

[Cite as *State v. McKissick*, 2018-Ohio-282.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105607

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAMONT L. MCKISSICK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-15-592880-A and CR-16-607621-A

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

RELEASED AND JOURNALIZED: January 25, 2018

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EILEEN T. GALLAGHER, P.J.:

{¶1} Defendant-appellant, Lamont McKissick, appeals from the judgment of the common pleas court denying his presentence motion to withdraw his no contest plea. He raises the following assignment of error for review:

1. The trial court abused its discretion in refusing to allow appellant to withdraw his no contest plea prior to sentencing.
2. The trial court misapplied the highly competent counsel standard for withdrawal of a plea.

{¶2} After careful review of the record and relevant case law, we affirm the trial court's judgment.

I. Procedural and Factual History

{¶3} In July 2016, McKissick was named in a two-count indictment in Cuyahoga C.P. No. CR-16-607621-A, charging him with aggravated robbery in violation of R.C. 2911.01(A)(1), with notice of prior conviction, repeat violent offender, forfeiture, and firearm specifications; and having weapons while under disability in violation of R.C. 2923.13(A)(2), with a forfeiture specification.

{¶4} At his arraignment, McKissick was declared indigent and assigned counsel. Thereafter, McKissick filed a motion to disqualify counsel. Following a hearing held in September 2016, the trial court granted McKissick's motion to disqualify counsel and appointed new counsel.

{¶5} In January 2017, McKissick filed a second motion to disqualify counsel. In the motion, McKissick stated that he was dissatisfied with counsel's representation and that he intended to represent himself.

{¶6} The trial court held a hearing on McKissick's motion to ensure that he was knowingly, intelligently, and voluntarily waiving his right to counsel. At the hearing, the trial court thoroughly informed McKissick of his constitutional right to counsel, explained the perils of self-representation, and advised him that he would be held to the same standards as an attorney. Following a comprehensive colloquy, the trial court found that McKissick "knowingly, voluntarily, and intelligently waived his right to an attorney in this case." Thereafter, McKissick signed a written waiver of counsel, and the trial court ordered assigned counsel to serve as standby counsel.

{¶7} On the day of trial, McKissick informed the trial court that he wished to withdraw his formally entered plea of not guilty and enter a plea of no contest to the offenses, as charged in the indictment. Following a recitation of the facts supporting the indictment and a Crim.R. 11 plea colloquy, the trial court accepted McKissick's no contest pleas and found him guilty of each count.

{¶8} Prior to sentencing, however, McKissick filed a pro se motion to withdraw his no contest pleas. On the record, McKissick explained the basis of his motion to withdraw as follows:

I just — I want to — I want to proceed to trial. I want to proceed to trial immediately. And I just want to — I just want to — I want to swing my shot. I'm tired of coming in here and just taking cop-out pleas to things I

didn't do. And I feel like I have a right to — I have a shot to fight for my freedom.

{¶9} The trial court elected to postpone sentencing to hold a hearing on McKissick's motion to withdraw his plea. McKissick elected to end his self-representation and have counsel reappointed to represent him at the motion to withdraw hearing.

{¶10} At the motion to withdraw hearing, counsel for McKissick argued that McKissick was entitled to withdraw his no contest plea based on his profession of innocence and the court's failure to advise McKissick of his right to counsel during the Crim.R. 11 plea colloquy. At the conclusion of the hearing, the trial court denied McKissick's motion to withdraw, stating, in relevant part:

So in preparation for today's hearing, I did pull the transcript of the hearing. I also reviewed the record in this case. I want to note that on a prior date, specifically January 27th, 2017, Mr. McKissick did exercise a written waiver of right to counsel, and he expressed his intent to proceed pro se. I went through a lengthy hearing * * * in which I asked a very lengthy series of questions from Mr. McKissick, who ensured that he knowingly, intelligently, and voluntarily waived his right to counsel. I found that he did, and Mr. McKissick did sign this written waiver. I have that in the file.

So although Mr. McKissick is not an attorney, he did proceed pro se, that is not a sufficient basis to argue ineffective assistance. I find today that [defense counsel] is highly competent in his representation of Mr. McKissick; he is a very well-qualified attorney to handle all types of criminal cases.

So, now I must review what happened at the Criminal Rule 11 hearing where you were represented by yourself.

I reviewed the file, and I reviewed the transcript. And I note that I explained to you, Mr. McKissick, each and every one of your constitutional

rights; what you would be waiving by pleading no contest. And to each of my questions to you and notifications of what you would be waiving, you said that you understood. I asked you that repeatedly. I advised you of the potential penalties, including the maximum sentences which could be imposed, and the consequences of your plea. You stated that you understood. I also asked whether any promises had been made, specifically about sentences, or whether you were promised anything in exchange for entering a no contest plea. You said no promises were made.

Here you made both a oral and a written motion to withdraw your plea, but I find that there is no substantive basis for the motion to withdraw. Again, I reviewed the record of the transcript; I considered the record in this case. Knowing that you have highly competent counsel representing you here today, I find that no errors occurred at the plea hearing. It appears that your basis for your change or your motion to withdraw your plea is a claim of innocence. But here I find that this is just simply a change of heart. And it is established that a change of heart isn't a sufficient basis for withdrawing a guilty plea. And this in our Eighth District, *State vs. Elliot* — common spelling for Elliot: A claim of innocence alone without more evidence is insufficient grounds for vacating a plea that was knowingly, voluntarily and intelligently entered. I found that Mr. McKissick's plea was knowingly, intelligently, and voluntarily entered, and I see no reason to go against that further determination.

Mr. McKissick, your motion to withdraw your no contest plea is denied.

{¶11} In March 2017, the trial court sentenced McKissick to an aggregate seven-year prison term.

{¶12} McKissick now appeals from the trial court's judgment.

II. Law and Analysis

{¶13} In his first assignment of error, McKissick argues the trial court abused its discretion by denying his motion to withdraw his no contest plea. In his second assignment of error, McKissick argues the trial court misapplied the highly competent

counsel standard when denying his motion to withdraw his no contest plea. We address McKissick's assignments of error together for judicial clarity.

{¶14} Under Crim.R. 32.1, “[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.”

{¶15} In general, “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). It is well established, however, that “[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. A trial court must conduct a hearing to determine whether there is a reasonable legitimate basis for the withdrawal of the plea.” *Id.* at paragraph one of the syllabus.

{¶16} 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).

{¶17} 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.

{¶18} This court has also set forth additional factors to consider, including whether (5) the motion was made in a reasonable time, (6) the motion states specific reasons for withdrawal, (7) the accused understood the nature of the charges and the possible penalties, and (8) the accused was perhaps not guilty or had a complete defense.

State v. Benson, 8th Dist. Cuyahoga No. 83178, 2004-Ohio-1677, ¶ 9, citing *State v. Pinkerton*, 8th Dist. Cuyahoga Nos. 75906 and 75907, 1999 Ohio App. LEXIS 4453 (Sept. 23, 1999); *State v. Fish*, 104 Ohio App.3d 236, 661 N.E.2d 788 (1st Dist.1995).

{¶19} In this case, McKissick does not dispute that he was given a full Crim.R. 11 hearing before he entered his no contest plea, that he was given a complete hearing on his motion to withdraw, and that the trial court gave full and fair consideration to his plea withdrawal request. Instead, McKissick argues that the trial court abused its discretion by denying his motion to withdraw where he was not represented by highly competent counsel at the plea hearing, and where the basis of his motion was a proclamation of innocence.

{¶20} After careful review, it is evident that the trial court improperly found that McKissick was represented by highly competent counsel in this case during its discussion of the relevant *Peterseim* factors. As stated, McKissick knowingly, intelligently, and voluntarily waived his right to counsel and represented himself pro se during the plea

hearing. While McKissick was represented by highly competent counsel at the time of the motion to withdraw hearing, the *Peterseim* criteria focuses on whether McKissick was represented by highly competent counsel at the time of the plea.

{¶21} However, under the circumstances of this case, we find the trial court was not precluded from denying McKissick's motion to withdraw merely because he was not represented by counsel at the plea hearing. In this case, the trial court went to great lengths to ensure that McKissick understood the rights he was waiving and the perils of self-representation. Despite these advisements, McKissick waived his right to counsel. When McKissick signed the written waiver of counsel, he elected to be held to the same standards as an attorney. Having waived his constitutional right to counsel, McKissick cannot now contend the trial court abused its discretion by denying his motion to withdraw on the basis that he represented himself during the plea hearing. A finding to the contrary would encourage invited error.

{¶22} Regarding McKissick's proclamation of innocence, this court has held that 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. Minifee*, 8th Dist. Cuyahoga No. 99202, 2013-Ohio-3146, ¶ 27, quoting *State v. Kramer*, 7th Dist. Mahoning No. 01-CA-107, 2002-Ohio-4176, ¶ 58. A mere change of heart regarding a guilty plea and the possible sentence is insufficient justification for the withdrawal of a guilty plea. *Ohio v. Westley*, 8th Dist. Cuyahoga No. 97650, 2012-Ohio-3571, citing *State v. Drake*, 73 Ohio App.3d 640, 645, 598 N.E.2d 115 (8th

Dist.1991). Likewise, a defendant's protestations of innocence are not sufficient grounds for vacating a plea that was voluntarily, knowingly, and intelligently entered. *Minifee* at ¶ 27, citing *State v. Bloom*, 8th Dist. Cuyahoga No. 97535, 2012-Ohio-3805, ¶ 13.

{¶23} During the motion to withdraw hearing, the trial court stated that it carefully considered the transcript of the proceedings as well as the basis of McKissick's motion. After careful consideration, the court found that McKissick's statements demonstrated that he merely had a change of heart. We agree. The record reflects that McKissick knowingly, voluntarily, and intelligently entered his no contest pleas after he was afforded a sufficient Crim.R. 11 colloquy. During the plea hearing, the trial court explained to McKissick the effect of a no contest plea, the nature of the charges at issue, the potential penalties he faced, and the constitutional rights he was waiving by pleading no contest. McKissick repeatedly stated that he understood the court's advisements and confirmed to the court that no threats or promises had been made. At no time did McKissick express that he did not understand the matters of which he was advised. A trial court's adherence to Crim.R. 11 raises a presumption that a plea is voluntarily entered. *State v. Elliott*, 8th Dist. Cuyahoga No. 103472, 2016-Ohio-2637, ¶ 25. Accordingly, we find the trial court did not abuse its discretion in determining that McKissick's statement that he was tired of "taking cop-out pleas to things I didn't do" did not constitute a sufficient basis for a withdrawal of his plea.

{¶24} Based on the foregoing, we find the record demonstrates that McKissick waived his right to be represented by highly competent counsel during the plea hearing, he was given a full Crim.R. 11 hearing before entering his pleas, he was afforded a complete and impartial hearing on his motion, and the trial court gave full and fair consideration to the plea withdrawal request. Additionally, beyond the trial court's misstatement concerning McKissick's representation by counsel, there is no evidence in the record to suggest the trial court misapplied the *Peterseim* standard or otherwise acted unjustly or unfairly. Therefore, we find the trial court did not abuse its discretion in denying McKissick's motion to withdraw his no contest plea.

{¶25} McKissick's first and second assignments of error are overruled.

{¶26} 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, PRESIDING JUDGE
MARY J. BOYLE, J., and
PATRICIA ANN BLACKMON, J., CONCUR