

[Cite as *State v. Elliott*, 2016-Ohio-2637.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103472

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RUSSELL ELLIOTT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-578040-A

BEFORE: E.T. Gallagher, J., McCormack, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: April 21, 2016

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Russell Elliott (“Elliott”), appeals his burglary conviction. He raises the following sole assignment of error:

1. The trial court abused its discretion in failing to provide appellant with a complete hearing on his motion to withdraw his guilty plea and in denying that motion.

{¶2} We find no merit to the appeal and affirm.

I. Facts and Procedural History

{¶3} Elliott was charged with one count of second-degree felony burglary and one count of misdemeanor theft after allegedly breaking into a church rectory at approximately 2:30 a.m. to steal a television. A priest, who lived in the rectory, was present when the burglary occurred.

{¶4} Following discovery, Elliott agreed to plead guilty to one count of second-degree burglary as charged in the indictment, and the state agreed to nolle the misdemeanor theft count. At the plea hearing, the state described the terms of the plea agreement, and the court asked Elliott if he wished to accept the plea, to which Elliott replied, “Yes, ma’am.” The trial court advised Elliott that his recent agreement to cooperate with police would have no impact on his plea agreement or on the court’s sentencing decision.

{¶5} During the plea colloquy, the court asked Elliott if he was satisfied with the services of his defense lawyer, and Elliott replied, “No, ma’am.” When the court asked why he was dissatisfied, Elliott stated that his lawyer never came to discuss the case with him, but later conceded that counsel visited him in the jail on more than one occasion. Counsel explained that he shared discovery with Elliott, described the ramifications of the state’s presentation of the evidence, explained the concept of circumstantial evidence in terms of how the state would present such evidence, and explained the arguments the prosecutor would make based on that evidence.

{¶6} Elliott asserted: “I asked him for one simple thing;” to speak with counsel outside the presence of other inmates. Defense counsel claimed that every time he went to visit Elliott in the jail, the only private meeting room was occupied. Elliott claimed the room was always available, but they never used it. Elliott also complained that his lawyer filed motions, including a motion for discovery, after Elliott had instructed him not to file any motions. On this point, the following exchange took place:

THE DEFENDANT: After I asked him not to file any motions.

* * *

[COUNSEL]: Your Honor, I don’t know — I have discussed that with him. I don’t practice that way. I always file motions. I also don’t think a defendant could invite error of that nature and then try and say later on, My first lawyer didn’t ask for discovery. * * * So if I didn’t file for discovery, that would be, in my opinion, ineffective assistance of counsel.

(Tr. 13.)

{¶7} Despite his complaints that he could not discuss his case with his lawyer in private, he indicated he was “fine” with the legal services of defense counsel. (Tr. 11.)

After further discussion regarding counsel’s service, the following exchange took place:

THE COURT: Well, Mr. Elliott, have you had enough time to discuss the facts of your case with [counsel]?

THE DEFENDANT: Yes, ma’am.

THE COURT: And is there anything else at this time that you feel that you need to talk to him about?

THE DEFENDANT: No, Ma’am.

{¶8} Following this discussion, the court completed the Crim.R. 11(C) colloquy and found that Elliott had been informed of his constitutional rights and understood the nature of the charges, the effect of his plea, and the maximum penalties that could be imposed. The court further found that Elliott was making his plea “knowingly, intelligently, and voluntarily” and accepted his guilty plea. The court scheduled sentencing for a later date.

{¶9} Between the time of the plea hearing and the sentencing hearing, the court allowed Elliott’s trial counsel to withdraw and appointed new counsel. At a plea hearing on unrelated charges in a new case, Elliott advised the court that he was satisfied with his new lawyer, but wanted to withdraw his guilty plea to second-degree burglary in this case.

He asserted he “didn’t know all the facts” when he entered his plea because his original lawyer was dishonest. (Tr. 35.)

{¶10} At the hearing on his motion, Elliott accused his previous attorney of lying about subpoenaing ADT records pertaining to his own house and falsely advising his mother that if he were found guilty, the state could charge her with perjury even if she told the truth. (Tr. 41.)

{¶11} The state argued that Elliott's prior attorney was an experienced criminal defense lawyer, and that the value of the ADT records was speculative. According to Elliott, the ADT records would show when the alarm system on his house was activated and deactivated. Elliott claims evidence that his house alarm was activated at the time the burglary occurred would prove he was not the culprit.

{¶12} The state further argued that neither Elliott's mother, nor his prior attorney, were present to testify in support of Elliott's allegations that his original lawyer lied to him and his mother. The state asserted that Elliott was familiar with the criminal justice system as a result of his 25 prior felony charges, and that he was using the motion to withdraw his plea as a delay tactic. Moreover, the state argued, the court conducted a thorough Crim.R. 11 colloquy to ensure that Elliott entered his guilty plea knowingly, intelligently, and voluntarily.

{¶13} The court denied Elliott's motion to withdraw his guilty plea, and Elliott pleaded guilty to the charges in the new case. The court sentenced Elliott to a three-year prison term and ordered restitution in the amount of \$300 for his second-degree felony burglary in this case. The court ordered the sentence to run consecutive to the sentence he received in the other case.

{¶14} Elliott now appeals the denial of his motion to withdraw his guilty plea.

II. Law and Analysis

{¶15} In his sole assignment of error, Elliott argues the trial court erred in denying his motion to withdraw his guilty plea.

{¶16} Crim.R. 32.1, governs motions to withdraw guilty pleas and states that “[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.”

{¶17} Generally, “a presentence motion to withdraw a guilty plea should be freely and liberally granted.” *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). However, a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *Id.* at paragraph one of the syllabus. Before ruling on a motion to withdraw a guilty plea, “the trial court must conduct a hearing to determine whether there is a reasonable legitimate basis for the withdrawal of the plea.” *Id.*

{¶18} The decision to grant or deny a presentence motion to withdraw is within the trial court’s discretion. *Id.* at paragraph two of the syllabus. Absent an abuse of discretion, the trial court’s decision must be affirmed. *Id.* at 527. An abuse of discretion requires a finding that the trial court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶19} A trial court does not abuse its discretion in denying a motion to withdraw the plea where a defendant was (1) represented by competent counsel, (2) given a full Crim.R. 11 hearing before he entered a plea, (3) given a complete hearing on the motion to withdraw, and (4) the record reflects that the court gave full and fair consideration to the plea withdrawal request. *State v. Peterseim*, 68 Ohio App.2d 211, 428 N.E.2d 863 (8th Dist.1980), paragraph three of the syllabus.

{¶20} Elliott argues the trial court failed to afford him a “complete” hearing and, therefore, failed to give “full and fair consideration” to his request to withdraw his plea. He further argues that due to “fundamental” problems with the lawyer who represented him at the time of the plea hearing, he did not enter his plea knowingly, intelligently, and voluntarily. Elliott contends the court should have given more consideration to the attorney-client relationship between Elliott and his first lawyer.

{¶21} Elliott alleges his original lawyer was ineffective and that the lawyer’s deficient performance caused him to plead guilty without knowing all the relevant facts. Elliott’s argument is akin to an ineffective assistance of counsel claim. A claim of ineffective assistance of counsel is waived by a guilty plea, except to the extent that the ineffective assistance of counsel caused the defendant’s plea to be less than knowing, intelligent, and voluntary. *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11, citing *State v. Spates*, 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (1992), citing *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973).

{¶22} In Ohio, every properly licensed attorney is presumed to be competent. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). In order to establish the prejudice necessary for an ineffective assistance of counsel claim, the appellant must demonstrate there is a reasonable probability that, but for counsel's deficient performance, he would not have pleaded guilty to the offense at issue and would have insisted on going to trial. *Williams* at ¶ 11, citing *Xie*, 62 Ohio St.3d at 524, 584 N.E.2d 715, and *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

A. Competent Counsel

{¶23} There is no evidence that Elliott's first lawyer was deficient apart from Elliott's self-serving and inconsistent statements regarding his lawyer's conduct. For example, Elliott asserted at the plea hearing that his lawyer never came to visit him in the jail to discuss the case with him, but later admitted that he came "more than once." (Tr. 9.) Elliott also complained they were unable to speak in private because every time counsel came to visit him there were other inmates around. (Tr. 10-11.) According to defense counsel, it was impossible to meet Elliott in private due to the visiting arrangements at the jail. Despite these alleged deficiencies, Elliott advised the court that he was nevertheless "fine" with his counsel's representation. (Tr. 11.)

{¶24} At the hearing on the motion to withdraw his guilty plea, Elliott accused his first lawyer of lying to him about subpoenaing records from ADT and lying to his mother about getting charged with perjury even if she testified truthfully. However, in evaluating the effectiveness of counsel's performance, we must presume that a properly

licensed attorney executes his legal duty in an ethical and competent manner. *Smith*, 17 Ohio St.3d 98, 477 N.E.2d 1128. Thus, it was incumbent on Elliott to produce evidence other than his own self-serving statements to rebut this presumption. *Id.* at 100. Because Elliott offered no evidence to rebut this presumption, we conclude that Elliott's first attorney was competent, despite his unsupported allegations to the contrary.

B. Crim.R. 11 Colloquy

{¶25} Elliott does not argue there were any deficiencies in the trial court's Crim.R. 11 colloquy. The record shows that the court advised Elliott of all the rights he was waiving by pleading guilty and the potential penalties he could receive for his conviction.

Upon questioning, Elliott advised the court that he understood what was happening and the rights he was waiving. Elliott's only complaint was that he had some disagreements with his counsel, but as we have already determined, the disagreements did not render counsel incompetent. Moreover, "a court's adherence to Crim.R. 11 raises a presumption that the plea was voluntarily entered." *State v. Wittine*, 8th Dist. Cuyahoga No. 90747, 2008-Ohio-5745, ¶ 8, citing *State v. Spence*, 8th Dist. Cuyahoga No. 54880, 1989 Ohio App. LEXIS 167, *2 (Jan. 19, 1989).

C. Hearing on Motion to Withdraw

{¶26} Elliott argues the trial court failed to hold a complete hearing on his motion to withdraw his guilty plea. However, the scope of a hearing on a motion to withdraw a guilty plea is dependent upon the facial validity of the motion itself. *Wittine* at ¶ 8. In *Wittine* we explained:

“The motion to withdraw a plea must, at a minimum, make a prima facie showing of merit before the trial court need devote considerable time to it. *United States v. Navarro-Flores*, 628 F.2d 1178, 1183 (C.A. 9, 1980); *United States v. Dabdoub-Diaz*, 599 F.2d 96, 100 (C.A. 5, 1979). Stated differently, the scope of the hearing to be held on the Crim.R. 32.1 motion should be reflective of the substantive merit of the motion itself. Hence, *bold assertions without evidentiary support simply should not merit the type of scrutiny that substantiated allegations would merit.*”

(Emphasis added.) *Id.* at ¶ 9, quoting *State v. Hall*, 8th Dist. Cuyahoga No. 55289, 1989 Ohio App. LEXIS 1602 (Apr. 27, 1989).

{¶27} Elliott’s motion was based solely on self-serving statements without any evidentiary support. What is more, Elliott’s motion was premised on bold accusations regarding his first lawyer’s alleged dishonesty, which was not only unsupported by evidence but also lacked credibility.

{¶28} Further, the court afforded Elliott the opportunity to fully present his argument and asked if his newly appointed counsel wished to add anything. The court also heard the state’s arguments. Moreover, the court had some personal knowledge regarding the basis for Elliott’s motion because it presided over the plea hearing where Elliott’s claims of ineffective counsel were first raised. The court had the opportunity to hear counsel’s version of the facts and assess counsel’s credibility at the first plea hearing. Under these circumstances, we find that the court gave Elliott’s motion sufficient consideration.

D. Claimed Innocence

{¶29} Finally, Elliott argues the court should have vacated his guilty plea because he consistently protested his innocence.

{¶30} However, when faced with a claim of innocence, ““the trial judge must determine whether the claim is anything more than the defendant’s change of heart about the plea agreement.”” *State v. Hoyle*, 8th Dist. Cuyahoga No. 102791, 2016-Ohio-586, ¶ 31, quoting *State v. Miniffee*, 8th Dist. Cuyahoga No. 99202, 2013-Ohio-3146, ¶ 27. A mere change of heart regarding a guilty plea and the possible sentence is insufficient justification for the withdrawal of a guilty plea. *Id.* Moreover, a defendant’s protestations of innocence alone are not sufficient grounds for vacating a plea that was voluntarily, knowingly, and intelligently entered. *Miniffee* at ¶ 27, citing *State v. Bloom*, 8th Dist. Cuyahoga No. 97535, 2012-Ohio-3805, ¶ 13.

{¶31} The record shows that Elliott was (1) represented by competent counsel, (2) given a full Crim.R. 11 hearing before he entered a plea, (3) given a complete hearing on the motion to withdraw, and (4) the record reflects that the court gave full and fair consideration to the plea withdrawal request. Therefore, the trial court acted within its discretion when it denied Elliott’s motion to withdraw his guilty.

{¶32} The sole assignment of error is overruled.

{¶33} 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 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.

EILEEN T. GALLAGHER, JUDGE

TIM McCORMACK, P.J., and
MARY J. BOYLE, J., CONCUR