[Cite as *State v. Bridges*, 2006-Ohio-6280.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87633

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ALVIN BRIDGES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-466879

BEFORE: Calabrese, J., Cooney, P.J., and McMonagle, J.

RELEASED: November 30, 2006

JOURNALIZED:

[Cite as *State v. Bridges*, 2006-Ohio-6280.]

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ANTHONY O. CALABRESE, JR., J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records and briefs of counsel.

{¶ 2} Defendant Alvin Bridges (appellant) appeals the court's denial of his pre-sentence motion to withdraw his guilty plea. Appellant also appeals his prison sentence as being unconstitutional. After reviewing the facts of the case and pertinent law, we affirm.

I.

{¶ 3} On June 10, 2005, appellant was indicted for five counts of drug related offenses. On November 28, 2005, appellant pled guilty to one count of drug possession in violation of R.C. 2925.11, a first-degree felony. On January 9, 2006, appellant filed a presentence motion to withdraw his guilty plea, pursuant to Crim.R. 32.1, claiming that when he entered the plea, he was under the mistaken belief that he was eligible for drug treatment or counseling in lieu of part or all of his prison

time. The court held a hearing on appellant's motion on January 11, 2006. On the same day, the court denied appellant's motion and proceeded to sentence him to three years in prison.

II.

{¶ 4} In his first assignment of error, appellant argues that "the trial court erred and abused its discretion in denying the appellant's motion to vacate plea, pursuant to Criminal Rule 32.1, prior to sentencing." Specifically, appellant argues that at the time he entered the guilty plea, he believed that, as a first- time offender, he could participate in drug counseling in exchange for a reduced prison sentence.

{¶ 5} Crim.R. 32.1 governs withdrawals of guilty pleas, and it reads, "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but 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." In *State v. Peterseim* (1979), 68 Ohio App.2d 211, 213, we held that "despite the more lenient standard applicable to pre-sentence motions, an appellate court will reverse a denial of leave to withdraw when the trial court has abused its discretion." It is not an abuse of discretion to deny a presentence motion to withdraw a guilty plea when a defendant: 1) is represented by competent counsel; 2) is given a full Crim.R. 11 hearing before entering a plea; and 3) is given a hearing on the motion to withdraw that plea during which the court considers the defendant's arguments in support of the motion. *State v. Palmer*, Medina App. No. 04CA0027-M, 2004-Ohio-7190; *State*

v. Sabatino (1995), 102 Ohio App.3d 483. In summary, a sufficient reason for the withdrawal must appear on the record and a "mere change of heart" is not reason enough. See *State v. Lambros* (1988), 44 Ohio App.3d 102, 103.

{¶ 6} In the instant case, the record reflects that at the November 28, 2005 hearing when appellant entered his original guilty plea, the prosecutor stated "there is a mandatory jail sentence with crack cocaine of this weight." Furthermore, the court stated to appellant, "this is a mandatory prison term, which means that by entering into this plea, you would be subjecting yourself to a minimum of three years in prison. Do you understand that?" Appellant replied, "Yes." The court went on to state the following: "With that understanding and those potential penalties in this case including the mandatory prison term of a minimum of three years, how do you plead to that charge in count one of the indictment, a charge of drug possession, felony of the first degree?" Appellant replied, "Guilty."

{¶ 7} We have held that "a defendant's mistaken belief or impression regarding the consequences of his plea is not sufficient to establish that such plea was not knowingly and voluntarily made." *Sabatino*, supra, at 486. Although defense counsel admits that he told appellant he may be eligible for a reduced sentence, this does not change the fact that appellant was told in open court at least three times that he was facing a mandatory minimum of three years in prison. The instant case falls squarely within the rule carved out by *Sabatino*. Accordingly, we

find that the court did not abuse its discretion in denying the motion to withdraw guilty plea, and appellant's first assignment of error is overruled.

III.

{¶ 8} In his second and final assignment of error, appellant argues that "Mr. Bridges' sentence was handed-down in contravention of his Sixth Amendment right to trial by jury; as such, Mr. Bridges is entitled to a new [sentencing] hearing according to *State v. Foster*."

{¶ 9} In *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court found that several provisions of S.B. 2 violate *Blakely v. Washington* (2004), 542 U.S. 269. Specifically, the court held:

> "Ohio's sentencing statutes offend the constitutional principles announced in *Blakely* in four areas. As was reaffirmed by the Supreme Court in *Booker*, 'Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.'"

Foster, supra, at ¶ 82 (citing *United States v. Booker* (2005), 543 U.S. 220, 224).

{¶ 10} The *Foster* court severed R.C. 2929.14(B), 2929.19(B)(2) and 2929.14(E)(4), which govern more than the minimum and consecutive sentences, and rendered them unconstitutional. As a result, the trial court is no longer obligated to follow these mandatory guidelines when sentencing a felony offender. "Where sentencing is left to the unguided discretion of the judge, there is no judicial impingement upon the traditional role of the jury." *Foster*, supra, at ¶ 90.

{¶ 11} In the instant case, the court sentenced appellant to three years in prison for violating R.C. 2925.11(C)(4)(e), which makes possession of 25 to 99 grams of crack cocaine a first-degree felony. When an offender is sentenced for violating R.C. 2925.11(C)(4)(e), the court is required to impose a mandatory prison term. *State v. Thomas*, Allen App. No. 1-04-88, 2005-Ohio-4616. Pursuant to R.C. 2929.14(A)(1), the prison term for a first-degree felony runs from three to ten years. Here, the court imposed a three-year prison sentence, making a finding that the minimum sentence is appropriate in this case. The court made no findings on the record that were used to increase appellant's sentence beyond the sentence he exposed himself to just by a guilty plea or jury verdict. Although appellant argues that he "was sentenced to a term of incarceration that is greater than the minimum and is not concurrent," he is mistaken. *Foster* applies to more than the minimum and/or consecutive sentences - appellant's sentence is neither. Given this, appellant's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR., JUDGE

COLLEEN CONWAY COONEY, P.J., CONCURS;
CHRISTINE T. MCMONAGLE, J., DISSENTS
(SEE SEPARATE DISSENTING OPINION.)

CHRISTINE T. MCMONAGLE, J., DISSENTING:

{¶ 12} Respectfully, I dissent. I would hold that the trial court abused its discretion in denying appellant's motion to withdraw his plea.

{¶ 13} Appellant was advised by the judge twice during the plea hearing that his sentence was "mandatory" and advised once that there was a "presumption of incarceration" attached to his plea. The judge did not define or explain the word "mandatory" nor the words "presumption of incarceration," however. At the conclusion of the plea hearing, appellant was permitted to remain on bail and the court ordered a presentence report.

{¶ 14} Prior to sentencing, counsel came forward, asked to withdraw the plea, and admitted to having misled appellant into believing that as a first-time drug offender, he would be eligible for drug treatment in lieu of incarceration, despite the mandatory term provisions. Unlike *State v. Sabatino* (1995), 102 Ohio App.3d 483, wherein the defendant tried to withdraw his plea before sentencing because he had not known it was a possibility that his employer would fire him as a result of his guilty

plea, in this case, appellant's counsel actually gave him incorrect information that induced him to accept the plea, i.e., that despite the word "mandatory," as a first-time drug offender, he was eligible for treatment in lieu of incarceration.

{¶ 15} Generally, a motion to withdraw a guilty plea filed before sentencing will be freely allowed. *State v. Peterseim* (1980), 68 Ohio App.2d 211. Although a "mere change of heart" is insufficient justification for withdrawing a plea, this court has found compelling the logic that "'a *** plea induced by a mistaken belief that a binding plea agreement had been made is invalid even if it is the defendant's own attorney who is responsible for the defendant's mistaken belief.'" *State v. Longo* (1982), 4 Ohio App.3d 136, 140, quoting *United States, ex rel. Elksnis v. Gilligan* (S.D.N.Y. 1966), 256 F.Supp. 244, 249. "[E]ven where no specific promise was made, and a guilty plea was entered as a result of a 'grave misunderstanding' solely on the part of defense counsel and not participated in by either the prosecution or the judge, the interests of justice require that the defendants be relieved of the pleas and the judgments of conviction vacated." Id.

{¶ 16} Likewise, in *State v. Blatnik* (1984), 17 Ohio App.3d 201, the Sixth District Court of Appeals, citing *Longo*, supra, with approval, found that although the erroneous advice of counsel regarding the sentence to be imposed does not, ipso facto, result in a manifest injustice, under certain circumstances, it may. The court concluded that although erroneous s*peculation* by counsel as to what a defendant's sentence will be does not constitute manifest injustice, an erroneous *representation*

by counsel regarding sentencing may result in manifest injustice. The record in this case reveals that appellant's motion was made prior to sentencing and did not result simply from a change of heart. Rather, the motion was made because counsel's inaccurate representations to appellant regarding sentencing induced him to accept the plea. Significantly, and decisive to this case, counsel confirmed that he gave this erroneous information to appellant, and furthermore, that appellant entered his plea "based on those representations." (Tr. 18.) Counsel came forward and, at great personal risk, admitted his error to the court prior to sentencing. If this is not a compelling situation in which a motion to withdraw a plea should be freely granted, what is?

{¶ 17} Finally, in light of the possibility that appellant may have been found not guilty if he had gone to trial, any argument that he was not prejudiced by the trial court's denial of his motion because the court sentenced him to the minimum sentence is, quite simply, specious.