[Cite as *State v. Bigelow*, 2009-Ohio-4093.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

STATE OF OHIO Appellee v. DEANDRE L. BIGELOW Appellant	C.A. No. 08CA0072-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 07CR0490

DECISION AND JOURNAL ENTRY

Dated: August 17, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Deandre Bigelow, appeals from his convictions in the Medina County Court of Common Pleas. This Court affirms in part and reverses in part.

I

{¶2} In October 2007, Bigelow was indicted on rape, in violation of R.C. 2907.02(A)(2), and two counts of kidnapping, in violation of R.C. 2905.01(A)(4) and (A)(2). Bigelow pleaded not guilty and his case proceeded to trial on May 19, 2008. After one day of trial, Bigelow entered a guilty plea to the rape count and the kidnapping count under R.C. 2905.01(A)(2). In exchange, the State agreed to request concurrent sentences on those two counts and to dismiss the remaining kidnapping count under R.C. 2905.01(A)(4). Bigelow's sentencing hearing was scheduled for June 27, 2009.

{¶3} On June 13, 2009, Bigelow filed a motion to withdraw his guilty plea and the court later held a hearing at which Bigelow was present and testified. The court denied

Bigelow's motion to withdraw his guilty plea. Bigelow filed a motion for reconsideration and attached supplemental authority to support his request to withdraw his plea. The court held a hearing on the motion for reconsideration and subsequently denied it. Bigelow was later sentenced to eight years on each count, to be served concurrently.[1] Bigelow now appeals from his convictions, asserting three assignments of error for our review.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO WITHDRAW GUILTY PLEAS[.]"

{¶4} In his first assignment of error, Bigelow argues that the trial court erred when it denied his motion to withdraw his plea. He considers his case analogous to *State v. Wheeland*, 9th Dist. No. 06CA0034-M, 2007-Ohio-1213, where we held that the trial court abused its discretion in denying Wheeland's motion to withdraw his plea. Thus, he asserts the trial court erred in his case as well. We disagree.

{¶5} Under Crim.R. 32.1, a defendant can file a "motion to withdraw a plea of guilty *** before sentence is imposed[.]" While a presentence motion to withdraw a guilty plea is "to

[1] Pursuant to *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, this Court reviews sua sponte all sentencing entries for errors with respect to the imposition of post-release control. See, e.g., *State v. Olah*, 9th Dist. No. 08CA009447, 2009-Ohio-3651, at ¶6. We note that Bigelow's sentencing entry indicates that post-release control is "required" for his offenses "for a term of five (5) years." Though the entry later notes that he "is ordered to serve *any term* of post-release control imposed by the Ohio Parole Board," we consider this phrase to reference the five-year term imposed earlier in the entry. (Emphasis added.) Additionally, we note that Bigelow was properly informed of the five year mandatory term of post-release control during his plea colloquy and again at his sentencing hearing. Thus, we consider his sentencing entry to adequately reflect the nature and term of his post-release control sentence.

be freely allowed and treated with liberality" by the trial court, "[a defendant] who enters a guilty plea has no right to withdraw it." *State v. Xie* (1992), 62 Ohio St.3d 521, 526, quoting *Barker v. United States* (C.A.10, 1978), 579 F.2d 1219, 1223. To prevail on a motion to withdraw a guilty plea, a defendant must provide a reasonable and legitimate basis for withdrawing his guilty plea. *State v. North*, 9th Dist. No. 06CA009063, 2007-Ohio-5383, at ¶5.

{¶6} "The decision to grant or deny a motion to withdraw a guilty plea lies within the sound discretion of the trial court." *State v. Atkinson*, 9th Dist. No. 05CA0079-M, 2006-Ohio-5806, at ¶10. Therefore, we review a motion to withdraw a guilty plea for an abuse of discretion. *State v. Griffin*, 9th Dist. No. 24179, 2009-Ohio-1212 at ¶11. An abuse of discretion is not merely an error of law or judgment, but means that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. We have previously determined that:

> "A trial court does not abuse its discretion in denying a motion to withdraw a plea when the following three elements were present: 1) the defendant was represented by competent counsel; 2) the trial court provided the defendant with a full hearing before entering the guilty plea; and 3) the trial court provided the defendant with a full hearing on the motion to withdraw his guilty plea and considered the defendant's arguments in support of his motion to withdraw his guilty plea." *State v. Brown*, 9th Dist. No. 23759, 2007-Ohio-7028, at ¶15, quoting *State v. Daugherty*, 9th Dist. No. 05CA0058, 2006-Ohio-2684, at ¶16.

Bigelow does not argue that the trial court erred in considering any of the foregoing elements. Instead, he asserts that we should look beyond these three elements alone, and should consider additional factors as we did in *Wheeland*. In reviewing the denial of Wheeland's motion to withdraw his plea, we considered other factors such as prejudice to the State based on his plea withdrawal, the timing of his motion, the reasons for the motion, his understanding of the charges and sentencing potential, and his potential to prevail in his defense and claims of innocence. *Wheeland* at ¶12.

{¶7} Though Bigelow argues we should consider the additional factors from *Wheeland*, he does not develop any argument in support of those factors. App.R. 16(A)(7). Instead, he merely asserts that he "has evidence to refute the [S]tate's case against him and show that he is innocent." He does not, however, indicate what that evidence would be, nor did he proffer any of that evidence to the trial court during the hearing on his motion to withdraw.

{¶8} In *Wheeland*, during the hearing on his motion to withdraw his plea, Wheeland presented the testimony of two witnesses who had recently come forward with "newly discovered evidence tending to show [that he] was perhaps not guilty or had a complete defense to the charge." (Internal quotations omitted.) *Wheeland* at ¶5. Because the trial court had failed to fully consider this new evidence, and because the potential harm to Wheeland greatly outweighed any prejudice that the State might suffer by permitting him to withdraw his plea, we concluded that the trial court erred by not permitting Wheeland to do so. Unlike Wheeland, Bigelow asserts only his professed innocence; he does not point to any "newly discovered evidence" which would support a finding that he is "not guilty or had a complete defense to the charge." Id. Because Bigelow did not provide the trial court with any "reasonable and legitimate [basis] for withdrawing his guilty plea," the trial court did not error in denying his motion. *North* at ¶5. Accordingly, Bigelow's first assignment of error lacks merit.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO REQUIRE THE STATE OF OHIO TO ELECT AT SENTENCING WHICH CHARGE THE STATE DESIRED THE COURT TO IMPOSE SENTENCE ON APPELLANT BECAUSE THE OFFENSES WERE ALLIED OFFENSES OF SIMILAR IMPORT[.]"

{¶9} In his second assignment of error, Bigelow asserts that the trial court abused its discretion when it sentenced him to concurrent prison terms for his rape and kidnapping convictions because his offenses were allied offenses of similar import.

{¶10} R.C. 2941.25 provides that:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

Thus, a defendant can be convicted for two offenses if the offenses are "(1) offenses of dissimilar import [or] (2) offenses of similar import committed separately or with separate animus." *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, at ¶17.

{¶11} This Court has held that "[w]hen a defendant pleads guilty and then affirmatively raises the issue of allied offenses, the trial court must conduct a hearing to determine whether any of the offenses to which the defendant has pleaded are allied offenses of similar import with a single animus." *State v. Banks*, 9th Dist. No. 24259, 2008-Ohio-6432, at ¶22, quoting *State v. Thrower* (1989), 62 Ohio App.3d 359, 376. Our review of the record reveals that Bigelow raised the issue of allied offenses at sentencing, however, the trial court failed to hold a hearing on the matter. This Court has previously concluded that "rape, in violation of R.C. 2901.02(A)(2) and kidnapping in violation of R.C. 2905.01(A)(2) *** are allied offenses of similar import." *State v. Evans*, 9th Dist. No. 07CA0057-M, 2008-Ohio-4772, at ¶24. Because we have previously determined that the offenses to which Bigelow pleaded guilty are allied offenses, it was imperative for the trial court to hold a hearing to determine whether the offenses were committed

separately or with a separate animus. The trial court's failure to do so constitutes reversible error. See *State v. Harris*, Slip Opinion No. 2009-Ohio-3323, at ¶25 (remanding the case to the trial court for a determination of whether felonious assault charges under R.C. 2903.11(A)(1) and (A)(2), if separately charged, were committed with the same animus). Thus, Bigelow's second assignment of error is sustained.

Assignment of Error Number Three

"THE TRIAL COURT ERRED WHEN IT APPLIED OHIO'S NEW SEXUAL OFFENDER REGISTRATION LAW TO APPELLANT, OHIO REV. CODE § 2950."

{¶12} In his third assignment of error, Bigelow alleges that the trial court erred in sentencing him under revised R.C. 2950, effective January 1, 2008, when the offenses to which he pleaded guilty occurred in September 2007. Bigelow further asserts that the revised law, the Adam Walsh Act, is unconstitutional because: it violates Article I, Section 10 of the U.S. Constitution which prohibits ex post facto laws by imposing a harsher criminal punishment for his offense which did not exist under law at the time he committed them; it violates Article II, Section 28 of the Ohio Constitution which prohibits the enactment of retroactive laws for the same reason; it violates the separation of powers doctrine by usurping, through legislative act, the judiciary's power to adjudicate a sexual offender's status; and it violates the Due Process clauses of both the United States Constitution and the Ohio Constitution by imposing residency restrictions upon him following his incarceration. We disagree.

{¶13} This Court has previously analyzed and rejected the constitutional arguments Bigelow offers on appeal. *State v. Honey*, 9th Dist. No. 08CA0018-M, 2008-Ohio-4943 at ¶5-21 (concluding that the Adam Walsh Act does not violate the prohibitions against ex post facto and retroactive laws, nor does it violate a defendant's substantive due process rights); *State v.*

Reinhardt, 9th Dist. No. 08CA0012-M, 2009-Ohio-1297, at ¶29 (concluding that the Adam Walsh Act does not violate the separation of powers doctrine). Moreover, we note that, although counsel admits in the brief that "the [aforementioned constitutional] arguments are the work of the Ohio Public Defender's Office," counsel made no attempt to apply the facts of Bigelow's case to the arguments asserted. Furthermore, he failed to acknowledge this Court's position of having rejected such arguments and did not offer any independent arguments or legal authority as to why we should revisit our previous decisions on these issues. Accordingly, Bigelow's third assignment of error is not well taken.

III

{¶14} Bigelow's first and third assignments of error are overruled. Bigelow's second assignment of error is sustained. The judgment of the Medina County Court of Common Pleas is affirmed in part, reversed in part, and the matter is remanded to the trial court for a hearing on the issue of allied offenses.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

DAVID C. SHELDON, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MICHAEL P. MCNAMARA, Assistant Prosecuting Attorney, for Appellee.