

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 12
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
ANTHONY SCOTT,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 07CR601.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Paul Gains
Prosecuting Attorney
Attorney Ralph Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Attorney Timothy Young
Ohio Public Defender
Attorney Jeremy Masters
Assistant Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215

JUDGES:

Hon. Joseph J. Vukovich
Hon. Mary DeGenaro
Hon. Cheryl L. Waite

Dated: September 26, 2008

VUKOVICH, J.

¶{1} Defendant-appellant Anthony Scott appeals the decision of the Mahoning County Common Pleas Court denying his presentence motion to withdraw his guilty plea. The issue on appeal is whether the trial court abused its discretion in denying said motion. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} Appellant was arrested for various offenses occurring throughout April 2007. Thereafter, appellant was indicted on the following charges: (1) aggravated robbery with a knife; (2) breaking and entering of a video store; (3) aggravated arson of a house; (4) burglary of that same house; (5) grand theft of a motor vehicle; (6) theft of credit cards and blank checks; (7) forgery of a check; (8) failure to comply with an order of a police officer while fleeing after a felony; and (9) intimidation of a witness.

¶{3} Various pretrials were held, and a trial date was set for October 22, 2007. On the day of trial, however, appellant entered guilty pleas to counts two, three, four, five, eight and nine. In return, the state agreed to dismiss counts six and seven and to stand silent at sentencing. The first count was left out of the plea negotiations and was to remain open as appellant wished to take a polygraph regarding the facts underlying this offense. (Plea Tr. 3). The court accepted the plea and ordered a presentence investigation.

¶{4} At the January 16, 2008 sentencing hearing, appellant orally asked to withdraw his guilty plea. Counsel disclosed that appellant wrote him two letters inquiring if he would be allowed to withdraw his plea. (Sent. Tr. 5). When the court asked appellant why he wished to withdraw his plea, appellant responded: "Because some of the cases I just pled guilty to in the beginning because I wanted to get it over with and done with, but I'm not guilty of all those charges." (Sent Tr. 5).

¶{5} Upon being asked by the court, appellant agreed that he remembered going through the plea form with the court at the plea hearing and he remembered her advising him that the state had to prove each element of those charges beyond a reasonable doubt. (Sent Tr. 6). He then added:

¶{6} "I did voluntarily enter the plea. What I'm saying -- I was told I going to go to -- like on December 6 I was supposed to go to court for a lie detector test to

prove my innocence. None of this stuff came back to me. I want to withdraw my plea because I'm not going to jail or prison for something I didn't do." (Sent. Tr. 7).

¶{7} At that point, the court denied appellant's plea withdrawal motion. (Sent. Tr. 7). The state and defense counsel then noted that appellant did not plead guilty to the count that he wished to disprove by a polygraph. Defense counsel further disclosed that he had extensive discussions with the state regarding appellant's request to "give a proffer regarding evidence" but the detectives were not interested. (Sent. Tr. 7-8).

¶{8} Returning to the matter of sentencing, defense counsel asked the court to consider a minimum sentence. Reference was made to a letter appellant wrote to the intimidation victim, and it was argued that appellant did not intend to intimidate her in the letter but rather he wished to express remorse. (Sent Tr. 8). In exercising his right to allocution, appellant apologized to the victims explaining that he had been getting high every day and running wild. (Sent. Tr. 9). Thereafter, the court sentenced appellant to a total of thirteen years in prison. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR

¶{9} Appellant's sole assignment of error provides:

¶{10} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DENYING MR. SCOTT'S PRESENTENCE MOTION TO WITHDRAW HIS GUILTY PLEA."

¶{11} 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." This rule establishes a fairly stringent standard for deciding a post-sentence motion to withdraw a guilty plea but provides no guidelines for deciding a pre-sentence motion. *State v. Xie* (1992), 62 Ohio St.3d 521, 526.

¶{12} Generally, it is said that a decision on a pre-sentence plea withdrawal motion is within the trial court's sound discretion. *Id.* at 526. Specifically, however, the Supreme Court has stated that a trial court should "freely and liberally" grant a pre-sentence motion to withdraw a guilty plea. *Id.* at 527. The Court has also noted that the trial court must conduct a hearing on the motion to decide if there exists a

reasonable and legitimate basis for it and that the appellate court, although not reviewing de novo, can reverse if the trial court's decision is unfair or unjust. *Id.*

¶{13} This court has adopted various 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. See, e.g., *State v. Thomas* (Dec. 17, 1998), 7th Dist. Nos. 96CA223, 96CA225, 96CA226, citing *State v. Fish* (1995), 104 Ohio App.3d 236, 240. Consideration of the factors is a balancing test. *Id.* Consequently, no one factor is conclusive. *Id.*

¶{14} Appellant urges a lack of prejudice to the state since the first charge remained set for trial and emphasizes that the state failed to allege prejudice. He also complains that there was a limited discussion of his desire to withdraw his plea. Appellant then states that his reasons for desiring withdrawal were equivalent to those in our *Cuthbertson* case where we reversed the denial of a presentence motion to withdraw a guilty plea. See *State v. Cuthbertson* (2000), 139 Ohio App.3d 895.

¶{15} However, our *Cuthbertson* reversal relied upon multiple factors including the lack of prejudice to the state, the pressure to plead, the defendant's expression of innocence, and the defendant's letter written to the court one week after the plea and two weeks prior to sentencing. The factors in the case at bar do not necessarily tip the scales in the same manner.

¶{16} We now turn our analysis to the nine factors hereinabove mentioned as proper considerations in a motion to withdraw a plea relative to the case before us. First, although prejudice to the state has been called an important factor, it is not dispositive, and a lack of articulated prejudice does not require plea withdrawal. See, e.g., *State v. Leasure*, 7th Dist. No. 01BA42, 2002-Ohio-5019, ¶19, 42. Contrary to appellant's suggestion, the fact that the aggravated robbery charge was still set for trial does not indicate a lack of prejudice. This offense occurred on a different day as the

other offenses and was apparently committed against a different victim. Before pleading, appellant had even filed a motion for separate trials due to this fact.

¶{17} It must also be pointed out that where a defendant does not express his desire to withdraw his plea until the sentencing hearing, it is understandable that the state is not prepared to explain the prejudice it may suffer. See *State v. O'Neill*, 7th Dist. No. 03MA188, 2004-Ohio-6805, ¶33. Additionally, the state seemed concerned about its promise to stand silent at sentencing, was focused on showing that the main reason for appellant's withdrawal was unrelated to the charges to which he pled guilty and was not actually provided much opportunity by the court to oppose the motion.

¶{18} Furthermore, the facts show at least one reluctant witness, made so as a result of appellant's own actions. See *State v. Johnston*, 7th Dist. No. 06CO64, 2007-Ohio-4620, ¶10-12 (prejudice to state can be inferred by facts showing reluctant witness); *State v. Banks*, 7th Dist. No. 05-MA-95, 2006-Ohio-0892. In any event, as aforementioned, the list is non-exclusive, and no one factor is dispositive. See, e.g., *O'Neill*, 7th Dist. No. 03MA188 at ¶33; *Fish*, 104 Ohio App.3d at 240. Rather, the trial court is to conduct a weighing of all of the factors. *Id.*

¶{19} Second, appellant did not express that he was dissatisfied with counsel. Rather, he suggested that he was dissatisfied with the failure of the state to accept his "proffer" and to schedule his polygraph on the aggravated robbery charge to which he did not even plead as such offense was purposely left out of the plea negotiations.

¶{20} Third and fourth, there are no complaints about the Crim.R. 11 plea hearing, and there is no indication that appellant did not understand the nature of the charges or the potential sentences. The charges were explained at the plea hearing twice and were written in the plea agreement. The potential sentences were explained in more detail than usual and were also contained in the plea agreement. He was even advised of the potential total sentence and the potential total fine after each potential fine was discussed. The court discussed the rights he was waiving. At the plea withdrawal hearing, appellant acknowledged that he remembered the content of the plea hearing.

¶{21} Fifth and sixth, there was a hearing on his withdrawal motion, and the court asked questions of appellant before denying his motion. The hearing was brief, but the court heard appellant express his reasons twice. The court also inquired as to

whether appellant remembered the items discussed at the plea hearing and elicited an admission that the plea was voluntarily entered. The court should have allowed the state to articulate prejudice; however, this lapse only positively affected appellant.

¶{22} Seventh, the timing of the motion was not reasonable. Appellant pled guilty on October 24, 2007. His sentencing was originally set for the beginning of December; this hearing was continued due to his attorney's engagement in another trial. The rescheduled sentencing hearing in late December was then continued again due to the court's engagement in a trial. Despite all this time and opportunity, appellant did not submit his oral motion until the January 16, 2008 sentencing hearing. Moreover, before the motion even was made at the sentencing hearing, the state had already presented statements to the court explaining the various situations with the notified victims and the victim of the arson had already spoken. There is no indication of when appellant expressed his desire to his counsel, whether the desire was clearly and concretely expressed as an instruction or why it was not transmitted to the court earlier.

¶{23} Eighth and ninth, the reasons for the motion and possibility of innocence do not weigh as heavily in his favor as he claims. In a nine-count indictment, appellant pled to six offenses; two were dismissed in his favor, and one was essentially severed and remained pending. Initially, appellant expressed that he pled to some of the charges because he wanted to get it over with but claimed that he was "not guilty of all those charges." His statement implied that he was guilty of some of the charges. In addition, contrary to appellant's argument below, it is unlikely that any rational fact-finder could construe his letter as lacking an intent to intimidate as it talked about hunting down her daughter and referred to a website concerned with revenge on witnesses who testify against defendants. We also note that appellant apologized to the victims (plural) after his motion was denied.

¶{24} Regarding these factors, appellant also conceded that he knew the state would have had to prove him guilty of each offense beyond a reasonable doubt if he went to trial and that he nonetheless voluntarily entered the plea. Upon further explanation of his reasons for seeking plea withdrawal, he started complaining about the state's failure to make a lie detector test available to him. However, the state and defense counsel explained to the court that the polygraph discussions were irrelevant

to the charges at issue, and this is further demonstrated by the transcript of the plea hearing. We also note that the trial court had before it the presentence investigation and victim impact statements, which could additionally help the court evaluate the character of the state's evidence and the likelihood of a defense.

¶{25} In conclusion, appellant stated that he decided he did not wish to go to prison for something he did not do, but pleas are often entered on various counts notwithstanding a defendant's claim that he did not commit some of the crimes contained in the plea; defendants accept such agreements because the evidence against them is strong and the chances of acquittal are weak. Such scenarios are even more acceptable to a defendant who negotiates with the state to have some of the charges dismissed in exchange for the plea, which charges could have otherwise resulted in additional convictions.

¶{26} The trial court heard appellant's claims at the withdrawal hearing and was in the best place to resolve his good faith and credibility and determine the weight of his assertions in support of his plea withdrawal. See *State v. Reed*, 7th Dist. No. 04MA236, 2005-Ohio-2925, citing *State v. Smith* (1977), 49 Ohio St.2d 261, syllabus ¶2. There are some factors that arguably support appellant's argument for plea withdrawal. However, a reasonable trial court could use its discretion to determine that the weight of the factors tip in favor of denying the request for plea withdrawal.

¶{27} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

DeGenaro, P.J., concurs.
Waite, J., concurs.