

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

State of Ohio

Court of Appeals No. S-13-031

Appellee

Trial Court No. 13 CR 169

v.

Taemar I. McDonald

DECISION AND JUDGMENT

Appellant

Decided: May 15, 2015

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Loretta Riddle, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of conviction and sentence entered by the Sandusky County Court of Common Pleas following that court's denial of defendant-appellant Taemar McDonald's motion to withdraw her guilty pleas. Appellant challenges that judgment through the following assignments of error:

Assignment of Error No. I

The trial court erred when it denied appellant's motion to withdraw her plea prior to sentencing.

Assignment of Error No. II

The trial court erred and prejudiced appellant when it forced her to proceed without counsel on her pro se motion to withdraw her plea and the corresponding hearing; thereby denying her a full hearing and full and fair consideration on her motion.

Assignment of Error No. III

Appellant received constitutionally ineffective assistance of counsel when her trial counsel failed to request a continuance in order for her to obtain counsel to represent her on her pro se motion to withdraw her plea and then failed to represent her on said motion and corresponding hearing.

{¶ 2} On March 7, 2013, appellant was indicted and charged with one count of felonious assault in violation of R.C. 2903.11(A)(1), a second degree felony, and two counts of child endangering in violation of R.C. 2919.22(B)(1), also second degree felonies. The victims of the offenses were appellant's two children, one of whom suffered extensive and life-threatening injuries. Appellant initially entered pleas of not guilty to all charges. Subsequently, her court-appointed attorney filed a motion for a competency evaluation and a motion for leave to file a plea of not guilty by reason of insanity ("NGRI"). In response, the court ordered the Court Diagnostic and Treatment

Center to conduct separate evaluations to determine appellant's competence to stand trial and her mental condition at the time of the commission of the offenses. Following that evaluation, the case proceeded to a competency hearing before the court below. The report concluded that appellant was both competent to stand trial and was not mentally impaired or NGRI. Appellant's counsel stipulated to the report's findings and concluded that an NGRI plea would not be plausible.

{¶ 3} On August 27, 2013, the parties appeared in open court and informed the court that they had reached a plea agreement. Under the terms of the agreement, appellant withdrew her prior pleas and entered pleas of guilty to one count of felonious assault, a second degree felony, and one count of attempted child endangering, a third degree felony. In exchange, the state agreed to move to dismiss the child endangering charge set forth in Count 2 of the indictment. The state did not make any agreement as to a sentencing recommendation. Before accepting appellant's guilty pleas, the court conducted a thorough Crim.R. 11 hearing. The court then found that appellant made a knowing, voluntary and intelligent waiver of her rights, accepted her guilty pleas, found her guilty of the two offenses, and referred the matter to adult probation for a presentence investigation.

{¶ 4} A sentencing hearing was set for September 30, 2013. Several days before that date, however, appellant's counsel filed a motion for a continuance. Counsel asserted that appellant had contacted him and wished to withdraw her pleas and, therefore, requested a continuance of the sentencing date. The court denied the request

for a continuance. At the sentencing hearing, however, the court first heard appellant's motion to withdraw her guilty pleas. Upon the court's inquiry, appellant explained her reasons for the motion as follows:

Um, well, Your Honor, at the time that I was, um, that I took the plea, I feel as though I was not in the right frame of mind, for one; and, for two, Your Honor, I got to talking to a few people, and, um, I'm really not happy with my – with Mr. Ickes' representation of me. I don't feel like he, you know, worked as hard as he should have, and, um, at this point I am asking to withdraw my plea, and, um, my plans would be to, um, buy – buy a lawyer and – and see where I can go from there.

{¶ 5} The court then proceeded with a hearing on appellant's motion. Initially, however, appellant's trial counsel sought to withdraw as counsel, citing appellant's dissatisfaction with his representation. Upon questioning by the court, appellant stated that she felt Ickes had not spent enough time with her when she asked him questions. She then stated that in her opinion, a paid attorney would be better than a court-appointed attorney and she wanted to hire an attorney to see if she could get a better outcome. She had not yet, however, hired a new attorney, had anyone in mind, or knew what one would cost. On the issue of her frame of mind when entering her pleas, appellant simply stated that she was under a lot of pressure at that time.

{¶ 6} Upon consideration, the court denied the motion. Before proceeding to sentencing however, the court addressed appellant's counsel's motion to withdraw.

Counsel assured the court that he was prepared to represent appellant at sentencing. The court then explained to appellant that unless she could articulate a more concrete reason to discharge counsel, she would not allow counsel to withdraw at that point in the proceeding. Appellant did not present any additional reasons for the motion and the court proceeded to sentence appellant to eight years in prison on the felonious assault charge and 36 months on the child endangering charge. The court further ordered the terms to be served consecutively. Appellant now appeals.

{¶ 7} Appellant's first and second assignments of error are related and will be discussed together. Appellant asserts that the lower court erred in denying her presentence motion to withdraw her guilty pleas and in forcing her to proceed pro se on that motion, thereby denying her full and fair consideration of the motion.

{¶ 8} 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 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).

{¶ 9} 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. Erie 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).

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 her guilty plea. *State v. Lambros*, 44 Ohio App.3d 102, 103, 541 N.E.2d 632 (8th Dist.1988).

{¶ 10} Appellant's arguments focus on the second, fourth and fifth factors cited above. She asserts that she was forced to proceed without counsel at the hearing on the motion. As such, she contends that she was not afforded a full hearing on her motion and that the court did not give full and fair consideration to the motion.

{¶ 11} In *Eversole, supra*, at ¶ 14, we discussed the fourth and fifth 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.

{¶ 12} On the issue of trial counsel's participation in the hearing on appellant's motion to withdraw, counsel directed the court to *Xie*, and indicated that appellant's dissatisfaction with his representation was a sufficient reason to allow her to withdraw her pleas. Counsel then stated that he would allow appellant to elaborate. Upon direct questioning by the court however, appellant could not articulate a reason that would justify dismissing Mr. Ickes from the case and appointing new counsel, or allowing her to withdraw her pleas. Rather, appellant simply stated that her parents thought she should withdraw her pleas and did not believe Mr. Ickes had worked hard enough. Appellant also expressed her belief that a paid attorney would get her a better deal than a court-appointed attorney. Appellant did not present any evidence in support of these assertions. It is noteworthy that appellant was facing charges that exposed her to up to 16 years in prison. Her trial counsel negotiated a plea agreement under which she could receive 2 to 8 years on the felonious assault charge and 9 to 36 months on the attempted child endangering charge, or no more than 11 years total. There is nothing in the record to suggest that appellant was not represented by competent counsel in the proceedings below.

{¶ 13} The court further examined appellant's assertion that she was not in her right frame of mind when she entered her plea. Other than claiming she was under a lot of pressure at the time, appellant again could not articulate how her frame of mind interfered with her ability to enter a knowing, intelligent and voluntary plea. The court

reiterated that appellant had undergone a psychological evaluation and was found to be both competent to stand trial and sane at the time of the offenses.

{¶ 14} Upon a complete review of the record, it is clear that the lower court held a hearing on appellant's motion to withdraw her guilty pleas and that the hearing did comport with the minimum standards of due process. Appellant was given ample opportunity to explain her reasons for wanting to withdraw her pleas. Her reasons were insufficient.

{¶ 15} Regarding the remaining *Fish* factors, although the motion was made within a reasonable time and the prosecution would not likely have been prejudiced had the pleas been set aside, these are only two factors that weigh in appellant's favor. Appellant was provided a full Crim.R. 11 hearing when she entered her pleas, she clearly understood the nature of the charges and possible penalties, and, as discussed above, she did not set forth specific reasons for the withdrawal in her motion. Finally, although she asserts in her brief before this court that she suffered from postpartum depression at the time of offenses, as stated above, she was given a full psychological evaluation earlier in the proceedings. Moreover, at the hearing below, although she asserted that she was not in her right mind and was under pressure when she entered her guilty pleas, she made no assertion that she was not in her right mind when she committed the offenses.

{¶ 16} Finding that appellant did not establish a reasonable and legitimate basis to withdraw her guilty pleas, the lower court did not abuse its discretion in denying the motion and the first and second assignments of error are not well-taken.

{¶ 17} In her third assignment of error, appellant asserts that her trial counsel was ineffective in representing her in the proceedings below.

{¶ 18} The standard for determining whether a trial attorney was ineffective requires appellant to show (1) that the trial attorney made errors so egregious that the trial attorney was not functioning as the “counsel” guaranteed appellant under the Sixth Amendment, and (2) that the deficient performance prejudiced appellant’s defense. *Strickland v. Washington*, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Furthermore, a court must be “highly deferential” and “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” in reviewing a claim of ineffective assistance of counsel. *Id.* at 689. A properly licensed attorney in Ohio is presumed to execute his duties in an ethical and competent manner. *State v. Hamblin*, 37 Ohio St.3d 153, 155-156, 524 N.E.2d 476 (1988).

{¶ 19} Appellant contends that her trial counsel was ineffective in not properly representing her at the hearing on her motion to withdraw her guilty pleas and in not seeking a continuance so that appellant could obtain new counsel to pursue appellant’s motion to withdraw her guilty pleas.

{¶ 20} We first note that trial counsel filed a motion for a continuance of the sentencing on September 26, 2013, citing appellant’s desire to withdraw her pleas as a reason for the request. The court denied the motion. Then, at the hearing, counsel informed the court that appellant wished to be heard on her request. In addition, counsel

cited to *Xie* and argued on appellant's behalf that her dissatisfaction with him was an adequate reason for the request to withdraw the plea. Nevertheless, despite the court's questioning appellant from several angles, in an attempt to understand her dissatisfaction with counsel, appellant had no real explanation. Under these circumstances, counsel did the only thing he could: he requested to withdraw as counsel. After learning from appellant that she did not have new counsel and likely did not have the funds to hire new counsel, the court denied the motion. Under these circumstances, we cannot say that counsel was ineffective in his representation of appellant at the hearing below. The third assignment of error is not well-taken.

{¶ 21} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Sandusky 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

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.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>
