

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

State of Ohio
Appellee

Court of Appeals No. L-11-1250
Trial Court No. CR0201101378

v.

Martin Cheno
Appellant

DECISION AND JUDGMENT
Decided: December 21, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from a judgment of conviction on a guilty plea entered in the Lucas County Court of Common Pleas. Since we conclude that the trial court acted within its discretion in denying appellant's presentence motion to withdraw his plea, we affirm.

A. Facts and Procedural Background

{¶ 2} On March 4, 2011, appellant, Martin Cheno, was indicted on one count of aggravated burglary, five counts of aggravated robbery, two counts of felonious assault, one count of attempt to commit murder, and one count of breaking and entering. In addition, the indictment included 16 firearms specifications.

{¶ 3} Initially, Cheno entered pleas of not guilty to all of the charges. However, as a result of an accepted plea bargain, Cheno subsequently withdrew his not guilty plea as to Count 7 (aggravated robbery), and the corresponding firearm specification, and entered a plea of guilty pursuant to *North Carolina v. Alford*. In exchange for Cheno's guilty plea, the state agreed to dismiss the remaining charges and firearms specifications. The trial court accepted Cheno's guilty plea after conducting a thorough Crim.R. 11 hearing.

{¶ 4} Cheno first expressed dissatisfaction with his guilty plea during the presentence investigation process, where he stated: "I took the plea because my lawyer advised me to. I really did not want to take it. I felt pressured to do it." During his sentencing hearing, Cheno orally moved to withdraw his guilty plea. Wanting to provide more time to consider the motion, the trial court rescheduled the sentencing hearing for September 14, 2011.

{¶ 5} The trial court started the September 14, 2011 sentencing hearing by giving Cheno an opportunity to speak for himself regarding his argument for withdrawing his plea. Cheno argued that his motion should be granted because he "got a different

perception of the evidence.” He stated that “I just want to go to trial. I don’t want to take the plea. That’s basically [why] I would like to withdraw it.”

{¶ 6} After consideration of Cheno’s argument, the trial court denied Cheno’s motion, and sentenced him to a total prison term of 13 years. This appeal followed. The state has not filed a brief in response.

B. Assignment of Error

{¶ 7} On appeal, Cheno assigns the following error for our review:

The trial court abused its discretion when it denied Mr. Cheno’s presentence motion to withdraw his plea.

II. Analysis

{¶ 8} In appellant’s sole assignment of error, he contests the trial court’s denial of his presentence motion to withdraw his guilty plea.

{¶ 9} Crim.R. 32.1 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.”

{¶ 10} Generally, a motion to withdraw a guilty plea is to be freely and liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992). However, the *Xie* court 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, “[a] trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the

withdrawal of the plea.” *Id.* Ohio courts have stated that “[a] mere ‘change of heart’ is an insufficient basis for permitting a defendant to withdraw his or her guilty plea.” *State v. Miller*, 11th Dist. No. 2009-P-0090, 2011-Ohio-1161, ¶ 28.

{¶ 11} Ultimately, “[t]he decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court.” *Xie* 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.

{¶ 12} In reviewing a trial court’s decision regarding a motion to withdraw a plea, the court in *State v. Fish*, 104 Ohio App.3d 236, 661 N.E.2d 788 (1st Dist.1995), set forth a non-exhaustive list of factors to weigh when considering a motion to withdraw a plea. Such factors include: (1) whether 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. *Id.* at 240.

{¶ 13} Cheno does not dispute his counsel’s competence. Further, Cheno admits that the trial court provided him with a full Crim.R. 11 hearing and held a full hearing on

the motion. In addition, the trial court acknowledged that the motion was made within a reasonable time. Cheno also acknowledged that he understood the nature of the charges and the possible penalties during the plea hearing. Essentially, Cheno limits his arguments to factors one and five.

{¶ 14} Cheno argues that factor one weighs heavily in his favor. Since the trial date had already been set and the state was ready to try the case in the event the trial court granted the motion, we agree that the prejudice to the prosecution would have been minimal.

{¶ 15} Cheno next argues that the trial court failed to give full and fair consideration to the motion. We disagree. Our review of the record reveals that the trial court went to great lengths to make sure that the motion received full and fair consideration. First, the trial court made sure to set aside enough time for the motion by rescheduling the sentencing hearing to another day when more time was available. Second, the trial court examined and applied each factor individually prior to rendering its decision. Contrary to Cheno's argument, we believe the trial court fulfilled its obligation to fully consider the motion.

{¶ 16} Looking to the seventh factor, we note that the reasons Cheno sets forth in support of his motion do not establish a reasonable and legitimate basis for withdrawal of his guilty plea. At the sentencing hearing, Cheno simply states that he wants to go to trial and that he felt as though his attorney's advice pressured him into accepting the plea bargain. However, the court asked Cheno whether he had been pressured into accepting

the plea bargain at the plea hearing. Cheno replied that he had not. Thus, Cheno's own words, given under oath, contradict his argument.

{¶ 17} Upon our examination of the factors in this case, we conclude that the trial court did not abuse its discretion when it denied Cheno's motion to withdraw his guilty plea. Accordingly, Cheno's sole assignment of error is not well-taken.

III. Conclusion

{¶ 18} Based on the foregoing, the judgment of the Lucas County Court of Common Pleas is hereby affirmed. Costs are hereby assessed to appellant in accordance with App.R. 24.

Judgment affirmed.

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

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, 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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