

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,	:	JUDGES:
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff - Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Craig R. Baldwin, J.
-VS-	:	
	:	
NAKEIAL H. CARTER	:	Case No. 2024 CA 0018
	:	
Defendant - Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2020-CR-0069R
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT:	December 30, 2024
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APPEARANCES:

For Plaintiff-Appellee

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Richland County, Ohio

By: MICHELLE FINK
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For Defendant-Appellant

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Baldwin, J.

{¶1} The appellant, Nakeial H. Carter, appeals his conviction and sentence in the Richland County Court of Common Pleas. Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On January 20, 2023, the appellant was indicted for one count of Attempted Murder in violation of R.C. §2923.02 and R.C. §2903.02, one count of Felonious Assault in violation of R.C. §2903.11(A)(2), one count of Carrying a Concealed Weapon in violation of R.C. §2923.12(A)(2), and twelve counts of Discharging a Firearm on or Near Prohibited Premises in violation of R.C. §2941.145.

{¶3} On February 27, 2024, the appellant entered a plea of guilty to the indictment.

{¶4} On March 20, 2024, the appellant filed a Motion to Withdraw Guilty Plea Prior to Sentencing.

{¶5} On April 12, 2024, the trial court held a hearing on the appellant's Motion to Withdraw Guilty Plea Prior to Sentencing. The trial court overruled the appellant's Motion to Withdraw Guilty Plea Prior to Sentencing and held a sentencing hearing on the same day.

{¶6} At the sentencing hearing, the appellant argues that counts four through fifteen should merge as the appellant shot the gun with the same animus. As the firearm used by the appellant could be fired in either a semi-automatic or an automatic configuration, the appellant argued, in the alternative, that bullets from each trigger pull should merge. The appellant did not present any evidence on the amount of times he pulled the trigger. The appellee argued that each bullet represents separate danger and

separate harm. The appellee presented a recording of the event where you could hear the bullets being fired.

{¶7} After listening to the recording, the trial court said, “it sounds like there were a few shots and then a bunch of shots.” The trial court continued, “[i]t may be a situation where the switch was not on when the initial shots went off but then there was a bunch of booms and then one boom at the end.” The trial court then told the appellant he was responsible for every shot fired.

{¶8} The trial court sentenced the appellant to ten-to-fifteen years for Attempted Murder which merged with Felonious Assault, a consecutive twelve months on Carrying a Concealed Weapon, a concurrent term of thirty-six months on twelve counts of Discharging of a Firearm on or Near Prohibited Premises, and a consecutive mandatory three-year firearm specification. The trial court also explained the mandatory two-to-five-year post-release control and ordered court costs and restitution to be paid. The appellant was given credit for time served.

{¶9} The appellant filed a timely notice of appeal and raised the following two assignments of error:

{¶10} “I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT’S PRE-SENTENCE MOTION TO WITHDRAW HIS GUILTY PLEA.

{¶11} “II. THE TRIAL COURT VIOLATED THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS AND R.C. 2941.25 BY FAILING TO MERGE COUNTS FOUR THROUGH FIFTEEN FOR DISCHARGING A FIREARM ON OR OVER PROHIBITED PREMISES.”

I.

{¶12} In the appellant's first assignment of error, the appellant argues the trial court abused its discretion in denying his Motion to Withdraw Guilty Plea Prior to Sentencing. We disagree.

STANDARD OF REVIEW

{¶13} A motion to withdraw a plea is governed by Crim.R. 32.1, which provides:

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.

ANALYSIS

{¶14} The appellant argues that the trial court erred in denying his Motion to Withdraw Guilty Plea Prior to Sentencing because they are to be freely granted.

{¶15} "A presentence motion to withdraw a guilty plea should be freely and liberally granted." *State v. Barnes*, 2022-Ohio-4486, ¶13, *citing State v. Xie*, 62 Ohio St.3d 521 (1992). However, a defendant does not have an absolute right to withdraw his or her plea, even when a motion to withdraw is made before sentencing. *Id.* Before ruling on a defendant's presentence motion to withdraw his plea, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for withdrawing the plea. *Id.* The determination of whether there is a reasonable and legitimate basis for the defendant's request to withdraw a plea is within the sound discretion of the trial court

and must be affirmed on appeal absent an abuse of discretion on the part of the trial court. *Id.* “Abuse of discretion” implies an unreasonable, arbitrary, or unconscionable attitude on the part of the court. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶16} The factors which may be considered by a trial court when making a decision on a motion to withdraw a guilty plea include: (1) prejudice to the state; (2) counsel’s representation; (3) adequacy of the Crim.R. 11 plea hearing; (4) extent of the plea withdrawal hearing; (5) whether the trial court gave full and fair consideration to the motion; (6) timing; (7) the reasons for the motion; (8) the defendant’s understanding of the nature of the charges and the potential sentences; and (9) whether the defendant was perhaps not guilty or has a complete defense to the charge. *State v. Fish*, 104 Ohio App.3d 236 (1st Dist.1995). No one factor is conclusive. *State v. Cuthbertson*, 2000-Ohio-2638 (7th Dist.2000); *State v. Shields*, 2023-Ohio 1561 (5th Dist.), ¶¶8-11.

{¶17} In the case *sub judice*, the appellant had a full Crim. R. 11 plea hearing, at all times the appellant was represented by competent counsel, the appellant did not allege that he did not understand the charges against him, and the incident was captured on video. In addition, the appellee played a recording between the appellant and his grandparents where they told him to get out of the deal because it was not good enough. This Court has previously found that the trial court does not abuse its discretion when the defendant is motivated by “a change of heart.” *State v. Carrington*, 2011-Ohio-3228 (5th Dist.), ¶11. Accordingly, the did not abuse its discretion in denying the appellant’s Motion to Withdraw Plea Prior to Sentencing by finding the appellant had merely a “change of heart” regarding his plea.

{¶18} The appellant’s first assignment of error is overruled.

II.

{¶19} In the appellant's second assignment of error, the appellant argues the twelve counts of Discharging a Firearm on or Near Prohibited Premises in violation of R.C. §2941.145 should merge for the purposes of sentencing. We disagree.

STANDARD OF REVIEW

{¶20} Appellate review of an allied-offense question is de novo. *State v. Miku*, 2018-Ohio-1584 (5th Dist.), ¶70, citing *State v. Williams*, 2012-Ohio-5699, ¶12.

ANALYSIS

{¶21} R.C. §2941.25 protects a criminal defendant's rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions by prohibiting convictions of allied offenses of similar import:

(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.

{¶22} The application of R.C. §2941.25 requires a review of the subjective facts of the case in addition to the elements of the offenses charged. *State v. Hughes*, 2016-Ohio-880 (5th Dist.), ¶22. In a plurality opinion, the Ohio Supreme Court modified the test

for determining whether offenses are allied offenses of similar import. *State v. Johnson*, 2010-Ohio-6314. The Court directed lower courts to look at the elements of the offenses in question and determine “whether it is possible to commit one offense and the other with the same conduct.” *Id.* at ¶48. If the answer is in the affirmative, the court must then determine whether or not the offenses were committed by the same conduct. *Id.* at ¶49. If the answer to the above two questions is yes, then the offenses are allied offenses of similar import and will be merged. *Id.* at ¶50. If, however, the court determines that the commission of one offense will never result in the commission of the other, or if there is a separate animus for each offense, then the offenses will not merge. *Id.* at ¶51. The “accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without separate animus[.]” *State v. Rogers*, 2015-Ohio-2459, ¶3.

{¶23} *Johnson’s* rationale has been described by the Supreme Court as incomplete. *State v. Earley*, 2015-Ohio-4615, ¶11. The Ohio Supreme Court has further instructed courts to ask three questions when considering whether a defendant’s conduct supports multiple offenses: “(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately, and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.” *State v. Ruff*, 2015-Ohio-995, ¶31.

{¶24} In *State v. McConnell*, 2023-Ohio-654 (5th Dist.), the defendant fired twenty-three bullets over a roadway and into a habitation. The defendant was charged with one count of Attempted Murder, twenty-three counts of felonious assault, twenty-three counts

of Discharging a Firearm into a Habitation, and twenty-three counts of Discharging a Firearm over a Roadway. *Id.* at ¶48. This Court found that the twenty-three shots fired over a roadway did not merge with each other. *Id.* at ¶49. Those shots could have struck other cars and passengers. Accordingly, each shot constituted a separate offense. *Id.* at ¶50.

{¶25} Similar to *McConnell*, in the case *sub judice*, the appellant fired twelve shots at a fleeing vehicle. The appellant was using a firearm that could be switched from semi-automatic to automatic fire. The trial court noted that some of the shots were close together and that it might be a situation where the appellant switched from semi-automatic fire to automatic fire part way through. However, the trial court does not go so far as to make this finding. Aside from the recording the State played, no evidence was presented as to whether or not the appellant used the firearm in the automatic fire configuration. The trial court then found the appellant responsible for every bullet fired. As the appellant failed to demonstrate “a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without separate animus,” the trial court did not err in failing to merge the twelve counts of Discharging a Firearm on or Near Prohibited Premises. *Rogers* at ¶3.

{¶26} Accordingly, the appellant’s second assignment of error is overruled.

CONCLUSION

{¶27} Based upon the foregoing, the decision of the Richland County Court of Common Pleas is, hereby, affirmed.

By: Baldwin, J.

Delaney, P.J. and

Hoffman, J. concur.