

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals Nos. WD-04-082
WD-04-083

Appellee

Trial Court Nos. 03-CR-385
03-CR-506

v.

Michael Oke

DECISION AND JUDGMENT ENTRY

Appellant

Decided: December 9, 2005

* * * * *

Raymond C. Fischer, Wood County Prosecuting Attorney, and
Gary D. Bishop, former Assistant Prosecuting Attorney, and
Jacqueline M. Kirian, Assistant Prosecuting Attorney, for appellee.

Wendell R. Jones, for appellant.

* * * * *

SKOW, J.

{¶ 1} Appellant, Michael Oke, appeals his convictions and sentence in the Wood County Court of Common Pleas on single counts of aggravated burglary, kidnapping, rape, and sexual battery. For the reasons that follow, the convictions are affirmed.

{¶ 2} On March 30, 2003, appellant and a male companion met victim No. 1 and her companion, a female, at a party. When they went upstairs to the men's apartment, appellant and his friend produced a white powdery substance, which they indicated was

cocaine, and which -- at the men's invitation -- both women snorted. The women stated that upon snorting the substance (which was later found not to be cocaine), they became dizzy and disoriented, and very soon thereafter, became unconscious. Victim No. 1 awoke the next morning to find that she was on the couch, partially disrobed, with appellant sitting next to her and fondling her. Laboratory evidence obtained as a result of victim No. 1's rape kit examination revealed the presence of semen.

{¶ 3} On March 31, 2003, Detective Nathaniel Schiffel executed a search warrant to recover victim No. 1's missing underwear and socks from the upstairs apartment. While conducting the search, Schiffel spoke to individuals living in the apartment who stated that appellant and his companion had brought two girls back to the apartment the night before and had had sexual intercourse with them. At this point, appellant was identified as a suspect. He was not immediately questioned, however, because Schiffel was initially unable to locate him.

{¶ 4} Several months later, on the night of June 6, 2003, victim No. 2 was at home in her apartment, sleeping on her couch, when appellant entered the residence, turned off the lights, closed the blinds, and proceeded to attack her sexually. Appellant struck her, threw her to the ground, strangled her, threatened to kill her and performed oral sex on her against her will. She kicked free of him and tried to run across the room to get to a bathroom and lock herself in. Appellant caught her and struck her with a closed fist on the side of her jaw. He knocked her down, then again began strangling her

and, again, threatened to kill her. Ultimately, he had sexual intercourse with her against her will.

{¶ 5} As a result of the darkness, victim No. 2 was unable to identify her assailant. The day after the attack, DNA samples were taken from friends with whom she had spent the previous evening. Those samples were then compared to the semen sample in her rape kit.¹

{¶ 6} On June 25, 2003, Sergeant Alan Carsey questioned appellant at the Bowling Green Police Department on an unrelated criminal mischief charge. Carsey then contacted Schiffel, and the two agreed that appellant would be held until Schiffel arrived at the station in order to question him about victim No. 1's case. Appellant, who had just given false information to Carsey concerning his identity, then fled the station before Schiffel had an opportunity to speak to him.

{¶ 7} On June 30, 2003, dispatch received a call that appellant was at 706 Napoleon, in Bowling Green. Carsey immediately prepared an arrest warrant that charged appellant with obstructing official business, a misdemeanor of the first degree. The warrant was based on appellant's having provided false information to police and having fled the police station five days earlier. Carsey brought the warrant, together with

¹Appellant and the state disagree as to whether the samples taken at this time included a sample from appellant. Testimony by Detective Scott Kleiber at a June 22, 2004 suppression hearing suggests that they did, but the state insists in its brief that, in fact, they did not.

a fully executed probable cause affidavit, to the clerk of courts' office, where Deputy Clerk Pam Hunker evaluated the accuracy of the documents, then signed the warrant.

{¶ 8} Appellant was arrested that day, and was questioned at the Bowling Green Police Department by Schiffel and Detective Scott Kleiber. The detectives read appellant his *Miranda* rights at the start of the videotaped interrogation. Thereafter, appellant signed a written waiver, confessed to having sex with victim No. 1, and consented to having an oral DNA swab taken from him. Before consenting to the swab, appellant asked Detective Schiffel what it was for. Schiffel answered that it would demonstrate whether appellant and victim No. 1 had had sex, but that it would reveal nothing with respect to the issue of consent. Schiffel told appellant that if he refused to consent, Schiffel would "just need to get a warrant typed up."

{¶ 9} Appellant's oral swab was submitted to the Ohio Bureau of Criminal Identification and Investigation ("B.C.I.") for analysis, where it was confirmed that he was the source of the semen taken from victim No. 1 during her rape kit examination. Thereafter, appellant's DNA profile was entered into the statewide DNA profile database known by the acronym C.O.D.I.S.

{¶ 10} In September 2003, B.C.I. ran the DNA sample of victim No. 2's assailant through C.O.D.I.S. and confirmed that the DNA belonged to appellant.

{¶ 11} On October 2, 2003, appellant was indicted in case number 03-CR-385, in connection with the attack against victim No. 2 on or about June 6, 2003. Specifically, the indictment charged appellant with: (1) aggravated burglary, a felony of the first

degree in violation of R.C. 2911.11 (A)(1); (2) kidnapping, a felony of the first degree in violation of R.C. 2905.01(A)(4); and (3) rape, a felony of the first degree in violation of R.C. 2907.02(A)(2).

{¶ 12} On October 17, Detectives Kleiber and Schiffel went to Knox County to interrogate appellant in connection with the case. According to testimony by Kleiber, appellant voluntarily waived his *Miranda* rights, then issued a statement wherein he denied knowing victim No. 2 and denied ever having had sexual relations with her. Although Kleiber testified to the voluntariness of appellant's waiver, the evidence was undisputed that no written waiver was ever executed.

{¶ 13} On December 4, 2003, appellant was indicted in case number 03-CR-506, in connection with the attack against victim No. 1 on or about March 30, 2003. Although he was initially charged with sexual battery as a felony of the third degree in violation of R.C. 2907.03(A)(4), such charge was later amended to reflect a violation of R.C. 2907.03(A)(3), also a felony of the third degree.

{¶ 14} Appellant subsequently filed motions in each case, wherein he sought to suppress statements and physical evidence obtained from interrogations by the Bowling Green Police Department on June 30, 2003 and October 17, 2003. Following a suppression hearing, the trial court granted appellant's motions as to the October 17, 2003 statement, but denied the motions as to the June 30, 2003 statement and the physical evidence derived therefrom.

{¶ 15} On August 27, 2004, appellant pled no contest in both cases to all of the offenses charged.

{¶ 16} At the sentencing hearing, held on October 26, 2004, appellant requested to have new counsel assigned to consider the merits of withdrawing his pleas. The court denied appellant's motions on the grounds that they were untimely made.

{¶ 17} After classifying appellant as a sexual predator in connection with both cases, the court proceeded to sentencing. In case number 03-CR-385, the court merged the charges of kidnapping and rape for purposes of sentencing, and for those combined offenses ordered appellant to serve eight years at the Ohio Department of Rehabilitation and Corrections. The court imposed an additional eight-year sentence on the aggravated burglary charge in that case. In case number 03-CR-506, the court imposed a sentence of four years imprisonment. The court ordered that all of the sentences were to be served consecutively, pursuant to R.C. 2929.14(E)(4). Thus, appellant was sentenced to a total of 20 years imprisonment.

{¶ 18} Appellant filed notices of appeal and a motion to consolidate appeals. The motion to consolidate was granted on December 1, 2004. In this consolidated appeal, appellant raises the following assignments of error:

{¶ 19} I. "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING HIS MOTION TO SUPPRESS STATEMENTS AND PHYSICAL EVIDENCE."

{¶ 20} II. "THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF APPELLANT BY DENYING HIS MOTION TO WITHDRAW GUILTY PLEA [SIC, NO CONTEST]."

{¶ 21} III. "APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT IMPOSED CONSECUTIVE SENTENCES PURSUANT TO O.R.C. §§2929.11(B), 2929.14 & 2929.19."

{¶ 22} In his first assignment of error, appellant asserts that the trial court erred in denying his motions to suppress his June 30, 2003 statement and physical evidence.

{¶ 23} In a hearing on a motion to suppress, the trial court functions as the trier of fact, because the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of the witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. A reviewing court must accept the trial court's findings of fact as long as they are supported by competent, credible evidence, *State v. Harris* (1994), 98 Ohio App.3d 543, 546. Accepting the trial court's findings of fact as true, the reviewing court must then independently determine as a matter of law whether the applicable legal standard has been satisfied. *State v. McCulley* (Apr. 28, 1994), 8th Dist. No. 64470.

{¶ 24} Here, appellant argues that the statement and physical evidence should have been suppressed because: (1) the arrest warrant was invalid; (2) the good faith rule did not apply; (3) the exclusionary rule did not apply; and (4) appellant's consent to the oral swab was coerced.

{¶ 25} We begin with an examination of appellant's challenge to the validity of the arrest warrant. This challenge is specifically based on alleged violations of Crim.R. 4, which pertinently provides:

{¶ 26} "A) Issuance

{¶ 27} "(1) Upon complaint. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, a warrant for the arrest of the defendant, or a summons in lieu of a warrant, shall be issued by a judge, magistrate, clerk of court, or officer of the court designated by the judge, to any law enforcement officer authorized by law to execute or serve it.

{¶ 28} "* * *

{¶ 29} "The issuing authority shall issue a summons instead of a warrant upon the request of the prosecuting attorney, or when issuance of a summons appears reasonably calculated to ensure the defendant's appearance."

{¶ 30} First, appellant argues that a summons, rather than a warrant, was required in this case, because "there could have been no genuine concern that [a]ppellant represented a risk of flight." In support of this argument, appellant points out that police found him at 706 Napoleon on three separate occasions. The standard for issuing a summons is that issuance of the summons be reasonably calculated to ensure the defendant's appearance. Crim.R. 4(A)(1). The mere fact that appellant could sometimes be found at a certain address does little, if anything, to meet that standard.

{¶ 31} Far more compelling are the facts militating against the issuance of a summons, which are as follows: (1) 706 Napoleon has never been listed as appellant's home address; (2) before June 30, 2003, appellant had been found at 706 Napoleon on only one occasion; (3) appellant intentionally gave false information as to his name, address, and social security number before fleeing the Bowling Green precinct on June 25, 2003; and (4) between March 31, 2003, when detectives first identified appellant as a suspect in case number 03-CR-506, and June 30, 2003, the detectives had already made several unsuccessful attempts to locate him. Given appellant's history, issuance of an arrest warrant in lieu of a summons was certainly reasonable and was well within the detective's discretion.

{¶ 32} Appellant next argues that the arrest warrant was invalid because it was issued without a probable cause determination. As indicated above, Crim.R. 4 requires that "it appear[] from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed, and that the defendant has committed it." Crim.R. 4(A)(1).

{¶ 33} In the instant case, Sergeant Carsey submitted a probable-cause affidavit with the complaint and request for a warrant. According to testimony by Mary Cowell, Clerk of Court of the Bowling Green Municipal Court, before an arrest warrant can issue, the clerk must "read the probable-cause affidavit and determine if certain issues apply as to whether a warrant should issue or not." Cowell explained that her office must confirm: (1) jurisdiction; (2) identity of the suspect, including name, date of birth, and social

security number; (3) citation of an applicable statute; and (4) a statement of facts indicating that the statute has been violated. Appellant does not deny that the foregoing requirements are sufficient to meet the standard for issuance of an arrest warrant. Nor does he deny that those requirements were met in this case.

{¶ 34} Instead, appellant grounds his challenge on a one-word statement by Mary Cowell, who when asked by the state whether she really even made a probable-cause determination, answered, "No." Although Cowell did make this statement -- apparently in reference, not just to herself, but to her office, in general -- it is clearly at odds with the rest of her testimony, and, as such, was properly ignored by the trial court. For all of the foregoing reasons, we find that the arrest warrant was validly issued in this case.

{¶ 35} The state argues that even assuming the existence of some technical defect in the arrest warrant, there are two exceptions to the exclusionary rule under which appellant's statement and consent to an oral swab would be admissible: (1) the good faith exception; and (2) the inevitable discovery doctrine.

{¶ 36} The purpose of the exclusionary rule is to deter illegal police behavior that violates Fourth Amendment protections against unreasonable searches and seizures. See *United States v. Leon* (1984), 468 U.S. 897; *State v. Wilmoth* (1986), 22 Ohio St.3d 251. Under the good faith exception to the exclusionary rule, evidence is allowed to be admitted where an officer's actions were "objectively reasonable." Here, there is no indication that anything in Sergeant Carsey's affidavit was in any way inaccurate. Nor is there any evidence or assertion that the obstruction charge was unjustified or that any of

the essential elements of the warrant were unsatisfied. We therefore conclude that Carsey's actions were objectively reasonable. As such, the disputed evidence would properly be admitted under the good faith exception.²

{¶ 37} Under the second exception to the exclusionary rule, the inevitable discovery doctrine, illegally obtained evidence is admissible at trial if the state demonstrates within a reasonable probability that the law enforcement officers would inevitably have discovered the evidence during the course of a lawful investigation. *State v. Perkins* (1985), 18 Ohio St.3d 193, 196.

{¶ 38} At the time the detectives questioned appellant on June 30, 2003, he was the primary suspect in case number 03-CR-506. Victim No. 1 had provided a full description of appellant, and Detective Schiffel, after questioning the owner of the apartment where the incident occurred, had identified appellant as the probable assailant.

{¶ 39} Appellant does not dispute that such evidence would have been sufficient to establish probable cause to obtain a search warrant for an oral swab. Instead, appellant argues the evidence was insufficient to trigger the inevitable discovery rule. As appellant points out, the inevitable discovery rule does not apply where police *could* have obtained a warrant but chose not to. See *State v. Coyle* (Mar. 15, 2000), 11th Dist. No. 99-CA-2480.

²Contrary to appellant's assertion, the good faith exception applies not just to search warrants, but also to arrest warrants. See *State v. City of Chillicothe*, 4th Dist. No. 02CA2664, 2003-Ohio-2600, at ¶ 18; *State v. Scott* (Oct. 22, 1999), 6th Dist. Nos. E-98-065, E-98-066.

{¶ 40} Here, Detective Schiffel made clear during the June 30, 2003 videotaped questioning that if appellant did not consent to a buccal swab, a warrant for such *would*, in fact, be sought. Although his intentions were never put to the test, because appellant ultimately did consent, there is nothing in the record to suggest that Schiffel's statements were anything less than truthful and wholly supported by the evidence. Although the circumstances of this case present us with a close question, we find that Schiffel's statements sufficiently demonstrate that, even without the June 30, 2003 encounter, law enforcement officers would inevitably have discovered the evidence during the course of their lawful investigation. Accordingly, even if the arrest warrant were found to be invalid in this case, such would not provide grounds for suppressing either appellant's June 30, 2003 statement or his consent to an oral swab.

{¶ 41} Appellant's final argument in support of suppressing the evidence is that the trial court erred in finding that his consent to have the buccal swab test was voluntary, rather than coerced.

{¶ 42} Although "[s]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions," *Katz v. United States* (1967), 389 U.S. 347, 357, "[n]o Fourth Amendment violation occurs when an individual voluntarily consents to a search." *State v. Fry*, 4th Dist. No. 03CA26, 2004-Ohio-5747, at ¶ 18 (citations omitted).

{¶ 43} Whether consent is voluntary or the product of duress or coercion, either express or implied, is a question of fact to be determined from the totality of the facts and circumstances. *Ohio v. Robinette* (1996), 519 U.S. 33, 40, citing *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 248-249. The burden is on the state to demonstrate voluntariness of consent, and that burden "is not satisfied by showing a mere submission to a false claim of lawful authority." *State v. Whitfield*, 3rd Dist. No. 1-04-80, 2005-Ohio-2255, ¶ 17, citing *Florida v. Royer* (1983), 460 U.S. 491, 497.

{¶ 44} In order to meet its burden, the state must show by clear and convincing evidence that the consent was freely and voluntarily given. *Florida v. Royer*, 460 U.S. 491, at 497; *State v. Pierce* (1998), 125 Ohio App.3d 592, 598; *State v. Jackson* (1996), 110 Ohio App.3d 137, 142. Important factors in determining whether a consent was voluntary are: (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. *State v. Lattimore*, 10th Dist. No. 03AP-467, 2003-Ohio-6829. Although knowledge of the right to refuse consent is a relevant factor to be taken into account, it is not a prerequisite to establishing voluntary consent. See *State v. Fry*, *supra*, at ¶ 24; see, also, *Schneckloth*, 412 U.S. at 248-249.

{¶ 45} Factors that arguably detract from the voluntariness of appellant's consent are as follows. First, appellant was in police custody when he agreed to the buccal swab

procedure, and, therefore, could not reasonably have been under the impression that he was free to leave. Second, Detective Schiffel had advised appellant prior to obtaining his consent that failure to do so would result in Schiffel's obtaining a warrant. According to appellant, this statement constituted very subtle coercion that caused him to give involuntary consent. However, the mere fact that an officer informs a suspect that he will obtain a search warrant if the individual does not consent to a search does not necessarily vitiate an otherwise voluntary consent. See *State v. Dunwoody*, 5th Dist. No. 2004CA49, 2005-Ohio-219, at ¶ 19, citing *United States v. Salvo* (1998), 133 F.3d 943. In fact, where, as here, there were grounds for a search warrant, a law enforcement officer's advice that a warrant can be obtained in the absence of consent does not constitute coercion. *Id.*, citing *United States v. Farudo* (1974), 412 U.S. 218.

{¶ 46} Appellant also argues that Detective Schiffel's limited explanation as to what the buccal swab test would demonstrate deceived him into believing that the swab had no significance and, as such, amounted to coercion. As indicated above, Schiffel told appellant that the test would demonstrate whether sex occurred between appellant and victim No. 1, but would prove nothing with respect to the issue of consent. According to appellant, Schiffel should also have told him that his DNA sample would be submitted to the B.C.I. to be compared with other such samples in its database, and that it could be used to implicate him in other crimes. We are not persuaded by this argument.

{¶ 47} Detective Schiffel's statement to appellant was truthful. And, as a result of that statement, appellant gave his consent. To the extent that the same sample was later

used in connection with another case without appellant's additional, specific consent does nothing to alter the voluntariness of appellant's original consent. Moreover, appellant fails to cite -- and this court's research has likewise failed to reveal -- any authority in support of the proposition that the state must obtain specific consent each time it plans to use DNA evidence that was obtained in an earlier case. In fact, the Ohio Court of Appeals, in *State v. Whitefield*, 3rd Dist. No. 1-04-80, 2005-Ohio-2255, came to just the opposite conclusion, finding that the appellant in that case had failed to establish any legitimate expectation of privacy in the results of DNA tests of his saliva, where he had voluntarily permitted the saliva to be removed from his person. *Id.*, at ¶ 20-21.

{¶ 48} In addition to the foregoing, review of the videotaped interrogation reveals a cooperative, and apparently relaxed, appellant. And review of appellant's pre-sentence report reveals that appellant was both mature and criminally experienced. Viewing the totality of the circumstances, we find that there was clear and convincing evidence that appellant voluntarily consented to the search.

{¶ 49} For all of the foregoing reasons, appellant's first assignment of error is found not well-taken.

{¶ 50} We note that the state, in response to appellant's first assignment of error, additionally asserts that the trial court erred in suppressing appellant's October 17, 2003 statement.

{¶ 51} App.R. 3(C)(1) relevantly provides:

{¶ 52} "A person who intends to defend a judgment or order against an appeal taken by an appellant and who also seeks to change the judgment or order * * * shall file a notice of cross appeal within the time allowed by App.R. 4."

{¶ 53} Under App.R. 4, "A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed * * *."

{¶ 54} Because the state, by its argument herein, seeks not just to defend the trial court's judgment, but also to change it, it should have complied with the requirements for filing a cross appeal, as set forth at App.R. 3 and App.R. 4. Since those requirements were not complied with, the state's argument will be given no additional consideration.

{¶ 55} Appellant argues in his second assignment of error that the trial court abused its discretion and erred to the prejudice of appellant by denying his October 26, 2004 motions to withdraw his pleas. As indicated above, appellant specifically asked to have new counsel assigned to consider the merits of withdrawing his pleas.

{¶ 56} Appellant's counsel offered the following in support of his oral motions: " * * * Mr. Oke has from the outset of this case maintained his firm desire to litigate these matters. And obviously there was a plea entered. The Court did conduct a Rule 11 hearing. But I think it's not uncharacteristic of these types of cases for there to be a change in position for obvious reasons that do not relate to the concern for the sentence that could be imposed here today. I do believe that the history of this case does demonstrate that there are conceivably reasons which would support a presentence motion to withdraw a plea other than the defendant's concern for the possible sentence

here today. So I would ask the Court to seriously consider both my request made on behalf of Mr. Oke to appoint alternate counsel to review its merits and the second request which would be for an opportunity for that attorney to prepare a formal motion to withdraw the plea presentence and to have the Court hear that motion on his behalf."

{¶ 57} The state responded that this was a "13th-hour request to withdraw a plea that was entered quite some time ago. The defendant has had literally since late August to contemplate these matters. To show up here on the day of sentencing with a request to withdraw a plea clearly smacks, to me, of just having cold feet about the sentence that may be about to be imposed." Counsel went on to state, "What I glean from Mr. Hart's argument is that the defendant wishes to challenge the effectiveness of Mr. Hart's representation. Having gleaned that from the vague statements elicited thus far, I would simply respond that the record clearly shows that Mr. Hart has acted diligently in his representation of the defendant. He has obtained full discovery in this matter. He has actively participated in pretrial discussions and negotiations. And he has, indeed, on the one case, filed a motion to suppress and saw that through hearing, asking very much the appropriate questions that have been asked to advance a motion to suppress of this nature.

* * *"

{¶ 58} Defense counsel acknowledged that he first learned of appellant's desire to withdraw his plea on the day of sentencing, but he also explained that appellant had made several unsuccessful attempts to reach him in the preceding weeks. He specifically stated: "[Appellant] had formed in his mind the intention and desire to try and contact

me to indicate to bring this matter to the Court prior to sentencing, but that given my failure to return his phone calls or request for phone calls that I was not able to bring that matter to the Court in a more timely manner."

{¶ 59} The trial court then denied the motions, stating:

{¶ 60} "Well, Mr. Oke has been in the Justice Center for 339 days as of October 21st. So it's already been, five more days than that, so 344 days. It does appear, even if it were in the last week, although we have no verification of it until this morning that the defendant wished to bring these motions. In view of the last-minute hour, the lack of timeliness, the Court is not going to - - I'm going to deny the motion to withdraw his pleas. I'm also going to deny the motion concerning counsel. And implicit in the motions was a motion to continue the sentencing, which the Court likewise is going to deny as well at this time."

{¶ 61} Crim.R. 32.1 relevantly provides:

{¶ 62} "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."

{¶ 63} The Supreme Court of Ohio has held that although a presentence motion to withdraw a guilty, or no contest, plea should be freely and liberally granted, a defendant does not have an absolute right to withdraw the plea prior to sentencing. *State v. Xie* (1992), 62 Ohio St.3d 521, 527. The trial court must conduct a hearing on such a motion

"to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." Id.

{¶ 64} "Absent an abuse of discretion on the part of the trial court in making its ruling, its decision must be affirmed." Id. A trial court does not abuse its discretion unless its ruling is "unreasonable, arbitrary or unconscionable." Id., quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 65} To determine whether a trial court abused its discretion in refusing to grant a presentence motion to withdraw a guilty or no contest plea, a reviewing court must consider a number of factors, including, but not limited to the following: "(1) whether the defendant was represented by highly competent counsel; (2) whether the defendant was afforded a complete Crim.R. 11 hearing before entering the plea; (3) whether the trial court conducted a full and impartial hearing on the motion to withdraw the plea; (4) whether the trial court gave full and fair consideration to the motion; (5) whether the motion was made within a reasonable time; (6) whether the motion set out specific reasons for the withdrawal; (7) whether the defendant understood the nature of the charges and the possible penalties; (8) whether the defendant was possibly not guilty of the charges or had a complete defense to the charges; and (9) whether the state would have been prejudiced by the withdrawal.'" *State v. McIntosh* (2005), 160 Ohio App.3d 544, 547, quoting *State v. Jefferson*, 1st Dist. No. C-020802, 2003-Ohio-4308, citing *State v. Fish* (1995), 104 Ohio App.3d 236, 240, 661 N.E.2d 788.

{¶ 66} In this case, the record does not demonstrate that appellant was represented by incompetent counsel. It does demonstrate that appellant was afforded a full Crim.R. 11 plea hearing, during which he indicated an understanding of the charges and penalties, the voluntariness of his plea, and satisfaction with his representation.

{¶ 67} It was not until the sentencing hearing, 60 days later, that appellant expressed his desire to "seriously consider withdrawing his former pleas" and to have "an alternate attorney * * * to review the merits of the motion[s] to withdraw plea[s]."

{¶ 68} The sole reason that was given for appellant's request was his "strong desire to litigate these matters," a desire which defense counsel stated appellant had maintained "from the beginning." There was no suggestion of any change in circumstances, confusion, or any defense that might vindicate appellant.

{¶ 69} Defense counsel attempted to excuse the timing of the request with vague references to appellants "several attempts," prior to sentencing, to reach his counsel by phone.

{¶ 70} Although the hearing on appellant's oral motion to withdraw pleas was relatively short, the trial court gave defense counsel a full opportunity to speak.

{¶ 71} There is only one factor that weighs in favor of granting appellant's motions to withdraw his pleas, and that is the lack of evidence to show that that the prosecution would have been prejudiced if the trial court had granted the motion.

{¶ 72} On the basis of all of the foregoing, we find that the trial court gave full and fair consideration to appellant's motion. We further find that, under the circumstances, the

trial court did not abuse its discretion in denying appellant's motions to withdraw his no contest pleas. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 73} Appellant argues in his third, and final, assignment of error, that he was denied due process when he was sentenced to serve his sentences consecutively. Specifically, he argues that the trial court erred to his prejudice by basing its findings in support of those consecutive sentences on facts that were neither admitted to by appellant nor found by a jury as required under *Blakely v. Washington* (2004), 542 U.S. 296.

{¶ 74} Under R.C. 2929.14(A)(1), the prison term for a first degree felony "shall be three, four, five, six, seven, eight, nine, or ten years." And under R.C. 2929.14(A)(3), the prison term for a third degree felony "shall be one, two, three, four, or five years."

{¶ 75} The court may order a term greater than the minimum sentence, pursuant to R.C. 2929.14(B)(2), if "the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others." And the court may order consecutive terms, pursuant to R.C. 2929.14(E)(4), if "the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public * * *." Pursuant to R.C. 2929.19(B)(2)(c), the court must state its reasons for its findings.

{¶ 76} Here, the trial court satisfied those statutory requirements when made detailed findings, based on the presentence report, that both R.C. 2929.14(B)(2) and (E)(4) applied.

{¶ 77} In *Blakely*, supra, the United States Supreme Court determined that enhancement of a criminal sentence is violative of the Sixth Amendment right to a jury trial where a trial court makes findings based on facts that were not submitted to a jury or admitted by the defendant.

{¶ 78} This court, however, has held that *Blakely* protections are not implicated under Ohio's sentencing scheme and that *Blakely* applies only when the maximum sentence in the available range for an offense has been exceeded, a situation which simply does not occur under Ohio law. *State v. Curlis*, 6th Dist. No. WD-04-032, 2005-Ohio-1217, at ¶ 18; see also, *State v. Dickson*, 6th Dist. No. OT-05-001, 2005-Ohio-6132, at ¶ 3; *United States v. Booker* (2005), 543 U.S. ____ (holding that "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.") Thus, appellant did not have a constitutional right to have the facts supporting the findings essential to his non-minimum, consecutive sentences determined by a jury. See *Dickson*, supra. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 79} On the basis of all of the foregoing, the judgments of conviction are affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Wood County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

William J. Skow, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
