

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

STATE OF OHIO,	:	APPEAL NO. C-080730
	:	TRIAL NO. B-0705435
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
JUSTIN HUNTER,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: July 2, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Edward C. Perry, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

DINKELACKER, Judge.

{¶1} After entering guilty pleas, defendant-appellant, Justin Hunter, filed a motion to withdraw the pleas. We find no merit in his three assignments of error and, therefore, affirm the convictions that resulted from the pleas.

Facts and Procedure

{¶2} Hunter was charged in a 12-count indictment with robbery,¹ aggravated robbery,² felonious assault,³ receiving stolen property,⁴ carrying a concealed weapon,⁵ and accompanying firearm specifications. He entered guilty pleas to four counts of aggravated robbery and two gun specifications. In exchange for his pleas, the state dismissed all other charges and specifications and sought the required minimum nine-year sentence.

{¶3} Subsequent to the plea hearing, defense counsel moved to withdraw the pleas. The motion was based on new information from witnesses who could purportedly testify to an alibi. The trial court held a hearing and overruled the motion. Hunter was then sentenced to nine years in prison.

{¶4} On appeal, Hunter asserts that his convictions must be reversed because the indictment failed to allege the requisite mental state for each of the offenses, because the overruling of his motion to withdraw his pleas was erroneous, and because his rights under Crim.R. 11(C)(2)(a) were violated.

¹ See R.C. 2911.02(A)(2).

² See R.C. 2911.01(A)(1).

³ See R.C. 2903.11(A)(1).

⁴ See R.C. 2913.51(A).

⁵ See R.C. 2923.12(A)(2).

Validity of Indictment

{¶5} Relying on *State v. Colon*⁶, Hunter alleges in his first assignment of error that his indictment was defective because it failed to charge the requisite culpable mental state for aggravated robbery. Because Hunter waived these alleged errors in the indictment by entering guilty pleas to the offenses, we overrule his first assignment of error.

{¶6} The Ohio Supreme Court in *Colon* (“*Colon I*”) held that “when an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment.”⁷ The defendant in *Colon I* was charged with robbery, but the court held that an indictment failing to specify the appropriate mens rea of recklessly for robbery had resulted in structural error.⁸

{¶7} Reconsidering its holding in *Colon I*, the Ohio Supreme Court in *Colon II* narrowed the expansive breadth of *Colon I* by holding that the application of “structural error analysis should be reserved only for rare cases in which multiple errors at trial follow the defective indictment.”⁹ The court noted that a “defective indictment will seldom have such effect, and therefore, in most defective indictment cases, the court may analyze the error pursuant to Crim.R. 52(B) plain-error analysis.”¹⁰

{¶8} Subsequent to the *Colon* cases, this court held in *State v. Morgan* that a plain-error analysis was unnecessary when the defendant’s guilty plea acted as a waiver of the alleged defects in the indictment, including a failure to allege a culpable mental

⁶ 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

⁷ Id., syllabus.

⁸ Id. at ¶10.

⁹ 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, ¶8.

¹⁰ Id.

state.¹¹ We noted in *Morgan* that we have “long held that ‘[t]he entry of a plea of guilty is a grave decision by an accused to dispense with a trial and allow the state to obtain a conviction without following the otherwise difficult process of proving his guilt beyond a reasonable doubt. * * * Entering a plea of guilty is conclusive. More is not required; the court has nothing to do but give the judgment and sentence.’ ”¹²

{¶9} “Waiver is the intentional relinquishment or abandonment of a right, and waiver of a right ‘cannot form the basis of any claimed error under Crim. R. 52(B).’ ”¹³ Therefore, a “criminal defendant who pleads guilty is limited on appeal; he may only attack the voluntary, knowing, and intelligent nature of the plea and ‘may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.’ ”¹⁴

{¶10} Finally, the primary goal of both *Colon* decisions was to protect against “multiple errors” during a lengthy trial proceeding.¹⁵ Since *Morgan* had entered a guilty plea, he forfeited his right to a trial, and the “multiple errors” that might have arisen as a result of a defective indictment never came to light in a trial.

{¶11} In this case, as in *Morgan*, but not in *Colon I*, Hunter was convicted upon guilty pleas. Consequently, he waived the alleged defects in the indictment, including a failure to allege a culpable mental state. The Ohio Supreme Court, speaking through the *Colon* decisions, along with other Ohio appellate courts that have considered the issue, still accept the waiver doctrine with regard to guilty pleas.¹⁶

¹¹ 1st Dist. No. C-080011, 2009-Ohio-1370.

¹² Id. at ¶24, quoting *State v. DeArmond* (1995), 108 Ohio App.3d 239, 242, 670 N.E.2d 531.

¹³ *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶23, quoting *State v. McKee*, 91 Ohio St.3d 292, 299, 2001-Ohio-41, 744 N.E.2d 737, fn. 3 (Cook, J., dissenting); accord *Morgan* at ¶25.

¹⁴ *Morgan* at ¶25, citing *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130, 595 N.E.2d 351, and *Tollett v. Henderson* (1973), 411 U.S. 258, 267, 93 S. Ct. 1602.

¹⁵ Id. at ¶28, quoting *Colon II* at ¶8.

¹⁶ See *State v. Easter*, 2nd Dist. No. 22487, 2008-Ohio-6038; *State v. McGinnis*, 3rd Dist. No. 15-08-07, 2008-Ohio-5825, ¶26; *State v. Hanley*, 4th Dist. No. 08CA1, 2009-Ohio-149, ¶18; *State v.*

Denial of Motion to Withdraw Plea

{¶12} Hunter next alleges that the trial court abused its discretion when it denied his motion to withdraw his guilty pleas. But the trial court considered all the applicable factors, and nothing in this record suggests that the trial court, on balance, abused its discretion in denying the motion. Therefore, we overrule Hunter’s second assignment of error.

{¶13} The Ohio Supreme Court has held that, although “a presentence motion to withdraw a guilty plea should be freely and liberally granted[,] * * * a defendant does not have an absolute right to withdraw a plea prior to sentencing.”¹⁷ When a defendant moves to withdraw a guilty plea before sentence, “the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.”¹⁸ The decision to grant or deny a presentence motion to withdraw a plea is within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion.¹⁹

{¶14} In determining whether a trial court abused its discretion in ruling on a presentence withdrawal motion, this court is aided by the following factors: (1) whether the accused 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

Smith, 6th Dist. No. L-7-1346, 2009-Ohio-48, ¶10; *State v. Hayden*, 8th Dist. No. 90474, 2008-Ohio-6279, ¶6.

¹⁷ *State v. Xie*, (1992) 62 Ohio St.3d 521, 527, 584 N.E.2d 715.

¹⁸ *Id.*

¹⁹ *Id.*; accord *State v. McIntosh*, 160 Ohio App.3d 544, 2005-Ohio-1760, 828 N.E.2d 138.

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.²⁰

{¶15} At the plea hearing in this case, Hunter answered in the affirmative when asked by the trial court if he was satisfied with his representation and if the advice of his counsel to enter the guilty plea was in his best interest. Accordingly, the record indicates that he was represented by competent counsel. Furthermore, the record of the plea hearing reflects a thorough explanation of Hunter's rights under Crim.R. 11, as well as his understanding and waiver of those rights. The record also supports the conclusion that the trial court granted Hunter a full, fair, and impartial hearing on his motion to withdraw his guilty pleas.

{¶16} Hunter's motion to withdraw his guilty pleas was made within a reasonable time and set out specific reasons for the withdrawal. He alleges that, at the hearing on the motion to withdraw his pleas, he did not understand the charges and possible penalties. But at the plea hearing, Hunter, in response to the trial court's questions, confirmed that he understood the charges against him, that he was entering the plea of his own free will, and that no one had threatened or forced him to enter the plea.

{¶17} The trial court considered whether Hunter had a complete defense to the charges. In doing so, the court noted Hunter's failure to present information regarding an alibi, pointed out that attacking a witness's credibility was not a defense, and noted the presence of co-defendants ready to testify against Hunter.

²⁰ See *State v. Jefferson*, 1st Dist. No. C-020802, 2003-Ohio-4308, ¶17, citing *State v. Fish* (1995), 104 Ohio App.3d. 236, 240, 661 N.E.2d 788.

{¶18} Finally, this case was complicated by the number of defendants, the number of charges, and the difficulty of bringing all the defendants to trial on separate occasions, while attempting to ensure the availability of witnesses. Consequently, the record supports the conclusion that the state would be prejudiced by the withdrawal of his pleas.

{¶19} Even though a presentence motion to withdraw a guilty plea should be freely granted, we reiterate that the decision is one within the discretion of the trial court. In sum, this record does not indicate that the trial court abused its discretion in denying Hunter’s motion to withdraw his guilty pleas.

Hunter’s Rights Under Crim.R. 11(C)(2)(a)

{¶20} In Hunter’s final assignment of error, he asserts that his plea was not knowingly, intelligently, and voluntarily entered because he had been misinformed by the trial court about the duration of postrelease control. We hold that the trial court’s incorrect statement regarding the postrelease control did not render Hunter’s guilty plea invalid. Because the correct postrelease-control term was in the plea agreement, and because Hunter freely indicated his acceptance of the plea agreement at the plea hearing, we overrule his third assignment of error.

{¶21} The Ohio Supreme Court held in *State v. Sarkozy* that “[i]f a trial court fails during a plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control, the defendant may dispute the knowing, intelligent, and voluntary nature of the plea.”²¹ The supreme court clarified that “*some compliance* prompts a ‘substantial compliance’ analysis and the corresponding ‘prejudice’ analysis,” such as when a trial court misinforms a

²¹ 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, syllabus.

defendant at the plea hearing about the length of postrelease control or misinforms the defendant that postrelease control is discretionary rather than mandatory.²²

{¶22} Here, Hunter argues that his plea was not knowing, voluntary, and intelligent because the trial court misinformed him that he would be subject to a three-year term of postrelease control, rather than the mandatory five-year term of postrelease control. Hunter’s written plea agreement accurately reflected that he would serve a postrelease-control term of five years. Moreover, Hunter replied affirmatively when the trial court asked him if he understood that he would be placed on postrelease control after his release from prison, if he had discussed the plea agreement with his attorney, if he was satisfied with his attorney’s representation, and if he believed that the agreement was in his best interest.

{¶23} We hold that, under these circumstances, despite the trial court’s failure to correctly inform Hunter about the duration of postrelease control, the court satisfied the substantial-compliance standard. Accordingly, Hunter’s final assignment of error has no merit.

Conclusion

{¶24} Because the record does not demonstrate that Hunter failed to understand the significance of his guilty pleas or to enter them freely, we hold that he waived the alleged defects in the indictment by entering his guilty pleas. We also hold that the trial court did not abuse its discretion in overruling Hunter’s motion to withdraw his pleas. Finally, we hold that the trial court’s failure to state the correct duration of postrelease control did not prevent the court from substantially

²² Id. at ¶23 (emphasis added); see *State v. Alfarano*, 1st Dist. No. C-061030, 2008-Ohio-3476, paragraph two of the syllabus (finding “substantial compliance,” although the trial court had incorrectly stated the duration of postrelease control, because the correct duration was stated in the written plea agreement, which the defendant had indicated that he understood).

complying with Crim.R. 11. For these reasons, we overrule Hunter's three assignments of error and affirm the trial court's judgment.

Judgment affirmed.

PAINTER, P.J., and SUNDERMANN, J., concur.

Please Note:

The court has recorded its own entry this date.