighed, not the crystallized methamphetamine. At the plea withdraw hearing, the trial court discussed the case law in Ohio from the Sixth Appellate District and the Ohio Statutes providing for the methamphetamine amount mixture or preparation to be used to determine the degree of the crime charged. Tr. at 14.

{¶20} The trial court further discussed the strength of the State's case against Appellant, and the strong possibility of a conviction, including a strong odor of methamphetamines, the officer's observation of Appellant "cooking," eight cans of car starter fluid, fuels for lanterns, syringes, funnels, latex gloves, cold packs, batteries, bottles with hoses, and several manufacturing sites in the same trailer. Based upon the strength of the State's evidence and the law in Ohio, the trial court found Appellant benefited from the plea agreed upon and the representation of his attorney.

{¶21} Appellant did not present any witnesses to testify on his behalf, nor did he present any evidence at the plea withdraw hearing. Rather, Appellant asserted he would have liked to have the arresting officers questioned and subpoenas issued. The trial court found the decision to call the officers as witnesses to be tactical decisions made by Appellant's trial attorney. Tr. at 30-31.

{¶22} We find the record demonstrates the only two factors that weigh in favor of withdrawing Appellant's plea are the timeliness of the request and lack of prejudice to the State. These are only two of the nine factors to be considered. In *State v. Preston*, 2nd Dist 25393, 2002-Ohio-4404, the Second District, held,

After considering the nine factors, we find that a majority of the factors weigh in favor of affirming the decision of the trial court. While the

lack of prejudice to the State and the timeliness of the motion factors weigh in favor of withdrawing the plea, these are only two of the nine factors to be considered. Furthermore, the overall consideration is whether a reasonable and legitimate basis for the withdrawal of the plea exists. Here, there is no reasonable and legitimate basis for withdrawing Preston's guilty pleas, because the record establishes that he knowingly pled guilty. Accordingly, the trial court did not abuse its discretion when it denied Preston's motion to withdraw his guilty plea.

{¶23} The record herein demonstrates the trial court held a thorough hearing on the matter, and Appellant was given an ample opportunity to present any evidence to support his motion. Appellant did not have evidence of a defense; rather, the State had sufficient evidence to support a conviction on each charge, and the substance found at the scene later tested positive for methamphetamine. The record demonstrates Appellant benefited from his trial counsel's representation in the plea negotiations, he received a full and fair Criminal Rule 11 plea hearing and subsequent hearing on his motion to withdraw, and the trial court gave the motion to withdraw plea full and fair consideration. We find the trial court did not abuse its discretion in denying Appellant's motion to withdraw his plea of guilty.

{¶24} The sole assignment of error is overruled.

{¶25} The judgment of the Guernsey County Court of Common Pleas is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Gwin, J. concur