

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93082

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES ROSIN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515674

BEFORE: Blackmon, J., Kilbane, P.J., and Dyke, J.

RELEASED: March 18, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Timothy F. Sweeney
820 W. Superior Avenue, Suite 430
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

Kerry A. Sowul
Assistant County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant James Rosin appeals the trial court's denial of his motion to withdraw his guilty. Rosin assigns the following errors for our review:

"I. The trial court abused its discretion in refusing to allow Rosin to withdraw his guilty plea prior to sentencing."

"II. Rosin's guilty plea to the amended charge of burglary was not made knowingly, voluntarily and intelligently, and as a result, the court's acceptance of that plea was in violation of Rosin's constitutional rights and Criminal Rule 11."

"III. The State improperly, illegally and unconstitutionally withheld exculpatory evidence from the defense in violation of the discovery rules and its obligations under *Brady v. Maryland*."

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On September 18, 2008, the Cuyahoga County Grand Jury indicted Rosin on one count of burglary. On October 2, 2008, Rosin pled not guilty at his arraignment, and a trial date was scheduled. Afterwards, there were numerous pretrials.

{¶ 4} On January 20, 2009, the date of trial, Rosin entered into a plea agreement with the State, which resulted in him pleading guilty to an amended charge of burglary. The amended charge reduced the offense from a second degree to a fourth degree felony.

{¶ 5} After Rosin entered his plea, the trial court allowed the victim, David Kennard, who was present for the previously-scheduled trial, to address the court instead of returning on the date of sentencing. During his statement, Kennard indicated that the property that was the subject of the charge was owned as rental property.

{¶ 6} On February 10, 2009, the scheduled sentencing date, Rosin made an oral motion to withdraw his guilty plea. Thereafter, the trial court scheduled a hearing for February 20, 2009.

{¶ 7} At the hearing on Rosin's motion to withdraw his plea, he indicated that his plea was not made knowingly or intelligently. Rosin argued that he was not aware until after Kennard made his statement to the court that the property may not have been an occupied structure or permanent or temporary habitation of Kennard. As such, Rosin argued the prosecutor would not be able to prove an essential element of the charge.

{¶ 8} The State indicated that it was likely that during discovery, defense counsel was orally advised that Julie Smith, an eyewitness to the offense, had described the premises in a statement as unoccupied. Defense counsel denied being aware of any statement to the police that the structure was unoccupied.

{¶ 9} In a journal entry dated March 2, 2009, the trial court denied Rosin's motion to withdraw his guilty plea. The trial court sentenced Rosin to ten months in jail. Rosin now appeals.

Presentence Motion to Withdraw Guilty Plea

{¶ 10} In the first assigned error, Rosin argues the trial court abused its discretion when he denied his motion to withdraw his guilty plea. We disagree.

{¶ 11} A motion to withdraw a guilty plea is governed by the standards set forth in Crim.R. 32.1, which state:

“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.”

{¶ 12} The general rule is that motions to withdraw guilty pleas before sentencing are to be freely allowed and treated with liberality. *State v. Marks*, Cuyahoga App. No. 92548, 2009 -Ohio- 6306, citing *State v. Peterseim* (1979), 68 Ohio App.2d 211, 214, 428 N.E.2d 863, citing *Barker v. United States* (C.A. 10, 1978), 579 F.2d 1219, 1223. However, a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715. In ruling on a presentence withdrawal motion, the court must conduct a hearing and decide whether there is a reasonable and legitimate basis for the withdrawal of the plea. *Id.*

at 527, 584 N.E.2d 715. The decision to grant or deny such a motion is within the sound discretion of the trial court. *Id.*

{¶ 13} 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. Cardwell*, Cuyahoga App. No. 92796, 2009-Ohio-6827. In summary, a sufficient reason for the withdrawal must appear on the record. See *State v. Lambros* (1988), 44 Ohio App.3d 102, 103, 541 N.E.2d 632; *State v. Bridges*, Cuyahoga App. No. 87633, 2006-Ohio-6280, ¶ 5; see, also, *State v. Peterseim*, *supra* at 214, 428 N.E.2d 863.

{¶ 14} Upon review, we find the trial court did not abuse its discretion when it denied Rosin's motion to withdraw his guilty plea. The record reflects that at his plea hearing, Rosin was represented by competent counsel and was afforded a full hearing pursuant to Crim.R. 11. Rosin denied being threatened or promised anything in exchange for pleading guilty to the amended charge of burglary.

{¶ 15} The record also reflects that after Rosin filed his motion, he was given a full and impartial hearing on his motion to withdraw his guilty plea. Further, the record indicates that the trial court gave full and fair

consideration to the plea withdrawal request. The trial court considered whether there was deficiency in the process leading to Rosin's guilty plea to the amended charge, and found none. The trial court's written decision denying Rosin's request, states in pertinent part as follows:

"In this case, defense counsel made a written request for discovery from the prosecutor on October 10, 2008, within ten days of being assigned as counsel. Defense counsel filed a written notice of alibi and a written motion for a change in bond. Moreover, defense counsel was able to persuade the prosecutor to reduce a second degree felony to a fourth degree felony, resulting in a charge against the accused where the maximum possible sentence on the amended charge was six months less than the minimum possible sentence on the original charge. These facts suggest that defense counsel was competently and zealously representing the accused. Although it may not be part of the record in this case, it is also worth noting that this court's own experience with defense counsel is that he is nothing other than competent and capable."
March 2, 2009 Journal Entry.

{¶ 16} The trial court also considered whether basic fairness justified a withdrawal of the plea. The trial court's journal entry further stated:

"In this regard, the court notes first that no later than the time the prosecutor filed the discovery responses on December 2 (and probably earlier; given that at least four informal discovery pretrial conferences took place before then) the defendant had the names and addresses of the complaining witness, David Kennard, and the eyewitness, Julie Smith. The court assumes that competent counsel spoke to these witnesses to determine whether their testimony would support a finding of proof beyond a reasonable doubt on each element of the burglary charge. The court also considers that it was likely that an assistant county prosecutor verbally advised the defendant, through counsel, that eyewitness Julie Smith

had described the premises in question as unoccupied. Finally, the fact that the address of the complaining witness given in discovery is different from the address of the premises where the offense happened surely put the defendant on notice that there might be a question of whether 3111 Walton was ‘a permanent or temporary habitation’ of the complaining witness. Hence, the available evidence does not support a conclusion that the defendant first became aware of the possible deficiencies in the State’s proof after he had changed his plea.” Id.

{¶ 17} It was within the trial court's province to determine whether Rosin's arguments in support of his motion were reasonable and legitimate. We defer to the trial court's judgment in evaluating the “good faith, credibility and weight” of Rosin's motivation and assertions in entering and attempting to withdraw his plea. See, *Xie*, 62 Ohio St.3d at 525, 584 N.E.2d 715. Therefore, we do not find the trial court's decision was unreasonable, arbitrary or unconscionable. Accordingly, we overrule the first assigned error.

Knowingly, Voluntarily, and Intelligently

{¶ 18} In the second assigned error, Rosin argues his guilty plea to the amended charge was not knowingly, voluntarily, or intelligently made. We disagree.

{¶ 19} A guilty plea will be considered knowing, intelligent, and voluntary if, before accepting the plea, the trial court, at the very least, substantially complied with the procedures set forth in Crim.R. 11 with respect to nonconstitutional notifications. *State v. King*, 184 Ohio App.3d

226, 2009-Ohio-4551, 920 N.E.2d 399, citing *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. Substantial compliance means that under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving. *Id.*

{¶ 20} Crim.R. 11(C)(2) provides:

“(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 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 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.”

{¶ 21} Rosin argues his guilty plea to the amended charge of burglary was not made knowingly, voluntarily, or intelligently because he did not discover until after he pled that the subject property was rental property and unoccupied.

{¶ 22} In our resolution of the first assigned error, we concluded that the record indicates that the trial court complied with Crim.R. 11 as set forth

above. We also concluded that the trial court did not abuse its discretion in denying Rosin's presentence motion to withdraw his guilty plea. Therefore, we find that Rosin knowingly, voluntarily, and intelligently entered his plea. Accordingly, we overrule the second assigned error.

Withholding Exculpatory Evidence

{¶ 23} In the third assigned error, Rosin argues the State withheld exculpatory evidence in violation of *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. Rosin specifically argues that the State withheld evidence that the property in question was rental property and that it was unoccupied.

{¶ 24} The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Id.*

{¶ 25} In this case, we find no *Brady* violations. As previously discussed in the resolution of the first assigned error, the State provided discovery, which indicated that the victim's address was different from the premises that was the subject of the amended charge. In addition, the trial court found that subsequent to Rosin's discovery request, there was at least four informal discovery pretrial conferences between the State and defense counsel.

{¶ 26} Our review of the record indicates that ten pretrials were scheduled in the instant case, and five were actually held. Seven continuances were granted at the request of the defendant, and each time the basis of the request was to obtain further discovery. The trial court found that as a result of these pretrial conferences, the prosecutor likely advised defense counsel that Julie Smith, a witness to the offense had indicated to the police that the property was unoccupied.

{¶ 27} Finally, the issue of whether a house is an “occupied structure” when it is temporarily unoccupied has been addressed in numerous cases in Ohio. *State v. Jackson*, 12th Dist. Nos. CA2005-02-033 and CA2005-03-051, 2006-Ohio-1147. At common law, in order to commit a burglary, a house had to be occupied as a dwelling, although a temporary absence with the intention of returning would not render it unoccupied. *State v. Green* (1984), 18 Ohio App.3d 69, 71, 480 N.E.2d 1128. However, if a house was permanently abandoned or its use was changed to something other than residential, it would cease to be considered a dwelling. *Id.*

{¶ 28} Rosin was convicted of burglary, in violation of R.C. 2911.12(A)(4), which states: “No person, by force, stealth, or deception, shall * * * [t]respass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present.”

{¶ 29} R.C. 2909.01(C) defines an “occupied structure” as “any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

“(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

“(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

“(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

“(4) At the time, any person is present or likely to be present in it.”

{¶ 30} Using this definition, Ohio courts have determined an apartment purchased with the intent of renting it out for investment purposes, a home that was vacant while being repaired, and a home uninhabitable while undergoing major renovations, were all found to meet the definition of an occupied structure. *State v. Craig* (Apr. 8, 1998), 9th Dist. No. 18350; *State v. Tomstrom* (Nov. 19, 1998), Cuyahoga App. No. 72898; *State v. Woodruff*, 12th Dist. No. L-04-1125, 2005-Ohio-2268.

{¶ 31} In this case, although the owner indicated that the property was a rental unit and the trial court opined that it was being used for storage, reasonable minds could conclude that this was a temporary situation, and the

house had not been abandoned. Reasonable minds could also conclude, despite the property being an unoccupied rental unit, that a person could be present or likely to be present.

{¶ 32} We conclude that Rosin was on notice, in advance of entering his guilty plea, that the premises were unoccupied. Further, even if the property was a rental unit and presently unoccupied, Rosin could still be convicted of burglary in violation of R.C. 2911.12(A)(4). As such, we find no *Brady* violations. Accordingly, we overrule the third assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, PRESIDING JUDGE and
ANN DYKE, JUDGE, CONCUR

