

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23243
v.	:	T.C. NO. 08 CR 0177/01
RODNEY J. MARSHALL, JR.	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 30th day of October, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Rodney J. Marshall, filed February 5, 2009. On February 13, 2008, an indictment was returned against Marshall containing 34 counts, and on August 19, 2008, another charge was added in a “B”

indictment.

{¶ 2} The matter was set for trial on September 22, 2008, and on that date, Marshall filed a “Notice of Conflict of Interest,” requesting that the Montgomery County Prosecutor’s Office be barred from the prosecution of all charges in both indictments. Alternatively, Marshall requested that the prosecutor’s office be barred from the prosecution of the charges in Counts 14 and 15 of the initial indictment, since the alleged victims therein were the wife and son of the county prosecutor. Marshall’s notice further indicated that the county prosecutor’s wife is a municipal court judge.

{¶ 3} On the day of trial, Marshall withdrew his previous pleas of not guilty and pled guilty to 18 of the 35 counts against him, namely: two counts of grand theft (motor vehicle), in violation of R.C. 2913.02(A)(1), felonies of the fourth degree; two counts of theft (over \$500), in violation of R.C. 2913.02(A)(1), felonies of the fifth degree; one count of receiving stolen property (motor vehicle), in violation of R.C. 2913.51(A), a felony of the fourth degree; three counts of breaking and entering (unoccupied structure), in violation of R.C. 2911.13(A), felonies of the fifth degree; one count of burglary (occupied structure/person present), in violation of R.C. 2911.12(A)(1), a felony of the second degree; three counts of burglary (occupied/criminal offense), in violation of R.C. 2911.12(A)(3), felonies of the third degree; two counts of theft (R.C. 2913.71 property), in violation of R.C. 2913.02(A)(1), felonies of the fifth degree; two counts of receiving stolen property (firearm), in violation of R.C. 2913.51(A), felonies of the fourth degree; one count of having weapons while under disability (prior offense of violence), in violation of R.C. 2923.13(A)(2), a felony of the third degree, and from the “B” indictment, one count of engaging in a pattern

of corrupt activity, in violation of R.C. 2923.32(A)(1), a felony of the first degree. The remaining charges were dismissed in exchange for his pleas, including the charges involving the wife and son of the county prosecutor. There was an agreed upon sentencing range of not less than eight and not more than 12 years in prison. A presentence investigation was ordered, and sentencing was set for October 8, 2008.

{¶ 4} On October 7, 2008, Marshall filed a motion to withdraw his guilty pleas, and sentencing was postponed. After retaining substitute counsel, Marshall filed a supplemental motion to vacate the pleas and a motion to dismiss. A hearing was held on January 8, 2009, at which Marshall and his mother, Lisa Jewett, testified.

{¶ 5} According to Marshall, his counsel misled him, and he did not understand the implications of his guilty pleas and that he would be sentenced to prison. He testified that he instructed his attorney to file a motion to suppress, and that his attorney told him it had been filed, although it had not. He further testified that his attorney advised him that the judge would hold hearings on both the motion to suppress and the motion regarding the alleged conflict of interest after he signed the plea forms. According to Marshall, his counsel “was leading me on to believe that after I signed the plea form, that then [the court] * * * would rule on the motions before he went on with the proceedings * * * .”

{¶ 6} On January 16, 2009, the trial court overruled the motion to withdraw the guilty pleas. The trial court found that Marshall’s testimony “that he did not know in this case that he was pleading guilty, having certain charges dismissed, admitting to the truth of the remaining charges, waiving his rights, and that he would be sentenced to a prison sentence of between eight and twelve years, is not credible.” On January 21, 2009, Marshall

was sentenced to 10 years.

{¶ 7} Marshall asserts one assignment of error as follows:

{¶ 8} “THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION BY DENYING APPELLANT’S PETITION TO VACATE THE GUILTY PLEAS AND BY DENYING THE MOTION TO DISMISS.”

1. Motion to Withdraw Pleas

{¶ 9} According to Marshall, his counsel’s performance was deficient in that he failed to file the motion to suppress and lied to Marshall about it. Further, Marshall asserts, his counsel was ineffective for advising Marshall that once Marshall entered his pleas, the court would rule on his suppression and conflict of interest motions. Marshall also asserts that urging him to plead guilty while aware of the alleged conflict of interest constitutes deficient performance. Marshall acknowledges that the trial court complied with Crim.R. 11, but asserts that “even though the judge did what he could to ensure that appellant received a full and fair hearing, his attorney’s misstatements prevented that from happening.” Finally, Marshall argues, the fact that the State failed to present evidence contrary to Marshall’s testimony establishes the truth of Marshall’s assertions.

{¶ 10} “Under Crim. R. 32.1, a pre-sentence motion to withdraw a guilty plea ‘should be freely and liberally granted.’” (Internal citations omitted). *State v. Fugate*, Montgomery App. No. 21574, 2007-Ohio-26. “However, a defendant does not have an absolute right to withdraw his plea prior to sentencing. (Internal citations omitted). A trial court must hold a hearing on the motion to determine if a reasonable and legitimate basis exists for the withdrawal. * * * Yet, the decision to grant or deny the motion is within the

court's discretion. * * * Generally, denials of pre-sentence motions to withdraw pleas have been upheld even if the accused was mistaken as to an aspect of the plea's consequences. (Internal citations omitted).

{¶ 11} “On appeal, a court will reverse a trial court’s denial of a pre-sentence motion to withdraw a guilty plea only upon a finding of an abuse of discretion. (Internal citation omitted). An abuse of discretion occurs where the trial court’s ruling is unreasonable, arbitrary, or unconscionable. (Citations omitted). In *State v. Barnett* (1991), 73 Ohio App.3d 244, 250 * * * quoting [*State v. Peterseim* (1980), 68 Ohio App.2d 211, 213 -214], we stated:

{¶ 12} ““A trial court does not abuse its discretion in overruling a motion to withdraw: (1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim. R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request.”” *State v. Askew*, Montgomery App. No. 20110, 2005-Ohio-4026, ¶ 6-8.

{¶ 13} “* * *

{¶ 14} “When conducting the hearing on the motion to withdraw, the trial court may consider: ‘(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) the extent of the hearing on the motion to withdraw, * * * [5] whether the timing of the motion was reasonable; [6] the reasons for the motion; [7] whether the defendant understood the

nature of the charges and potential sentences, and [8] whether the accused was perhaps not guilty or had a complete defense to the charge.” *Id.*, ¶ 10 -11.

{¶ 15} “In the course of our appellate review, we defer to the factfinder’s assessment of credibility.” *State v. Goney*, Montgomery App. No. 22753, 2009-Ohio-4326, ¶ 25, citing *State v. Hixon*, Montgomery App. No. 19868, 2004-Ohio-1308, ¶ 10.

{¶ 16} Marshall’s argument, while citing the first, second and fourth of the *Peterseim* factors, is in fact addressed solely to the first of those factors, namely that he received ineffective assistance of counsel in that he was misled and accordingly did not understand the implications of the plea proceedings. We need not reach the merits of Marshall’s arguments regarding this factor, however, since we defer to the trial court’s assessment of Marshall’s credibility, and the trial court expressly found Marshall’s testimony about his misunderstanding of the plea proceedings not credible. Other than Marshall’s testimony, the record does not support a finding of deficient performance by counsel.

{¶ 17} Further, as the trial court correctly noted, Marshall “was not a ‘potted plant’ listening to some gibberish” during the plea hearing. Marshall indicated to the trial court that he was satisfied with his attorney’s representation. He indicated that he understood that “a plea of guilty is a complete admission of guilt and that upon accepting the plea, the Court may proceed to judgment and sentence immediately.” Marshall was asked whether there were any “promises or representations” made to him other than those on the record, and Marshall responded in the negative. After signing the plea forms, and before entering his pleas, Marshall was again asked if there was anything he did not understand and if he had

any questions for the trial court or for defense counsel, and Marshall responded in the negative. Finally, the trial court's thorough decision denying Marshall's motion belies his assertion that the court did not give full and fair consideration to the request to withdraw his pleas. Accordingly, the trial court did not abuse its discretion in denying Marshall's motion to withdraw his pleas.

2. Motion to Dismiss

{¶ 18} Despite the wording of his assigned error, Marshall's brief is directed solely to his motion to withdraw his pleas. We note, in his motion to dismiss, Marshall argued in part that "there are numerous conflicts which exist over Judge Heck's involvement in this matter." According to the motion, Judge Heck presided over Marshall's arraignment and preliminary hearing. At the January 8th hearing on Marshall's motions, however, counsel stated that he was "withdrawing completely" any arguments regarding Judge Heck. At the conclusion of the hearing, the trial court allowed Marshall until January 16th to supplement his motion to dismiss. On January 9, 2009, Marshall filed a "Motion to Withdraw," again stating that all arguments involving Judge Heck were withdrawn, and noting that Judge Heck, in fact, had no involvement in this matter in her capacity as a judge. The trial court granted the "Motion to Withdraw." The remaining arguments in the motion to dismiss involved the county prosecutor's alleged conflict of interest.

{¶ 19} The trial court did not rule upon the motion to dismiss by judgment entry. At sentencing, however, the trial court stated, "[t]here was a motion to dismiss and the Court implicitly denied that by not ruling on it. Furthermore, the Court finds it to have been waived by the plea[s] of guilty which the Court has, by entry, found to be knowingly,

voluntarily and intelligently [made].”

{¶ 20} Having found that Marshall’s pleas were validly entered, we agree that Marshall has waived any argument regarding a conflict of interest as set forth in his motion to dismiss. We further note the two counts which purportedly gave rise to a conflict of interest were in fact dismissed as part of the plea bargain.

{¶ 21} Marshall’s sole assignment of error is overruled, and the judgment of the trial court is affirmed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

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