

[Cite as *State v. Witherspoon*, 2010-Ohio-4569.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-01-025
- vs -	:	<u>OPINION</u> 9/27/2010
TERRANCE WITHERSPOON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-11-1877

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Dennis L. Adams, 120 North Second Street, Hamilton, Ohio 45011, for defendant-appellant

YOUNG, P.J.

{¶1} Defendant-appellant, Terrance Laron Witherspoon, appeals the decision of the Butler County Court of Common Pleas denying his motion to withdraw his guilty plea.

{¶2} On December 17, 2010, appellant was indicted on one count of

trafficking in heroin, in violation of R.C. 2925.03(A)(2), with a forfeiture specification. The same day, appellant pleaded guilty to the bill of information describing the charges, which stemmed from the evening of October 25, 2009, when police discovered appellant with 42 units of heroin and \$1,264 in cash.

{¶13} According to the facts presented at the plea hearing, on October 25, 2009, neighborhood residents notified police that two individuals were selling heroin or other drugs nearby. The police detained appellant because he matched the residents' description. Prior to performing a pat down search, the police witnessed appellant quickly move away and place his hands into his pockets. When an officer grasped appellant's hand, the heroin and cash fell out.

{¶14} On January 21, 2010, immediately prior to sentencing, appellant orally moved to withdraw his guilty plea. Appellant stated he recently sent a letter to the court requesting permission to withdraw his guilty plea because his attorney failed to "tell [him] the truth about the legality of [his] stop, frisk, and arrest."¹ The court stated it had not received appellant's letter, and appellant's attorney indicated he was unaware of appellant's intent to withdraw his plea. The trial court subsequently overruled appellant's motion and sentenced him to 17 months in prison.

{¶15} Appellant timely appealed, raising one assignment of error:

{¶16} "THE TRIAL COURT ERRED BY DENYING THE DEFENDANT-APPELLANT'S MOTION TO WITHDRAW PLEA[.]"

{¶17} Appellant argues the trial court erred by failing to conduct a "full" evidentiary hearing on his motion to withdraw his guilty plea and by denying said

1. Appellant's letter was postmarked January 20, 2010 and was not received into the record until January 25, 2010.

motion. We disagree with both arguments.

{¶18} Crim.R. 32.1 permits a defendant to file a motion to withdraw a guilty plea prior to sentencing. Generally, a presentence motion to withdraw a guilty plea should be freely and liberally granted. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. Nevertheless, a defendant does not have "an absolute right to withdraw a guilty plea prior to sentencing." *Id.* at paragraph one of the syllabus; *State v. Metcalf*, Butler App. No. CA2002-12-299, 2003-Ohio-6782, ¶9. Rather, the trial court must conduct a hearing to determine whether there is a "reasonable and legitimate basis for the withdrawal of the plea." *Xie* at paragraph one of the syllabus.

{¶19} The decision to grant or deny a presentence motion to withdraw a guilty plea rests within the trial court's discretion. *Id.* at paragraph two of the syllabus. A reviewing court defers to the judgment of the trial court because "the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *Id.* at 525, quoting *State v. Smith* (1977), 49 Ohio St.2d 261. Absent an abuse of discretion, the trial court's decision to grant or deny a motion to withdraw a guilty plea must be affirmed. *Xie* at 527; *Metcalf* at ¶10. An abuse of discretion implies that the trial court's ruling was "unreasonable, arbitrary, or unconscionable." *Metcalf* at ¶10.

{¶10} The factors to be weighed in considering a presentence motion to withdraw a plea include: (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; (9) whether the accused was perhaps not guilty or had a complete defense to the charge. *State v. Ward*, Clermont App. No. CA2008-09-083, 2009-Ohio-1169, ¶7.

{¶11} In the case at bar, appellant takes issue with the extent of the trial court's hearing on his motion to withdraw. Specifically, appellant argues that the hearing "must be complete and impartial and the Court must give full and fair consideration to the basis for the Defendant-Appellant's motion to withdraw a plea."

{¶12} As a general rule for presentence motions to withdraw a plea, "unless it is clear that denial of the motion is warranted, a trial court should hold a hearing." See generally *Xie*, 62 Ohio St.3d 521; *State v. Francis* (2004), 104 Ohio St.3d 490, 500, 2004-Ohio-6894, ¶51. We find that the hearing on appellant's motion was adequate in light of appellant's failure to provide support for the basis of his motion, namely, ineffective assistance of counsel.

{¶13} In order to prove a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient, i.e., not reasonably competent, and that counsel's deficiencies prejudiced his defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. To make this showing, a defendant must overcome the strong presumption that attorneys licensed to practice in Ohio provide competent representation. *Bradley* at 142; *State v. Allison*, Pickaway App. No. 06CA9, 2007-Ohio-789, ¶10. "However, in the context of a guilty plea, a defendant must also demonstrate that there is a reasonable probability that, but for his counsel's errors, he would not have pled guilty and would have insisted on going to trial." *Allison* at ¶10, quoting *Hill v. Lockhart* (1985), 474 U.S. 52, 58-59.

{¶14} Despite appellant's claim that his counsel failed to tell "the truth" regarding his search and seizure, the record shows that appellant's counsel contacted him at least three times prior to the sentencing hearing to discuss the consequences of pleading guilty, which included "giving up any rights to a motion to suppress." Further, during its thorough Crim.R. 11 plea hearing, the trial court asked appellant whether he was "satisfied with the advice and representation that [he] received from [counsel] in this case," to which appellant replied "Yes." The court also asked appellant "[i]s there anything that you claim that [your counsel] could have or should have done on your behalf that he has not done," to which appellant replied "No."

{¶15} The record also shows that in denying appellant's motion, the trial court commended appellant's counsel for competent representation. Specifically, the court stated: "Mr. Witherspoon, you are not entitled to the counsel of your choice. You are entitled to be appointed competent counsel. Mr. Hawkins has represented probably a hundred people in this courtroom over the last five years that I have been on the bench. I was familiar with his reputation prior to that time. He is highly competent counsel. It doesn't sound to me that there has been a break down in communication between you, that you have met multiple times, discussed these issues. * * * With regard to the withdrawal of your plea, I find it suspect that you stood there quietly until there was some question in your mind what was going to happen and then you want to withdraw your plea. * * * although I do consider it and I am analyzing it as a presentence motion to withdraw a plea under these circumstances, I don't find that there has been a legitimate and reasonable basis established for that."

{¶16} In sum, appellant provided no substantiation for his claim of ineffective

assistance of counsel other than his own self-serving, vague statements. This court has previously held that an appellant "cannot meet his burden [under his claim of ineffective assistance of counsel] by making bare allegations which find no support in the record." *State v. Cox* (Oct. 18, 1999), Clermont App. No. CA99-02-016, at 4.

{¶17} Regarding the remaining elements related to a presentence motion to withdraw a plea, our review of the record indicates that appellant understood the nature of the charges against him, based on his criminal history and prior contacts with the court. The extent to which the state would have been prejudiced by appellant's withdrawal of his guilty plea is unclear from the record. The record also does not indicate that appellant had meritorious defenses to the charges. Rather, the record indicates that appellant had a "change of heart" immediately before he was sentenced. We have held that a "change of heart" is insufficient justification to withdraw a plea. *Metcalf*, 2003-Ohio-6782, ¶19.

{¶18} For the above reasons, we find that the trial court did not abuse its discretion in declining to hold a "full" or evidentiary hearing on appellant's motion to withdraw his guilty plea since appellant did not request such a hearing and the facts do not show that such a hearing was warranted. Cf. *State v. Childs*, Butler App. No. CA2009-03-076, 2010-Ohio-1814.

{¶19} Accordingly, appellant's sole assignment of error is overruled.

{¶20} Judgment affirmed.

POWELL and BRESSLER, JJ., concur.

