[Cite as *State v. McClain*, 2016-Ohio-705.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103089

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TAVARRE McCLAIN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-586972-A

BEFORE: Blackmon, J., Keough, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: February 25, 2016

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Tavarre McClain appeals his guilty plea and assigns the following three errors for our review.

> I. The proceedings below were defective in that the court erred in accepting a plea which was neither knowingly, willingly nor intelligently made in violation of Crim.R. 11 and defendant's constitutional rights.
>
> II. The court erred in violation of Crim.R. 32.1 by failing to allow defendant to withdraw his plea.
>
> III. The lower court erred in imposing a sentence that was not authorized by law.

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

{¶3} The Cuyahoga County Grand Jury indicted McClain for one count of aggravated murder, one count of involuntary manslaughter, two counts of felonious assault, one count of discharge of a firearm on or near a prohibited premises, and one count of having a weapon while under disability. All of the counts included one-and three-year firearm specifications.

{¶4} The charges arose from McClain getting into a verbal altercation with the victim. During the argument, McClain pulled out a handgun and attempted to fire it at the victim. The handgun did not immediately fire. McClain unjammed the weapon and proceeded to fire six shots at the victim. One of the shots hit the victim and was fatal.

{¶5} On March 9, 2015, the state presented two separate plea offers to McClain. The first option was that McClain would plead to murder with a firearm specification and having a weapon while under disability. This option would carry a sentence of 18 years to life.

{¶6} The second option was that McClain would enter a plea to involuntary manslaughter with a firearm specification, felonious assault, discharge of a firearm near a prohibited premises, and having a weapon while under disability. Under this option, McClain would agree that none of the counts would merge as allied offenses. He would be subject to a minimum prison term of 17 years with a maximum of 23 years.

{¶7} After discussing the options with his attorney, McClain decided he wanted to proceed with trial that was set for March 30, 2015. On March 23, 2015, a hearing was held to revoke McClain's telephone privileges because he was contacting the state's witnesses. McClain admitted to calling the witnesses but denied encouraging them to change their testimony. The trial court revoked his telephone privileges.

{¶8} On the date of trial, McClain decided to accept the second plea option presented by the state. He pleaded guilty to one count of involuntary manslaughter with both one-and three-year firearm specifications, one count of felonious assault with the firearm specifications deleted, one count of discharge of firearm on or near a prohibited premises with one-and three-year firearm specifications, and one count of having a weapon while under disability. The remaining counts were dismissed. He agreed that as part of the plea none of the offenses would be considered allied offenses and would not

merge. After accepting the plea, the trial court continued sentencing until a presentence investigation report ("PSI") could be completed.

{¶9} On April 28, 2015, the sentencing hearing was conducted. Prior to McClain being sentenced, his attorney told the court that his client wished to withdraw his plea and wanted new counsel to be assigned. The trial court then questioned McClain as to why he wanted to withdraw his plea. McClain stated that he felt pressured to take the plea and that his attorney never discussed the evidence against him and that he did not understand the accusations.

{¶10} Defense counsel responded that he thoroughly discussed the plea agreement with McClain and that he was apprised of the state's evidence against him. The state added that the fact that McClain had been calling the state's witnesses showed McClain was aware of the evidence against him. The trial court then discussed the motion to withdraw with McClain in depth. The trial court subsequently denied McClain's motion, after concluding as follows:

> All right, Mr. McClain. So the record is clear that we have had several discussions, you and I, about the allegations, the nature of the allegations, potential consequences, your options about having a trial or accepting responsibility. That I offered to answer any of your questions.
>
> That I gave [your defense attorneys] as much time as necessary to prepare for the case. They were prepared to try the case, and we went on the record and went over the plea and I asked you very specifically if you understood those offenses, you told me "yes."
>
> I asked you very specifically how you wanted to plea. You told me guilty and with the range. 17 to 23 years was the recommended range. I don't have to accept that range, but I told you I would. Up front with you, I told

> you. And also then I asked you after you pled guilty, if you are in fact guilty. You said "yes." You told me that on the record.
>
> It sounds now like you had some buyer's remorse that you want to put this process back in the beginning and start over with new attorneys and now at this point, it's really unfair to the State of Ohio, the victim's family, and I know [your defense attorneys] have practiced for decades in this courtroom and they do an excellent job. They always fight for their clients, and they also give very sound advice. My recollection is that [the prosecutor] and what [defense counsel] have said, that you were given the opportunity to have advice from whomever you wanted and you came in here and pled guilty.
>
> So, I don't feel like you have met your burden at this point to withdraw your plea. So that would be considered an oral motion that you made and it's going to be denied.

Tr. 72-73.

{¶11} Before imposing the sentence, the trial court heard statements from both McClain's mother and uncle and the victim's family. The trial court also considered the PSI, which showed that in the past McClain was found delinquent in juvenile court for five separate assaults, including felonious assault. He had also been found delinquent for aggravated rioting, criminal trespassing, obstructing official business, and false information. The trial court sentenced McClain to 23 years in prison.

Hearing

{¶12} For ease of discussion, we will address McClain's second assigned error first. In his second assigned error, McClain argues that the trial court failed to conduct a hearing on his motion to withdraw and erred by denying his plea because he claimed he was innocent of the charges and there was no evidence that the state would have been prejudiced by the trial court's granting the motion.

{¶13} "[A] presentence motion to withdraw a guilty plea should be freely and liberally granted. Nevertheless, it must be recognized that a defendant does not have an absolute right to withdraw a plea prior to sentencing." *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). We review presentence motions to withdraw guilty pleas for an abuse of discretion. *Id.*

{¶14} In determining whether the trial court abused its discretion by denying a defendant's motion to withdraw a plea, we consider the following factors: (1) whether the accused was represented by highly competent counsel; (2) whether the accused was afforded a full hearing pursuant to Crim.R. 11 before he entered the plea; (3) whether, after the motion to withdraw was filed, the accused was given a complete and impartial hearing on the motion; and (4) whether the record reveals 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).

{¶15} This court has also set forth additional factors to consider, including that (1) the motion was made in a reasonable time; (2) the motion stated specific reasons for withdrawal; (3) the record shows that the defendant understood the nature of the charges and possible penalties; and (4) the defendant had evidence of a plausible defense. *State v. Heisa*, 8th Dist. Cuyahoga No. 1018877, 2015-Ohio-2269, ¶ 19; *State v. Pannell*, 8th Dist. Cuyahoga No. 89352, 2008-Ohio-956, ¶ 13.

{¶16} McClain contends that a hearing was not conducted on his motion to withdraw his plea. However, a review of the transcript shows that a hearing was

conducted immediately after he moved to withdraw his plea. The trial court questioned McClain about his motion and what he understood at his initial plea hearing. Defense counsel and the state were also given an opportunity to respond to McClain's motion. Thus, the trial court conducted a full and impartial hearing on McClain's motion.

{¶17} McClain also contended that because he claimed he was innocent, the trial court should have granted his motion. Where a defendant claims the plea should be withdrawn because he is innocent, the trial court must determine whether the claim of innocence is anything more than the defendant's change of heart about the plea agreement. *State v. Westley*, 8th Dist. Cuyahoga No. 97650, 2012-Ohio-3571, ¶ 7. "A mere change of heart regarding a guilty plea and the possible sentence is insufficient justification for the withdrawal of a guilty plea." *Id*., citing *State v. Drake*, 73 Ohio App.3d 640, 645, 598 N.E.2d 115 (8th Dist.1991).

{¶18} In the instant case, the trial court concluded that McClain's desire to withdraw his plea was based on a "change of heart." This was not an abuse of discretion because the review of the plea hearing demonstrated that McClain was aware of the evidence against him, and as we will discuss in addressing his first assigned error, he subjectively understood the nature of the charges and the possible sentence that would be imposed. Moreover, according to the state, the testimony of witnesses who knew McClain and saw him shoot the victim would be presented if the matter went to trial. Under these circumstance, McClain's ability to raise a meritorious defense was doubtful.

{¶19} McClain also argues that the state would not have been prejudiced by allowing him to withdraw his motion. A lack of prejudice to the state does not automatically allow a presentence plea withdrawal. *State v. Leasure*, 7th Dist. Belmont No. 01BA42, 2002-Ohio-5019, ¶ 19. Rather, presentence plea withdrawal is a matter within the trial court's sound discretion. *Xie*, 62 Ohio St.3d at 527, 584 N.E.2d 715. We conclude the lack of prejudice alone did not dictate that McClain be allowed to withdraw his plea. None of the other factors listed above support the conclusion that the trial court abused its discretion by denying the motion, and as we will discuss in McClain's first assigned error, he subjectively understood the nature of the charges and possible sentence when he entered the plea. Moreover, McClain had contacted the state's witnesses, which could have impacted their trial testimony. Accordingly, McClain's second assigned error is overruled.

Nature of the Charges and Sentence

{¶20} In his first assigned error, McClain argues that his plea was not knowingly, voluntary, or intelligently entered because he did not understand the nature of the crimes for which he was charged and did not understand the fact his convictions would not be merged for sentencing.

{¶21} In order for a plea to be given knowingly and voluntarily, the trial court must follow the mandates of Crim.R. 11(C). If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is void. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

{¶22} A trial court must strictly comply with Crim.R. 11 as it pertains to the waiver of federal constitutional rights. These include the right to trial by jury, the right of confrontation, and the privilege against self-incrimination. *Id*. at 243-44. However, substantial compliance with Crim.R. 11(C) is sufficient when waiving nonconstitutional rights. *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). The nonconstitutional rights that a defendant must be informed of are the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a) and (b). 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. *Nero* at 108.

{¶23} A review of the plea hearing shows that under the totality of the circumstances, McClain understood the nature of the charges and that the convictions would not merge for purposes of sentencing. The prosecutor set forth each of the charges to which McClain agreed to plea, the range of the possible sentence, and that an agreement that the charges would not merge was a condition of the plea. After the prosecutor set forth the plea, the trial court asked McClain's attorney if that was his understanding of the plea. His attorney responded:

> Yes, it is, your honor, and that's what I have discussed with my client, and after discussing it with my client, and his mother and uncle, Judge, we are prepared at this time for his change of plea with the understanding that

> before you accept this plea, you will go over his constitutional rights with him. I'm satisfied that once you have done so, the change of plea will be knowingly, intelligently, and voluntarily made.

Tr. 33.

{¶24} The trial court then asked McClain if he understood what the prosecutor said and what his attorney agreed to and whether if that was McClain's undestanding of the plea. McClain responded, "Yes, sir." After McClain stated that he understood the rights he was waiving, the court discussed each count to which McClain was pleading and asked McClain, "Do you understand those offenses?" to which McClain responded, "Yes, sir." McClain also stated that he agreed that there would be a sentencing range of 17 to 23 years in prison. McClain then entered a plea of guilty to each count.

{¶25} McClain's reliance on *State v. Blair*, 128 Ohio App.3d 435, 715 N.E.2d 233 (2d Dist.1998), is misplaced because *Blair* is distinguishable from this case. In *Blair*, the trial court asked the defendant whether he discussed the facts of the case with his lawyer and whether he understood the nature of the charges. The defendant responded "yes" to both questions. However, the Second Appellate District reversed the conviction holding that, "[a] defendant's mere affirmative response to the question whether he understands the nature of the charge against him, *without more,* is insufficient to support the necessary determination that he understands the nature of the charge against him." (Emphasis added.) *Id*. at 438. The court reasoned that the record must show that the defendant had

acquired an understanding of the charges against him from any source in order for the court to determine the defendant understood the charges. *Id.* 437-438.

{¶26} Unlike *Blair*, the record in this case is not silent as to McClain's understanding of the charges against him. The record shows that defense counsel, the prosecutor, and the trial court all discussed the charges with McClain prior to his entering his plea. The trial court was not faced with McClain's mere affirmative response that he understood the charges against him. Thus, we conclude the totality of the circumstances showed that McClain subjectively understood the nature of the charges and sentence he was facing.

{¶27} Moreover, the trial court conducted a hearing after McClain orally motioned to withdraw his plea. When the trial court asked McClain why he wanted to withdraw the plea, McClain responded:

> I feel like I was pressured into taking the plea in the first place. I feel like I always pushed trial, not talked to my lawyer [sic]. Every time I talked to him, every time I was asking him when do we start in preparation for trial, then we didn't go over any evidence the state had against me.
>
> I seen a couple police reports and he never even gave me any real evidence that like, I don't even know what I'm being accused of. I know I'm being accused of murder, but I don't know all the accusations against me. I never read any police reports — I mean, witness reports or anything. My attorney was representing me the whole time. I was forced to take the plea because if I went to trial, my attorney wouldn't have been able to fight for me.

Tr. 52.

{¶28} McClain's attorney responded by stating that he discussed the case with McClain and also talked to him regarding who the witnesses were. He also stated that

this was evidenced by the fact that McClain then proceeded to try to call these witnesses. His attorney also stated that he explained the charges to McClain more than one time and also explained how he could receive multiple charges when there was only one victim.

{¶29} The trial court then went through each of the charges and explained them to McClain and McClain stated that he understood each charge. The court then told him if he had gone to trial and was convicted, he would have been sentenced to life with parole. McClain acknowledged that by taking the plea, he was reducing the time he would spend in prison. McClain then continued to disagree that he understood the charges when he took the plea. The trial court noted that McClain did not state he did not understand at the time of the plea, nor did he tell the court at that time that he felt pressured. The only reason McClain could give the trial court for not speaking up at the plea hearing was "Basically, I just turned 19. I'm facing life in prison. Like I panicked at the fact I could be spending all that time in prison." Tr. 62. Defense counsel reminded the trial court that the court gave McClain time to talk to his mother prior to taking the plea.

{¶30} Based on the transcript of the plea hearing in which McClain indicated he understood the charges and agreed range of sentence, along with the trial court's discussion at the hearing regarding withdrawal of the plea, the trial court did not abuse its discretion by concluding that McClain was merely having a change of heart regarding the plea. Accordingly, McClain's first assigned error is overruled.

Legally Incorrect Sentence

{¶31} In his third assigned error, McClain argues the trial court erred by accepting the plea that contained a stipulation to not merge the crimes. McClain argues that based on the facts presented, merger was appropriate because there was only one animus.

{¶32} The fact that the offenses would not merge was one of the conditions of McClain's plea. When the transcript demonstrates that the state and defense counsel agreed that the offenses were not allied, the issue of allied offense is waived on appeal. *State v. Booker*, 8th Dist. Cuyahoga No. 101886, 2015-Ohio-2515, ¶ 19; *State v. Adams*, 8th Dist. Cuyahoga No. 100500, 2014-Ohio-3496, ¶ 10; *State v. Yonkings*, 8th Dist. Cuyahoga No. 98632, 2013-Ohio-1890; *State v. Carman*, 8th Dist. Cuyahoga No. 99463, 2013-Ohio-4910; *State v. Ward*, 8th Dist. Cuyahoga No. 97219, 2012-Ohio-1199. McClain's reliance on *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, is misplaced. In *Underwood*, the record was silent regarding the merger of the offenses. Accordingly, McClain's third assigned error is overruled.

{¶33} 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 the Cuyahoga County Court of Common Pleas 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

KATHLEEN ANN KEOUGH, P.J., and
EILEEN T. GALLAGHER, J., CONCUR