[Cite as *State v. Cherry*, 2013-Ohio-2596.]

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

State of Ohio	Court of Appeals No. E-10-045
Appellee	Trial Court No. 2008-CR-686
v.	
John D. Cherry, Sr.	**DECISION AND JUDGMENT**
Appellant	Decided: June 21, 2013

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Dan M. Weiss, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of conviction and sentence entered by the Erie County Court of Common Pleas after defendant-appellant, John D. Cherry, Sr. pled guilty to one count of attempted felonious assault. Appellant now challenges that judgment through the following assignments of error:

A. The trial court erred in denying appellant's pre-sentence motion to withdraw his plea of guilty in case No. 2008-CR-686.

B. The court committed reversible error by participating in plea negotiations and off record discussions with appellant.

{¶ 2} Appellant was indicted on December 10, 2008, and charged with one count of felonious assault with a physical harm specification and one count of tampering with evidence. Upon arraignment, appellant entered a plea of not guilty. On April 8, 2009, appellant was indicted and charged with two additional charges, aggravated burglary and aggravated robbery, both with physical harm specifications, in relation to the same incident that prompted the original charges. Upon arraignment on the additional charges, appellant again entered pleas of not guilty.

{¶ 3} On February 12, 2010, in open court, appellant withdrew his previous not guilty pleas and entered a plea of guilty to one count of attempted felonious assault in violation of R.C. 2903.11(A)(1) and 2923.02, a third degree felony. In exchange for appellant's guilty plea, the state agreed to dismiss all remaining charges and specifications. In addition to the plea in this case, appellant, through his attorney, agreed to admit to a probation violation in case No. 2006-CR-250 and to waive a hearing in that case. Appellant also agreed to serve a three-year prison sentence in this case, which would run concurrent to the sentence for the probation violation in case No. 2006-CR-250.

{¶ 4} On April 29, 2010, appellant filed a motion to withdraw his guilty plea. Appellant asserted that he had entered the plea because he had been told by the court and prosecutor that if he did not enter the plea, his probation would be revoked in case No. 2006-CR-250 and he would be sent to prison in that case on the Tuesday following the plea hearing. Evidently, due to other charges pending in Sylvania Municipal Court, appellant had violated his probation in case No. 2006-CR-250. Appellant claimed, however, that his probation officer told him that she was not going to recommend that he be charged with a probation violation in that case. Had he known that he would not be charged with a probation violation in case No. 2006-CR-250, appellant asserted, he would not have entered the plea in this case. The state responded that appellant's plea had been knowing, voluntary and intelligent and that the record from the plea hearing demonstrated that no one forced appellant to enter the plea.

{¶ 5} On August 19, 2010, the lower court held a hearing on appellant's motion to withdraw. Following arguments from counsel, the court denied the motion. The court also denied appellant's counsel's request to allow appellant to testify. The court found that appellant's guilty plea was entered in compliance with Crim.R. 11. The court further determined that the probation officer's comments to appellant were irrelevant because ultimately whether appellant had violated his probation in case No. 2006-CR-250 was the court's decision. The court then proceeded to sentence appellant to the agreed upon term, three years in prison, and ordered that that sentence run concurrent to the time he had remaining in case No. 2006-CR-250.

{¶ 6} We will first address appellant's second assignment of error, in which he asserts that the lower court committed reversible error by participating in plea negotiations and off-the-record discussions with appellant. Appellant contends that the lower court's participation made his plea involuntary and created in his mind the belief that he could not receive a fair trial.

{¶ 7} In Ohio, although a judge's participation in plea negotiations is strongly discouraged, such participation does not per se render a plea invalid under the Ohio and United States Constitutions. *State v. Byrd*, 63 Ohio St.2d 288, 293, 407 N.E.2d 1384 (1980). Rather, the court in *Byrd* held that "[a] trial judge's participation in the plea bargaining process will be carefully scrutinized to determine if it affected the voluntariness of the defendant's plea." *Id.* at the syllabus. A judge's participation in negotiations affects a guilty plea when: the judge conveys a message to the defendant that going to trial would be futile; the judge implies that sentencing after a trial would be greater than sentencing if the defendant pleads guilty; or the judge goes to great lengths to intimidate a defendant into accepting a guilty plea. *State v. Lutchey*, 6th Dist. No. WD-03-094, 2004-Ohio-4847, ¶ 11, citing *Byrd*, at 292-293.

{¶ 8} In the proceedings below, the case proceeded to the sentencing hearing on August 19, 2010, at which time the court also addressed appellant's motion to withdraw his guilty plea. Appellant's counsel argued that appellant should be permitted to withdraw his plea because, prior to entering the plea he had been led to believe, in off-the-record discussions, that if he did not enter the guilty plea in this case his probation

would be revoked in a different case four days later and he would be sentenced to three years in prison on that probation violation. Counsel expressly argued that "[n]o plea should be entered – accepted by a Court when the Court is aware that it was a [sic] either/or choice. * * * He has a right to both to enter a not guilty plea and to still have a revocation hearing and that's – that's what the law – the law states as we have cited." The court responded:

> Well, as I recall, the matter was set for trial on the following Monday so I spent some time with you and Mr. Cherry and Kevin Baxter, the Prosecutor, and I believe Assistant County Prosecutor Jeanne Lippert was present that day. And the whole essence of the conversation, and I talked to John about this, was hey, look, based upon my review of the probable cause letter, I – you could get three years just on your probation violation, and the State is offering you three years on your – all these new charges that would run concurrent to the time that you can get on a probation violation. And he asked me, you know, well, Judge, would you really send me to prison on a probation violation and I said well, most likely I would based upon my review of the probable cause letter that you picked up a bunch of new charges which is a violation of your probation. And so the State's basically giving you a gift by saying, hey, three years on the probation violation, which is pretty much a no-brainer, but we'll run this – all this new time, including attempted felonious – I mean, the charges were attempted – or

were felonious assault, tampering with evidence, aggravated burglary, and aggravated robbery. So – and in looking at the victim's impact statement on one of the – on the felonious, you know, this is – these are serious offenses. So, I understand, again, you know, I've talked to John, you know. I like John. I know he doesn't want to go to prison. I know he's got a lot of family support. But he can just get three years just on his violation and then another, I don't know how many years, at least 20 something on – if he was convicted of these four charges that were pending against him and he agreed – he agreed to three concurrent to the three that he could get. So I think the Court's going to find that it's irrelevant what the probation officer said to him because ultimately it's the Court's decision and I was quite honest with John and you at the plea. And, I mean, my job it to be fair to Mr. Cherry as well as to the State of Ohio. I take that very seriously. I think that you all know that, and I hope you do. And do I like sending people to prison? Absolutely not. But for what he's facing, or could be facing if a jury were to convict him of everything, this is more than a reasonable agreement * * * that was entered into.

{¶ 9} Following further arguments from the parties, including appellant's counsel's request that appellant be allowed to testify as to his reasons for entering the plea, the court continued:

> But * * * don't refer to it as an option. The probation violation hearing was scheduled. And the fact remained that the Court had sufficient grounds to violate Mr. Cherry from his probation and he faced time in that probation violation case. The only thing that we were pointing out to Mr. Cherry was hey, you're looking at three years on your probation violation hearing and in this new case they're offering you three years to run at the same time. That was something that I think any Defendant would consider and should be advised of and he was.

{¶ 10} Appellant's counsel did not contest the lower court's memory of the plea negotiations in which it was involved.

{¶ 11} It is clear from this record that the court limited its role to explaining the severity of the charges appellant was facing. Contrary to appellant's belief, his probation in case No. 2006-CR-250 was going to be revoked, regardless of his plea in this case. The court was merely explaining the value of the deal the state was offering. Nothing about the judge's statements conveyed a message that going to trial would be futile or that sentencing after a trial would be greater than sentencing if appellant pled guilty. Moreover, nothing indicates that the court went to great lengths to intimidate appellant into accepting a guilty plea. In short, we find nothing coercive in the trial court's participation in the plea negotiations and the second assignment of error is not well-taken.

{¶ 12} In his first assignment of error, appellant argues that the lower court committed reversible error by denying his presentence motion to withdraw his guilty plea.

{¶ 13} Generally, a Crim.R. 32.1 presentence motion to withdraw a guilty plea is to be freely and liberally granted, although there is no absolute right to withdraw a plea prior to sentencing. *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992), paragraph one of the syllabus. In *Xie*, the Supreme Court of Ohio directed that a trial court conduct a hearing on such a motion "to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Id*. A trial court's decision granting or denying a presentence motion to withdraw a guilty plea is within the court's sound discretion and will not be reversed on appeal absent an abuse of that discretion. *Id.* at paragraph two of the syllabus. The term "abuse of discretion" implies that the trial court's attitude in reaching its decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 14} In determining whether a trial court abused its discretion in denying a presentence motion to withdraw a guilty plea, a reviewing court weighs a list of factors, including:

> (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. 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 (1st. Dist.1995).

{¶ 15} Finally, a change of heart or mistaken belief about pleading guilty is not a reasonable basis that requires a trial court to permit the defendant to withdraw his guilty plea. *State v. Lambros*, 44 Ohio App.3d 102, 103, 541 N.E.2d 632 (8th Dist.1988).

{¶ 16} Appellant moved to withdraw his guilty plea arguing that the plea was involuntary because it was not the product of his free choice. That is, he contends that his options were to plead guilty in the present case and be sentenced to three years in prison, or plead not guilty in the present case and be sentenced to three years in prison in case No. 2006-CR-250, which was scheduled for a hearing on an alleged probation violation four days after the plea hearing in this case. As we explained above, appellant misstates the terms of the plea.

{¶ 17} With regard to the first factor, the state contends it would be prejudiced if the plea were vacated because it would have to assemble witnesses and evidence for a case that was originally indicted in December 2008. Witnesses may no longer be

available to the prosecution and memories of events may no longer be accurate. Under these circumstances, we do find that this factor weighs in favor of the state and that the state would have been be prejudiced if appellant were permitted to withdraw his plea. *See State v. Strong*, 6th Dist. No. WD-08-009, 2009-Ohio-1528; *State v. Baumgartner*, 6th Dist. No. E-07-034, 2008-Ohio-5794.

{¶ 18} As to the second factor, appellant does not assert that his trial counsel was not competent and, upon a review of the record, we find that appellant was represented by highly competent counsel in the proceedings below. Similarly, appellant does not contend that the lower court failed to give him a full Crim.R. 11 hearing and it is clear from our review of that hearing that the court substantially complied with the requirements of Crim.R. 11(C)(2)(a) and (b) and strictly complied with the requirements of Crim.R. 11(C)(2)(c).

{¶ 19} As to factors six and seven, appellant filed his motion to withdraw his plea approximately two and one-half months after entering the plea, and set forth a specific reason for the withdrawal. That reason, however, forces us to question the reasonableness of the timing of the motion. In that motion, appellant asserts:

> Mr. Cherry had been informed by his Probation Officer that she was not going to violate him on the then recent Municipal Court conviction. On Friday, February 12, 2010, when counsel the [sic] defendant met with the Court at an unscheduled conference, Counsel had not confirmed the truth of

that statement. Later, Mr. Cherry's probation officer confirmed that she did tell him that he would not be violated as a result of his plea and conviction. Accordingly, at the time appellant entered his guilty plea, he already knew of his probation officer's position on the probation violation and it appears that his counsel was aware of the statement through appellant, but had not yet confirmed it with the probation officer. That appellant then waited over two months to file the motion to withdraw his guilty plea does not weigh in his favor.

{¶ 20} The crux of appellant's argument relates to the fourth and fifth factors to be weighed. Appellant asserts that because the lower court denied his request to testify at the hearing on his motion to withdraw, he was not given a full hearing on the motion and the court did not give his motion full and fair consideration.

{¶ 21} In *Eversole, supra*, 6th Dist. Nos. E-05-073, E-05-074, E-05-075, E-05-076, 2006-Ohio-3988, at ¶ 14, we discussed these factors and the type of hearing necessitated by a motion to withdraw a guilty plea:

> While the *Xie* court failed to specifically set forth what type of hearing is required, it is axiomatic that such hearing must comport with the minimum standards of due process, i.e., meaning notice and opportunity to be heard. See *Fuentes v. Shevin* (1972), 407 U.S. 67, 80. However, *Xie* does not require that a full evidentiary hearing be held in all cases. See *State v. Mercer* (Jan. 14, 2000), 6th Dist. Nos. L-98-1317, L-98-1318; *State v. Smith* (Dec. 10, 1992), 8th Dist. No. 61464. The scope of a hearing on an

appellant's motion to withdraw his guilty plea should reflect the substantive merits of the motion. *Smith; State v. Mitchell* (Nov. 30, 2000), 6th Dist. No. L-99-1357. "[B]old assertions without evidentiary support simply should not merit the type of scrutiny that substantial allegations would merit. * * * This approach strikes a fair balance between fairness for an accused and preservation of judicial resources." *Smith*; see also, *State v. Graham* (Dec. 23, 1996), 4th Dist. No. 95 CA 22.

{¶ 22} While the court below did not permit appellant to testify, a review of the record reveals that the substantive merits of appellant's motion were fully addressed at the hearing. Appellant's counsel fully explained appellant's position that his plea had not been voluntary because appellant believed his probation would be revoked if he did not plead guilty. The court listened to the parties' arguments on the motion, explained its recall of the earlier hearing, as we noted above, and denied the motion to withdraw. On this record, we find that the lower court gave appellant's motion a hearing that comported with the minimum standards of due process and that the court gave his motion full and fair consideration.

{¶ 23} Finally, appellant contends that he had a valid defense to the charge and was not guilty of the allegation. In his motion to withdraw, appellant asserted that he wished to submit to a polygraph test. With regard to the ninth factor,

the trial court must determine whether the claim of innocence is "anything more than the defendant's change of heart about the plea agreement." *State*

v. Kramer, 7th Dist. No. 01-C.A.-107, 2002-Ohio-4176, ¶ 58. "A change of heart or mistaken belief about pleading guilty is not a reasonable basis for withdrawal of a guilty plea." *State v. Smith*, 8th Dist. No. 94419, 2010-Ohio-5784, ¶ 9. "When none of the *Fish* factors weigh heavily in the defendant's favor regarding the presentence withdrawal of a guilty plea, a strong inference arises that the plea is being withdrawn merely because of a change of heart about entering the plea." *State v. Moore*, 7th Dist. No. 06 CO 74, 2008-Ohio-1039, ¶ 13. *State v. Jones*, 7th Dist. No. 09 MA 50, 2011-Ohio-2903, ¶ 20.

{¶ 24} Other than appellant's assertion of innocence, there is nothing in the record to support appellant's claim. We therefore cannot find that this factor weighs in appellant's favor.

{¶ 25} Having reviewed the record in this case and weighed the nine factors set forth in *Fish*, *supra*, 104 Ohio App.3d 236, 661 N.E.2d 788, we conclude that the trial court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea. The first assignment of error is not well-taken.

{¶ 26} On consideration whereof, the court finds that the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal 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