

COPY

FILED

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

2019 APR -9 PM 12:32
DARREN A. HENDERSON
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

STATE OF OHIO

Plaintiff : CASE NO. 2018 CR 000660

vs. :
Judge McBride

KEITH MICHAEL WIELAND

:
DECISION/ENTRY

Defendant :

Carol A. Rowe, assistant prosecuting attorney for the state of Ohio, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Bruce S. Wallace, counsel for the defendant Keith Michael Wieland, 108 South High Street, PO Box 467, Mt. Orab, Ohio 45154

This cause is before the court for consideration of a motion filed on December 17, 2018 by the defendant Keith Michael Wieland to withdraw his guilty plea in this case pursuant to Crim.R. 32.1. The court held an evidentiary hearing on January 10, 2019. Neither party requested an oral argument, and the court took the motion under advisement on February 21st following the submission of written arguments.

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

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On August 2, 2018, the defendant Keith Michael Wieland was indicted on two counts: (1) aggravated trafficking in drugs in violation of R.C. 2925.03(A)(1), a felony of the second degree, and (2) aggravated possession of drugs in violation of R.C. 2925.11(A), a felony of the second degree.

The state alleges that on April 5, 2018, the defendant was stopped by police with 40 grams of methamphetamine in his possession. The defendant was a passenger in a vehicle when it was stopped on Interstate 275 in Milford, Ohio. Police conducted a canine sniff on the vehicle, and the canine alerted to the presence of narcotics. The police search of the vehicle revealed two bags of methamphetamine under the passenger seat, where the defendant was seated. Another bag of methamphetamine fell from the defendant as he exited the vehicle. Additionally, a scale with drug residue was in his pocket. The bags were weighed and tested, indicating that defendant was in possession of approximately 40 grams of methamphetamine.

At the final pretrial hearing, which was held on November 19, 2018, the defendant entered a plea of guilty to aggravated possession of drugs as charged in Count 2. The state agreed to dismiss Count 1 and not to take a position on sentencing as to Count 2. The defendant signed a written plea form, in which the defendant acknowledged that he understood that his guilty plea was an admission to the facts alleged with respect to Count 2, as well as the possible prison terms that the defendant could receive, the possible financial sanctions, 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 would be a mandatory sentence, postrelease control, and a fine (unless the court found that the defendant was indigent). 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 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 if had anything to add. The state read the following:

"The defendant on April 5, 2018, in Clermont County, Ohio, knowingly obtained or possessed a controlled substance, and the drug involved in the violation was a compound, mixture, preparation, or substance included in Schedule I or II, that would be Methamphetamine, a Schedule II drug, and the amount of the drug involved equaled or exceeded five times the bulk amount but was less than fifty times the bulk amount. That's contrary to and in violation of Section 2925.11(A), a felony of the second degree.

Your Honor, specifically on April 5, 2018, a vehicle in which the defendant was a passenger was stopped on Interstate 275 in Milford, Clermont, County, Ohio. A canine sniff was conducted on the vehicle and alerted to the presence of narcotics. A search of the vehicle resulted in two bags being found under the passenger seat, where the defendant Mr. Keith Michael Wieland was seated, and those bags contained suspected methamphetamine. Another bag fell from Mr. Wieland's person as he was getting out of the vehicle. Additionally, a scale with residue was found in his pocket. The substances were weighed and tested. Mr. Wieland was found to be in possession of

approximately 40 grams of lab confirmed methamphetamine.”

The court asked if the defendant had any disagreement with the statement of facts if there was anything he wished to add, to which the defendant replied that he did not. At the conclusion of the hearing, the court accepted the defendant's guilty plea and found that it was made knowingly, intelligently, and voluntarily.

Following the plea hearing, on January 2, 2019, 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.

At the defendant's sentencing hearing, held on December 11, 2018, the defendant orally moved to withdraw his plea of guilty so that he could move forward with a full trial. He indicated that he wanted an agreement in writing from the state agreeing to what his sentence should be. He stated that he did not want to be unsure of whether his sentence would be as low as two years or possibly up to eight years. Additionally, the defendant stated: "The 28 grams was for the CI or whatever and I'll admit to the 12 grams that was mine of the 40. So technically I still have only a Felony 3."

Per the court's instruction, the defendant filed a written motion to withdraw his guilty plea on December 17th. The court held an evidentiary hearing on January 10, 2019. Following the January 10th hearing, the defendant filed a memorandum in support of his motion on January 25th. The state filed a motion in opposition on February 11th.

The defendant did not file a reply, and neither party requested an oral argument on the motion.

At the evidentiary hearing, the defendant's former attorney, who represented him at the time he entered his guilty plea, Ronald A. Mason, testified. He credibly testified to the following facts. Mason has been an attorney licensed in the state of Ohio for 33 years. He has represented thousands of criminal defendants in felony cases throughout that time, including in Clermont County.

Mason confirmed that he met with the defendant at the jail at least twice to discuss his case, but he believes he met with the defendant at the jail on more occasions than that. He also spoke with the defendant on days the defendant had hearings in the court, which occurred five times leading up to the defendant's final pretrial hearing.

The state had informed Mason at the first pretrial hearing that it had not provided all of its discovery due to the fact that it was protecting the identity of a confidential informant. The state indicated that Mason could review the full evidence at the prosecutor's office. The state had not provided a copy of the narrative report, and a police report that the state provided was mostly blank.

In order to ascertain more information about the evidence the state had, Mason filed a motion to suppress at the second pretrial hearing. On October 18, 2018, the court held an evidentiary hearing on the motion to suppress. During the course of that hearing, Mason and the defendant learned much more about the state's evidence. The court ultimately overruled the motion, but Mason discussed the information that the defense had learned from the suppression hearing with the defendant and its impact on the merits

of the case. Mason believed that the defendant appeared to understand the testimony that had been provided.

On November 15th, Mason went to the prosecutor's office to review the remainder of the undisclosed evidence. He was able to review the narrative report, but could not make a copy. It did not contain any information that he did not already know from the motion to suppress hearing. The state also indicated that it had a cell phone recording of the defendant made by the confidential informant. The state had reviewed the recording and found that it did not contain relevant information as to either party. Therefore, Mason did not listen to the recording.

The next day, November 16th, Mason went to the jail to discuss the upcoming final pretrial hearing with the defendant, which was scheduled for November 19th. Mason relayed the information he had reviewed the prior day, and told the defendant that he needed to decide whether to accept a plea deal or to proceed to trial by Monday. Mason thoroughly explained the options to the defendant, and they discussed the strengths and weaknesses of the state's case and his case. Mason also answered all of the defendant's questions. The defendant was leaning towards entering a guilty plea but had not made his final decision by the time Mason left.

On November 19th, the defendant indicated to Mason that he wished to accept a plea deal. That morning the defendant entered a guilty plea at his final pretrial hearing, which the court accepted, as described above.

The defendant's sentencing hearing was scheduled for December 11th. At the hearing, the defendant asked to withdraw his guilty plea and have Mason withdraw as

counsel, as discussed previously. This was the first time that Mason learned that the defendant had any lingering apprehensions about proceeding with his guilty plea.

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."¹

The decision to grant or deny a presentence motion to withdraw a guilty plea is within the trial court's sound discretion.² A defendant's motion to withdraw a guilty plea "should be freely and liberally granted."³ "However, a defendant does not possess an absolute right to withdraw a guilty plea prior to sentencing."⁴ The trial court must conduct a hearing to ascertain "whether there is a 'reasonable and legitimate basis for the withdrawal of the plea.'"⁵ "A defendant who has a change of heart regarding his guilty

¹ Crim.R. 32.1.

² *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992), at paragraph two of the syllabus. See *State v. Taveras*, 12th Dist. No. CA2016-06-054, 2017-Ohio-1496, 89 N.E.3d 6, ¶ 16, quoting *State v. Tapia-Cortes*, 2016-Ohio-8101, 75 N.E.3d 878, ¶ 12 (holding same).

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

⁴ *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.

⁵ *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.

plea should not be allowed to withdraw that plea just because he realizes that an unexpected sentence may be imposed.”⁶

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.”⁷

However, “no single factor is conclusive,” and as such the court must balance them.⁸

⁶ (Internal quotations omitted.) *Wofford*, 2015-Ohio-3708 at ¶ 11, quoting *State v. Dafforn*, 12th Dist. Clermont No. CA2006-03-023, 2006-Ohio-7035, ¶ 13.

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

⁸ *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*, 139 Ohio App.3d 895, 2000-Ohio-2638, 746 N.E.2d 197, ¶ 15 (7th Dist.).

The first factor inquires into whether the defendant was represented by highly competent counsel at the time he pled guilty. It is clear that the defendant was. Mason has been practicing as a criminal defense lawyer for more than 30 years. He has represented thousands of clients in felony cases. Additionally, Mason had at least seven conversations with the defendant before the final pretrial hearing, including at least two jail visits. Mason fully explained to the defendant what his options were, reviewed the strengths and weaknesses of the state and defense's cases, and answered all of the defendant's questions.

The defendant did not raise any issues regarding the representation he received until the time of his sentencing. Indeed, 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 satisfactorily answered his questions. Moreover, Mason was able to secure a favorable plea in which the state agreed to dismiss Count 1 involving aggravated trafficking in drugs and to take no position at the time of the sentencing as to the sentence. In consideration of these circumstances, the defendant was represented by highly competent counsel at the time he pled guilty.

The second factor examines whether the defendant was afforded a complete Crim.R. 11 hearing before entering the plea.⁹ The court's review of the hearing on

⁹ 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:

November 19, 2018 hearing 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, 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 moved to withdraw his plea at the sentencing hearing and wanted the court to determine the issue at that time, the court offered a full and impartial evidentiary hearing on the motion on January 10, 2019. The trial court permitted witness testimony and accepted written arguments from the parties after the hearing.

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

(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."

motion. The court held an evidentiary hearing on the motion, listened to testimony and considered all evidence as to the motion, accepted briefs from counsel, thoroughly reviewed the record, conducted relevant legal research, 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."¹⁰ Moreover, courts have found that motions to withdraw made at the sentencing hearing are considered delayed.¹¹ Between the time the defendant entered his guilty plea, November 19, 2018, and his oral motion to withdraw it at his sentencing hearing, on December 11, 2018, 22 days had passed. Under this fifth factor, the defendant's motion to withdraw his plea was not made within a reasonable time.

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 withdraw his guilty plea because the state did not initially provide full disclosure of the evidence in order to protect the identity of a confidential informant. It continues:

"The ongoing delay of the discovery process hindered the defendant in his ability to prepare for trial, as well as to give his plea decision full and meaningful consideration. In his haste to secure a favorable plea agreement by the scheduled

¹⁰ *Chissenhall*, 2016-Ohio-999 at ¶ 18, quoting *State v. Daly*, 12th Dist. Clermont No. CA2015-06-054, 2015-Ohio-5034, ¶ 26.

¹¹ 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); *State v. Osborne*, 12th Dist. Warren No. CA2006-01-008, 2007-Ohio-1794 (finding undue delay where the defendant's presentence motion to withdraw came four years after his plea).

deadline, and coupled with some confusion caused by the delayed receipt of the discovery from the State, Mr. Wieland entered a plea of guilty that became increasingly unacceptable to him."

These reasons were undercut by the testimony of Mason, who made several clarifications. Although Mason did not review the disclosed evidence at the prosecutor's office until November 15th or relay his findings to the defendant until November 16th, he did not learn much new information from the withheld discovery. Instead, both he and the defendant had learned the substance of the withheld information at the motion to suppress hearing the month before, on October 18th. The only new information gleaned on November 15th was the identity of the confidential informant and the existence of an audio tape. However, the audio tape did not contain relevant information to either party. Moreover, Mason testified that criminal defendants regularly enter guilty pleas without knowing the identity of a confidential informant when that identity would not impact the strength of the case.

As such, the defendant, upon learning this on November 16th, was not confronted with new information that would have altered the trajectory or merits of his case. It is difficult for the court to believe that the defendant's meeting with Mason on November 16th led to confusion or haste to make a decision on whether to accept a plea agreement. Instead, it would have only served to confirm what the defendant already knew from the motion to suppress hearing the month before. Therefore, although the defendant's motion to withdraw states a specific reason for withdrawing his plea, the reason is largely unavailing.

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.

As to the length of the sentence, the court indicated at the plea hearing the possible sentence lengths that it could impose, including a sentence of up to eight years. The court also explained that he may also have to serve a sentence in any other case for which he was on community control at the time of commission of the offense in this case. Although the defendant acknowledged he understood this, at the sentencing hearing on December 11, 2018, the defendant stated that he wanted something in writing from the state agreeing on his sentence because he did not want the possibility of being sentenced to eight years in prison. The defendant's statement at his sentencing hearing reflects a "change of heart," which courts have advised should not be allowed "just because he realizes that an unexpected sentence may be imposed."¹²

The eighth factor considers whether the defendant was possibly not guilty of the charge or had a complete defense to the charge. The defendant has not suggested that he is innocent or has a complete defense. The defendant's statement at his sentencing

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

hearing further suggests his guilt: "The 28 grams was for the CI [confidential informant] or whatever and I'll admit to the 12 grams that was mine of the 40. So technically I still have only a Felony 3." The 12 grams of methamphetamine that the defendant references had been found on his person and fell to the ground as he exited his vehicle. The other 28 grams were found underneath his passenger seat, which would have been in his immediate control, i.e. in his possession. Furthermore, the defendant did not say that the 28 grams was not his, but only that it was for the confidential informant. Accordingly, his statement to the court is not a profession of innocence nor does it suggest a complete defense.

Moreover, like other cases in which courts have denied motions to withdraw guilty pleas, the defendant is likely guilty of aggravated possession of drugs in this case.¹³ The evidentiary hearing on the motion to suppress indicated that there was significant evidence of the defendant's guilt. Therefore, the court does not believe this is a case where the defendant was potentially not guilty or has a complete defense.

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."¹⁴ In the instant case, the state would suffer at least some prejudice. The state has not maintained contact with the

¹³ See *Chissenhall*, 2016-Ohio-999 at ¶ 26 (noting that there was "overwhelming evidence" of the defendant's guilt).

¹⁴ *Osborne*, 2007-Ohio-1794 at ¶ 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).

confidential informant since the defendant pled guilty, and one of its other witnesses, a Clermont County Narcotics Unit agent, has subsequently retired. Accordingly, the state would suffer some degree of prejudice in securing its witnesses due the defendant's belated withdrawal of his guilty plea.

Upon considering all nine of the above factors, the court concludes that the defendant has not shown that a reasonable and legitimate basis for the withdrawal of his guilty plea exists. The nine factors weigh against allowing the defendant to withdraw his guilty plea.

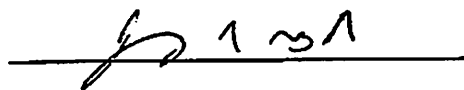
CONCLUSION

For the foregoing reasons, the defendant's motion to withdraw his guilty plea is not well-taken and is hereby denied.

Counsel shall conference by telephone and call the Assignment Commissioner within three business days of the date of this Decision in order to schedule the sentencing hearing, which shall be held within three weeks of the date of this Decision.

IT IS SO ORDERED.

DATED: 4-7-19



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Decision/Entry were sent by e-mail on this 9th day of April 2019 Carol Rowe, Assistant Prosecuting Attorney, at crowe@clermontcountyohio.gov, and to Bruce Wallace, Attorney for the Defendant, at ucbruce@aol.com. Printed copies were also provided to the Prosecuting Attorney's Office and the Probation Department, and a printed copy was sent by regular U.S. Mail to Bruce Wallace, 108 S. High Street, P.O. Box 467, Mt. Orab, Ohio 45154.



Judicial Assistant