

[Cite as *State v. Bosby*, 2011-Ohio-599.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94466

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ALVIN BOSBY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-530188

BEFORE: Boyle, J., Rocco, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: February 10, 2011

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Alvin Bosby, appeals the trial court's denial of his presentence motion to vacate his guilty plea. We affirm.

Procedural History and Facts

{¶ 2} In October 2009, Bosby was indicted with one count of burglary in violation of R.C. 2911.12(A)(1), a felony of the second degree. On November 23, 2009, Bosby changed his plea and entered a guilty plea, which the trial court accepted after complying with Crim.R. 11. At the plea hearing, the trial court indicated that, although a second-degree felony carries a possible prison term of two to eight years in prison, the trial court agreed to impose no more than six years. The trial court then continued sentencing for one week.

{¶ 3} At the sentencing hearing, the trial court first heard from the victim, who identified Bosby in open court as the perpetrator and testified as to how frightened his family had been since the incident. The prosecutor then spoke and asked the court to impose a five-year sentence in light of Bosby's multiple prior burglary convictions. Next, the court heard from defense counsel who offered mitigating factors on Bosby's behalf, including that he was in school studying business management and that he had a family dependent on him. The trial court then asked to hear from Bosby, who at that time asked whether he could withdraw his plea, stating "I don't feel I was guilty." He further indicated that he entered the plea because he was scared in light of his history. The trial court continued the sentencing hearing and told Bosby to file a written motion.

{¶ 4} The court reconvened the next day for sentencing. Prior to sentencing, the court heard Bosby's oral motion to withdraw his plea. Bosby acknowledged that he knowingly, voluntarily, and intelligently entered his plea but said that he believed he "was

going to get like two years.” He admitted, however, that he understood at the time of the plea that he faced an agreed sentence of more than two years but less than six years. The trial court concluded that Bosby simply had a change of heart and denied his motion to withdraw his guilty plea. The court then sentenced him to five years in prison.

{¶ 5} Bosby appeals, raising a single assignment of error:

{¶ 6} “The trial court erred and abused its discretion when it denied Mr. Bosby’s motion to vacate his plea without a hearing at which Mr. Bosby was represented by counsel, thereby denying him the effective assistance of counsel and due process in violation of U.S. Constitution Amendments V, VI and XIV, and Ohio Constitution Article One Sections 10 and 16.”

Presentence Motion to Withdraw Guilty Plea

{¶ 7} Generally, a motion to withdraw a guilty plea made before sentencing should be freely and liberally granted. *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715. A defendant does not, however, have an absolute right to withdraw his plea before sentencing.

Id. at paragraph one of syllabus. The trial court is required to “conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.”

Id. Following the hearing, the trial court’s decision to grant or deny a motion to withdraw a plea will be upheld absent an abuse of discretion. *Id.* at 527.

{¶ 8} “No abuse of discretion is demonstrated where: (1) the accused is represented by highly competent counsel, (2) the accused was afforded a full hearing, pursuant to Crim.R. 11, before entering the plea, (3) after the motion to withdraw is filed the accused is given a complete and impartial hearing on the motion, and (4) the record reveals that the trial court gave full and fair consideration to the plea withdrawal request.” *State v. Tull*, 168 Ohio App.3d 54, 2006-Ohio-3365, 858 N.E.2d 828, ¶18, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863. This court has further recognized that these factors have been expanded to include: “(5) whether the court gave full and fair consideration to the motion; (6) whether the motion was made in a reasonable time; (7) whether the motion states specific reasons for withdrawal; (8) whether the accused understood the nature of the charges and the possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense.” (Internal citation and quotation omitted.) *State v. Robinson*, 8th Dist. No. 89651, 2008-Ohio-4866, ¶123.

{¶ 9} Bosby argues that the trial court abused its discretion because it failed to conduct a hearing and did not adequately consider his motion. We disagree.

{¶ 10} To the extent that the trial court did not have a full evidentiary hearing, one is not required in all cases. *Id.* at ¶124. Rather, the hearing must comport with the minimum standards of due process, i.e., meaningful notice and opportunity to be heard. *Id.* And the scope of the hearing should be reflective of the substantive merit of the motion itself, i.e.,

“bold assertions without evidentiary support simply should not merit the type of scrutiny that substantiated allegations would merit.” *State v. Smith* (Dec. 10, 1992), 8th Dist. No. 61464. Further, the scope of the hearing is within the sound discretion of the trial court. *Id.*, citing *State v. Posta* (1988), 37 Ohio App.3d 144, 524 N.E.2d 920.

{¶ 11} In this case, we do not find that the scope of the hearing was an abuse of discretion. Bosby had a chance to state the reasons for his motion. The mere fact that the trial court found them unpersuasive does not mean that the court did not adequately consider Bosby’s motion. And while Bosby previously asserted that he did not believe that he was “guilty,” his alleged innocence was known to him at the time of the plea agreement, and therefore not a credible claim after the fact. See *State v. Mitchell* (Nov. 30, 2000), 6th Dist. No. L-99-1357. Further, although Bosby claimed that he believed that he would get only two years, he acknowledged that the trial court properly informed him of his potential sentence based on the plea agreement. Here, the record supports the trial court’s conclusion that Bosby simply had a change of heart after hearing the statements of the victim and prosecutor and realizing his potential sentence. And a change of heart is not a sufficient basis for withdrawal of a plea. *Id.*; see, also, *State v. Goney*, 2d Dist. No. 22753, 2009-Ohio-4326; *State v. Lambros* (1988), 44 Ohio App.3d 102, 541 N.E.2d 632.

{¶ 12} We likewise find that the other factors support the trial court’s decision to deny Bosby’s motion to withdraw. Bosby stated that he was satisfied with his counsel. Bosby

was afforded a full hearing pursuant to Crim.R. 11 before he entered his plea. Further, even at the time of requesting to withdraw his plea, he fully admitted that his plea was knowingly, voluntarily, and intelligently made. And while Bosby's request was timely made, he failed to articulate any substantial reason for withdrawal. Likewise, despite Bosby's claimed innocence, the victim personally identified Bosby as the perpetrator prior to sentencing. Under these circumstances, we cannot say that the trial court abused its discretion in denying Bosby's presentence motion to withdraw his plea.

{¶ 13} Finally, we find no merit to Bosby's bare claim that his Sixth Amendment right to counsel was violated because his trial counsel refused to file a motion to vacate his plea on his behalf. We cannot agree that his trial counsel's refusal to file a frivolous motion equates to a deprivation of counsel. Indeed, defense counsel has an ethical duty not to file frivolous motions. Prof.Cond.R. 3.1; see *Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 592 N.E.2d 882; *State v. Brazell* (1968), 15 Ohio App.2d 104, 106, 239 N.E.2d 125 (recognizing that defense counsel is not the lackey of the defendant; counsel has duty and right to make an independent evaluation of the merits of the case and how to proceed).

{¶ 14} Accordingly, Bosby's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant 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. 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.

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MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR