

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO)	JUDGE JOHN P. O'DONNELL
)	
Plaintiff)	CASE NO. CR 515674
)	
-vs-)	<u>JOURNAL ENTRY</u>
)	
JAMES M. ROSIN)	
)	
Defendant)	

JOHN P. O'DONNELL, JUDGE

On September 18, 2008, James Rosin was indicted on one count of Burglary in violation of R.C. §2911.12(A)(2). By the indictment, the prosecutor alleged that, on August 5, 2008, the defendant:

did by force, stealth or deception, trespass, as defined in Section 2911.21(A)(1), in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of David Kennard, when David Kennard, not the accomplice of the offender, was present or likely to be present with the purpose to commit in the habitation any criminal offense, to-wit: Theft, R.C. §2913.02.

The defendant was arraigned on October 2, 2008. He entered a plea of not guilty and, because he was determined to be indigent, was appointed a defense attorney.

The court then held a number of pre-trial conferences, culminating with a trial date of January 20, 2009. On the morning of trial the defendant, after negotiations through his counsel with the prosecutor, withdrew his plea of not guilty and entered a plea of guilty to an amended charge of Burglary, in violation of R.C. §2911.12(A)(4). The effect of the amended charge was to eliminate the element of "purpose to commit in the habitation a criminal offense," thus reducing the felony level of the charge from a second degree to a fourth degree felony.

The defendant entered his guilty plea after a thorough plea colloquy with the court that complied with Criminal Rule 11. After the plea colloquy, the court allowed the complaining witness, David Kennard, to make a statement then, as is his right pursuant to R.C. 2930.14, instead of having to return to court yet again for the sentencing hearing, which was scheduled for February 10. During his statement, Kennard said that the property that is the subject of the burglary charge is owned by him as rental property and was used primarily for storage.

When the case was called for sentencing on February 10, the defendant made an oral motion to withdraw his plea. That motion was set for a hearing on February 20.

At the hearing, the defendant asserted that his plea should be allowed to be withdrawn because it was not made knowingly and intelligently. The defendant argued that he was not aware until hearing Kennard's post-plea statement to the court that the property may not have been an "occupied structure" that was a "permanent or temporary habitation of David Kennard," and that he could not have made an intelligent decision to plead guilty in the absence of information suggesting that the prosecutor would be unable to prove an essential element of the charge.

The prosecutor provided evidence that the defendant's counsel was likely orally advised during a pre-trial conference that an eyewitness to the offense, Julie Smith, had described the premises in a statement as unoccupied. The prosecutor denied being aware of any statement to police by Kennard to the effect that the structure was unoccupied.

Additionally, the court notes that in discovery responses filed by the prosecutor on December 2, 2008, the address of the complaining witness is shown as Willowdale Avenue, whereas the address of the offense was 3111 Walton Avenue. Finally, the court notes that on

January 7, 2009, the defendant filed a notice of alibi wherein he asserted that at the time of the offense he was nowhere near 3111 Walton Avenue.

A pre-sentence motion to withdraw a guilty should be freely and liberally granted.¹ However, a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. A trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.² The trial court should give consideration at the hearing to at least the following factors: whether the accused is represented by highly competent counsel; whether the accused was afforded a full Criminal Rule 11 hearing before entering a guilty plea; and whether the accused is afforded a full and fair hearing on the motion to withdraw.³

In this case, defense counsel made a written request for discovery from the prosecutor on October 10, 2008, within ten days of being assigned as counsel. Defense counsel filed a written notice of alibi and a written motion for a change in bond. Moreover, defense counsel was able to persuade the prosecutor to reduce a second degree felony to a fourth degree felony, resulting in a charge against the accused where the maximum possible sentence on the amended charge was six months less than the minimum possible sentence on the original charge. These facts suggest that defense counsel was competently and zealously representing the accused. Although it may not be part of the record in this case, it is also worth noting that this court's own experience with defense counsel is that he is nothing other than competent and capable.

As noted above, the defendant was afforded a hearing in full compliance with Criminal Rule 11 before changing his plea. After the motion to withdraw the plea was orally made, the

¹ *State v. Xie* (1992), 62 Ohio St. 3d 521, 527.

² *Id.*, at syllabus 1.

³ *State v. Peterseim* (1980), 68 Ohio App. 2d 211, at syllabus 3.

court then allowed sufficient time to prepare for a hearing and afforded the defendant a full hearing.

The court therefore finds there were no deficiencies in the process leading to the defendant's guilty plea that would justify granting the withdrawal of that plea.

The court finally considers whether basic fairness justifies a withdrawal of the plea. In this regard, the court notes first that no later than the time the prosecutor filed the discovery responses on December 2 (and probably earlier, given that at least four informal discovery pre-trial conferences took place before then) the defendant had the names and addresses of the complaining witness, David Kennard, and the eyewitness, Julie Smith. The court assumes that competent counsel spoke to these witnesses to determine whether their testimony would support a finding of proof beyond a reasonable doubt on each element of the burglary charge. The court also considers that it was likely that an assistant county prosecutor verbally advised the defendant, through counsel, that eyewitness Julie Smith had described the premises in question as unoccupied. Finally, the fact that the address of the complaining witness given in discovery is different from the address of the premises where the offense happened surely put the defendant on notice that there might be a question of whether 3111 Walton was "a permanent or temporary habitation" of the complaining witness. Hence, the available evidence does not support a conclusion that the defendant first became aware of the possible deficiencies in the State's proof after he had changed his plea.

Even assuming the defendant first became aware during the post-plea statement by Kennard that the premises may have been either unoccupied or not Kennard's habitation, the statement was not thorough and unequivocal. Kennard made no mention of: how long the structure had been used for storage; whether he or someone else stayed there from time to time;

how likely he was to be on the premises; or any number of other circumstances that could bear on the proof at trial of the “occupied structure” element of the offense. The court also notes, in considering the basic fairness of granting or overruling the motion to withdraw, that the defendant, although having filed a notice of alibi, did not include as part of his argument in support of his motion to withdraw the plea a claim that he is, in fact, innocent of either the offense charged or the amended charge to which he pled guilty. Where a defendant admits in open court to having committed a crime, but later learns that the prosecutor’s proof may not have been as strong as he thought it was, that admission should stand absent prosecutorial misconduct or a deprivation of a constitutional right, neither of which happened in this case.

In consideration of all the foregoing, the defendant’s oral motion to withdraw his plea, asserted February 10, 2009, is denied. A sentencing hearing will be scheduled by separate entry.

IT IS SO ORDERED.

JOHN P. O’DONNELL, JUDGE

PROOF OF SERVICE

A copy of the foregoing Journal Entry was mailed this _____ day of February,

2009, to:

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