[Cite as *State v. Gabel*, 2015-Ohio-2803.]

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

State of Ohio	Court of Appeals Nos. S-14-038 S-14-042 S-14-043 S-14-044 S-14-045
Appellee	
v.	
Cory L. Gabel	Trial Court Nos. 12 CR 457 12 CR 458 14 CR 563 13 CR 1023 14 CR 11
Appellant	

DECISION AND JUDGMENT

Decided: July 10, 2015

* * * * *

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

Timothy F. Braun, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Cory Gabel, appeals the judgment of the Sandusky County Court of Common Pleas, which sentenced him to a total term of 90 months in prison following a jury trial. We affirm.

A. Facts and Procedural Background

{¶ 2} The relevant facts in this case are undisputed. On April 19, 2012, Gabel was indicted in case No. 12 CR 457 on one count of domestic violence in violation of R.C. 2919.25(A), a felony of the third degree. On that same day, he was indicted in case No. 12 CR 458 on one count of possession of a deadly weapon while under detention in violation of R.C. 2923.131(B) and one count of illegal possession in a courthouse in violation of R.C. 2923.123(B), felonies of the fifth degree.

{¶ 3} On October 10, 2012, Gabel entered a plea of no contest to an amended charge of domestic violence in case No. 12 CR 457, and also pleaded guilty to possession of a deadly weapon in detention in case No. 12 CR 458. Under the terms of a plea agreement, the domestic violence count was reduced to a felony of the fourth degree and the illegal possession in a courthouse count was dismissed.

{¶ 4} At his subsequent sentencing hearing, the trial court imposed prison sentences of 18 months in case No. 12 CR 457 and one year in case No. 12 CR 458, ordering the two sentences to be served concurrently. However, the trial court suspended the prison sentences and place Gabel on community control for a period of five years in both cases.

{¶ 5} On December 6, 2013, Gabel was indicted in case No. 13 CR 1023 on one count of domestic violence in violation of R.C. 2929.25(A), a felony of the third degree. While case No. 13 CR 1023 was pending before the court, Gabel was once again indicted, in case No. 14 CR 11, on one count of burglary in violation of R.C.

2911.12(A)(2), a felony of the second degree, one count of burglary in violation of R.C. 2911.12(B), a felony of the fourth degree, and one count of violating a protection order in violation of R.C. 2929.27(A)(1), a felony of the third degree. Subsequently, on July 3, 2014, Gabel was indicted in case No. 14 CR 563 on one count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree, and one count of violating a protection order in violation of R.C. 2929.27(A)(1), a felony of the third degree.

{¶ 6} A plea hearing was held for each of the aforementioned cases on July 28, 2014. At the plea hearing, Gabel acknowledged his violation of the terms of his community control in case Nos. 12 CR 457 and 12 CR 458. Further, Gabel entered a plea of guilty to the domestic violence count in case No. 13 CR 1023. In case No. 14 CR 11, Gabel entered a plea of guilty to one count of burglary and one count of violating a protection order. Finally, in case No. 14 CR 563, Gabel pleaded guilty to one count of violating a protection order. Following a Crim.R. 11 colloquy, the trial court accepted Gabel's pleas and scheduled the matter for a sentencing hearing on July 31, 2014.

{¶ 7} On the day of sentencing, Gabel appeared before the trial court with defense counsel, and proceeded to file a pro se motion to withdraw his guilty pleas, asserting that he did not understand the terms of his pleas at the time they were entered. The trial court, upon questioning Gabel, found his stated reason to be lacking in credibility. Rather, the court determined that Gabel's motion was a delay tactic and subsequently denied the motion.

{¶ 8} Following the denial of Gabel's motion to withdraw the guilty pleas, the court recessed for a short time to allow Gabel's family to arrive. When the case was recalled, the trial court revisited Gabel's motion, and the following discussion took place:

> THE COURT: We are set down for sentencing, but prior to sentencing, Mr. Gabel was here and had a Motion to Withdraw his plea. He made an oral motion. Since then, we have filed it, so it's part of the record and in it, it's – I'm not quite sure what you're saying that you didn't understand. It sounds like you're unhappy with your attorney, and I'm not sure what you said you were confused about.
>
> [GABEL]: Just the time and everything, but, I mean, me and [defense counsel] talked about it just a minute ago, so stuff is – was not understood, but we figured it out.
>
> THE COURT: You all right now?
>
> [GABEL]: Yes, ma'am.
>
> THE COURT: Okay. All right. I'll put a motion – should I say that you're withdrawing your motion then or –
>
> [GABEL]: Yes ma'am.

{¶ 9} Following the withdrawal of Gabel's motion, the trial court proceeded to sentencing. Ultimately, the trial court revoked Gabel's community control in case Nos. 12 CR 457 and 12 CR 458, and imposed the 18-month prison sentence in case No. 12 CR 457 (the longer of the two sentences, which were ordered to be served

concurrently). Further, the court imposed prison sentences of 24 months, 12 months, and 36 months in case Nos. 14 CR 11, 13 CR 1023, and 14 CR 563, respectively. The court ordered these sentences to be served consecutively for an aggregate prison term of 90 months. Gabel's timely appeal followed, and these cases have been consolidated for purposes of appeal.

B. Assignments of Error

{¶ 10} On appeal, Gabel raises the following assignments of error:

> 1. THE DEFENDANT'S GUILTY PLEA[S] WERE NOT MADE KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY BECAUSE THE TRIAL COURT FAILED TO DISCUSS THE MAXIMUM PENALTY WITH THE DEFENDANT AS REQUIRED BY CRIMINAL RULE 11(C)(2).
>
> 2. THE TRIAL COURT IMPROPERLY DENIED THE APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEAS.
>
> 3. THE TRIAL COURT DIDN'T COMPLY WITH THE SENTENCING STATUTES WHEN THE COURT IMPOSED THE MAXIMUM SENTENCE IN CASE NO. 14-CR-563.

II. Analysis

A. Guilty Pleas and Crim.R. 11(C)(2)(a)

{¶ 11} In his first assignment of error, Gabel argues that his guilty pleas were not entered voluntarily, knowingly, and intelligently. In particular, he argues that the trial

court failed to comply with Crim.R. 11(C)(2)(a) insofar as it did not discuss the possibility of consecutive sentences during the Crim.R. 11 colloquy.

{¶ 12} Crim.R. 11(C) delineates the requirements for a proper, voluntary plea. *State v. Gonzalez*, 193 Ohio App.3d 385, 2011-Ohio-1542, 952 N.E.2d 502 (6th Dist.). As applicable here, Crim.R. 11(C)(2)(a) provides:

> (C) Pleas of guilty and no contest in felony cases
>
> * * *
>
> (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest 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.

{¶ 13} In *State v. Millhoan*, 6th Dist. Lucas Nos. L-10-1328, L-10-1329, 2011-Ohio-4741, we addressed the argument advanced by Gabel in the present case concerning the trial court's discussion of the possibility of consecutive sentences. In that case, we stated:

As to appellant's assertion that the trial court failed to advise him with respect to "discretionary consecutive penalties," Rule 11 does not require the court to explain that sentences for multiple offenses may be run consecutively. In *State v. Johnson*, 40 Ohio St.3d 130 (1988), syllabus, the Supreme Court of Ohio held, "Failure to inform a defendant who pleads guilty to more than one offense that the court may order him to serve any sentence imposed consecutively, rather than concurrently, is not a violation of Crim.R. 11(C)(2), and does not render the plea involuntary." (Citations omitted). *Id.* at ¶ 32.

{¶ 14} In light of the foregoing, we find that the trial court's failure to expressly inform Gabel that it could order consecutive sentences did not violate the requirements of Crim.R. 11(C)(2)(a). Accordingly, Gabel's first assignment of error is not well-taken.

B. Denial of Motion to Withdraw Guilty Pleas

{¶ 15} In his second assignment of error, Gabel argues that the trial court erred in denying his motion to withdraw his guilty pleas.[1]

{¶ 16} Relevant to Gabel's argument, Crim.R. 32.1 provides: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but

[1] In his appellate brief, Gabel also argues that the trial court failed to comply with Crim.R. 44 by failing to obtain a knowing, voluntary, and intelligent waiver of his right to counsel prior to proceeding with the hearing on the pro se motion to withdraw the guilty pleas. We find no merit to this argument since Gabel was represented by appointed counsel throughout the entire course of these proceedings, including during the hearing on the motion to withdraw the guilty pleas.

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."

{¶ 17} Generally, a presentence motion to withdraw a guilty plea is to be freely and liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992). However, the *Xie* court indicated that a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *Id.* at paragraph one of the syllabus. Rather, "[a] trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Id.* Ohio courts have stated that "[a] mere 'change of heart' is an insufficient basis for permitting a defendant to withdraw his or her guilty plea." *State v. Miller*, 11th Dist. Portage No. 2009-P-0090, 2011-Ohio-1161, ¶ 28.

{¶ 18} Ultimately, "[t]he decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court." *Xie* at paragraph two of the syllabus. Thus, in order to find that the trial court abused its discretion, a reviewing court must find that the court's ruling was "unreasonable, arbitrary or unconscionable." *Id.* at 527.

{¶ 19} In reviewing a trial court's decision regarding a motion to withdraw a plea, we are guided by the following factors first espoused by our sister court in *State v. Fish*, 104 Ohio App.3d 236, 661 N.E.2d 788 (1st Dist.1995): (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. *Id.* at 240.

{¶ 20} As noted in our recitation of the facts, Gabel actually withdrew his motion upon questioning by the court just prior to sentencing. On that basis alone, we find no merit to Gabel's argument that the trial court abused its discretion in denying his motion to withdraw his guilty pleas. However, we reach the same result upon consideration of the *Fish* factors.

{¶ 21} Considering the timeliness of Gabel's motion, we note that the motion was not filed until the day of sentencing. Moreover, although Gabel stated that he did not understand the terms of his pleas at the time they were entered, we find that the trial court reasonably discounted Gabel's reasons given the fact that the terms of the pleas were thoroughly explained during the Crim.R. 11 hearing and contained in the written plea agreements that were signed prior to sentencing. Finally, there was no evidence presented during the course of these proceedings that would lead the trial court to believe that Gabel was innocent of the crimes with which he was charged.

{¶ 22} Having examined the foregoing factors in this case, and in light of Gabel's withdrawal of the motion for withdraw his guilty pleas, we conclude that the trial court

did not abuse its discretion in denying Gabel's motion. Accordingly, Gabel's second assignment of error is not well-taken.

C. Sentencing

{¶ 23} In his third and final assignment of error, Gabel argues that the trial court failed to consider R.C. 2929.11 and 2929.12 prior to imposing the maximum sentence for violating a protection order in case No. 14 CR 563.

{¶ 24} We review felony sentences under the two-prong approach set forth in R.C. 2953.08(G)(2). R.C. 2953.08(G)(2) provides that an appellate court may increase, reduce, modify, or vacate and remand a disputed sentence if it clearly and convincingly finds either of the following:

> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

{¶ 25} While the abuse of discretion standard set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, is no longer controlling in our review of felony sentences, *Kalish* is still useful in determining whether a sentence is clearly and convincingly contrary to law. In that regard, the Supreme Court of Ohio has held that a sentence is not clearly and convincingly contrary to law where the trial court considered the purposes and principles of sentencing under R.C. 2929.11 along with the seriousness

and recidivism factors under R.C. 2929.12, properly applied postrelease control, and imposed a sentence within the statutory range. *Id.* at ¶ 18.

{¶ 26} R.C. 2929.11(A) provides, in relevant part: "The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes * * *." In order to comply with the mandates of R.C. 2929.11, a trial court must impose a sentence that is "reasonably calculated to achieve the two overriding purposes of felony sentencing * * * commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B). In carrying out its obligations to impose a sentence that is consistent with the purposes and principles of sentencing under R.C. 2929.11, the trial court must weigh the factors indicating that the offender's conduct is more serious than conduct normally constituting the offense under R.C. 2929.12(B) against those factors indicating that the offender's conduct is less serious than conduct normally constituting the offense under R.C. 2929.12(C). Further, the court must weigh the factors contained in R.C. 2929.12(D) indicating the likelihood that the offender will commit future crimes against the factors contained in R.C. 2929.12(E) indicating that the offender is not likely to commit future crimes.

{¶ 27} Here, Gabel argues that "[t]he record and the judgment entry are silent on the question whether the court properly considered [R.C. 2929.11 and 2929.12] before

sentencing the appellant." Rather than independently evaluating the facts of this case in light of the principles and purposes of sentencing, Gabel contends that the trial court simply adopted the state's recommended sentence. We disagree.

{¶ 28} At the sentencing hearing, the trial court indicated its consideration of the principles and purposes of sentencing as follows:

> I have to look at protecting the public and also punish the Defendant.
>
> * * *
>
> I also have to look at what is commensurate with the seriousness of the offense and the amount of times it's been repeated. I have to look at not making it demeaning, but I have to look at its impact on the victim and consistent with sentences imposed for similar crimes for similar offenders. I've looked through this, and I'm basically going on the sentence recommendation that you and your counsel worked out with the State. I am not going to deviate from that, and I think that is appropriate in this case * * *.

{¶ 29} Further, the court's compliance with R.C. 2929.11 and 2929.12 is evidenced by the sentencing entries, in which the following language is found:

> The Court finds that it must consider the purposes and principles of sentencing to punish the offender and protect the public from future crime by the offender. The court took into account the Defendant's record and the need to incapacitate the Defendant as well as to rehabilitate him. The

> sentence shall be reasonably calculated and commensurate with, and not demeaning to the seriousness of the offender's conduct and its impact on the victim and consistent with sentences for similar crimes by similar offenders.

{¶ 30} In light of the foregoing, we find no merit to Gabel's contention that the trial court simply adopted the state's recommended sentence without any consideration of the principles and purposes of sentencing under R.C. 2929.11 and 2929.12. Rather, the trial court expressly indicated its consideration of the relevant statutes, and concluded that the recommended sentence was appropriate in light of those statutes. On this record, we do not find that Gabel's sentence is clearly and convincingly contrary to law.

{¶ 31} Accordingly, Gabel's third assignment of error is not well-taken.

III. Conclusion

{¶ 32} For the foregoing reasons, the judgment of the Sandusky County Court of Common Pleas is affirmed. Gabel 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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE