

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 25020

Appellee

v.

LORI LYNN JENKINS

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 09 03 0747

Appellant

DECISION AND JOURNAL ENTRY

Dated: May 19, 2010

CARR, Judge.

{¶1} Appellant, Lori Jenkins, appeals the judgment of the Summit County Court of Common Pleas. This Court reverses.

I.

{¶2} On March 19, 2009, the Summit County Grand Jury indicted Jenkins on one count of illegal manufacture of drugs in violation R.C. 2925.04(A), a felony of the first degree; one count of illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041(A), a felony of the second degree; one count of endangering children in violation of R.C. 2919.22(B)(6), a felony of the third degree; one count of aggravated possession of drugs in violation of R.C. 2925.11(A)(C)(1), a felony of the fourth degree; and one count of possessing criminal tools in violation of R.C. 2923.24, a felony of the fifth degree. On March 27, 2009, Jenkins waived her arraignment on the charges in the indictment.

{¶3} On August 25, 2009, Jenkins entered a plea of guilty to an amended count of illegal manufacture of drugs in violation of R.C. 2925.04(A), a felony of the second degree, and child endangering in violation of R.C. 2919.22(B)(6). The trial court then set September 3, 2009, as the sentencing date. Jenkins contends that on August 26, 2009, she filed a pro se motion to withdraw her plea. The record does not contain a formal motion filed on that date.

{¶4} On September 2, 2009, Jenkins' original attorney filed a motion requesting permission to withdraw as counsel of record. In this motion, withdrawing counsel noted that Jenkins had previously "contacted the Court via letter" to say that she wished to withdraw her plea on the grounds that it was not voluntarily and knowingly entered. In that same motion, counsel for Jenkins stated that he had to clarify the details of the plea agreement for Jenkins on the day she entered her guilty plea. This was necessary because counsel, on the day Jenkins was to enter her plea, discovered the plea offer included the charge of manufacturing of methamphetamines as amended to a felony of the second degree rather than illegal assembly/possession of chemicals to manufacture methamphetamines, a felony of the second degree. The balance of the plea deal remained the same in regard to the child endangering charge and the agreed upon sentence. Withdrawing counsel stated that the process of clarifying the terms of the plea deal may have caused Jenkins to be "hurried" in entering her plea as her case was called soon after the actual terms of the plea agreement were explained to her.

{¶5} Also on September 2, 2009, Jenkins retained new counsel. On that same date, both new counsel and withdrawing counsel filed motions to withdraw the guilty plea on behalf of Jenkins. Furthermore, Jenkins' new counsel filed a motion to unseal warrant and affidavit with a request for an oral hearing.

{¶6} On September 3, 2009, the trial court conducted a hearing on the motion to withdraw the plea prior to sentencing Jenkins. The trial court allowed counsel for Jenkins to explain that the plea may have been rushed. The trial court, however, indicated that it would not entertain the issue of whether Jenkins should be permitted to withdraw her plea in light of a possibly unlawful search. The trial court allowed counsel for Jenkins to state the issue on the record and then, after allowing the State to address the court, promptly denied Jenkins' motion. The trial court then proceeded to sentence Jenkins to a three-year prison term.

{¶7} The conviction was journalized on September 10, 2009. Subsequently, on September 25, 2009, the trial court issued a nunc pro tunc journal entry to correct several clerical errors in the September 10, 2009 entry.

{¶8} On September 28, 2009, Jenkins filed a motion captioned "notice of filing defendants['] pro se motion for withdrawal of plea." Attached to this motion was a copy of a letter which was dated August, 26, 2009. In this signed letter which was addressed to the trial court, Jenkins indicated that miscommunication with original counsel resulted in her being unaware of one of the charges to which she pleaded guilty. This motion, and the letter attached thereto, was not time-stamped until September 28, 2009. At that time, the trial court had ruled on a separate pre-sentence motion to withdraw the plea and Jenkins' conviction had been journalized. Also, on September 28, 2009, Jenkins filed a notice of filing a transcribed statement which purportedly had been taken on March 9, 2009; a motion for reconsideration of her motion to withdraw her plea; as well as a motion instantter to suppress and to dismiss concerning the pre-sentence search issue.

{¶9} Subsequently, on October 2, 2009, Jenkins timely filed her instant appeal. On appeal, Jenkins raises one assignment of error.

II.

ASSIGNMENT OF ERROR

“THE TRIAL COURT IMPROPERLY DENIED DEFENDANT’S PRO SE AND COUNSELS[’] PRESENTENCE MOTIONS TO WITHDRAW HER PLEA.”

{¶10} In her sole assignment of error, Jenkins argues that the trial court abused its discretion in denying her pre-sentence motion to withdraw her guilty plea. This Court agrees.

{¶11} Crim.R. 32.1, which governs the withdrawal of guilty pleas, states:

“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.”

{¶12} This Court has held that “[a] criminal defendant may withdraw his guilty plea prior to sentencing if the criminal defendant has presented a legitimate and reasonable basis for the withdrawal of the guilty plea.” *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶20. While an appellate court reviews a trial court’s decision to grant or deny a criminal defendant’s motion to withdraw his guilty plea for an abuse of discretion, this Court has asserted that “[w]hen a motion to withdraw a guilty plea is made before sentencing, it is to be freely allowed and treated with liberality.” *State v. Eklich* (June 29, 1994), 9th Dist. No. 2279-M. See, also, *State v. Xie* (1992), 62 Ohio St.3d 521, 527.

{¶13} An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. This Court has previously held that a trial court does not abuse its discretion by

denying a pre-sentence motion to withdraw a guilty plea when the following three elements are present:

“(1) the defendant is represented by competent counsel; (2) the trial court provides the defendant with a full hearing before entering the guilty plea; and (3) the trial court provides the defendant with a full hearing on the motion to withdraw the guilty plea, where the court considers the defendant’s arguments in support of his motion to withdraw the guilty plea.” *West* at ¶22, quoting *State v. Pamer*, 9th Dist. No. 04CA0027-M, 2004-Ohio-7190, at ¶10.

Furthermore, this Court has required that a trial court’s decision regarding a pre-sentence motion to withdraw a guilty plea also take into consideration the facts and circumstances which are specific to each case. *West* at ¶23. In reviewing the trial court’s decision, this Court must consider those same facts and circumstances. *Id.*

{¶14} In *State v. Wheeland*, 9th Dist. No. 06CA0034-M, 2007-Ohio-1213, at ¶12, this Court recognized several additional factors which may be relevant to the inquiry of whether the trial court properly ruled on a motion to withdraw a guilty plea. Those factors included:

“(1) whether the state will be prejudiced by withdrawal; 2) the representation afforded to the defendant by counsel; 3) the extent of the Crim.R. 11 plea hearing; 4) the extent of the hearing on the motion to withdraw; 5) whether the trial court gave full and fair consideration to the motion; 6) whether the timing of the motion was reasonable; 7) the reasons for the motion; 8) whether the defendant understood the nature of the charges and potential sentences; and 9) whether the accused was perhaps not guilty or had a complete defense to the charge.’ *State v. Fulk*, 3d Dist. No. 15-04-17, 2005-Ohio-2506, at ¶13, quoting *State v. Lewis*, 3d Dist. No. 1-02-10, 2002-Ohio-3950, at ¶11.” *Wheeland* at ¶12.

{¶15} On appeal, Jenkins argues the trial court abused its discretion in denying her motion to withdraw her plea because she did not understand the nature of the charges against her when she entered her guilty plea. Jenkins also asserts that the trial court did not adequately consider whether the reasons she offered in support of her motion were reasonable.

{¶16} The record suggests that there may have been some issues with the representation afforded to Jenkins throughout the plea and sentencing phases, as well as the sufficiency of the hearing on Jenkins' motion to withdraw her plea.

{¶17} After Jenkins had entered her guilty plea and just one day prior to sentencing, on September 2, 2009, Jenkins' original attorney filed a motion to withdraw as counsel of record. In that motion, the attorney explained that he had a discussion with Jenkins immediately prior to her plea colloquy in which it was necessary to clarify the charges contained in the State's plea offer. The attorney stated that he did explain to Jenkins the charges that were part of the plea agreement, the potential penalties associated thereto, the agreed upon sentence, as well as the rights she would be giving up by entering the plea. The attorney also stated that the conversation caused Jenkins to be "hurried" as she entered her plea. In concluding, Jenkins' original attorney stated, "Counsel assumes all responsibility for his client if she is now relaying that she did not understand the plea deal, the charges, etc. and is asking the court to permit her to withdraw her plea and withdraw him as counsel of record so that she may seek alternate counsel."

{¶18} The following day, at the hearing on the motion to withdraw her plea, Jenkins' new counsel stated on the record that Jenkins' understanding of the nature of the plea offer changed just before she entered her plea. The State responded that the plea offer had not changed throughout the course of the plea bargaining process. However, Jenkins' prior counsel, in the motion he filed the previous day, admitted that he did not adequately convey the charges in the plea offer until just prior to the plea colloquy. When permitted by the trial court to speak at the hearing on the motion to withdraw her plea, Jenkins stated, "It was changed on me two seconds before I did it and I'm not guilty of that." Jenkins further stated, "I understood that I

was pleading to possession of chemicals *** [a]nd when he come out there and said we are going to go in and plead to manufacturing, I never agreed to plead to that.”

{¶19} Jenkins was represented by new counsel at the September 3, 2009 hearing on the motion to withdraw her plea. Jenkins’ new counsel stated on the record that he had reviewed the case “at light speed” and discovered that the search warrant had not been issued until “11:24 pm on March 9th.” The trial judge then stated, “I’m not going to get into that.” Defense counsel then stated on the record there was a concern with “whether or not this search ha[d] been appropriately effected.” It is evident that the trial court was unwilling to consider Jenkins’ argument regarding the validity of the search prior to ruling on the motion to withdraw her plea. After the trial court ruled that it would not allow Jenkins to withdraw her guilty plea, the following exchange occurred:

“The Court: Ma’am, anything you want to tell me before I pass the sentence?

“The Defendant: I think that I was lied to the whole time by my attorney. The people that came to my house, they were searching my house before they ever had a search warrant. Alls (sic) they asked was could they look at the table that I stained.”

“The Court: Ma’am, this not the time for this. You can indicate that you believe that your attorney has not – this is long past time to talk about search issues. You’ve pled guilty, I’ve gone over all your rights, anything else you want to tell me before I pass the sentence?

“The Defendant: I just think I’m being wrongfully convicted of something I didn’t do.”

{¶20} As noted above, a pre-sentence motion to withdraw a plea is to be “freely allowed and treated with liberality.” *Eklich*, supra; see, also *Xie*, 62 Ohio St.3d at 527. In this case, Jenkins stated at the hearing on her motion that she was unaware of one of the charges to which she was pleading at the plea colloquy. In his motion to withdraw as counsel of record, Jenkins’ prior counsel acknowledged that he did not inform Jenkins of the actual charges in the plea offer

until just prior to the plea colloquy and that Jenkins was “hurried” in entering her plea. Also, the record indicates that the trial court was unwilling to consider Jenkins’ argument regarding possible issues with the validity of the search. Given the specific facts and circumstances of this case, the trial court abused its discretion in denying Jenkins’ pre-sentence motion to withdraw her plea.

{¶21} Jenkins’ assignment of error is sustained.

III.

{¶22} Jenkins’ sole assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed and the cause remanded for further proceedings consistent with this decision.

Judgment reversed,
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 Summit, 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.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

RUSSELL A. BUZZELLI, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.