

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

STATE OF OHIO :
Plaintiff : **CASE NO. 2016 CR 000308**
vs. :
ROBERT ANTHONY SCOTT ELAM : **Judge McBride**
Defendant : **DECISION/ENTRY**

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BARBARA A. WIEDENSEIN
CLERK OF COMMON PLEAS
CLERMONT COUNTY, OH

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Ronald A. Mason, counsel for the defendant Robert Anthony Scott Elam, 110 Main Street, Milford, Ohio 45150

This cause is before the court for consideration of a motion filed on May 15, 2017 by the defendant Robert Anthony Scott Elam to withdraw his guilty plea in this case pursuant to Crim.R. 32.1. The court held an evidentiary hearing and heard oral argument on the motion on May 25, 2017. At the conclusion of the arguments of counsel, the court took the motion under advisement.

Upon consideration of the motion, the record of the proceedings, the evidence presented for the court's consideration, the arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On May 31, 2016, the defendant Robert Anthony Scott Elam was indicted on one count of aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree.

The state alleges that on May 21, 2016, the defendant, along with his co-defendant Austin Carter, forced entry into the apartment of Jacob Knox, Franchessca Knox, Nicholas Stout, and Rebecca Baker, and began punching three of the residents, namely, Jacob Knox, Nicholas Stout, and Rebecca Baker. Franchessca Knox was also present but was not assaulted.

The state alleges that the defendant and Austin Carter left the apartment after Jacob Knox returned from his bedroom with an unloaded firearm. The state further maintains that both co-defendants then tried to kick down the apartment door.

In reviewing the presentence investigation report that the court ordered in this case, the police report related to the incident is quoted as saying that, of the four people in the apartment during the alleged assault, only one, Rebecca Baker, identified the defendant as hitting Nicholas Stout.¹ Rebecca Baker was noted in the police report to have seen Austin Carter and "a male" assaulting Nicholas Stout. The report states that

¹ Of note, at the evidentiary hearing on the defendant's motion, held on May 25, 2017, the state informed the court that in the statements submitted by three residents on the night of the assault (as opposed to the police report summary of their statements), three residents stated that there was another male involved in the assault in addition to Austin Carter. However, these statements were not introduced into evidence.

Jacob Knox, Franchessca Knox, and Nicholas Stout identified only the co-defendant Austin Carter as the assailant.

Detective Christopher Allen attempted to contact the four apartment residents, including Jacob Knox, Franchessca Knox, Rebecca Baker, and Nicholas Stout.² However, he was unable to reach any of the residents with the exception of Rebecca Baker.³ Rebecca Baker advised that she did not care what happened in the case.⁴ All four apartment residents subsequently moved out of the apartment.⁵

At a plea or trial setting which was held on April 20, 2017, the state amended the charge of aggravated burglary to burglary, and the defendant entered a plea of guilty to one count of burglary in violation of R.C. 2911.12(A)(1), a felony of the second degree. The defendant signed a written plea form, which set forth the maximum prison term that the defendant could receive, along with possible fines and post release control.

The court engaged in a full plea colloquy in accordance with Crim.R. 11. Among other things, the court explained that there was a presumption in favor of prison because of the offense being a felony of the second degree.

During the hearing, counsel for the defendant stated that the defendant did not deny that he was culpable but that he was the secondary assailant, as compared to Austin Carter. The state agreed with that statement.

The court read the charge to the defendant and informed him of his rights and the possible punishment that he could receive upon conviction of the charge. The defendant indicated that he understood his rights. The defendant also agreed that he

² Pls. Ex. C.

³ Pls. Ex. C.

⁴ Pls. Ex. C.

⁵ Pls. Ex. C.

had discussed the case fully with his counsel, explained all of the relevant facts and circumstances to his counsel, and that he was satisfied with his counsel's representation.

The state then read a statement of facts. The court instructed the defendant to listen carefully, and indicated that at the end of the statement, he would be asked if he disagreed with the statement or had anything to add. The statement read:

"The defendant on or about the 21st of May, 2016, in Clermont County, Ohio, by force, stealth, or deception, did trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the defendant was present, with purpose to commit in the structure or in the separately occupied portion of the structure any criminal offense. Specifically, the defendant, with his co-defendant, forced entry to the victims' apartment and began punching three residents of the home. The assaults only stopped when one of the residents was able to get to his unloaded firearm. At that point, the defendant and co-defendant were removed from the home. However, the defendant and co-defendant continued trying to kick down the front door of the residence at that time."

The court asked if the defendant had any disagreement with the statement, to which the defendant replied that he did not. At the conclusion of the hearing, the court found that the defendant had pled guilty voluntarily and of his own free will.

Following the plea hearing, on May 2, 2017, the court filed an entry that accepted the defendant's plea of guilty and ordered a presentence investigation. The court found that the requirements of Crim.R. 11 were satisfied; that the defendant entered the guilty plea knowingly, intelligently, and voluntarily; and that the defendant understood the nature of the charge and the full consequences of entering his plea.

Upon accepting the defendant's plea of guilty, the court ordered a presentence investigation and scheduled a sentencing hearing to be held on May 8, 2017.

In the defendant's written statement in his presentence investigation report, he stated that he thought that he, Austin Carter, and Austin's girlfriend were going to the victims' apartment, none of whom he knew, to help Rebecca Baker move some of her things. The defendant also stated that he did not hit anyone. Further, the defendant averred "I might have taken the case to trial but 3-13 years is a big risk and I feel I was guilty of the situation but not how I was portrayed * * *."

At the defendant's sentencing hearing, held on May 8, 2017, the defendant orally moved to withdraw his plea of guilty so that he could move forward with a full trial on the aggravated burglary charge. During the hearing, the court asked the state what offense it alleges that the defendant intended to commit on May 21, 2016, when the defendant entered the victims' apartment. The state responded that the defendant intended to commit the crime of assault. The court reviewed the presentence investigation report with the state and defendant. The court highlighted that the defendant's statement during the investigation did not admit that the defendant intended to assault anyone, nor did it admit that he did, in fact, assault anyone inside the apartment. Moreover, the court highlighted that only Rebecca Baker was identified in the police report as stating that another male assisted the codefendant Austin Carter in the assault of Nicholas Stout.

The court then explained, as it had at the plea hearing, that the defendant must have had the purpose to commit a crime inside the apartment in order to be guilty of burglary. The court informed the defendant that he could move forward with his plea or,

if he did not have the purpose to commit a crime in the apartment, the court would consider a motion to withdraw the plea. After a break, during which the defendant considered the court's statements, defense counsel moved to withdraw the defendant's guilty plea.

When the defendant indicated a desire to withdraw his guilty plea, the court instructed the defendant to file a motion to withdraw his guilty plea by May 15, 2017, which the defendant did. The state filed its motion in opposition to the defendant's motion to withdraw his guilty plea on May 19th. The court then held an evidentiary hearing on the motion, and heard oral argument as to the motion, on May 25th.

At the hearing on May 25th, the defendant testified regarding his desire to withdraw his guilty plea. The defendant averred that he believed he was going to the victims' apartment with Austin Carter to help Rebecca Baker move some boxes. He stated that he had no intention of forcing entry into the apartment, and that in fact, someone in the apartment opened the door and voluntarily allowed him inside. The defendant also testified that he had no intention of assaulting any of the residents, no intention of assisting Austin Carter in assaulting them, and no intention of committing any other crimes inside the apartment. Additionally, the defendant denied assaulting anyone in the apartment.

The defendant further testified that he was confused about what the state's burden was to prove that he was guilty of complicity to commit aggravated burglary and the concept of being "guilty by association." He testified that his attorney discussed these concepts with him. Indeed, the defendant consulted with his attorney on at least six occasions, and he felt that his counsel had answered all of his questions. The two

discussed that the jury may view the defendant negatively because the defendant was at the wrong place at the wrong time with the wrong person. The defendant stated that he pled guilty because he was scared of trying a first degree felony charge since he was "guilty by association" with the co-defendant, Austin Carter. The defendant indicated that he believed the state could prove that he was guilty of aggravated burglary just by proving that he was at the victims' apartment on the night of the assault. Then, at the sentencing hearing, the defendant came to understand that, should he go to trial, the state would need to prove the defendant's intent, that he had the purpose to commit a crime inside of the apartment, and that this was an issue the jury would decide.

The defendant also claims he misunderstood the state's fact statement that it read during the plea hearing, in which the state indicated that the defendant and his co-defendant forced entry into the victims' apartment and began punching three residents of the home. The defendant testified that he did not correct the statement to reflect his actual actions or intent because, as he understood it, if he challenged anything about the offered guilty plea to burglary, then the plea deal would become unavailable to him.

The state presented the testimony of Detective Christopher Allen of the Clermont County Sheriff's Office. Detective Allen investigated the present case. He testified that he tried to contact Nicholas Stout, Rebecca Baker, Jacob Knox, and Franchessca Knox within one to two weeks after the alleged assault occurred. At that time, he was only able to reach Rebecca Baker. When Detective Allen called the other three residents, all of his calls went to their voicemails and he never received any calls back. He testified that his ability to contact the residents before the original May 8th trial date was no different than it was on May 8th. Counsel for the state also noted that he had tried to

recently contact the four residents and that he could not contact any of them, including Rebecca Baker.

LEGAL ANALYSIS

Crim.R. 32.1 governs the withdrawal of guilty pleas. 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 a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.”⁶

The decision to grant or deny a presentence motion to withdraw a guilty plea is within the trial court’s sound discretion.⁷ A defendant’s motion to withdraw a guilty plea “should be freely and liberally granted.”⁸ “However, a defendant does not possess an absolute right to withdraw a guilty plea prior to sentencing.”⁹ The trial court must conduct a hearing to ascertain “whether there is a ‘reasonable and legitimate basis for the withdrawal of the plea.’”¹⁰ “A defendant who has a change of heart regarding his guilty plea should not be allowed to withdraw that plea just because he realizes that an unexpected sentence may be imposed.”¹¹

⁶ Crim.R. 32.1.

⁷ *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992), at paragraph two of the syllabus.

⁸ *State v. Chissenhall*, 12th Dist. Nos. CA2015-07-055, CA2015-07-063, 2016-Ohio-999, ¶ 10, citing *Xie*, 62 Ohio St.3d at 527.

⁹ *State v. Newton*, 12th Dist. Preble No. CA2014-10-011, 2015-Ohio-2319, ¶ 10, citing *State v. Manis*, 12th Dist. Butler No. CA2010-01-25, 2010-Ohio-4569, ¶ 8.

¹⁰ *State v. Wofford*, 12th Dist. Butler No. CA2014-10-210, 2015-Ohio-3708, ¶ 7, quoting *State v. Snider*, 12th Dist. Clermont No. CA2012-10-075, 2013-Ohio-4641, ¶ 8.

¹¹ Internal quotations omitted. *Wofford*, 2015-Ohio-3708 at ¶ 11, quoting *State v. Dafforn*, 12th Dist. Clermont No. CA2006-03-023, 2006-Ohio-7035, ¶ 13.

Factors courts weigh in considering a presentence motion to withdraw a plea include:

- "(1) whether the defendant was represented by highly competent counsel,
- (2) whether the defendant was afforded a complete Crim.R. 11 hearing before entering the plea,
- (3) whether the trial court conducted a full and impartial hearing on the motion to withdraw the plea,
- (4) whether the trial court gave full and fair consideration to the motion,
- (5) whether the motion was made within a reasonable time,
- (6) whether the motion set out specific reasons for the withdrawal,
- (7) whether the defendant understood the nature of the charges and the possible penalties,
- (8) whether the defendant was possibly not guilty of the charges or had a complete defense to the charges, and
- (9) whether the state would have been prejudiced by the withdrawal."¹²

However, "no single factor is conclusive," and as such the court must balance them.¹³

The first factor inquires into whether the defendant was represented by highly competent counsel at the time he made his guilty plea. It is undisputed that the defendant was. At no time did the defendant raise any issues regarding the

¹² *Chissenhall*, 2016-Ohio-999 at ¶ 7, citing *Wofford*, 2015-Ohio-3708 at ¶ 7.

¹³ *Newton*, 2015-Ohio-2319 at ¶ 13, quoting *State v. Burris*, 10th Dist. Franklin No. 13AP-238, 2013-Ohio-5108, ¶ 11. See *State v. Ward*, 12th Dist. Clermont No. CA2008-09-083, 2009-Ohio-1169, ¶ 7, citing *State v. Cutberthson*, 2009-Ohio-1169, 139 Ohio App.3d 895, 2000-Ohio-2638, ¶ 15 (7th Dist.).

representation he received. At his plea hearing, the defendant confirmed that his counsel fully explained the details and circumstances of his plea agreement. Further, the defendant confirmed that his counsel had spoken with him at least six times prior to his sentencing hearing and that his counsel had satisfactorily answered his questions. Moreover, defense counsel was able to secure a favorable plea in which the state agreed to amend the aggravated burglary charge, a first degree felony, to burglary, a second degree felony. In consideration of these circumstances, the defendant was represented by highly competent counsel at the time of his guilty plea.

The second factor examines whether the defendant was afforded a complete Crim.R. 11 hearing before entering the plea.¹⁴ The court's review of the hearing on April 20, 2017 indicates that he received a full Crim.R. 11 hearing. During the court's plea colloquy, the court determined that the defendant's plea was made knowingly,

¹⁴ Crim.R. 11(C) provides:

"(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

intelligently, and voluntarily. Neither party has argued that there were any defects in the colloquy.

The third factor, whether the trial court conducted a full and impartial hearing on the motion to withdraw the guilty plea, is relevant for the appellate court to determine whether the trial court abused its discretion, but it does not weigh for or against granting the motion at the trial level. Although the defendant raised the motion to withdraw his plea at the sentencing hearing, the court offered a full and impartial hearing on the motion on May 25, 2017. The trial court permitted the defendant and the state to offer oral arguments, allowed the defendant to testify regarding his desire to withdraw his plea, and allowed the state to present the testimony of the detective who had investigated the alleged burglary.

Likewise, the fourth factor, whether the trial court gave full and fair consideration to the motion, is important for the appellate court to determine whether the trial court abused its discretion, but it does not weigh for or against granting the motion at the trial level. The court notes that it has given fair and full consideration to the defendant's motion. The court held an evidentiary hearing on the motion, accepted testimony evidence from the defendant and a detective, accepted exhibits from the state, allowed oral argument from counsel, accepted briefs from counsel, and, as of the entry of this motion, has applied each of the nine factors for consideration.

The fifth factor concerns whether the defendant's motion to withdraw his plea was made within a reasonable time. "[U]ndue delay between the occurrence of the alleged cause for a withdrawal of a plea and the filing of the motion is a factor adversely

affecting the credibility of the movant and militates against the granting of the motion.”¹⁵ Moreover, courts have found that motions to withdraw made at the sentencing hearing are considered delayed.¹⁶

Between the time the defendant entered his guilty plea, April 20th, and his oral motion to withdraw it at his sentencing hearing, on May 8th, 19 days had passed. Even so, courts also consider the reason for the delay.¹⁷ In the instant case, the defendant's delay resulted from his failure to fully appreciate the state's burden of proof until the day of his sentencing. As will be explained more fully in considering the remaining factors, the defendant credibly testified that he did not understand that the state had to prove his mens rea, specifically that he trespassed into the apartment by force, stealth, or deception with the *purpose* to commit a crime therein. Instead, the defendant had believed that he could be found guilty of aggravated burglary merely by being at the apartment while Austin Carter assaulted the victims. The fact that the defendant was confused about this point until his sentencing hearing, when the court again explained the state's burden and clarified the element of intent, adequately explains why the defendant waited to move to withdraw his guilty plea until his sentencing hearing.

The sixth factor examines whether the motion to withdraw set forth specific reasons for the withdrawal. The defendant's motion states that the defendant wishes to

¹⁵ *Chissenhall*, 2016-Ohio-999 at ¶ 18, quoting *State v. Daly*, 12th Dist. Clermont No. CA2015-06-054, 2015-Ohio-5034, ¶ 26.

¹⁶ See *Chissenhall*, 2016-Ohio-999 at ¶ 19 (finding undue delay where the defendant had over two months between his plea hearing and sentencing and waited until just before the sentencing hearing to move to withdraw his plea); *Osborne*, 2007-Ohio-1794 (finding undue delay where the defendant's presentence motion to withdraw came four years after his plea).

¹⁷ See *Chissenhall*, 2016-Ohio-999 at ¶ 19 (in finding undue delay, the court noted that there was “no indication in the record to explain why Chissenhall did not move the court prior to the day of sentence * * *”).

withdraw his guilty plea because he was confused and scared during his plea hearing. These reasons were buttressed by the defense's oral argument on the motion, as well as the defendant's own testimony.

The seventh factor questions whether the defendant understood the nature of his charge and the possible penalties. The charge and its penalties, including fines and postrelease control, were addressed in the written plea form and at the plea hearing. The defendant does not posit that he was not fully apprised of the charge and penalties at his plea hearing. At the plea hearing, the defendant indicated that he understood the nature of the proceedings, the charge against him, and the potential penalties that could be imposed upon him if convicted of the charge. He also indicated that he understood his rights and knew that he was forfeiting certain rights by entering a guilty plea. In addition, the written plea form the defendant signed stated that he was fully advised and understood the nature of the charges.

Even so, the defendant credibly testified at the evidentiary hearing that he was confused during his plea hearing about what the state was required to prove in order to convict him of aggravated burglary or burglary, should he seek a full trial. More specifically, the defendant conflated the concept of complicity to commit burglary with his counsel's advice that a jury may believe the defendant was "guilty by association" because he was with Austin Carter when Austin Carter assaulted the victims. The crimes of aggravated burglary (the original charge) and burglary (the amended charge) both require that the defendant must have trespassed into the apartment with the *purpose* to commit a criminal offense in the apartment.

The defendant credibly testified that, at his plea hearing, he did not accurately understand the charges of aggravated burglary or burglary. He averred that he believed he could be found guilty of aggravated burglary because he was in the wrong place at the wrong time, even though he never had the purpose to commit any crime in the victims' apartment, including assaulting anyone in the victims' apartment or assisting Austin Carter in assaulting anyone. Defense counsel had attempted to explain to the defendant that a jury may view the defendant as guilty from his association with Austin Carter. That explanation, the defendant says, led him to believe that he could be proven guilty even if he did not have the requisite intent required for aggravated burglary. Therefore, although the nature of the charges was explained to the defendant by the court and defense counsel, the defendant did not adequately understand them.

The eighth factor considers whether the defendant was possibly not guilty of the charge or had a complete defense to the charge. In contradistinction to other cases in which courts have denied motions to withdraw guilty pleas, the defendant is possibly not guilty of either aggravated burglary or burglary.¹⁸ In the presentence investigation interview, the defendant averred that he believed he was going to the victims' apartment to help Rebecca Baker move, he did not trespass into the apartment, he did not assault any of the victims, he did not assist Austin Carter in assaulting the victims, and he did not enter the apartment with the purpose of committing a crime inside. Furthermore, only one of four statements summarized in the police report implicated the defendant as one of the assailants. If the jury, as the trier of fact, believes the defendant's version of events – he did not trespass into the apartment, he did not assault any of the victims, he

¹⁸ See *Chissenhall*, 2016-Ohio-999 at ¶ 26 (noting that there was “overwhelming evidence” of the defendant’s guilt).

did not assist Austin Carter in assaulting any of the victims, and he did not enter the victims' apartment with the purpose to commit a crime therein – then he could be found not guilty. Upon reviewing the evidence presented in this case, the record of this case, and the defendant's testimony, the court believes that it is possible that the defendant is not guilty.

The final factor is whether the state would be prejudiced by the withdrawal of the defendant's guilty plea. "Numerous Ohio courts have * * * found the potential for prejudice, caused to the state by a defendant's delay in filing a motion to withdraw a plea, to be a major factor for consideration in the court's decision."¹⁹

In the instant case, Detective Allen indicated that he had difficulties contacting the four apartment residents since they have all moved out of the apartment and did not respond to his phone calls. Detective Allen has only ever been able to reach one of the four apartment occupants, Rebecca Baker. Since that time, which was one to two weeks after the alleged assault, he has lost contact with her. Notably, Detective Allen had lost contact with Rebecca Baker *before* the original trial date of May 8, 2017. Likewise, counsel for the state indicated that he too was unable to reach her prior to the original trial date. Furthermore, the state never subpoenaed any of the four witnesses for trial. As such, the state is in no worse position now than it would have been had the

¹⁹ *State v. Osborne*, 12th Dist. Warren No. CA2006-01-008, 2007-Ohio-1794, ¶ 19, citing *State v. Fish*, 104 Ohio App.3d 236, 240 (1st Dist. 1995); *State v. Ward*, 12th Dist. Clermont No. CA2005-05-033, 2006-Ohio-1662, ¶¶ 13-14 (citing that the defendant did not maintain his innocence or present a viable defense in denying the defendant's motion to withdraw, but instead his motion was an attempt to evade prison).

trial proceeded as scheduled on May 8th.²⁰ It appears that none of the four witnesses would have been present to testify on behalf of the state at the original trial date. Accordingly, the prejudice the state would suffer would be minimal, if any.

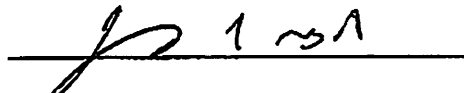
Upon considering all nine of the above factors, the court concludes that the defendant has shown that a reasonable and legitimate basis for the withdrawal of his guilty plea exists. On the whole, the nine factors weigh in favor of allowing the defendant to withdraw his guilty plea so that he may proceed to trial on his aggravated burglary charge.

CONCLUSION

For the foregoing reasons, the defendant's motion to withdraw his guilty plea is well-taken and is hereby granted.

IT IS SO ORDERED.

DATED: 7-31-17



Judge Jerry R. McBride

²⁰ Cf. *State v. Richardson*, 12th Dist. Butler No. CA07-09-183, 1998 WL 344315, *3 (June 28, 1998) (finding that the state was prejudiced where the state's witnesses had already testified before the defendant accepted a plea and three of the four witnesses were from out-of-state).