[Cite as *State v. McGarvey*, 2009-Ohio-4637.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 132
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
KEITH McGARVEY,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 08CR61.
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 Thaddeus Wexler 721 Boardman-Poland Road, Suite 201 Youngstown, Ohio 44512

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 1, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Keith McGarvey appeals the judgment of the Mahoning County Common Pleas Court which sentenced him after his guilty plea. Appellant contends that the court intimidated him at sentencing by stating that he would get a longer sentence if he lost at trial. Appellant concludes that his plea was not entered knowingly, intelligently and voluntarily due to these statements.

¶{2} Because the contested statements were made by the court at sentencing two months after the plea hearing, the plea is not invalid on the basis of intimidation. Considering the fact that it was the court that suggested plea withdrawal at the sentencing hearing, we cannot conclude that appellant failed to file a presentence plea withdrawal motion due to the court's statements at sentencing. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{3} On February 28, 2008, appellant was indicted on three counts of receiving stolen property, all fourth degree felonies. One count represented items totaling over $5,000 in value, and the other two counts represented two firearms that had been stolen. His girlfriend, Cynthia Russell, was indicted on three counts of theft, as she was alleged to be the one who stole the items from the Lake Milton residence of a couple for whom she performed housekeeping services. She made a statement alleging that appellant not only knew that all of the items had been stolen but he also forced her to steal from the residence by threatening her.

¶{4} Two pretrials were conducted, and discovery was provided. On April 7, 2008, appellant entered guilty pleas to the three charges. The state agreed to stand silent at sentencing if appellant paid $4,000 in restitution before the sentencing hearing. (Plea Tr. 2). The court disclosed that he could be sentenced from six to eighteen months on each count for a maximum total of four and one-half years in prison. (Plea Tr. 6). The court advised that there was an excellent chance of probation if restitution was timely made but if restitution was not made, then there was no chance of probation. (Plea Tr. 6-7). A presentence investigation report was

ordered. Notably, the court made no inappropriate statements at the plea hearing intimating that sentencing would be harsher if he went to trial.

¶{5} Sentencing proceeded on June 2, 2008. Appellant did not make full restitution by this time as he spent some time in jail due to a driving under suspension charge and he said he was having trouble getting a check from his employer. (Sent. Tr. 4, 7). The court began scolding appellant about his failure to make restitution. After hearing some explanations, the court asked appellant if he ever thought he should apologize for committing the crimes. Appellant responded: "I'm sorry that Cindy felt she needed to steal this stuff, yeah, I am. I am very sorry for that." (Sent. Tr. 7). The court further prodded appellant, basically suggesting appellant should implore the court and beg for probation. (Sent. Tr. 7-8). Appellant then stated:

¶{6} "Your Honor, I made a vow to myself 20 years ago when I got in trouble for stealing that I'll live on the streets, I'll beg out of trash cans. Never once did stealing ever cross my mind. And why she would do this, I don't know, you know. And I'm being charged with this, fine, you know. I don't know why she did it, but here I am. But what do I say? That I'm innocent?" (Sent. Tr. 8).

¶{7} After a discussion on appellant interrupting, the court announced:

¶{8} "What we do if you're not guilty is I'll just let you vacate the plea and we'll get a jury and have them come down and decide if you're guilty or not. We'll try the case. If you're not guilty, then you get to leave, and if you're guilty, of course, then you're going down hard. Huh?"

¶{9} When voiced that he thought he would get the maximum sentence if he took it to trial, the court responded that this was not necessarily so but added that if appellant goes to trial and the jurors unanimously found him guilty, "then not only are you a criminal, but you're a liar, too, and it is likely that I would sentence you to a significant amount of time in the penitentiary, up to whatever the maximum time is * * *." (Sent. Tr. 10). The following colloquy then occurred:

¶{10} "THE COURT: Yeah. Well, it's a little different from the way you put it. But if you're not guilty, I'm happy to give you a trial and find out if you're guilty or not. That's up to you.

¶{11} "THE DEFENDANT: * * * I don't want to go to trial and waste the court's time.

¶{12} "THE COURT: You're not wasting my time. I'm full time.

¶{13} "THE DEFENDANT: I want to get it paid off and get it over with.

¶{14} "THE COURT: Well, you missed the point on the payoff.

¶{15} "THE DEFENDANT: May I talk over this with my lawyer before – because I'm seriously thinking about going to trial?" (Sent. Tr. 10-11).

¶{16} The court called a brief recess so that appellant could discuss the matter with his attorney. (Sent. Tr. 11). After the recess, counsel advised that appellant was "still quite conflicted". He noted that he explained to appellant what the evidence was against him and what the potential would be at trial. Counsel stated that he was more than willing to take it to trial but that he was not sure that was what appellant truly wanted to do. (Sent Tr. 12).

¶{17} The court reiterated that appellant could receive up to four and one half years if he gets convicted. The court noted that if he wins at trial, then he would go free. The court also stated that he could maintain the plea and proceed with disposition. Appellant answered: "I think we'll go ahead and just get it over with today. I know that I'm innocent, Cindy knows I am, God knows I am, but I'll do whatever I can to help her pay this back, so if you want to charge me, in essence, I'll take that." (Sent. Tr. 13).

¶{18} After defense counsel made closing remarks, the court disclosed that appellant's criminal history showed five probation violations, multiple battery offenses, multiple domestic violence charges, multiple charges of burglary and related offenses such as trespassing, providing false information to a police officer, criminal mischief, disorderly conduct, obstructing official business and criminal damaging. The court also pointed out that he had been charged with assault and criminal trespass since committing the subject offenses. (Sent. Tr. 15-16). The court went through a discussion of the seriousness and recidivism factors. (Sent. Tr. 18-19).

¶{19} The court then sentenced appellant to nine months in prison on each offense to run consecutively plus restitution. The court filed its sentencing entry on June 5, 2008. Appellant filed timely notice of appeal.

ASSIGNMENT OF ERROR

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

¶{21} "APPELLANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTER A PLEA OF GUILTY AS A RESULT OF THE INTIMIDATING NATURE OF THE PLEA AND SENTENCING PROCEEDINGS IN VIOLATION OF CRIMINAL RULE 11(C) AND HIS FEDERAL CONSTITUTIONAL RIGHTS."

¶{22} Appellant believes that the above recited statements made at sentencing show that appellant was under duress to take the plea as it was reasonable to interpret the trial court's statements as a threat to use maximum, consecutive sentences as retaliation for going to trial. He also complains that there was no reference to an *Alford* plea.

¶{23} An *Alford* plea is one that permits a defendant to plead guilty to a charge while maintaining his or her innocence. *North Carolina v. Alford* (1970), 400 U.S. 25. A trial court may accept a guilty plea containing a protestation of innocence when "a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." Id. at 37.

¶{24} However, *Alford* does not apply if the protestations of innocence are made after and not contemporaneous with the guilty plea. *State v. Gales* (1999), 131 Ohio App.3d 56, 60 (7th Dist.), citing *State v. Johnson* (Dec. 13, 1994), 7th Dist. No. 93CA15. We have instructed:

¶{25} "Accordingly, a court is not required to inquire into a defendant's reasons for pleading guilty despite his assertions of innocence when such assertions occur at sentencing, after a guilty plea has been accepted. Nor is a court required to inform a defendant about the existence of Crim.R. 32.1, which allows the filing of a motion to withdraw a plea." *Gales*, 131 Ohio App.3d at 60.

¶{26} Here, the plea had been accepted and journalized, and sentencing occurred two months later. Thus, appellant's assertions of innocence at sentencing were not subject to the principles set forth in *Alford*. Cf. *State v. Dumas*, 7th Dist. No. 98CA157, 2002-Ohio-6614, ¶40 (combined plea/sentencing hearing).

¶{27} As for the court's statements at sentencing, the court said in pertinent part that appellant would "go down hard" and that he would receive a "significant"

sentence “up to the maximum” if he lost after trial. Although the court did not actually say that he would receive maximum, consecutive sentences if he went to trial, the court did imply that if appellant just continued through sentencing that day, he would not receive as harsh a sentence as if he withdrew his plea and lost at trial. Appellant cites no law on the particular issue, but we note the following background law on retaliation in sentencing.

¶{28} It has been characterized as vindictive for a trial court to sentence a defendant to a longer sentence after plea vacation merely in retaliation for the plea withdrawal. See *Alabama v. Smith* (1989), 490 U.S. 794. It has also been stated that a court’s participation in plea negotiations is not per se invalid but should be avoided and is carefully scrutinized by the reviewing court. *State v. Byrd* (1980), 63 Ohio St.2d 288, 293. In that case, the Court vacated a plea that had been negotiated by the trial court behind-the-scenes; the Court also recognized that a defendant is easily influenced to take an offer when he is advised that a sentence will be longer after a trial and conviction. Id. Thus, it is not proper for a court to threaten a longer sentence if a defendant refuses to accept a plea and instead demands trial.

¶{29} Here, however, the defendant merely chose to forgo filing a plea withdrawal motion. This is different than the defendant who enters a plea due to the court’s threats of retaliation. Contrary to appellant’s suggestions, it is not the plea that is alleged to be involuntary due to intimidation by the court. A prior plea does not become invalid by statements of the trial court at later sentencing. As the state points out, at the plea hearing, the court advised appellant of his constitutional rights and made sure he understood the non-constitutional provisions within Crim.R. 11 as well. The record of the plea hearing transcript is not alleged to contain improprieties.

¶{30} Rather, appellant’s only argument concerns the court’s statements at sentencing two months later. Thus, it is only appellant’s decision (at sentencing) to forgo seeking plea withdrawal that he can contend was involuntary due to intimidation.

¶{31} However, appellant was not even the one who initiated the idea of plea withdrawal, and he never actually asked for such remedy. Appellant was prepared to be sentenced when the court started pressuring him to apologize. Even then, appellant expressed that he did not know why his girlfriend stole the items, *without*

actually expressing that he did not commit the offense of receiving stolen property. The court then further criticized his failure to take responsibility. It was at this time, that appellant expressed his innocence. Still, he seemed to be referring to the theft and his alleged participation in the theft as opposed to the receiving stolen property charges with which he was indicted.

¶{32} Although the court had no duty to inform appellant of the plea withdrawal option, the court did advise the defendant that he could vacate the plea and proceed to trial. *Gates*, 131 Ohio App.3d at 60 (the trial court is not required to advise the defendant about the ability to vacate a plea when defendant voices his innocence at sentencing). Were it not for the trial court's suggestion of plea withdrawal, appellant would have been sentenced without a thought about withdrawing his plea.

¶{33} Notably, even if a plea withdrawal motion had been made, this would have been a mid-sentencing hearing request made two months after the plea. Thus, timeliness was not on his side. As the state notes, besides a vague claim of innocence, appellant makes no argument as to any other plea withdrawal factors. See *State v. Thomas* (Dec. 17, 1998), 7th Dist. Nos. 96CA223, 96CA225, 96CA226, citing *State v. Fish* (1995), 104 Ohio App.3d 236, 240.

¶{34} Appellant was represented by counsel. He had the opportunity to speak with counsel during a recess called at sentencing for this very purpose. At that recess, counsel evaluated the potential of losing at trial and recited the evidence against him. For instance, there is essentially no dispute that the objects were stolen by his girlfriend. Some of the items were admittedly possessed by appellant. In addition, his girlfriend made a statement against him, implicating him in more than just receiving the stolen property. The record shows that appellant made an informed decision to proceed with his plea.

¶{35} Considering the context of the statements in a sentencing hearing during an argument on responsibility, we conclude that the trial court's statements were not reversible as the plea itself was not affected by such statements and it was the statements themselves that generated appellant's consideration of whether to seek plea withdrawal. That is, considering the fact that it was the court who suggested plea withdrawal at the sentencing hearing, we cannot say that appellant failed to file a

presentence (actually mid-sentence) plea withdrawal motion *due to* the court's statements about a longer sentence upon conviction after trial.

¶{36} Although the trial court should refrain from making statements about sentencing to a longer term if a plea is withdrawn, the totality of the circumstances here permit the plea to stand.

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

Donofrio, J., concurs.
Waite, J., concurs.