

[Cite as *State v. Worley*, 2011-Ohio-1680.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95003

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEWAYNE WORLEY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510879

BEFORE: Sweeney, J., Kilbane, A.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: April 7, 2011

ATTORNEYS FOR APPELLANT

Robert Tobik
Cuyahoga County Public Defender
BY: Nathaniel McDonald
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Marcus L. Wainwright
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} Appellant, Dewayne Worley, appeals the trial court's decision denying his motion to withdraw his guilty plea. For the reasons that follow, we reverse the judgment of the trial court and remand for a new hearing on appellant's motion to withdraw his guilty plea.

{¶ 2} On May 22, 2008, appellant was indicted on six counts arising from a May 5, 2008 altercation with his ex-girlfriend, Constance Winston. He had contacted her in order to retrieve a can of gasoline from her garage.

After he arrived at her residence, an altercation ensued, during which gasoline was spilled on the premises and on Winston.

{¶ 3} Appellant was charged with aggravated arson in violation of R.C. 2909.02(A)(1), a felony of the first degree; aggravated burglary in violation of R.C. 2911.11(A)(1) and (A)(2), felonies of the first degree; felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree; arson in violation of R.C. 2909.03(A)(1); and possession of criminal tools in violation of R.C. 2923.24(A), a felony of the fifth degree.

{¶ 4} On August 5, 2008, the case was called for trial. At that time, counsel for appellant and the state were each prepared to present their cases to the court. Prior to swearing the jury, the trial court addressed whether the parties had discussed a potential plea agreement. Upon excusing the parties for lunch, the trial court indicated that it would allow extra time over lunch for the parties to discuss a potential plea agreement. The trial court instructed the corrections officer to leave appellant in the holding cell during the lunch break in the event that the parties chose to pursue plea negotiations.

{¶ 5} During the lunch recess, appellant's counsel and the state reached a plea agreement, whereby the state would dismiss Counts 1, 3, 4, and 6 and amend Count 2 from aggravated burglary to burglary in exchange for appellant's guilty plea to the amended Count 2 and the original Count 5.

Appellant's counsel represented that he had discussed the plea agreement with appellant and informed him of the constitutional rights he would be waiving by entering a guilty plea. Additionally, appellant was fully informed of the potential consequences of conviction if he refused to accept the plea agreement and proceed to trial. Counsel also represented that he had assured appellant that "he was ready, willing, and able to try the case, and that appellant's guilty plea would be entered knowingly, voluntarily, and intelligently."

{¶ 6} Subsequently, the trial court engaged appellant in a thorough Crim.R. 11 colloquy regarding the knowing, voluntary and intelligent nature of his plea. The trial court instructed appellant on all of his constitutional rights. Appellant repeatedly stated that he understood the rights he was waiving and was prepared to enter a guilty plea. Upon instructing appellant of his constitutional rights, the court made a finding that appellant was entering a knowing, voluntary, and intelligent plea. Appellant then pled guilty to the two counts as enumerated on the record. Appellant's counsel and the state agreed that the trial court had thoroughly complied with the standards of Crim.R. 11. The record reflects that the plea was entered on August 5, 2008 and filed with the clerk's office on August 12, 2008.

{¶ 7} Appellant's sentencing hearing occurred on September 5, 2008. At the hearing, the trial court discussed two letters it received from appellant

since the August 5, 2008 change of plea hearing. First, the trial court read into record a letter postmarked August 11, 2008 from appellant to the court, in which appellant apologized generally to the victim and asked the court for leniency. In addition, the trial court noted that it had received from appellant a pro se motion to disqualify counsel written on the same day. The motion read as follows: “Motion to Disqualify Counsel. Dewayne Worley moves this Court to disqualify David Grant from representing me.”

{¶ 8} The memorandum in support reads: “I am requesting to dismiss my attorney on the grounds he asked me to plead guilty to a sentence of two to eight years for a crime I did not commit. He never advised me of my plea agreement until the last minute. I just felt pressed into something I did not feel was right. So I feel he deceived me once, he will do it again. I ask this Court to withdraw this counsel. He has not been in my best interest. Thank you. Dewayne Worley.”

{¶ 9} Based on the motion to disqualify and the memorandum in support, the trial court found that appellant was effectively asking to withdraw his plea. Consequently, the trial court treated the motion as if it were a motion to withdraw and held the requisite hearing. During the hearing on appellant’s motion for withdraw of plea, the trial court provided a summary of the procedural history of the case.

{¶ 10} In its summary, the trial court stated that the change of plea hearing occurred on August 12, 2008, as opposed to August 5, 2008. In pertinent part, the trial court stated: “Defendant requested a continuance of trial from July 14 to August 5 in order to fully acclimate himself with the discovery provided by the State of Ohio. The Court granted the request. And trial then came forward on August 5th. Counsels [sic] asked the Court for another continuance between August 5th and August 12th in order for them to engage in a full day plea negotiations. I believe that was two days. They did so. Trial came on August 12th. Counsels [sic] showed up at 8:00 a.m. The court waited there three hours while they renegotiated. Proceeded with trial. Seems it was time to have all discovery exchanged, and then over the lunch hour was the plea. That is what I have in my notes.”

{¶ 11} Despite the trial court’s mistaken recollection, the trial court docket, transcripts, and judgment entries clearly establish that the change of plea hearing occurred on August 5, 2008.¹

{¶ 12} After hearing from the state and appellant’s counsel, the trial court swore in the appellant and allowed him to address the issues on the record. The following exchange occurred:

¹The trial court’s error may have stemmed from the fact that the judgment entry for the August 5, 2008 proceeding was filed with the clerk’s office on August 12, 2008.

{¶ 13} “COURT: * * * The question comes, at what point were you under duress and not advised of your Constitutional rights? You telling me Mr. Grant didn’t do everything he could to zealously represent you? So go ahead.

{¶ 14} “APPELLANT: I’m saying I’ve been here since May. There were no offers put on the table until you came back from lunch, ten minutes before you came back from lunch.

{¶ 15} “COURT: I know that to be incorrect.

{¶ 16} “APPELLANT: And in my defense —

{¶ 17} “COURT: I’m sorry, Mr. Worley, I can’t let you lie in the courtroom. You are under oath. I know there were two days of full negotiations.

{¶ 18} “APPELLANT: I wasn’t here.

{¶ 19} “COURT: And there were discussions among the defense, the State, as to felonious assault versus a burglary, F-2. I’m aware of that.

{¶ 20} “APPELLANT: I wasn’t up here for two days.

{¶ 21} “COURT: Sure were.

{¶ 22} “APPELLANT: I wasn’t up here.

{¶ 23} “COURT: Go ahead. I’m going to advise you perjury is punishable one to five years in prison.

{¶ 24} “APPELLANT: Ask my lawyer.

{¶ 25} “COURT: I’m not going to let you lie in my courtroom, Mr. Worley. But I take your concerns seriously, but I’m not going to let you lie about an officer of this Court. I’m aware, because I granted the continuance from the 5th to the 12th. They negotiated for two days.”

{¶ 26} Based on the testimony at the hearing, the trial court found that appellant was zealously represented, and there was no other basis for him to withdraw his guilty plea. Consequently, the trial court denied his motion to disqualify counsel and to withdraw his plea. The trial court proceeded directly to sentencing.

{¶ 27} At the sentencing hearing, the trial court imposed a six-year sentence, subject to three years of postrelease control. Additionally, the trial court imposed a no-contact order with the victim for the duration of the prison term and postrelease control.

Law and Analysis

{¶ 28} Appellant presents four assignments of error for our review.²

Withdrawal of Plea

{¶ 29} In his first assignment of error, appellant argues that the trial court abused its discretion when it refused to allow him to withdraw his guilty plea prior to sentencing based on the court's misunderstanding of the pertinent procedural history of his case. Specifically, appellant contends that there was a legitimate basis for his motion to withdraw because he only entered the plea because he felt unduly pressured due to a number of facts and circumstances beyond his control.

{¶ 30} The decision of a trial court to grant or deny a motion to withdraw a guilty plea is reviewed using an abuse of discretion standard. *State v. Van Dyke*, Lorain App. No. 02CA008204, 2003-Ohio-4788, at ¶7, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863, paragraph two of the syllabus. To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

² Appellant's assignments of error are contained in the appendix to this Opinion.

{¶ 31} Crim.R. 32.1 governs motions to withdraw guilty pleas and states in pertinent part that “[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed * * *.” Although “presentence motions to withdraw guilty pleas should be freely granted, a defendant ‘does not have an absolute right to withdraw a plea prior to sentencing.’” *State v. McGregor*, Cuyahoga App. No. 86165, 2005-Ohio-5561, at ¶3, quoting *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715. “Instead, the trial court ‘must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.’” *Id.*

{¶ 32} Certain factors should be evaluated when considering a presentence motion to withdraw a guilty plea. These factors include: “(1) whether the accused is represented by highly competent counsel; (2) whether the accused was given a full Crim.R. 11 hearing before entering the plea; (3) whether a full hearing was held on the motion; (4) whether the trial court gave full and fair consideration to the motion; (5) whether the motion was made within a reasonable time; (6) whether the motion sets out specific reasons for the withdrawal; (7) whether the accused understood the nature of the charges and possible penalties; and (8) whether the accused was perhaps not guilty of or had a complete defense to the charge or charges.” *State v. See*, Cuyahoga App. No. 89256, 2007-Ohio-6203, ¶9, citing *State v. Fish* (1995), 104 Ohio App.3d 236, 239, 661 N.E.2d 788.

{¶ 33} In the case at bar, the record reflects that appellant was represented by competent counsel throughout the proceedings before the trial court, received a hearing in accordance with Crim.R. 11 prior to entering his guilty plea, and, on September 5, 2008, before sentencing, was granted a hearing on his motion to withdraw his guilty plea. Additionally, appellant's motion to withdraw was timely and stated specific reasons for the withdrawal. Essentially, appellant argues that he felt rushed into making the decision as to whether he should accept the plea agreement and only entered the guilty plea because he felt pressured by the timing and by his counsel's misrepresentations.

{¶ 34} In denying appellant's motion to withdraw his guilty plea, the trial judge stated: "Your basis to seem to want to withdraw your plea seems because you are rushed, and I know that to be an outright lie, that Mr. Grant only told you about [the plea] ten minutes before. * * * [T]his is simply a case of fear of what the sentence is the Court is going to impose. There is no basis that you were not properly represented by Mr. Grant."

{¶ 35} The record indicates that the trial court rejected appellant's basis for his motion to withdraw his plea primarily on the mistaken belief that appellant was lying to the court. Despite the confusion, appellant's change of plea was, in fact, entered on August 5, 2008. The plea negotiations between appellant's counsel and the state took place over the course of an extended

lunch recess on that date. By incorrectly concluding that appellant had approximately one week to consider the plea offer, the trial court failed to fully consider the merits of appellant's arguments, including the fact that he only had a limited amount of time to consider the plea offer on August 5, 2008 — i.e., a portion of the lunch break between 12:13 p.m. and 2:00 p.m. When appellant attempted to correct the trial court's error and argue the merits of his motion, he was cut short and was threatened with a perjury conviction. As such, appellant was not granted a fair opportunity to support the basis of his motion.

{¶ 36} We find that the trial court abused its discretion by failing to give full and fair consideration to appellant's motion to withdraw his guilty plea based on the court's factual error relating to the pertinent procedural history of appellant's case. Accordingly, we reverse the judgment of the trial court and order the trial court to hold a new hearing on appellant's motion to withdraw his guilty plea. Further, we order that appellant be appointed new counsel to represent his interests during the hearing.

{¶ 37} Appellant's remaining assignments of error are rendered moot by our analysis above. App.R. 12(A)(1)(c).

{¶ 38} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, A.J., CONCURS

SEAN C. GALLAGHER, J., CONCURS IN JUDGMENT ONLY

APPENDIX

Appellant's Assignments of Error

"I. The trial court, in violation of appellant's rights under the United States and Ohio Constitutions, abused its discretion when it refused to allow appellant to withdraw his guilty plea prior to sentencing based on the court's mistake regarding the pertinent procedural history of his guilty plea."

"II. The trial court violated appellant's rights under the United States and Ohio Constitutions and Ohio law by not holding the required hearing regarding appellant's motion to disqualify counsel."

"III. The trial court violated appellant's rights under the United States Constitution and Ohio Constitution by not providing him with new counsel prior to a hearing regarding his motion to withdraw his guilty plea."

"IV. The appellant was denied his right to effective assistance of counsel under the sixth Amendment and fourteenth amendment to the United States Constitution and the Ohio Constitution when defense counsel failed to communicate adequately regarding plea bargaining."