

COURT OF APPEALS  
MUSKINGUM COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	
-vs-	:	Case No. CT2009-0036
	:	
JAMES STRIBLIN	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Criminal Appeal from Muskingum County Court of Common Pleas Case No. CR-2005-0260 & CR-2009-0131
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 27, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
ROBERT L. SMITH Assistant Prosecuting Attorney 27 North Fifth Zanesville, Ohio 43701	ERIC J. ALLEN The Law Office of Eric J. Allen, Ltd. 713 South Front Columbus, Ohio 43206

*Edwards, P.J.*

{¶1} Defendant-appellant, James Striblin, appeals his conviction and sentence from the Muskingum County Court of Common Pleas on one count of possession of drugs and one count of vandalism. Plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On September 14, 2005, the Muskingum County Grand jury indicted appellant in Case No. CR2005-0260 on one count of possession of drugs (crack cocaine) in violation of R.C. 2925.11(A), a felony of the first degree. The count was accompanied by a forfeiture specification. At his arraignment on April 2, 2007, appellant, who had been extradited from Texas, entered a plea of not guilty to the charge. Subsequently, a bench warrant was issued for appellant's arrest in December of 2007.

{¶3} On June 24, 2009, the Muskingum County Grand jury indicted appellant in Case No. CR2009-0131 on one count of vandalism in violation of R.C. 2909.05(B)(1)(a), one count of vandalism in violation of R.C. 2909.05(B)(2), and one count of vandalism in violation of R.C. 2909.05(B)(1)(b). All were felonies of the fifth degree.

{¶4} On July 6, 2009, appellant's counsel filed a Motion to Withdraw in Case No. CR2005-0260, alleging that there had been a "breakdown of communication" between counsel and appellant.

{¶5} At his arraignment on July 9, 2009, appellant entered a written plea of not guilty by reason of insanity in Case No. CR2009-0131.

{¶6} Thereafter, on July 13, 2009, appellant withdrew his former not guilty pleas in Case No. CR2005-0260 and entered a plea of guilty to one count of possession of drugs (crack cocaine) in violation of R.C. 2925.11(A), a felony of the third degree, and

to the forfeiture specification. On the same date, appellant withdrew his former not guilty plea in Case No. CR2009-0131 and entered a plea of guilty to one count of vandalism in violation of R.C. 2909.05(B)(1)(a), a felony of the fifth degree.

{¶7} On July 29, 2009, appellant filed a pro se Motion to Withdraw Guilty Plea in Case No. CR2005-0260. Appellant's counsel, on August 7, 2009, filed a supplement to such motion, arguing that appellant had entered his plea under coercion and duress.

{¶8} A hearing on appellant's motion was held on August 10, 2009, the date of the sentencing hearing. After denying appellant's motion, the trial court, as memorialized in an Entry filed in Case No. CR2005-0260 on August 11, 2009, sentenced appellant to three years in prison. As memorialized in an Entry filed in Case No. CR2009-0131 on the same date, the trial court sentenced appellant to six months in prison. The trial court, in its Entry in such case, ordered that appellant's sentence be served consecutively to his sentence in Case No. CR2005-0260, for an aggregate sentence of three and one half years.

{¶9} On August 12, 2009, appellee filed a Nolle Prosequi as to the remaining vandalism counts in Case No. CR2009-0131.

{¶10} Appellant now raises the following assignment of error on appeal:

{¶11} "I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA."

I

{¶12} Appellant, in his sole assignment of error, argues that the trial court erred in denying his Motion to Withdraw his Guilty Plea. We disagree.

{¶13} Appellant's motion was made prior to sentencing. 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."

{¶14} Generally, a motion to withdraw a guilty plea is to be freely and liberally granted. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715. However, the *Xie* Court indicated that a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *Id.* at paragraph one of the syllabus. Rather, "[a] trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Id.* The court further held that "[t]he decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court." *Id.* at paragraph two of the syllabus. Accordingly, in order to find that the trial court abused its discretion, a reviewing court must find that the court's ruling was "unreasonable, arbitrary or unconscionable." *Id.* at 527, 584 N.E.2d 715.

{¶15} In reviewing a trial court's decision regarding a motion to withdraw a plea, the court in *State v. Fish* (1995), 104 Ohio App.3d 236, 661 N.E.2d 788, set forth a non-exhaustive list of factors to weigh when considering a motion to withdraw a plea. Such factors include: (1) whether the prosecution would be prejudiced if the plea was vacated; (2) whether the accused was represented by highly competent counsel; (3) whether the accused was given a full Crim.R. 11 hearing; (4) whether a full hearing was held on the motion; (5) whether the trial court gave full and fair consideration to the motion; (6) whether the motion was made within a reasonable time; (7) whether the motion set forth specific reasons for the withdrawal; (8) whether the accused

understood the nature of the charges and possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense to the crime. *Id.* at 240, 661 N.E.2d 788. Finally, a change of heart or mistaken belief about pleading guilty is not a reasonable basis that requires a trial court to permit the defendant to withdraw his guilty plea. *State v. Lambros* (1988), 44 Ohio App.3d 102, 103, 541 N.E.2d 632. When looking at the ninth factor, “the trial judge must determine whether the claim of innocence is anything more than the defendant's change of heart about the plea agreement.” *State v. Kramer*, Mahoning App. No. 01-C.A.-107, 2002-Ohio-4176, ¶ 58.

{¶16} A trial court does not abuse its discretion in overruling a motion to withdraw a guilty plea if the following elements are present: (1) the defendant is represented by competent counsel; (2) the trial court provides the defendant with a full hearing before entering the guilty plea; and (3) the trial court provides the defendant with a full hearing on the motion to withdraw guilty plea, where the court considers the defendant's arguments in support of his motion to withdraw a guilty plea. *State v. Rosemark* (1996), 116 Ohio App.3d 306, 308, 688 N.E.2d 22.

{¶17} Upon review, we find the trial court did not abuse its discretion when it denied appellant's motion to withdraw his guilty plea. The record reflects that at his plea hearing, appellant was represented by competent counsel and was afforded a full hearing pursuant to Crim.R. 11. Appellant denied being threatened or promised anything in exchange for pleading guilty. Appellant, when asked, also indicated that he was satisfied with the advice and assistance of his counsel and that he understood the nature of the offenses and any possible defenses that he might have to the same.

{¶18} Moreover, the record also reflects that appellant was given a full and impartial hearing on his motion to withdraw guilty plea, and that the trial court gave full and fair consideration to his plea withdrawal request. At the hearing on August 10, 2009, appellant indicated that he wished to withdraw his plea because he was innocent and because he entered his plea under coercion and duress. With respect to his claim of innocence, we note that appellant previously entered a plea of guilty to one count of possession of drugs in Case No. CR2005-0260. A change of heart is not a legitimate basis for withdrawing a plea. See *Lambros*, supra. The following discussion occurred on the record when appellant's counsel, Tracy Younkin, was asked whether he wanted to elaborate on the coercion and duress claim or whether he preferred appellant to address the same:

{¶19} "MR. YOUNKIN: Your Honor, it's my client's contention that when I filed my motion to withdraw as counsel, that put undue pressure on him to enter a guilty plea for fear that he would be forced to appear without an attorney if he chose to go the route of trial. He's saying that it's his contention that because I entered his guilty plea, the duress and that pressure after being, in his words, coerced to enter the guilty plea for fear of - - with the threat that he would be forced to go forward without an attorney, that he did so despite that fact that he's not guilty.

{¶20} "Beyond that, I don't have any more information other than what Mr. Striblin has stated in his own words this afternoon.

{¶21} "THE COURT: Thank you, Mr. Younkin.;

{¶22} "Pretty accurate, Mr. Striblin?

{¶23} "MR. STRIBLIN: Yes, Your Honor.

{¶24} “THE COURT: Is that the duress and coercion you believe you were under?

{¶25} “MR. STRIBLIN: Mr. Younkin told me - - like I told you, I don’t have money to hire another attorney. I gave Mr. Younkin everything I had. And he told me if I didn’t take this plea that he would withdraw as counsel. So, I felt under, you know, pressure. You know, I face a substantial amount of time, you know, so I was scared. So, I, you know, needed to take this deal or - - and he constantly told me: We know they set you up, we know that they’re withholding evidence, but, you know, you’re going to get a lot of time if you go to trial.

{¶26} “THE COURT: I asked you, when you were changing your plea, if you were satisfied with the advice and assistance you were provided by Mr. Younkin in this case. You said yes; right?

{¶27} “MR. STRIBLIN: I was scared - -

{¶28} “THE COURT: That’s not the question. You said yes?

{¶29} “MR. STRIBLIN: I said - - probably. I was so confused.

{¶30} “THE COURT: You said yes. And you have been - - you have been convicted of offenses before; right?

{¶31} “MR. STRIBLIN: I never had this - -

{¶32} “THE COURT: Answer the question. Have you been convicted of other criminal offenses?

{¶33} “MR STRIBLIN: Yes.

{¶34} “THE COURT: So, you have been in court before, this wasn’t your first time; was it?

{¶35} “MR. STRIBLIN: This is my first time in trial, sir. I mean, this is my first time facing this much time with a trial.

{¶36} “THE COURT: You have been convicted to other offenses, correct, and pled guilty; right?

{¶37} “MR. STRIBLIN: Yeah.” Transcript of August 10, 2009 hearing at 17-19.

{¶38} It was within the trial court's province to determine whether appellant's arguments in support of his motion were reasonable and legitimate. We defer to the trial court's judgment in evaluating the “good faith, credibility and weight” of appellant's motivation and assertions in entering and attempting to withdraw his plea. See, *Xie*, 62 Ohio St.3d at 525, 584 N.E.2d 715. We, therefore, do not find the trial court's decision was unreasonable, arbitrary or unconscionable.

{¶39} Appellant's sole assignment of error is, therefore, overruled.

{¶40} Accordingly, the judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Farmer J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Sheila G. Farmer

JUDGES

