

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-10-1365

Appellee

Trial Court No. 10CRB00715-A

v.

Carl M. DeVault

DECISION AND JUDGMENT

Appellant

Decided: January 6, 2012

* * * * *

John B. Arnsby, Maumee Municipal Prosecuting Attorney, and
Raymond A. Runner, Assistant Municipal Prosecuting Attorney,
for appellee.

Jeffrey P. Nunnari, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Carl DeVault, appeals the November 19, 2010 judgment of the Maumee Municipal Court which, following the court's denial of appellant's presentence motion to withdraw his no contest pleas, sentenced him to 90

days of incarceration with 75 days suspended, a fine, court costs and three years of probation. Because we find that the court abused its discretion, we reverse.

{¶ 2} Appellant was charged with the felony offense of assault on a peace officer (in Maumee Municipal Court case No. 10 CRA 00716), resisting arrest and obstructing official business, both second degree misdemeanors, and disorderly conduct, a fourth degree misdemeanor. The charges stem from an incident on August 22, 2010, where appellant's wife was the subject of a traffic stop and, ultimately, charged with driving under the influence of alcohol. Appellant, who was a passenger in the vehicle and was also intoxicated, began arguing with the officers and a physical altercation allegedly ensued.

{¶ 3} On September 27, 2010, appellant, represented by counsel, entered no contest pleas to resisting arrest and disorderly conduct. The remaining charges were dismissed. During the plea hearing appellant was informed of the possible penalties. The court confirmed that appellant was not threatened into or promised anything in exchange for his plea, that he understood his potential defenses, and that he was satisfied with his counsel. The court then explained the rights appellant was waiving by entering the plea. These included the right to a jury trial, the right against self-incrimination, and the right to subpoena witnesses.

{¶ 4} The court then accepted his pleas and the state set forth its facts in support of the charges. According to the prosecutor, while the officers were administering the field sobriety tests to appellant's wife, appellant began to yell and harass the officers.

Appellant, despite being commanded to remain in the vehicle, exited the vehicle and began wrestling with the officers. The prosecutor stated that appellant went for an officer's gun belt. Appellant failed to comply with their cease and desist requests and was ultimately Tasered. The court then made a finding of guilt and the matter was set for sentencing on November 19, 2010.

{¶ 5} On November 12, 2010, appellant, with new counsel, filed a motion to withdraw his no contest pleas. In support, appellant argued that during the plea hearing the trial court failed to inform him of the effect of his guilty plea. Appellant stated in an attached affidavit that he believed that a no contest plea would allow him to explain his version of the facts to the court and that the judge could ultimately find him not guilty. Appellant stated that he was innocent of the charges and that had he known the effect of the no contest plea he would not have allowed his attorney to enter the plea.

{¶ 6} A hearing on the motion was held on November 19, 2010. Appellant testified that counsel did not tell him what to expect at the September 27, 2010 pretrial. Appellant stated that his counsel went in to speak with the prosecutor, came out and said that appellant would enter a no contest plea and the felony charge would be dismissed. Appellant testified that at the plea hearing he was not satisfied with his counsel but that he was scared to tell the court. He also stated that he thought that his counsel was entering a not guilty plea on his behalf. Appellant testified that had he known that his counsel was going to admit all the facts on his behalf and that the court would then find him guilty he would not have entered the plea.

{¶ 7} During cross-examination, appellant acknowledged that his former counsel explained the charges against him and the alleged facts surrounding the charges. Appellant admitted that counsel discussed what was going to take place at the court hearing and the possible pleas. However, appellant denied knowing that his counsel was entering no contest pleas on his behalf.

{¶ 8} During redirect, appellant denied discussing with former counsel that during the incident he engaged in active combat with the arresting officers or that he tried to grab their weapons.

{¶ 9} Appellant's wife, Devi DeVault, also testified. DeVault testified that she and appellant were represented by the same attorney in the proceedings. DeVault testified that when they met with counsel prior to the September 27, 2010 pretrial they understood that appellant was going to enter a not guilty plea. DeVault stated that their attorney went in to talk to the prosecutor, came out and said that she was getting a DUI and that appellant's felony charge would be dismissed.

{¶ 10} DeVault testified that she and her husband were intimidated by their counsel and that they were scared to speak up in front of the judge. DeVault stated that they were shocked when the prosecutor said that appellant went after the officer's gun because it was not true.

{¶ 11} When cross-examined, DeVault admitted that they were not coerced to enter their no contest pleas and that they answered affirmatively when the judge asked if

they understood their pleas. DeVault also admitted that she and her husband were under the influence of alcohol on the night they were arrested.

{¶ 12} At the conclusion of the hearing, the trial court denied appellant's motion to withdraw his plea. The judge stated that he reviewed the plea hearing and did not believe that appellant did not understand what was happening. The court did not believe that appellant was coerced.

{¶ 13} The matter then proceeded to sentencing. The appeal followed.

{¶ 14} Appellant now raises the following assignment of error for our consideration:

{¶ 15} "The trial court erred as a matter of law and abused its discretion to the prejudice of appellant when it refused to allow him to withdraw his previously tendered pleas of no contest."

{¶ 16} A presentence motion to withdraw a guilty or no contest plea is to be freely and liberally granted. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. The *Xie* court further indicated that a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *Id.* at paragraph one of the syllabus. Rather, the court must to conduct a hearing on the motion to determine "whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Id.* The court further held that "[t]he decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court." *Id.* at paragraph two of the syllabus. Accordingly, in order to find that the

trial court abused its discretion, a reviewing court must find that the court's ruling was "unreasonable, arbitrary or unconscionable." *Id.* at 527.

{¶ 17} In considering whether a presentence motion to withdraw a plea should have been granted, an appellate court should consider:

{¶ 18} "(1) [W]hether the prosecution would be prejudiced if the plea was vacated; (2) whether the accused was represented by highly competent counsel; (3) whether the accused was given a full Crim.R. 11 hearing; (4) whether a full hearing was held on the motion; (5) whether the trial court gave full and fair consideration to the motion; (6) whether the motion was made within a reasonable time; (7) whether the motion set forth specific reasons for the withdrawal; (8) whether the accused understood the nature of the charges and possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense to the crime." *State v. Eversole*, 6th Dist. Nos. E-05-073, E-05-076, E-05-075, 2006-Ohio-3988, ¶ 13, citing *State v. Fish* (1995), 104 Ohio App.3d 236.

{¶ 19} In his sole assignment of error, appellant argues that he should have been permitted to withdraw his presentence no contest pleas. Appellant's argument centers on the third and eighth factors listed above. Specifically, appellant argues that because he did not understand what a no contest plea was, his pleas were not made knowingly. Supporting this argument is the fact that, at the plea hearing, the trial court did not explain the effect of a no contest plea as required under Crim.R. 11(E).

{¶ 20} Crim.R. 11(E) provides that "[i]n misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty." Crim.R. 11(B)(2) states that a no contest plea "is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding."

{¶ 21} The Supreme Court of Ohio clarified that the court is required only to explain the effect of the specific plea being entered. *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, syllabus. In *Jones*, the court determined that where a trial court fails to inform the defendant of the effect of his plea as a non-constitutional right, prejudice must still be shown. *Id.* at ¶ 52. Prejudice is shown where, when viewing the totality of the circumstances, the plea would not have been entered.

{¶ 22} Using the *Fish* considerations and the *Jones* holding, we will examine the merits of appellant's assignment of error. First, allowing appellant to withdraw his plea would likely have resulted in little prejudice to the state. The case had been pending for approximately three months so it would be unlikely that witnesses' recollection of the events would have measurably faded. Next, it is undisputed that appellant was represented by highly competent counsel at the plea hearing. Third, the trial court thoroughly explained the constitutional rights that appellant was waiving by proceeding with the pleas. The court did not, however, explain the effect of a no contest plea.

Appellant was given a full hearing on the motion and the court gave the motion full and fair consideration. The motion was filed seven weeks after the plea was entered and only one week prior to the sentencing date.

{¶ 23} Appellant testified at the hearing that he had discussed the case, including his version of the facts and the specific charges, with his attorney. Appellant also reviewed any possible defenses.

{¶ 24} Reviewing the record, we agree that the trial court failed to notify appellant of the effect of his no contest pleas. Looking at the totality of the circumstances, we must now determine whether appellant was prejudiced by the court's omission.

{¶ 25} Appellant asserted in his affidavit attached to his motion to withdraw that neither his counsel nor the trial court explained what a no contest plea meant. Appellant stated that the facts recited by the prosecutor were false and that he was innocent of the charges. He reiterated these assertions at the motion hearing. The state concedes that the court failed to comply with Crim.R. 11(C)(2) but argues that appellant did not establish prejudice.

{¶ 26} This court has examined cases where the trial court failed to notify the defendant of the effect of a no contest plea. *State v. Lamb*, 6th Dist. No. L-07-1181, 2008-Ohio-1569 and *State v. Bohne*, 6th Dist. No. E-07-052, 2008-Ohio-2986. In both cases we held that the appellant failed to establish prejudice. In *Lamb*, we determined that the appellant was willing to enter his plea until he learned that he was not eligible for a treatment facility. *Id.* at ¶ 14. Appellant also claimed prejudice because the case

against him was "weak." We found that the record demonstrated ample evidence to the crimes charged. *Id.* at ¶ 16. In *Bohne*, we held that the appellant failed to establish prejudice where the facts she disputed were only as to the amount of restitution she owed. *Id.* at ¶ 69.

{¶ 27} In the present case, the totality of the circumstances show that appellant was prejudiced by the court's failure to inform him of the effect of his plea. Appellant believed that he was going to have the opportunity to present his version of the facts to the court. Appellant disputed the facts presented by the state and maintained his innocence. Further, because the motion to withdraw appellant's no contest pleas was made prior to sentencing, the motion is reviewed more liberally. Accordingly, the trial court abused its discretion when it denied appellant's motion to withdraw his no contest pleas. Appellant's assignment of error is well-taken.

{¶ 28} On consideration whereof, we find that appellant was prejudiced or prevented from having a fair proceeding, and the judgment of the Maumee Municipal Court is reversed and the matter is remanded for proceedings consistent with this decision. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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