

**IN THE COURT OF APPEALS OF OHIO**

SEVENTH APPELLATE DISTRICT  
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

CHRISTOPHER ALLEN MONEYPENNY,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**  
**Case No. 21 BE 0018**

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Criminal Appeal from the  
Court of Common Pleas of Belmont County, Ohio  
Case No. 21-CR-26

**BEFORE:**

Gene Donofrio, Cheryl L. Waite, Carol Ann Robb, Judges.

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**JUDGMENT:**

Affirmed

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*Atty. J. Kevin Flanagan*, Belmont County Prosecutor, *Atty. Daniel Fry* and *Atty. David Liberati*, Belmont County Assistant Prosecutors, 52160 National Road, St. Clairsville, Ohio 43950, for Plaintiff-Appellee and

*Atty. Scott Essad*, 5500 Market Street, Suite 99, Youngstown, Ohio 44512, for Defendant-Appellant.

Dated:  
May 5, 2022

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**Donofrio, J.**

{¶1} Defendant-Appellant, Christopher Moneypenny, appeals from a Belmont County Common Pleas Court judgment overruling his motion to vacate his guilty plea to a charge of rape.

{¶2} A Belmont County Grand Jury indicted appellant on February 4, 2021, on one count of rape, a first-degree felony in violation of R.C. 2907.02(A)(1)(b)(B); one count of sexual battery, a third-degree felony in violation of R.C. 2907.03(A)(5)(B); and one count of gross sexual imposition, a third-degree felony in violation of R.C. 2907.05(A)(4)(C)(2). Appellant initially entered a not guilty plea. The alleged victim in this case was appellant's six-year-old daughter.

{¶3} After plea negotiations with plaintiff-appellee, the State of Ohio, appellant entered a plea agreement. Pursuant to the terms of the agreement, appellant changed his plea to an amended charge of rape in violation of R.C. 2907.02(A)(2) and the state dismissed the remaining two charges. On March 26, 2021, the trial court held a change of plea hearing, accepted appellant's plea, and entered a finding of guilt. The court set appellant's sentencing hearing for April 12, 2021.

{¶4} On the day his sentencing hearing was set to proceed, appellant filed a motion to withdraw his guilty plea. The court then postponed the sentencing hearing. It held a hearing on appellant's motion to withdraw his plea on April 13, 2021. At the conclusion of the hearing, the trial court overruled appellant's motion to withdraw his plea and set the matter for sentencing. The court subsequently sentenced appellant to a minimum of 11 years in prison with a maximum of 16.5 years in prison and classified him as a Tier III sex offender.

{¶5} Appellant filed a timely notice of appeal on May 10, 2021. He now asserts a single assignment of error for our review.

{¶6} Appellant's sole assignment of error states:

THE TRIAL COURT ERRED WHEN IT DENIED CHRISTOPHER  
MONEYPENNY'S MOTION TO WITHDRAW GUILTY PLEA.

{¶7} Appellant argues the trial court should have allowed him to withdraw his guilty plea. He contends that in analyzing the factors for whether to allow a defendant to withdraw his plea, the trial court held three of the factors in higher regard when instead, the court was to weigh the factors equally. Specifically, appellant argues the court gave more weight to the factors regarding the prejudice to the state, the representation provided by defense counsel, and whether the defendant was perhaps not guilty or had a complete defense.

{¶8} Crim.R. 32.1, which governs the withdrawal of a guilty plea, 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." This rule establishes a fairly strict standard for deciding a post-sentence motion to withdraw a guilty plea but provides no guidelines for deciding a presentence motion. *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992).

{¶9} A decision on a presentence plea withdrawal motion is within the trial court's sound discretion. *Id.* at 526. Therefore, we will not reverse the trial court's decision absent an abuse of discretion. Abuse of discretion means that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶10} The Ohio Supreme Court has stated that a presentence motion to withdraw a plea should be "freely and liberally" granted. *Xie*, at 527. But the Court has also recognized that a "defendant does not have an absolute right to withdraw a plea prior to sentencing." *Id.* Therefore, the trial court must conduct a hearing on the motion to decide if there is a reasonable and legitimate basis for it. *Id.*

{¶11} This court has adopted nine factors to weigh in considering a presentence motion to withdraw a plea: (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) whether the defendant understood the nature of the charges and potential sentences; (5) the extent of the hearing on the motion to withdraw; (6) whether the trial

court gave full and fair consideration to the motion; (7) whether the timing of the motion was reasonable; (8) the reasons for the motion; and (9) whether the accused was perhaps not guilty or had a complete defense to the charge. *State v. Thomas*, 7th Dist. Mahoning Nos. 96CA223, 96CA225, 96CA226, 1998 WL 934645 (Dec. 17, 1998), citing *State v. Fish*, 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1st Dist.1995). Consideration of the factors is a balancing test and no one factor is conclusive. *Id.*

{¶12} Thus, we must consider these nine factors in determining whether the trial court abused its discretion in denying appellant's motion to withdraw his plea.

{¶13} The first factor is whether the state will be prejudiced by withdrawal of the plea.

{¶14} Appellant contends there was no prejudice to the state because it had not yet prepared the victim to testify at trial. Thus, he questions how the state could be prejudiced.

{¶15} At the hearing, the prosecutor spoke to the potential prejudice to the state. He told the court that the state had informed the victim that appellant had pleaded guilty to the rape charge and she would not have to testify. (Motion Tr. 7-8). If the motion was granted, the state argues it would be prejudiced because it would have to go back to the victim and tell her that appellant now claimed he did not rape her and she would have to testify in court. Additionally, apparently after appellant was arrested, the victim's mother/appellant's wife kept in close contact with appellant. (Motion Tr. 11-14). The state had suspicions that the mother/wife was trying to influence the victim's testimony. (Motion Tr. 14). Eventually, the victim was placed in the custody of another family member.

{¶16} The trial court found that the state would be prejudiced by a withdrawal of the plea to the extent that the burden of testifying was lifted from the victim and because the mother/wife was trying to persuade the victim to recant her allegations. (Motion Tr. 34).

{¶17} Here, the fact that the state told the victim she would not have to testify may prejudice the state. And the fact that the mother/wife may have been encouraging the victim to recant her testimony could also prejudice the state if the matter now went to trial. Thus, the first factor weighs against granting appellant's motion to withdraw.

{¶18} The second factor is the representation afforded to the defendant by counsel. Appellant asserts the trial court should have recognized that he was unhappy with his counsel's representation and offered him alternate counsel.

{¶19} At the hearing, appellant's counsel told the court that when discussing the plea deal with appellant he shared all of the evidence with him, discussed the strengths and weaknesses of the case with him, and gave him his honest opinion about going to a jury trial. (Motion Tr. 4-5). Based on this information, counsel stated that appellant decided to enter the plea agreement. (Motion Tr. 5).

{¶20} Speaking to the matter of defense counsel's representation, the prosecutor stated that he knew defense counsel spent a great deal of time with appellant because defense counsel was in constant contact with the prosecutor's office regarding plea negotiations. (Motion Tr. 8).

{¶21} Appellant told the court that he felt he and his counsel had a "conflict of interest." (Motion Tr. 19). Appellant stated that counsel repeatedly told him to take the plea deal but appellant actually wanted to go to trial and felt that he was "pushed into doing things [he] didn't want to do." (Motion Tr. 19-20). The court then asked appellant:

THE COURT: Do you remember that you - - I asked you whether you were entering your guilty plea voluntarily, and that no one had promised you or threatened you or coerced you in any way against your free will. Do you remember that?

THE DEFENDANT: I remember that and I lied about that.

THE COURT: All right. Do you remember that I asked you whether Mr. Miller had explained everything to you, gone over all the possible evidence with you, and answered all of your questions?

THE DEFENDANT: That is correct.

THE COURT: And then my next question was - - and you answered yes, because I asked, "Are you satisfied with his advice and his competence?" You remember that?

THE DEFENDANT: Yes, I do.

(Motion Tr. 21-22).

{¶22} Under the original indictment, appellant was facing a rape charge with the possibility of life in prison and two additional third-degree felony charges. Defense counsel negotiated a plea deal that reduced the rape charge so that appellant no longer faced life in prison and the two third-degree felonies were dismissed. Counsel negotiated this deal even though appellant had admitted during a polygraph test that he had raped his daughter.

{¶23} Given the above, defense counsel provided appellant with competent representation. The record demonstrates that counsel spent significant time discussing the case with appellant and in plea negotiations with the prosecutor. And counsel provided appellant with his professional opinion on the plea deal. Appellant was free to listen to his counsel's advice or to go against it. Thus, the second factor weighs against granting the motion to vacate.

{¶24} The third factor examines the extent of the Crim.R. 11 plea hearing. The trial court here conducted a thorough plea hearing. First, the court explained to appellant the charges he faced, the amended charge pursuant to the plea agreement, and all of the possible penalties, which appellant stated that he understood. (Plea Tr. 2-5). The court explained the effect of a guilty plea, which appellant indicated he understood. (Plea Tr. 7). Appellant indicated to the court that he was entering his plea voluntarily and that no one promised him anything, threatened him, or coerced him to plead guilty. (Plea Tr. 8-9). He further told the court that his attorney had explained everything to him, had answered all of his questions, and he was satisfied with his attorney's advice and competence. (Plea Tr. 10). The court explained post-release control to appellant, which he stated he understood. (Plea Tr. 10-12). The court then explained to appellant each of the constitutional rights he was waiving by pleading guilty. (Plea Tr. 12-14). Appellant told the court that he wished to waive each of these rights. (Plea Tr. 12-14).

{¶25} Given the above, the trial court conducted a full and complete change-of-plea hearing. Thus, the third factor weighs against vacating appellant's plea.

{¶26} The fourth factor concerns whether the defendant understood the nature of the charges and potential sentences. Before accepting his guilty plea, the trial court

explained the charges and possible sentences appellant faced in detail. The court explained to appellant that he faced charges of first-degree-felony rape, third-degree-felony sexual battery, and third-degree-felony gross sexual imposition. (Plea Tr. 2). It informed appellant that on the rape charge, he faced a sentence from ten years to life in the penitentiary, a \$20,000 fine, and sex offender registration every 90 days for the rest of his life. (Plea Tr. 2-3). It further explained that on each of the other two charges he faced five years in the penitentiary, a \$10,000 fine, and sex offender registration. (Plea Tr. 3). Appellant stated that he understood these potential penalties. (Plea Tr. 3). The court went on to explain that pursuant to the plea agreement, the rape charge would be amended so that instead of a maximum penalty of life in prison he would face a maximum sentence of 16.5 years and a minimum sentence of 3 to 11 years. (Plea Tr. 3-5). Appellant indicated that he understood the amendment to the rape charge and the possible penalties he faced. (Plea Tr. 5).

**{¶27}** Based on the court's colloquy with appellant, the fourth factor weighs against vacating appellant's plea.

**{¶28}** The fifth factor considers the extent of the hearing on the motion to withdraw. The trial court held a full hearing on appellant's motion. The court first discussed the charges appellant originally faced. (Motion Tr. 3-4). It then listened to statements from appellant's counsel and the prosecutor. (Motion Tr. 4-6). The court then permitted appellant to address why he believed the court should grant the motion. (Motion Tr. 17). The court and appellant went through a detailed discussion of the timeline of events and why appellant wanted to withdraw his plea. (Motion Tr. 17-33). Finally, the court made its findings as to each of the *Fish* factors. (Motion Tr. 33-37).

**{¶29}** Because the court afforded appellant an extensive hearing on his motion, the fifth factor weighs against vacating appellant's plea.

**{¶30}** The sixth factor is whether the trial court gave full and fair consideration to the motion to withdraw the plea. This factor ties in with the fifth factor just addressed. The court listened to everything defense counsel, the prosecutor, and appellant had to say. It then analyzed each of the nine factors with respect to the facts of this case before reaching its decision. Thus, the sixth factor weighs against vacating appellant's plea.

{¶31} The seventh factor looks at whether the timing of the motion was reasonable.

{¶32} Appellant entered his guilty plea on March 26, 2021. Counsel stated that appellant did not contact him until the day of sentencing to file the motion to withdraw, which counsel filed that day April 12, 2021. (Motion Tr. 6). Appellant stated that he began trying to contact his counsel to file the motion to withdraw on April 3 but he was unable to reach him until April 12. (Motion Tr. 18). The court noted that defense counsel was away and unavailable the previous week, which would have been the week of April 5. (Motion Tr. 35-36).

{¶33} Given this information, the trial court found that appellant's motion was not untimely. The trial court was correct in this finding. Although appellant's motion was filed the day of his sentencing hearing, he had been trying to contact his attorney for over a week before that to no avail. Apparently, defense counsel had been on vacation that week, which should not be held against appellant. Thus, the seventh factor weighs in favor of granting appellant's motion.

{¶34} The eighth factor considers the reasons for the motion. Appellant asserted at the hearing that he was innocent and that he entered the plea because he felt pressured by counsel to do so and that he later changed his mind. (Motion Tr. 19, 36). That being said, appellant confessed to acts that constituted rape. (Motion Tr. 10). And appellant admitted during a polygraph examination that he inserted his finger into the victim's vagina. (Motion Tr. 27-31). Moreover, appellant indicated to the court at his plea hearing that no one had coerced him to enter a guilty plea and that he was entering it of his own free will. (Plea Tr. 8-9).

{¶35} Thus, the eighth factor weighs against granting the motion to withdraw.

{¶36} The ninth and final factor is whether the accused was perhaps not guilty or had a complete defense to the charge.

{¶37} Appellant argues that it was inappropriate for the trial court to rely on the presentence investigation (PSI) in considering whether he was perhaps not guilty or had a complete defense. He urges that while technically permissible, it is inappropriate for the court to look to the PSI for any purpose other than sentencing. The state, however, points out that appellant took a polygraph test before he entered his guilty plea. It notes



that appellant admitted during the polygraph test that he raped the victim by placing the tip of his finger inside of her vagina. The state points out that appellant has never challenged his confession.

{¶38} At least one other court has found that the trial court did not abuse its discretion in considering the PSI at a hearing on a motion to withdraw a plea when the same evidence was already within the court's knowledge. *State v. McCoy*, 4th Dist. Gallia No. 19CA4, 2020-Ohio-3088, ¶ 32 (“[T]he trial court referenced the PSI when discussing whether Appellant was not guilty or had a complete defense to the charges. As will be discussed below, evidence of Appellant's guilt or defenses interposed was brought to the trial court's attention during the hearings on Appellant's motion in limine and motion to withdraw his plea. Therefore, we find no merit to Appellant's assertion that the trial court abused its discretion and based its findings on evidence not properly before the court.”)

{¶39} In this case, the court did reference the PSI. But in doing so the court was referencing appellant's polygraph test. Appellant did not take the polygraph as part of the PSI. He took the polygraph test during the investigation of this case. So even though the trial court may have referred to the PSI, the information it referred to was not gathered for the purposes of sentencing as appellant asserts.

{¶40} Thus, the ninth factor weighs against granting appellant's motion.

{¶41} Because the *Fish* factors weigh heavily against granting the motion to vacate the guilty plea, the trial court did not abuse its discretion in overruling appellant's motion.

{¶42} Accordingly, appellant's sole assignment of error is without merit and is overruled.

{¶43} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the sole assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**