

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

State of Ohio

Court of Appeals No. WD-12-065

Appellee

Trial Court No. 2011CR0673

v.

David Phillips

DECISION AND JUDGMENT

Appellant

Decided: October 25, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Aram Ohanian and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Jeffrey P. Nunnari, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, David Phillips, appeals from his conviction for passing bad checks in the Wood County Court of Common Pleas. For the reasons that follow, we affirm in part and reverse in part.

{¶ 2} Appellant was indicted on December 12, 2011, for one count of passing bad checks in violation of R.C. 2913.11(B) and a felony of the fourth degree. On September 25, 2012, he pled guilty to the indictment and was found guilty.

{¶ 3} Before sentencing, on September 28, 2012, appellant filed a motion to withdraw his plea. The state filed a memorandum in opposition. A hearing commenced on October 12, 2012. The court denied appellant's motion on October 16, 2012. On November 8, 2012, he was sentenced to five years community control. Appellant now appeals setting forth the following assignments of error:

I. The trial court erred as a matter of law and abused its discretion to the prejudice of appellant when it refused to allow him to withdraw his previously tendered plea of guilty.

II. The trial court erred to the prejudice of appellant when it failed to properly inform him that community service could be imposed if he failed to pay the court costs as ordered.

{¶ 4} In his first assignment of error, appellant contends that the court erred in denying his motion to withdraw his guilty plea.

{¶ 5} 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).

{¶ 6} 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: 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, quoting *State v. Fish*, 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1st Dist.1995).

{¶ 7} 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), *State v. Cherry*, 6th Dist. Erie No. E-10-045, 2013-Ohio-2596.

{¶ 8} Appellant testified that on June 8, 2012, he met with his attorney who informed him that he needed \$38,000 to resolve his case. Because he did not have the

money, he decided to go to trial. In the days leading up to the trial date, appellant testified, he attempted to discuss his defense with his attorney but his attorney did not seem interested. Appellant provided his attorney with a list of witnesses he thought would be helpful in his defense. Two days before his scheduled trial date, appellant met with his attorney for approximately an hour. Appellant testified that his attorney told him that based on the testimony of two of his witnesses, he would be acquitted. His attorney then told him to meet him at court, the day of trial “around” 9:00 a.m.

{¶ 9} Appellant testified that on the day of trial he arrived at the court at 9:15 a.m. He could not find his attorney. At approximately 9:30 a.m., he went to the fourth floor courtroom where he found his attorney. His attorney told him that the judge was mad because appellant was late. When the judge took the bench, he threatened to hold appellant in contempt for being late. Appellant testified that he was “stunned” and that he felt like his attorney had set him up. His attorney then told him that his witnesses could not be used and he urged appellant to plead guilty. Appellant testified that because of the stress of finding out he would not be acquitted and threatened with contempt, he did not enter his guilty plea voluntarily and he did not believe his attorney effectively represented him.

{¶ 10} Crim.R. 11(C)(2) provides:

In felony cases the court may refuse to accept a plea of guilty * * *
and shall not accept a plea of guilty * * * without first addressing the
defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty * * *, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant of and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶ 11} The transcript of appellant's plea hearing shows that appellant answered affirmatively when asked if he was entering his guilty plea voluntarily. He indicated he understood the nature of the charge and the maximum penalties involved. He admitted to the truth of the facts the state put on the record. He stated he understood that by pleading guilty he was waiving his right to a trial by jury and his right to call witnesses. He stated that no one had forced him to enter the plea through force or promises. Finally, he

answered affirmatively when asked if he was satisfied with his attorney. While the court did not inform appellant that his sentence could be immediately imposed, appellant suffered no prejudice as the court scheduled sentencing for a later date.

{¶ 12} In denying appellant’s motion to withdraw his plea, the court stated that “[T]his is clearly a case of buyer’s remorse.” The court noted that appellant failed to appear for his initial arraignment date, finally appearing four months later. Appellant backed out of one plea arrangement before demanding a jury trial. On the day of his jury trial, with 35 potential jurors waiting, the court noted that appellant was 70 minutes late. As for the atmosphere in the court once appellant agreed to a plea, the court recalled that all parties patiently waited while appellant and his counsel went over the agreement. In conclusion, the court specifically found appellant’s testimony “to not be credible.” Such is the discretion of the trial court. Based on the foregoing, we find no abuse of discretion. Appellant’s first assignment of error is found not well-taken.

{¶ 13} In his second assignment of error, appellant contends that the court erred in failing to inform him, pursuant to R.C. 2947.23, that community control could be imposed if he failed to pay his court costs.

{¶ 14} Appellant was sentenced under the former version of R.C. 2947.23¹ which states in pertinent part:

¹ The statute has since been amended. Pursuant to 2012 Sub.H.B. No. 247, effective March 22, 2013, R.C. 2947.23(A)(1)(a) requires that a defendant be notified that community service might be required for failure to pay court costs only when “the judge or magistrate imposes a community control sanction or other nonresidential sanction.”

In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

(i) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

(ii) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

{¶ 15} This court has held:

[t]he appropriate remedy for such failure is to reverse the trial court's sentence solely as it relates to the imposition of court costs, and to remand

the cause for the limited purpose of allowing the trial [court] to give proper notification pursuant to R.C. 2947.23(A) with a concomitant opportunity for the defendant to object. *State v. Griffin*, 6th Dist. Lucas No. L-11-1283, 2013-Ohio-411, ¶ 51.

{¶ 16} We have reviewed the transcript from the sentencing hearing. We agree that the trial court did not properly inform appellant that his failure to pay costs could result in extra community service hours being imposed upon him. Therefore, we remand the case back to the trial court for the limited purpose of resentencing appellant and providing him with proper notification pursuant to R.C. 2947.23(A)(1). *State v. Rosino*, 6th Dist. Wood No. WD-12-038, 2013-Ohio-3373. Appellant's second assignment of error is found well-taken.

{¶ 17} On consideration whereof, we affirm appellant's conviction and reverse that portion of the November 8, 2012 judgment of the Wood County Court of Common Pleas as it relates to the imposition of costs. We remand the case for the limited purpose of allowing the trial court to give proper notification pursuant to R.C. 2947.23(A)(1) with the accompanying opportunity for appellant to object. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed in part
and reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, 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>.