[Cite as *State v. Breznicki*, 2011-Ohio-697.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94971

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MAJOR BREZNICKI

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-527966

BEFORE: Jones, J., Kilbane, A.J., and Rocco, J.

RELEASED AND JOURNALIZED: February 17, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Major Breznicki, appeals the trial court's judgment denying his motion to withdraw his plea. We affirm.

I. Procedural History

{¶ 2} A ten-count indictment, consisting of charges of rape, gross sexual imposition, kidnapping, disseminating matter harmful to juveniles, and endangering children, was filed against Breznicki in September 2009. Some of the charges also included sexually violent predator and sexual motivation specifications. After negotiations with the state, Breznicki

pleaded guilty to one count of rape, and the remaining charges and specifications were dismissed.

{¶ 3} Prior to sentencing, the court received several letters from Breznicki's mother indicating that Breznicki wanted to withdraw his plea and that he was dissatisfied with his attorney. The court held a hearing. At the hearing, the court stated that it did not find the letters from Breznicki's mother to be a proper request to withdraw his plea. The court further stated that, although it believed Breznicki's attorney was a "good attorney" and was "fighting for him," it also believed that the relationship between Breznicki and his attorney had broken down. Thus, the court allowed Breznicki to make an oral motion for new counsel, which he did, and appointed new counsel.

{¶ 4} Breznicki's new attorney filed a motion to withdraw his plea. The court held a hearing on the motion, at the conclusion of which, it denied the motion. The court then sentenced Breznicki to an eight-year term of incarceration.

{¶ 5} Breznicki's sole assignment of error is as follows: "The trial court abused its discretion in denying appellant's pre-sentence motion to withdraw his guilty plea."

II. Law and Analysis

{¶ 6} 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, ¶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.

{¶ 7} 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, ¶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, 219, 450 N.E.2d 1140.

{¶ 8} Factors to be considered in reviewing a presentence motion to withdraw a guilty plea are: (1) whether the accused was 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 set 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. Fish* (1995), 104 Ohio App.3d 236, 239, 661 N.E.2d 788, citing *Peterseim*, supra at 213-214.

{¶ 9} In support of his motion to withdraw his plea, Breznicki averred in an affidavit that he was "led to believe that if he were to enter a plea of 'guilty' to Rape he would be sentenced to a community control sanction." The record belies that assertion. In particular, Breznicki was afforded a full Crim.R. 11 hearing before he entered his plea. At the hearing, the trial court repeatedly informed him that he would *not* be sanctioned to a community control sanction:

{¶ 10} "You're looking at three to ten years in the institution, a fine of up to $20,000 and five years Post Release Control upon your release from prison, as well as 90 days reporting."

{¶ 11} Breznicki questioned the court, "[s]o I am going to prison?" The court responded: "You're going to get a Presentence report, but you're pleading to a rape. *I'm not putting you on probation*. This case has the possibility of probation, *but if you're pleading because you think I'm going to put you on probation, you might want to have a trial*." (Emphasis added.) The court further explained, "I'm not making you a promise of any particular sentence, but *I do know I'm not putting you on probation*." (Emphasis added.) Breznicki responded "[o]kay." The court reiterated "if you're thinking that I'm sending you for a PSI so that I can put you on probation, you are not correct about that[,]" and inquired of Breznicki "[w]hat do you want to do?" Breznicki responded "[g]o on with this." The court repeated its advisement that it was not going to sentence Breznicki to a community control sanction later in the hearing: "But as I've already indicated to you, I do not believe

probation is on the table for you in this case." Breznicki indicated that he understood. Notwithstanding the above, when the court inquired of Breznicki whether he had any questions, he responded "I would do ten years probation." The court explained again, "[y]ou're not doing any probation if you're pleading to this or if you're found guilty on it, so it's up to you what you want to do." Breznicki indicated that he understood, did not have any questions, knew what he was doing, and still wished to enter a guilty plea.

{¶ 12} In addition to having been afforded a full Crim.R. 11 hearing, wherein it was demonstrated that Breznicki entered his plea knowingly, intelligently, and voluntarily, the record also demonstrates that he was represented by highly competent counsel, and the reason why that attorney was replaced was only because his relationship with Breznicki had broken down. Further, the record demonstrates that the trial court afforded Breznicki a full hearing on his motion to withdraw his plea and gave the motion full and fair consideration.

{¶ 13} On this record, the trial court did not abuse its discretion in denying Breznicki's motion to withdraw his plea and, accordingly, the 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.

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, A.J., and
KENNETH A. ROCCO, J., CONCUR