

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-080422
Plaintiff-Appellee,	:	TRIAL NO. B-0605942
vs.	:	<i>JUDGMENT ENTRY.</i>
LEE A. SKIERKIEWICZ,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Lee Skierkiewicz was indicted on 12 counts of theft and aggravated theft. In this appeal, he contests the denial of his presentence motion to withdraw his plea of no contest to six counts of theft.² We affirm.

In exchange for his no-contest plea, the state of Ohio dismissed the remaining counts and allowed Skierkiewicz to plead to a lesser felony in one count. The court found Skierkiewicz guilty, ordered a presentence report, and later held a hearing. At the sentencing hearing, and before the sentence was imposed, Skierkiewicz orally moved to withdraw his no-contest plea—presumably because the victim-impact statements indicated that a term of incarceration was warranted. Skierkiewicz argued that his defense counsel had “promised him” that the sentence would include community control instead of incarceration. The trial court overruled Skierkiewicz’s motion and sentenced him to four years’ incarceration.

Skierkiewicz now argues that the trial court abused its discretion in overruling his withdrawal motion, and that in any case his plea was not knowingly, voluntarily, and intelligently made.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² R.C. 2913.02(A)(2).

The decision denying a motion to withdraw a no-contest plea is reviewed under an abuse-of-discretion standard.³ Unless Skierkiewicz can show that the trial court acted unjustly or unfairly, or that its ruling was unreasonable, arbitrary, or unconscionable, there was no abuse of discretion.⁴ Usually a motion to withdraw a no-contest plea before sentencing should be freely granted where there is a reasonable basis for withdrawal of the plea.⁵

In deciding whether to grant a motion to withdraw a no-contest plea before sentencing, courts consider whether (1) the accused was represented by competent counsel; (2) the accused was given a full Crim.R. 11 hearing before entering the plea; (3) a full hearing has been held on the motion; (4) the trial court has given full and fair consideration to the motion;⁶ (5) the motion has been made within a reasonable time; (6) the motion sets out specific reasons for the withdrawal;⁷ (7) the accused understood the nature of the charges and possible penalties; and (8) the accused is perhaps not guilty of or has a complete defense to the charge or charges.⁸

In this case, Skierkiewicz was represented by competent counsel. And at the Crim.R. 11 hearing, the court informed him that he was pleading to fourth-degree felonies carrying a possible term of incarceration of nine years and that at sentencing he could either be placed on community control or be sent to the penitentiary—at no point did the court note any agreement that would have spared Skierkiewicz jail time. Before sentencing (and after reviewing the presentence-investigation report), Skierkiewicz moved to withdraw his plea. We note that the withdrawal motion was as close to a post-sentence motion as one could be. But the trial court nonetheless heard the motion and listened to defense counsel’s reason for moving to withdraw the plea: that counsel had represented to Skierkiewicz that he would likely be placed on community control. The

³ See *State v. Fish* (1995), 104 Ohio App.3d 236, 661 N.E.2d 788.

⁴ See, e.g., *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715.

⁵ See *id.*, citing *Barker v. United States* (C.A.10, 1978), 579 F.2d 1219, 1224, and *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

⁶ See *id.*, citing *State v. Peterseim* (1979), 68 Ohio App.2d 211, 428 N.E.2d 863.

⁷ See *State v. Mathis* (May 30, 1990), 1st Dist. No. C-890286.

⁸ See *Fish*, *supra*.

record also shows that Skierkiewicz understood the nature of the charges against him, along with the accompanying range of possible sentences (including the likelihood of a term of incarceration). And Skierkiewicz neither contested his guilt nor identified a defense to the charges—rather he alleged that his attorney had misled him to believe that he would not receive jail time.

At the sentencing hearing, Skierkiewicz stated that he was “promised something by [his] attorney, [and] that’s why [he] entered a no-contest plea.” The record, however, belies Skierkiewicz’s statement that his attorney had “promised” him community control. The record fails to reflect any promise made to Skierkiewicz by his attorney. The record reveals that Skierkiewicz’s attorney indicated to the court that the withdrawal motion was based on speculation that the plea would be entered and that Skierkiewicz would be placed on community control and given the opportunity to repay his debts, but that no promise had been made on the record.

Of course, Skierkiewicz’s attorney was wrong, and a term of incarceration was imposed. As we have noted, Skierkiewicz’s attorney was competent, and it would be a stretch to suggest that his attorney would have “promised” community control when Skierkiewicz faced an indictment that charged him with multiple thefts from multiple victims totaling over \$250,000. We are convinced that after he had read the presentence-investigation report, Skierkiewicz simply had a change of heart brought on by a likely term of incarceration. This change of heart was insufficient to justify the withdrawal of his plea when the remaining considerations set forth in *Fish* weighed heavily against granting his motion.⁹ And the record fails to reflect any promise that Skierkiewicz would be placed on community control, instead of receiving incarceration, in exchange for his no-contest plea.

A defendant who has a change of heart regarding his no-contest or guilty plea should not be permitted to withdraw that plea just because he is made aware that an unexpected sentence is going to be imposed.¹⁰ Skierkiewicz understood the

⁹ See *State v. Ward*, 12th Dist. No. CA2008-09-083, 2009-Ohio-1169, ¶17, citing *State v. Deloach*, 2nd Dist. No. 21422, 2006-Ohio-6303.

¹⁰ *State v. Lambros* (1988), 44 Ohio App.3d 102, 541 N.E.2d 632.

possibility of incarceration, and under the circumstances, the trial court did not abuse its discretion in denying Skierkiewicz's withdrawal motion. We overrule the first assignment of error.

Skierkiewicz's second assignment of error, which argues that his no-contest plea was not knowingly, voluntarily, and intelligently made, is likewise overruled. Skierkiewicz signed a waiver knowingly, intelligently, and voluntarily relinquishing his rights to a jury trial. The court took note of the waiver, and Skierkiewicz acknowledged that he understood the rights that he was forgoing and that he had signed the waiver voluntarily. Skierkiewicz faced over 25 years' incarceration, but he received only four. Skierkiewicz presumably took these matters into consideration when pleading no contest, and we are convinced that his plea was knowingly, intelligently, and voluntarily made.

Because Skierkiewicz's assignments of error have no merit, we affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., PAINTER and SUNDERMANN, JJ.

To the Clerk:

Enter upon the Journal of the Court on May 20, 2009

per order of the Court _____
Presiding Judge