

[Cite as *State v. Houck*, 2010-Ohio-743.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 09-CA-08
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-268
v.	:	
	:	(Criminal Appeal from
BRITTANY HOUCK	:	Common Pleas Court)
	:	
Defendant-Appellant	:	

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OPINION

Rendered on the 26th day of February, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Brittany Houck appeals from her conviction and sentence, following a guilty plea, to Misuse of a Credit Card, in violation of R.C. 2913.21(B)(2), a felony of the fifth degree. Houck contends that the trial court erred by overruling her pre-sentence motion to withdraw her guilty plea. She also contends that

the trial court erred by allowing her trial attorney to testify, over her objection, that he had not advised her that she would be sentenced to prison if she had not pled guilty.

{¶ 2} We conclude that the evidence in the record supports the trial court's finding that Houck had not been advised by her trial attorney that she would go to prison if she did not plead guilty. We further conclude that the evidence in the record supports the trial court's finding that Houck's decision to seek to withdraw her plea was a mere change of heart, so that the trial court did not abuse its discretion when it overruled her motion.

{¶ 3} Finally, we conclude that once Houck had testified concerning the substance of her communication with her trial attorney concerning whether to tender a plea, that communication was no longer confidential and privileged, so that the trial court did not err in overruling her objection to her former attorney's testifying concerning that communication.

{¶ 4} Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 5} Houck was indicted for Misuse of a Credit Card. Her retained counsel withdrew, due to a conflict of interest. She was then represented by Steve Layman, of the Miami County Public Defender's office. While represented by Layman, she pled guilty, and was referred for a pre-sentence investigation.

{¶ 6} Three days before her scheduled sentencing, Houck retained private counsel, and moved to withdraw her guilty plea. On the day that had been set for sentencing, the trial court heard her motion. Houck testified on her own behalf. The

State called Layman to testify. Houck objected, asserting the attorney-client privilege. Her objection was overruled. Layman testified. The trial court overruled Houck's motion to withdraw her plea, and proceeded, at the same hearing, to sentence Houck to community control sanctions.

{¶ 7} From her conviction and sentence, Houck appeals.

II

{¶ 8} Houck's First Assignment of Error is as follows:

{¶ 9} "THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO WITHDRAWAL [sic] PLEA OF GUILTY OR NO CONTEST."

{¶ 10} Houck relies upon *State v. Xie* (1992), 62 Ohio St.3d 521, for the proposition that a pre-sentence motion to withdraw a plea of guilty "should be freely and liberally granted, provided the movant demonstrates a reasonable and legitimate basis for the withdrawal." *Id.*

{¶ 11} Houck relied upon her testimony at the hearing on her motion to withdraw her plea as her "reasonable and legitimate basis" for the motion, as follows:

{¶ 12} "Q. And you understand you're being charged with serious crimes here?"

{¶ 13} "A. Yes.

{¶ 14} "Q. Okay. And you had previously entered a plea, is that correct?"

{¶ 15} "A. Yes.

{¶ 16} "Q. And why did you do that?"

{¶ 17} "A. I was pregnant and I was scared and I was pretty much told that that was the only choice that I had to do in order to stay out of jail.

{¶ 18} “Q. Okay. And what did you do Friday of last week?”

{¶ 19} “A. I, well, we were working on it Thursday and Friday and I found out some more information that would help the case.

{¶ 20} “Q. And you contacted my office?”

{¶ 21} “A. Yeah.

{¶ 22} “Q. And what do you wish to do today?”

{¶ 23} “A. Withdraw the plea of guilty.”

{¶ 24} The above-quoted testimony is the whole of Houck’s evidence at the hearing, after having first stated her name and address for the record. Upon cross-examination and some further examination by the court, Houck clarified that it was her trial attorney, Layman, who told her that she had to plead guilty to “stay out of jail.” Houck never explained or elaborated concerning the “more information that would help the case.”

{¶ 25} Over Houck’s objection, Layman testified. He testified that he had not told Houck that she would likely go to prison if she did not plead guilty. To the contrary, he testified that she would likely have an opportunity for community control even if she went to trial and was convicted, assuming she were a first-time offender. He could not remember whether she had a prior record. In fact, she did not.

{¶ 26} Layman was also asked if Houck appeared to be scared, to which he responded: “Not really scared, no. No more scared than anyone else that comes in to see Judge Lindeman.”

{¶ 27} At the conclusion of the evidence, the trial court ruled as follows:

{¶ 28} “Miss Houck, based upon the transcript of the testimony here and the

evidence the Court will overrule your motion to withdraw your guilty plea. I don't believe that you were threatened. I believe that you knew what was going on and I believe you just had a change of heart. Some people do."

{¶ 29} The sentencing hearing immediately followed the overruling of the motion to withdraw the plea. During the course of that hearing, the trial court made the following observation:

{¶ 30} "As an aside let me just tell you that whether there was a recommendation or not of community this is a classic case for community control. Mr. Layman would have never said that to you. I'm sorry, you lied. That would be preposterous. He knows that, I don't know if I've ever given anybody penitentiary time in all the 18 years I've been up for this kind, on these kind of facts where a non-violent crime where they're a first offender. That's just silly."

{¶ 31} There is evidence in the record from which the trial court could find, as it did, that Houck was not told that she would go to prison if she did not plead guilty. The only other basis for her motion was that she had "found out some more information that would help the case." This testimony is too vague and conclusory to support a finding that Houck's decision to seek to withdraw her plea was anything more than a change of heart.

{¶ 32} Houck cites *State v. Tull*, 168 Ohio App.3d 54, 2006-Ohio-3365, a decision of this court, for the proposition that newly discovered evidence in support of a meritorious defense is a valid basis for a pre-sentence motion to withdraw a guilty plea. In that case, in sharp contrast to this case, the defendant-movant explained the defense he wished to assert – that he was unable to pay the court-ordered child support that was

the basis for the felony non-support charge to which he had pled. The trial court in that case erroneously concluded that inability to pay – impossibility – was not a defense to a charge of criminal non-support.

{¶ 33} Houck’s First Assignment of Error is overruled.

III

{¶ 34} Houck’s Second Assignment of Error is as follows:

{¶ 35} “THE TRIAL COURT ERRED IN OVERRULING DEFENDANT’S OBJECTIONS TO THE TESTIMONY OF HER PREVIOUS COUNSEL.”

{¶ 36} Houck relied upon the attorney-client privilege set forth in R.C. 2317.02 in objecting to the testimony of Layman, her former attorney. She argues that she did not waive the privilege by filing a suit or by making allegations of inappropriate conduct by her former counsel.

{¶ 37} A client is not required to assert the attorney-client privilege with respect to every communication with her attorney; she may waive it. Here, Houck unequivocally waived the confidential, privileged nature of her communication with Layman concerning whether she should plead guilty to the charged offense, when she testified concerning the communication, including what Layman had advised her. She may not publish to the world her attorney’s advice to her and expect that it will thereafter remain privileged.

{¶ 38} A ruling to the contrary would permit anyone, in either criminal or civil litigation, to claim with impunity that she was acting on advice of counsel, without permitting her former counsel to be asked, by adverse parties, whether that was, in fact, counsel’s advice. The attorney-client privilege is a shield, to protect the confidentiality of

a client's consultation with her attorney, not a sword to facilitate perjury concerning the substance of counsel's advice.

{¶ 39} Houck's Second Assignment of Error is overruled.

IV

{¶ 40} Both of Houck's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

Copies mailed to:

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