

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

State of Ohio

Court of Appeals No. L-11-1172

Appellee

Trial Court No. CR0201001852

v.

Jason Craighead

DECISION AND JUDGMENT

Appellant

Decided: July 6, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Louis E. Kountouris, Assistant Prosecuting Attorney, for appellee.

Jayson A. Taylor, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that denied appellant's motion to withdraw his plea of no contest to two counts of

felonious assault with a firearm specification. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} The following undisputed facts are relevant to the issues raised on appeal. On May 14, 2010, appellant was indicted on five counts of felonious assault in violation of R.C. 2903.11(A)(2), each with a firearm specification pursuant to R.C. 2941.145. Appellant posted bond and was released. The trial court granted appellant funds of up to \$1,000 in order to hire an investigator.

{¶ 3} On November 2, 2010, after trial had been continued twice at appellant's request, the matter came on for jury trial. At that time, appellant entered a plea of no contest to one count of felonious assault with a firearm specification and one count of felonious assault without the specification. The state agreed to request a nolle prosequi to the remaining three counts of felonious assault and the remaining four firearm specifications. Sentencing was set for December 27, 2010, and bond was continued. When appellant failed to appear for two pre-sentencing interviews during November, a capias warrant was issued although later withdrawn by the court.

{¶ 4} Appellant failed to appear for sentencing on December 27, 2010. Another capias was issued and bond was reset at \$250,000. When appellant was arrested in Michigan, he posted bond and resisted extradition. He eventually was extradited and returned to Toledo, Ohio, on June 8, 2011. Sentencing was rescheduled for June 17, 2011, but on June 13, 2011, appellant orally moved to withdraw his plea. A written motion was submitted the following day and the state subsequently filed a motion in

opposition. In support of his motion, appellant asserted that he was not guilty of the crime charged, stating that “another person” claimed responsibility on the night of the shooting during an interview with a detective. Appellant did not provide any other details in support.

{¶ 5} At the oral hearing on the motion, the trial court heard arguments from counsel. Appellant did not testify or offer the testimony of witnesses. When the trial court questioned appellant, who was not under oath, appellant stated that he missed his sentencing date due to being hospitalized and admitted that once he was released from the hospital he failed to notify his attorney of his situation. Appellant further acknowledged that he did not return to Ohio voluntarily. He then stated that his plea had been entered under duress.

{¶ 6} The trial court denied appellant’s motion, finding that appellant had known that his girlfriend (sometimes referred to in the record as his wife) had told the police that she shot the two victims, that appellant had the benefit of two attorneys and a private investigator, that since his trial date had been continued twice he had ample opportunity to weigh the pros and cons of his plea, and that he had not shown a valid reason to withdraw it.

{¶ 7} Appellant now sets forth the following assignments of error:

- I. Denial of Defendant’s Motion to Withdraw Plea Was Abuse of Discretion by Trial Court.
- II. Appellant’s attorney offered Ineffective assistance of counsel.

III. Post *State v. Foster* violation of the Separation of Powers.

{¶ 8} In support of his first assignment of error, appellant asserts that the trial court abused its discretion by refusing to allow “a person who may be innocent or may have a defense” to withdraw his no contest plea. Appellant argues that granting the motion would not have prejudiced the prosecution, that trial counsel was ineffective for failing to present any evidence other than appellant’s own testimony, and that the state did not consider that he “might actually be not guilty or had a defense.”

{¶ 9} Pursuant to Crim.R. 32.1, a motion to withdraw a plea of guilty or no contest may be made before sentence is imposed. The rule does not provide guidelines for presentence withdrawal of a guilty plea; however, generally, courts hold that the decision to grant or deny such a motion is within the sound discretion of the trial court. *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992). The Supreme Court of Ohio directed in *Xie* that the trial court conduct a hearing on such motions “to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.” *Xie* at paragraph one of syllabus.

{¶ 10} It is well-established that the denial of a Crim.R. 32.1 motion cannot be reversed absent demonstration it was unreasonable, arbitrary or unconscionable. *Xie*, *supra*, at paragraph two of the syllabus. Further, this court is mindful that there is no absolute right to withdraw a plea prior to sentencing. *Xie* at paragraph one of syllabus. In accordance with the abuse of discretion standard of appellate review, the focus on appeal centers upon an examination of the underlying evidentiary hearing in which

appellant failed to persuade the trial court that he possessed a legitimate argument in support of the motion to withdraw his plea.

{¶ 11} This court must weigh several factors in determining whether a trial court abused its discretion by denying a pre-sentence motion to withdraw a guilty plea. Those factors include:

(1) whether the prosecution would be prejudiced if the plea was vacated;
(2) whether the accused was represented by highly competent counsel;
(3) whether the accused was given a full Crim.R. 11 hearing; (4) whether a full hearing was held on the motion; (5) whether the trial court gave full and fair consideration to the motion; (6) whether the motion was made within a reasonable time; (7) whether the motion set forth specific reasons for the withdrawal; (8) whether the accused understood the nature of the charges and possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense to the crime. *State v. Lawhorn*, 6th Dist. No. L-08-1153, 2009-Ohio-3216, citing *State v. Eversole*, 6th Dist. Nos. E-05-073, E-05-074, E-05-075, and E-05-076, 2006-Ohio-3988, ¶ 13, citing *State v. Fish*, 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1995).

{¶ 12} We note first that appellant did not argue in the trial court that he was not given a full and adequate Crim.R. 11 hearing, that he did not understand the nature of the charges, or that he was not represented by competent counsel when he entered his plea. Appellant's primary argument from the outset has been that it is possible he is not guilty

or has a complete defense to the charges against him. Appellant argues that his girlfriend, who was with him at the time of the shooting, claimed responsibility. Appellant asserts that his girlfriend's statement presents competent, credible evidence that he may not be guilty. Additionally, appellant now argues that the state would not be prejudiced if his plea were withdrawn and that he did not receive adequate legal representation when he entered his plea.

{¶ 13} The trial court noted at appellant's motion hearing that he had absconded to Michigan and was not present for his sentencing hearing on December 27, 2010, the date of his sentencing. Appellant claimed that he was hospitalized in Michigan from December 26 until December 28 and admitted he did not contact the trial court when he was released. It is undisputed that appellant was arrested in Michigan under a warrant out of the trial court on January 29, 2011, and remained in Michigan until June 2011, when he was transferred to Ohio. Appellant stated that he did not return to Ohio until June because he was "fighting extradition." Appellant admitted that from December 27, 2010, until June 2011 he did nothing proactive to withdraw his plea.

{¶ 14} At the conclusion of the motion hearing, the trial court summarized its decision in part as follows:

[A]ll of the facts that we talked about this morning were known to the defendant before he entered this plea. He knew at that time that * * * the wife had made this statement * * * that she was the shooter.

* * *

[T]here was no surprise here. You were given opportunity. The Court provided money for you to hire a private investigator. You were given two – benefit of two counsel in this case, Mr. McManus and Mr. Walz. You had two – at least two previous trial dates. Mr. Kountouris said three, and I’m not going to dispute that. It’s just I recall certainly two. And I think that you had ample opportunity to weigh the situation, weigh the pros and cons and make a level-headed decision. And I think that’s what you did. And so I am going to deny the motion to withdraw your plea.

{¶ 15} The trial court concluded that appellant made a calculated decision to enter his plea after weighing relevant factors as well as the state’s evidence, choosing not to have a trial which would have allowed him to present his evidence to a jury. When appellant said during his motion hearing that he had been under duress, “scared” and “confused” at the time he entered his plea, the trial court orally reviewed the transcript of the plea hearing, specifically noting the portions of the colloquy where, in response to the court’s inquiry, he stated that he felt that he was lucid, understood what was going on and had given the plea his “considerable thought.” The judge stated that she thought appellant “had ample opportunity at that point to tell the Court that you were confused.”

{¶ 16} We have reviewed the record and conclude that the trial court did not abuse its discretion in overruling the motion to withdraw appellant’s no contest plea. The record reflects that appellant claimed he initially said he was the shooter out of a desire to protect his girlfriend. Apparently, sometime thereafter appellant decided he would rather

profess innocence. However, a change of heart alone, which is what this appears to be, is not a basis for withdrawing a guilty or no contest plea. *State v. Gonzales*, 6th Dist. Nos. WD-06-084 and WD-06-085, 2007-Ohio-3565, ¶ 23; *State v. Lambros*, 44 Ohio App.3d 102, 103, 541 N.E.2d 632 (8th Dist.1988).

{¶ 17} Under the circumstances presented in this case, including the prejudice that the state clearly would suffer by granting the motion, we find that appellant failed to establish a legitimate and reasonable basis for withdrawing his plea. The trial court did not abuse its discretion by overruling the motion to withdraw and, accordingly, appellant's first assignment of error is not well-taken.

{¶ 18} In support of his second assignment of error, appellant asserts that he was denied effective assistance of counsel. Appellant argues that counsel was ineffective for failing to call any witnesses or present any evidence to support his claim of innocence. However, we believe the several arguments appellant offers in support of this claim come under the realm of trial strategy. At the time of the motion hearing, it was not known whether appellant's girlfriend was available and, if she had been, whether she would have been willing to testify on appellant's behalf, thereby incriminating herself. The record reflects that the state was prepared to call a long list of witnesses, several of whom were victims, and other eyewitnesses to the shooting. Trial counsel in this case was faced with what appeared to be a very strong case against appellant. Further, at appellant's plea hearing, appellant was asked whether he had an opportunity to consult with his attorney

regarding the state's evidence, his possible defense and his plea. Appellant responded that he had, and said he was satisfied with his attorney's consultation.

{¶ 19} *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), sets forth the standard for judging ineffective assistance claims: "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-688. Furthermore, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

{¶ 20} Applying the first prong, we find that appellant has not shown that counsel's representation fell below an objective standard of reasonableness. Because appellant fails to satisfy the first prong as set forth above, no further review is warranted. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 21} As his third assignment of error, which is supported by only three sentences, appellant refers to "[t]he Separation of Powers as established by our National and State constitution" and states that "the state judicial branch does not have legislative authority." Appellant does not articulate a specific claimed error relevant to said separation of powers, explain how those statements are relevant to his appeal, or provide any reference to the record in support of this assignment of error. Pursuant to App.R. 12(A)(2), where an appellant does not argue an assignment of error it need not be

considered by the reviewing court. *See also City of Toledo v. Moore*, 6th Dist. No. L-02-1288, 2003-Ohio-2362, ¶ 55, citing *Hawley v. Ritley*, 35 Ohio St.3d 157, 159, 519 N.E.2d 390 (1988). Accordingly, appellant's third assignment of error is not well-taken.

{¶ 22} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

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.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>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.</p>
