

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-11-038

Appellee

Trial Court No. 2009CR0408

v.

Ryan Kutnyak

DECISION AND JUDGMENT

Appellant

Decided: July 27, 2012

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Heather M. Baker and Jacqueline M. Kirian, Assistant
Prosecuting Attorneys, for appellee.

Bruce W. Boerst, Jr. and Andrew P. Abood, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the December 7, 2010 judgment of the Wood County Court of Common Pleas, which denied the motion of appellant, Ryan Kutnyak, to withdraw his guilty plea after he had been convicted of gross sexual imposition, but prior

to his sentencing. Upon consideration of the assignment of error, we reverse the decision of the lower court. Appellant asserts the following single assignment of error on appeal:

WHETHER THE LOWER COURT ERRED IN DENYING
DEFENDANT'S MOTION TO WITHDRAW PLEA WHEN THE
INTERESTS OF JUSTICE SO REQUIRED?

{¶ 2} Appellant was personally served with a warrant based upon a complaint on August 6, 2009, alleging that he had raped a woman on August 2, 2009. Appellant's attorney advised the court by letter that he represented appellant and waived a formal arraignment and entered a not guilty plea. A bill of information was filed on September 17, 2009, against appellant charging him with gross sexual imposition, in violation of R.C. 2907.05(A)(1), a felony of the fourth degree. The prosecution intended to prove the victim and appellant had spent the evening together at the victim's home and at a bar, they returned to the victim's home, the victim fell asleep at some point, and the victim awoke to find appellant sexually assaulting her, and appellant would not stop when the victim told him to stop. After consulting with his attorney, appellant waived prosecution by indictment and pled guilty to the charges on November 30, 2009. Appellant was convicted of the charge on December 1, 2009, and a sentencing hearing was scheduled for February 2, 2010.

{¶ 3} Appellant retained new counsel on January 12, 2010, and moved on January 20, 2010, to postpone the sentencing hearing. On March 8, 2010, appellant moved to withdraw his guilty plea. The motion was initially denied on March 25, 2010,

upon waiver of oral argument. The trial court vacated that order on May 26, 2010, after an untimely appeal was dismissed. The court scheduled a hearing on the matter for October 26, 2010. Prior to the hearing, appellant filed additional memoranda asserting newly discovered evidence. At the hearing, appellant asserted that he was innocent of the charges but had been pressured by his appointed counsel to plead guilty. He asserted that he had not understood consent was a complete defense to the charges and he was unaware of the full implications of entering a guilty plea to this offense. The trial court denied the motion on December 7, 2010, and appellant appealed the judgment to this court.

{¶ 4} On appeal, appellant argues that the trial court erred by denying appellant's motion to withdraw his guilty plea when the interests of justice required it be granted.

{¶ 5} There is no absolute right to withdraw a guilty plea after conviction, but prior to sentencing, *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992), paragraph one of the syllabus, and the matter is left to the sound discretion of the trial court who is in the better position to evaluate both the motivation of the defendant in pleading guilty and the credibility and weight to be given to the reasons for seeking to withdraw the plea. *Id.* at paragraph two of the syllabus. Therefore, we will not reverse the trial court's denial of the motion unless the defendant can establish that the trial court abused its discretion. *Id.* at 525. An abuse of discretion standard requires a finding that the trial court committed "more than an error of law or of judgment; it implies that the court's

attitude is unreasonable, arbitrary or unconscionable * * *.” *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 6} Crim.R. 32.1 gives no criteria for determining when withdrawal of a plea is justified. However, the Ohio Supreme Court has held that “a presentence motion to withdraw a guilty plea should be freely and liberally granted.” *Xie* at 526. Appellate courts evaluate the trial court’s decision based upon the following considerations:

(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 trial court gave full and fair consideration to the motion; (6) whether the timing of the motion was reasonable; (7) the reasons for the motion; (8) whether the defendant understood the nature of the charges and potential sentences; and (9) whether the accused was perhaps not guilty or had a complete defense to the charge. *State v. Murphy*, 176 Ohio App.3d 345, 2008-Ohio-2382, 891 N.E.2d 1255, ¶ 39, citing *State v. Griffin*, 141 Ohio App.3d 551, 554, 752 N.E.2d 310 (2001).

A change of heart is an insufficient reason to permit withdrawal of the plea. *State v. Locher*, 4th Dist. No. 11CA3414, 2012-Ohio-787, ¶ 17; *State v. Lawhorn*, 6th Dist. No. L-08-1153, 2009-Ohio-3216, ¶ 23, citing *State v. Gonzales*, 6th Dist. Nos. WD-06-084; WD-06-085, 2007-Ohio-3565, ¶ 23; *State v. Eversole*, 6th Dist.

Nos. E-05-073, E-05-074, E-05-075, E-05-076, 2006-Ohio-3988, ¶ 16; and *State v. Moore*, 7th Dist. No. 06-CO-74, 2008-Ohio-1039, ¶ 13.

{¶ 7} We find that appellant's motion to withdraw his guilty plea was timely made. He filed his motion prior to sentencing and very shortly after obtaining new counsel.

{¶ 8} We agree that appellee will face some prejudice if appellant is allowed to withdraw his plea because the prosecution will face obstacles in finding witnesses who can testify as to the relationship or behavior between appellant and the victim on the night of the crime. However, the ultimate issue in this case turns upon the credibility of the testimony of the victim and appellant. Therefore, any prejudice to appellee by allowing the withdrawal of the plea is minimal.

{¶ 9} We also find that appellant was well represented by a competent and experienced criminal attorney who met with appellant at least a dozen times, plus telephone conversations, over a five-month period to discuss the case. Appellant admitted that his counsel discussed with him the charges, potential penalties, and the prosecution's evidence, which consisted of text messages and DNA. They further discussed the significance of differences in the penalties for rape and gross sexual imposition. The trial court also conducted a thorough Crim.R. 11 plea hearing. Appellant acknowledged that his plea was knowingly, voluntarily, and intelligently made. Appellant was satisfied with the assistance of his attorney at the time. Furthermore, there is nothing on the face of the record to support a finding that his counsel rendered

ineffective assistance. The fact that the appointed attorney did not subpoena phone records does not automatically establish ineffective assistance. We believe it is clear that appellant understood the charges, the penalties he faced, and the implications of his plea.

{¶ 10} Furthermore, the trial court gave full consideration to appellant's motion to withdraw his plea. The court took the matter under advisement after the hearing before rendered a written decision.

{¶ 11} However, we find that appellant did present evidence that his motivation for withdrawing his plea was not based on a mere change of heart after he realized the full implication of his plea. Appellant asserted he discovered he had evidence to support his defense of consent: the prior physical intimacy between appellant and the victim on prior dates and on the night at issue, the victim's invitation to sleep in her room with her, the victim's action of undressing in front of him, the victim's action of walking appellant to the car after the incident. Furthermore, appellant asserted he had investigated the matter further and discovered several witnesses (including the victim's father, ex-fiance, and ex-fiance's brother, and two friends of appellant who were present at the bar that night) who would testify as to the victim's prior conduct and events prior to the date of this offense which could impeach the victim's testimony and establish appellant did not commit a crime. Appellant sets forth in his memorandum in support the specific facts about which each of these witnesses would be able to testify.

{¶ 12} The trial court concluded appellant had merely changed his mind about the plea prior to sentencing when he realized that he would have to register as a sexual

offender. The court further found that none of the evidence appellant would present could overcome his admission in open court that he committed the offense.

{¶ 13} Generally, an appellate court defers to the trial court because it is in a better position to evaluate the acceptance of the plea and appellant's motivation to withdraw the plea. However, in this case, we find that appellant has shown the trial court abused its discretion by denying his motion to withdraw his plea. Appellant has demonstrated that his motivation for withdrawing his plea is based upon more than a change of heart; he has identified evidence which, if believed, would enable him to obtain an acquittal. The trial court erred in considering appellant's prior admission of the facts in open court when determining whether he should be allowed to withdraw his guilty plea. Anyone who enters a guilty plea must admit to the facts presented by the prosecution and this fact has no bearing on determining the motivation for withdrawing the plea.

{¶ 14} Appellee argues that appellant has failed to support his claims with any evidence. This court has held that it will not accept a defendant's claims of innocence without an offer of evidence to support the claim. *State v. Richey*, 6th Dist. No. S-09-028, 2011-Ohio-280, ¶ 63, and *State v. Scott*, 6th Dist. No. S-05-035, 2006-Ohio-3875, ¶ 13. In the case before us, appellant has specifically identified potential witnesses and their generalized testimony to support his claim of innocence. We find it unnecessary for appellant to present affidavits or sworn testimony to support his claim of innocence. It is unlikely that appellant would misrepresent any of these witnesses or their

potential testimony in order to withdraw his plea because the prosecution can try him on charges of rape if his plea is withdrawn.

{¶ 15} Finally, appellee argues that some of the testimonial evidence appellant intends to present would be inadmissible at trial because it is barred under Evid.R. 608(B) as evidence attacking the victim's character, Evid.R. 313(B) as evidence of a prior inconsistent statement, and Evid.R. 401 and 402, as irrelevant evidence. We agree with appellee that some of the facts to which appellant's witnesses would testify would face evidentiary challenges. However, there are some facts which would be admissible to impeach the victim and those issues are better left to the trial court to sort out during trial.

{¶ 16} Appellant's sole assignment of error is found well-taken.

{¶ 17} Having found that the trial court did commit error prejudicial to appellant, the judgment of the Wood County Court of Common Pleas is reversed. This case is remanded to the trial court for further proceedings consistent with this decision. Appellee is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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