

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

STATE OF OHIO,)	
)	CASE NO. 08 MA 178
PLAINTIFF-APPELLEE,)	
)	
- VS -)	O P I N I O N
)	
JEFFREY GALLAGHER,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 08CR193.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 5, 2009

VUKOVICH, P.J.

{¶ 1} Defendant-appellant Jeffrey Gallagher 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 hereby affirmed.

STATEMENT OF THE CASE

{¶ 2} On February 14, 2008, Gallagher was indicted for three counts of trafficking heroin: the first count was for a violation of R.C. 2925.03(A)(1)(C)(6)(c), a fourth degree felony; the second count was for a violation of R.C. 2925.03(A)(1)(C)(6)(b), a fourth degree felony; and the third count was for a violation of R.C. 2925.03(A)(1)(C)(6)(c), a third degree felony because the offense allegedly occurred within 1000 feet of Taft Elementary School in Youngstown, Ohio.

{¶ 3} Gallagher entered a not guilty plea on March 12, 2008. On July 3, 2008, the state moved to amend the third count of the indictment from a third degree felony to a fourth degree felony because after recalculating the distance to the school it was discovered that the alleged offense did not occur within 1000 feet of Taft Elementary School. The trial court granted the motion. That same day, in accordance with a Crim.R. 11 plea agreement, the state moved to dismiss counts one and two of the indictment, and Gallagher withdrew his guilty plea and pled guilty to the amended third count of the indictment. The motion to dismiss counts one and two of the indictment was granted and after conducting a Crim.R. 11 colloquy, the trial court accepted the guilty plea. (07/03/08 J.E.; 06/30/08 Tr. 10).

{¶ 4} Sentencing was set for the morning of August 13, 2008. However, Gallagher failed to appear and a bench warrant was issued for his arrest. He was arrested that same day and brought before the court in the afternoon; thus, despite failing to appear at the scheduled time, a sentencing hearing was still held on August 13, 2008. Prior to issuing a sentence, the trial court asked Gallagher if he had anything to say. (08/13/08 Tr. 3). It was at that point that Gallagher, acting pro se,

orally moved to withdraw his guilty plea. (08/13/08 Tr. 3). After inquiring as to why he wished to withdraw his guilty plea, the trial court denied the motion and proceeded to sentencing. (08/13/08 Tr. 7). He received an 18 month sentence for the violation of R.C. 2925.03(A)(1)(C)(6)(c), a fourth degree felony, and his driver's license was suspended for five years.

{¶ 5} Gallagher timely appeals from the denial of his presentence motion to withdraw his guilty plea.

ASSIGNMENT OF ERROR

{¶ 6} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DENYING MR. GALLAGHER'S PRESENTENCE MOTION TO WITHDRAW HIS GUILTY PLEA WHEREIN HE WAS NOT GIVEN A FULL OR COMPETENT HEARING ON THE MOTION."

{¶ 7} Crim.R. 32.1 provides:

{¶ 8} "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."

{¶ 9} This rule, while establishing a standard for deciding a post-sentence motion to withdraw a guilty plea, does not provide guidelines for deciding a pre-sentence motion. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. 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. Thus, the decision to grant or deny the motion to withdraw the guilty plea is within the trial court's sound discretion; if the trial court's decision was unfair or unjust, the appellate court can reverse it. *Id.* The Supreme 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 the presentence motion to withdraw. *Id.*

{¶ 10} Previously, we have adopted various factors to weigh when considering whether the trial court abused its discretion in denying a presentence motion to withdraw a guilty plea. *State v. Scott*, 7th Dist. No. 08MA12, 2008-Ohio-5043, ¶13 (indicating that this court adopted the *State v. Fish* (1995), 104 Ohio App.3d 236,

factors in *State v. Thomas* (Dec. 17, 1998), 7th Dist. Nos. 96CA223, 96CA225, 96CA226). They are: “(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.” *Scott*, 7th Dist. No. 08MA12, 2008-Ohio-5043, ¶13, citing *Thomas*, 7th Dist. Nos. 96CA223, 96CA225, 96CA226 and *Fish*, 104 Ohio App.3d at 240. Consideration of the factors is a balancing test and, as such, no one factor is conclusive. *Scott*, 7th Dist. No. 08MA12, 2008-Ohio-5043, ¶13 citing *Fish*, 104 Ohio App.3d at 240.

{¶ 11} Thus, we now turn to the balancing of those nine factors to determine if the trial court abused its discretion in denying the presentence motion to withdraw the guilty plea. For ease of discussion, some factors are addressed together and the factors are addressed out of order.

{¶ 12} The first factor we address is whether the state would be prejudiced by the withdrawal. During the sentencing hearing when the motion to withdraw the guilty plea was discussed, the trial court specifically asked the prosecutor if his case would be jeopardized by allowing the plea to be withdrawn. (08/13/08 Tr. 6-7). The prosecutor responded, “I have no idea, Your Honor. I mean, this is the first I’ve heard of it, obviously.” (08/13/08 Tr. 7). That statement is neither an admission that prejudice would not occur nor an indication that it would not occur. However, the fact that the prosecutor does not verbalize how it would be prejudiced does not mean this factor supports a defendant. We have stated that a lack of articulated prejudice does not require plea withdrawal. *Scott*, 7th Dist. No. 08MA12, 2008-Ohio-5043, ¶16, citing *State v. Leasure*, 7th Dist. No. 01BA42, 2002-Ohio-5019, ¶19, 42. Furthermore, when 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. *Scott*, 7th Dist. No. 08MA12, 2008-Ohio-5043, ¶17, citing *State v. O’Neill*, 7th Dist. No. 03MA188, 2004-Ohio-6805, ¶33. Thus, when the prejudice factor is

looked at in this case with the limited facts before us, we cannot find that it weighs heavily in either party's favor; it does not clearly support or not support the trial court's decision to deny the motion to withdraw the guilty plea.

{¶ 13} Next, the third, fourth, fifth, sixth and eighth factors are addressed together. They are the extent of the Crim.R. 11 hearing, whether Gallagher understood the nature of the charges and potential sentence, Gallagher's reason for moving to withdraw his guilty plea, the trial court's consideration of that reason and the extent of the hearing on the motion to withdraw the guilty plea.

{¶ 14} Gallagher states that the Crim.R. 11 hearing was a "bare bones" hearing. That is an inaccurate description. The plea hearing transcript reveals that the trial court instructed on all the constitutional and nonconstitutional rights. Gallagher was instructed about his right to a jury trial, that the state had to prove the elements beyond a reasonable doubt, that he had the right to cross-examination witnesses against him, that he had the right to compel witnesses to testify on his behalf and that he could not be made to testify against himself. (06/30/08 Tr. 6-7). He was also informed about the maximum penalties of the offenses, the nature of the charges, and that he was eligible for community control. (06/30/08 Tr. 2, 5, 8, 9). Concerning the nature of the charge, it was explained in detail that the third count of the indictment was amended from a third degree felony to a fourth degree felony because the officer recalculated the distance that the offense occurred from the school and discovered that it was not within 1000 feet of the school. (06/30/08 Tr. 2). It was also clear that Gallagher was pleading to this amended charge and the other two charges were dismissed. (06/30/08 Tr. 3). Furthermore, when Gallagher was unclear on something he asked questions. (06/30/08 Tr. 3-4, 6).

{¶ 15} Admittedly, there may be some concern that Gallagher did not understand the nature of the charges because of statements he made during his motion to withdraw his guilty plea. At that hearing, his expressed reason for wanting to withdraw his guilty plea was because the offense was not committed within 1000 feet of a school.

{¶ 16} “MR. DUFFRIN [counsel for the state]: We amended it, Your Honor, anyway, the plea agreement, to reduce the measurement less than a thousand feet. It was an F-3, so that’s already been dealt with.

{¶ 17} “THE COURT: That’s what you’re talking about? The distance to the school?

{¶ 18} “THE DEFENDANT: Yeah.

{¶ 19} “THE COURT: They already dropped that.” (08/13/08 Tr. 4).

{¶ 20} Since he did not plead guilty to that school enhancement because the charge was amended to dismiss the enhancement, this may cause some concern that he did not understand the charge he pled guilty to. However, while he makes the argument that he wishes to withdraw his plea because the alleged offense did not occur within 1000 feet of a school, he also acknowledged that he knew that he did not plead to the enhancement. (08/13/08 Tr. 4).

{¶ 21} “THE COURT: That’s mine. It was amended down because they threw the school out. You understand you’re not being charged with being near a school?

{¶ 22} “THE DEFENDANT: Yeah, I know, but shouldn’t that have been dismissed?

{¶ 23} “THE COURT: No. It just reduces it a level.

{¶ 24} “* * *

{¶ 25} “THE COURT: Okay. I mean, you were not charged – you did not plead to selling or having – trafficking within a school zone. You didn’t plead to that.

{¶ 26} “THE DEFENDANT: But shouldn’t that have been – I don’t understand. Shouldn’t that have been dismissed, Your Honor, since they measured wrong since it wasn’t in a school zone?

{¶ 27} “THE COURT: No. It’s just an enhancement. It raises it a level.

{¶ 28} “THE DEFENDANT: The – wasn’t that part of the plea agreement?

{¶ 29} “THE COURT: Right. Plus they dismissed two other counts. So you want all your counts back. You’ll get them all back.” (08/13/08 Tr. 4-5).

{¶ 30} Thus, when those statements are considered in conjunction with the plea transcript which, as mentioned above, reveals that Gallagher understood that the third

count of the indictment was amended to dismiss the within 1000 feet of a school enhancement, we cannot find that he misunderstood the charges.

{¶ 31} Furthermore, in considering the expressed reason for moving to withdraw the guilty plea, the trial court adequately considered that reason. The sentencing transcript is twelve pages long. Six pages are a discussion of the motion to withdraw the guilty plea. (08/13/08 Tr. 3-8). During those six pages, the trial court spent two pages explaining to Gallagher that he did not plead to the school zone enhancement, rather, that charge was amended. (08/13/08 Tr. 4-6). The trial court also explained that the third count was not required to be dismissed because of the inaccurate measurement concerning the school, rather, all that was required was that the indictment had to be amended to dismiss the school enhancement. (08/13/08 Tr. 4-6). Consequently, the trial court did consider the arguments made by Gallagher and rightly found that since the argument was based on an enhancement that was not pled to because the count was amended there was not a valid reason for the withdrawal.

{¶ 32} Appellate counsel raises some concern that Gallagher was under the influence of drugs during the sentencing hearing when he made the discussed pro se argument to withdraw his guilty plea. Counsel asserts that the trial court should have extended the hearing until another day to ensure that Gallagher was not under the influence and so that his argument could further be explained.

{¶ 33} At the sentencing/motion to withdraw the guilty plea hearing, the trial court acknowledged that Gallagher might be under the influence by explaining that when Gallagher was picked up, he was not at Neil Kennedy Center getting treatment as he told his counsel he would be, but was picked up on the street with drugs on his person and was “probably using.” (08/13/08 Tr. 8-9). Although it may have been possible that Gallagher was under the influence, from the transcript, his argument appears to be reasonably coherent and, as stated above, he admitted during this argument that he understood he had not pled to the school enhancement. Furthermore, it is clear in the plea hearing transcript that Gallagher, at the time of making the plea, denied that he was under the influence of drugs and clearly indicated that he understood the charges against him and the charge he was pleading guilty to. (06/30/08 Tr. 2-5, 7).

{¶ 34} The fact that Gallagher may have been under the influence when making his motion to withdraw and the fact that the trial court admits such does concern this court. However, when considering both sets of transcripts and the colloquies between Gallagher and the trial court, that single fact alone does not show that the trial court abused its discretion when it did not postpone sentencing to determine if in fact Gallagher was under the influence or that it abused its discretion when denying the motion to withdraw. In all, after considering factors three, four, five, six and eight, they weigh in favor of the trial court's decision to deny the withdrawal of the guilty plea.

{¶ 35} The next factor addressed is the second *Fish* factor, the representation afforded to Gallagher. During Gallagher's pro se arguments to withdraw his guilty plea, defense counsel did not make any arguments in favor of withdrawing the guilty plea. It appears from the transcript that counsel was not aware of Gallagher's desire to withdraw the plea until Gallagher made the request. During the argument, Gallagher did express some dissatisfaction with his attorney by stating that he would like to fire his attorney. (08/13/08 Tr. 7). It appears his reason for wanting to fire the attorney was because counsel allegedly did not explain that he was pleading to the third count of the indictment that had been amended to dismiss the school enhancement.

{¶ 36} When reviewing the plea transcript, it is clear that Gallagher understood the charges against him. The transcript reveals that Gallagher asked questions when he was unclear on something. (06/30/08 Tr. 4). And furthermore, when asked if he was satisfied with the representation of his counsel he answered, "Absolutely, Your Honor." (06/30/08 Tr. 5). Thus, when all the transcripts are reviewed together, this factor supports the trial court's denial of the motion to withdraw the guilty plea.

{¶ 37} Next, we review the timing of the motion to withdraw, the seventh *Fish* factor. The plea occurred at the end of June while the motion to withdraw was made in the middle of August, approximately six weeks after the plea was entered. This is not an exorbitant amount of time. That said, the motion to withdraw was made at the sentencing hearing, right before sentencing. Given that there was time to make this motion earlier, this factor tends to weigh in favor of the trial court's decision.

{¶ 38} The last factor considered is the ninth *Fish* factor, whether the accused was perhaps not guilty or had a complete defense to the charge. Gallagher did state during the motion to withdraw that he is not a drug dealer. (08/13/08 Tr. 8). Since he did plead to trafficking, which is selling or offering to sell, this could be seen as an indication of his innocence. However, he offers nothing more to show that he might not be guilty or had a complete defense to the charge. The Fifth Appellate District has stated that the appellant must factually substantiate his claim of a meritorious defense or innocence. *State v. Davison*, 5th Dist. No. 2008-CA-00082, 2008-Ohio-7037, ¶50. Thus, without more, we will not find this factor weighs against the trial court's decision denying the motion to withdraw.

{¶ 39} Considering all the above, although not all nine factors weigh in favor of the trial court's denial of the motion to withdraw and some factors may be questionable as to what party they weigh in favor of, the weight of the combined factors does indicate that the trial court did not abuse its discretion in denying the motion to withdraw; there was no reasonable and legitimate basis to withdraw the guilty plea. This is so even though the trial court acknowledged that Gallagher may have been under the influence of drugs when making his argument to withdraw his guilty plea. Thus, this assignment of error is without merit.

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

Donofrio, J., concurs.

DeGenaro, J., concurs.