IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	**CASE NOS. CR 14 585375**
	)	**CR 14 585580**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
ANTIONE TOWNSEND	)	
	)	
Defendant.	)	

JOURNAL ENTRY DENYING THE DEFENDANTS' MOTIONS TO WITHDRAW GUILTY PLEAS

STATE OF OHIO	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CASE NO. CR 14 589741**
	)	
QUINCY HAMILTON	)	
	)	
Defendant.	)	

John P. O'Donnell, J.:

In each of these cases the defendant entered into a plea bargain with the plaintiff and then moved before sentencing to withdraw his guilty plea. Because the motions to withdraw the pleas were made at about the same time and raise essentially the same legal and factual issues, they are addressed together in this opinion even though the two defendants' cases are unrelated.

STATEMENT OF FACTS

State of Ohio v. Antione Townsend
Case Nos. 585375 and 585580

On March 17, 2014, Thurmond Gissentaner reported to the Cleveland police that his building at 7609 Euclid Avenue had been broken into and property stolen. Evidence led the police to believe that defendant Antione Townsend had committed the crime and on June 5 a grand jury indicted him for breaking and entering, theft and vandalism in case number 585580.

On May 8, Cleveland police officers went to the building at 8118 Euclid Avenue to investigate a report of a theft in progress. There they discovered Townsend loading stolen property into his car. He was arrested and, on June 17, indicted in case number 585375 for breaking and entering, theft, vandalism and possessing criminal tools. He had an initial appearance in common pleas court in that case on May 15 and a $1,000 bond was set. After posting the bond on May 30 he failed to appear for further proceedings in both cases and was ultimately arrested on August 18.

On August 20 he was arraigned in both cases and pled not guilty to all charges. He again posted a bond and was released from jail pending trial. Pretrial conferences were held on August 27 and September 10. A December 3 trial date was selected at the second pretrial conference. In the meantime, a third pretrial conference was scheduled for October 23 but Townsend failed to appear and a warrant was issued. He was arrested on the warrant on the December 3 trial date, but the case was not called for trial due to the pending capias. Townsend was still in jail when the case was called on the record on December 9.

At the December 9 hearing I was advised by the attorneys for the state and Townsend that a plea bargain had been reached in both cases. The proposed plea contemplated Townsend admitting to a single charge of breaking and entering in each case and the dismissal of all other

counts. Before accepting guilty pleas from Townsend I engaged in a colloquy with him pursuant to Rule 11 of the Ohio Rules of Criminal Procedure. First, I ascertained that he was in a clear state of mind. Second, he was thoroughly informed of the constitutional rights attendant to a trial that he would be giving up in each case by pleading guilty. Third, the charges were explained to him and he acknowledged that he understood the allegations. Then the following conversation took place:

> THE COURT: Both of these cases are fifth degree felonies, sometimes called F-5s. I want you to know the possible sentences, but before I talk to you about that, I want to assure myself that you understand the effect of a guilty plea.
>
> So do you understand that if you plead guilty as proposed, the effect of your guilty plea is that you are admitting the charge?
>
> THE DEFENDANT: Yes, your honor.
>
> . . .
>
> THE COURT: Finally, any sentence in these cases is likely to include an order of restitution for the amount of money damages that you caused to the owners of the property because of your conduct, and that amount or those amounts of each case are unknown at this point, but it would be, like I said, for the cost of repair, the cost of any items taken or destroyed and so on.
>
> Do you understand?
>
> THE DEFENDANT: Yes.
>
> THE COURT: If you plead guilty here this morning, are you doing so as your own choice?
>
> THE DEFENDANT: Yes, your honor.
>
> THE COURT: Are you by some means being pressured to do this against your better judgment?
>
> THE DEFENDANT: No, your honor.
>
> THE COURT: Do you want the plea bargain or do you want your trials?
>
> THE DEFENDANT: The plea bargain, your honor.

Thereupon, Townsend pled guilty as proposed and sentencing was set for January 5, 2015. Although it was clear to me during the hearing that Townsend was in jail, until that point in the hearing bond had not been mentioned. But just as the hearing was ending, Townsend's counsel reminded me that a capias was issued after his failure to appear on October 23 and asked that the bond be reinstated. That motion was granted and Townsend voluntarily appeared for sentencing as scheduled.

The January 5 sentencing hearing began with a request by Townsend's counsel to continue the hearing to allow time to file a motion to withdraw his guilty pleas. As reasons, defense counsel cited Townsend's concern "about entering the plea so quickly" and "that he felt a bit pressured" and "wanted a little bit extra time to reassure himself that this was the right thing to do." A continuance was granted and, on January 9, Townsend filed a motion to withdraw his guilty pleas.

In the motion, Townsend says he was "in a state of extreme agitation" and beset by "a great deal of confusion" when he arrived on January 5 for sentencing. He apparently told his lawyer he wanted to "withdraw his pleas because he felt that he had to plead guilty as it was the only way he could have his bond reinstated and leave county jail." Accordingly, the motion asks that he be permitted to withdraw his guilty pleas because "he felt that pleading [guilty] was his only way to get out of jail in a timely manner" even though his attorney never "promised him that he would have his bond reinstated by entering a plea, nor told him that he wouldn't be released from jail unless he plead."

A hearing on the motion to withdraw the guilty pleas was held on January 21.

State of Ohio v. Quincy Hamilton
Case No. 589741

On August 11, 2014, Consquela Powell reported to the Cleveland police that defendant Quincy Hamilton came to her home and raped her on August 10 then beat her on August 11. Hamilton was arrested on September 15 and has been in jail since. On October 16 a grand jury returned a ten-count indictment against him alleging one count each of rape, attempted felonious assault, burglary, domestic violence, intimidation of a crime victim or witness, and retaliation. He was also charged with two counts each of kidnapping and aggravated burglary.

Hamilton was arraigned on October 21 and pled not guilty to every charge. On November 4 his attorney made a written discovery request and the plaintiff produced its evidence by November 6.

Pretrial conferences were held on November 4 and November 25. At the second pretrial conference a trial date of December 15 was selected. When the case was called on the record for trial on December 15 Hamilton's lawyer and the prosecutor informed me that a trial was not necessary because a plea bargain had been reached. According to the terms of the plea bargain – all of which were read into the record by the prosecutor – Hamilton would plead guilty to attempted felonious assault, intimidation of a crime victim or witness and domestic violence as charged in counts five, eight and ten. Additionally, count two would be amended from kidnapping to abduction and count seven would be amended from a second-degree felony burglary to a third-degree felony burglary, and he would plead guilty to those amended charges. The five other counts would be dismissed.

Before asking Hamilton how he wished to plead I had a conversation with him pursuant to Criminal Rule 11. He denied being under the influence of any drugs or alcohol and denied any physical or mental illnesses. He mentioned that he was satisfied with the work done by his

counsel. He was informed of the constitutional rights he would be waiving by pleading guilty and indicated that he understood all of them. After each count was read to him he agreed that he understood the charge. Hamilton was also informed that the possible sentences ranged from probation to a maximum prison sentence of six years and no promises of a particular sentence were made. Finally, the plea colloquy included the following exchanges:

> THE COURT: Do you understand that the effect of pleading guilty to these five charges is that you are admitting these crimes?
>
> THE DEFENDANT: Yes.
>
> . . .
>
> THE COURT: Mr. Hamilton, if you do plead guilty to these five crimes here this morning, will you be doing so as your own choice?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Are you being pressured or forced to plead guilty?
>
> THE DEFENDANT: No.

Thereupon, Hamilton entered individual guilty pleas to the five charges and the other five counts were dismissed. A sentencing hearing was scheduled for January 12, 2015. At sentencing, the possibility of backing out of the plea bargain was raised for the first time not by the defendant, but by me after his counsel's remarks made it appear that Hamilton was counting on probation:

> DEFENSE COUNSEL: He has been here in county jail for four months, and kind of riding this out. He knows that the circumstances as relayed by Miss Powell were a little bizarre, but I think he took – and we can tell from the statement he made – took a safer course, entered a plea to a non-sex offense so that he could move on and put this case behind him, and I would respectfully suggest . . . the imposition of a term of community control[.]
>
> THE COURT: You said essentially that Mr. Hamilton pled guilty so that he could put this behind him?
>
> DEFENSE COUNSEL: Yes.

> THE COURT: He was told, as I recall – I don't have the transcript right in front of me – that he might go to prison.
>
> DEFENSE COUNSEL: That's correct.
>
> THE COURT: Does he want to withdraw his plea right now?

After some additional discussion, the sentencing was adjourned to allow Hamilton to confer with his counsel about whether to move to withdraw the guilty plea. The sentencing was reconvened on January 29 and the defendant made an oral motion to withdraw his guilty plea. With his consent, an immediate hearing was held on the oral motion to withdraw the plea. At the hearing he cited as his justification for withdrawing his guilty pleas the fact that he was innocent of all crimes charged.

LAW AND ANALYSIS

Rule 32.1 of the Ohio Rules of Criminal Procedure reads, in its entirety, as follows:

> A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

By its terms, Rule 32.1 allows a trial court to grant a postsentence motion to withdraw a guilty plea only if the defendant can show that a manifest injustice will result if the plea is not vacated. By contrast, the rule does not include a threshold standard to support a presentence motion to withdraw a guilty plea. But that doesn't mean a guilty plea can be withdrawn, presentence, at the whim of the defendant. Indeed, the Ohio Supreme Court has held that a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *State v. Xie*, 62 Ohio St. 3d 521 (1992), syllabus 1. A defendant may only withdraw a guilty plea before sentencing if there is a reasonable and legitimate basis for the withdrawal of the plea. *Id*.

Yet both Townsend and Hamilton cite to *Xie* for the proposition that presentence motions to withdraw a guilty plea should be freely and liberally granted. And it is undisputed that *Xie* includes the following observation by the Ohio Supreme Court:

> We agree that a presentence motion to withdraw a guilty plea should be freely and liberally granted. *Id*., 527.

But that phrase is the court's misrendering of its quotation just three paragraphs before of the standard applied under the nearly identical federal rule of procedure to a presentence motion to withdraw a guilty plea by the Sixth U.S. Circuit Court of Appeals in *Barker v. United States*, 579 F.2d 1219. The *Barker* court noted that "the general rule is that motions to withdraw guilty pleas before sentencing are to be freely allowed and treated with liberality." *Id*., 1223. That standard, in turn, was supported in *Barker* by citing to *Dorton v. United States*, 447 F.2d 401 (Tenth Circuit 1971). But just as the Ohio Supreme Court in *Xie* did not use the exact language from the Sixth Circuit in *Barker*, the *Barker* court did not use *Dorton's* exact verbiage. Instead, the *Dorton* decision adverted to earlier federal cases saying that a presentence motion to withdraw a guilty plea should be treated with "more liberality" or should be "construed liberally in favor of the accused." But these cases make clear that the adverbs liberality and liberally were meant to modify a court's consideration of a presentence motion to withdraw a guilty plea as opposed to the strict test of manifest injustice applied to postsentence motions to withdraw the plea.

In other words, it's not that the motions should be "freely and liberally" *granted* but that they should be liberally *allowed* and not summarily denied without a hearing. Ultimately, a defendant should only be permitted to withdraw a plea of guilty "if for any reason the granting of the privilege seems fair and just." *Kercheval v. United States*, 274 U.S. 220, 224 (1927).

So, while the Ohio Supreme Court "agreed" that presentence motions to withdraw a guilty plea should be "freely and liberally granted," it was impossible for the court to "agree" with something no other court had ever said. In considering whether the court really meant that such a motion should be freely and liberally granted it is worth remembering what happened in *Xie*.

The defendant was charged with one count of aggravated murder with a firearm specification. Under the law then in effect, he would have been eligible for parole after 17 years. But his lawyer informed him that his first parole eligibility if convicted of the charged offense would have come after 23 years. Based in part on that bad advice, Xie pled guilty to murder, without a firearm specification, for which he was eligible for parole after 15 years. Before sentencing, Xie moved to withdraw his guilty plea on the basis of the bad advice and because "he had been talked into accepting it by one of his attorneys and by his wife, and 'did not feel right' about [the guilty plea]." *Xie,* supra, 522. The trial court denied the motion and the court of appeals reversed because it thought the trial court held the defendant to the postsentence manifest injustice standard. The Ohio Supreme Court, despite its pronouncement that presentence motions to withdraw guilty pleas should be "freely and liberally granted," reversed the court of appeals and found that the trial court did not abuse its discretion when it denied Xie's motion. In other words, the court ignored what Townsend and Hamilton claim is its own standard for deciding presentence motions to withdraw a guilty plea.

Evidence that the Ohio Supreme Court really meant to say that presentence motions should be freely *considered* after a full hearing, and not freely *granted*, includes the many appellate cases upholding trial courts' denials of motions to withdraw guilty pleas.

The Eighth District Court of Appeals routinely nods at the notion that a presentence motion to withdraw a guilty plea should be "freely and liberally granted" while at the same time affirming the trial court's denial of the motion for lack of a reasonable and legitimate basis. Examples of insufficient reasons abound: a defendant who "had been under a lot of stress" at the time of the plea;[1] a defendant's assertion that he had not been taking his psychiatric medication before the plea hearing;[2] a defendant who said "I know I'm innocent";[3] a defendant "unduly influenced by his family to accept the plea bargain";[4] and a defendant who claimed that he had been "bullied" by his counsel into pleading guilty and was under medication that left him unable to understand the consequences of his plea.[5] In each of these circumstances, the appellate court rotely acknowledged *Xie*'s "freely and liberally granted" language but concluded that the justification offered to withdraw the guilty plea was not enough to support the motion.

It is past time to discard the inexact "freely and liberally granted" standard and instead focus on what the court actually held in *Xie*: Is there a reasonable and legitimate basis for the withdrawal of a guilty plea?

A plea bargain is a contract and subject to the principles of contract law. *State v. Torres*, 8th Dist. No. 97749, 2012-Ohio-2932, ¶ 15. Unconscionability is one reason a contract can be revoked and seems to be the tacit standard that appellate courts really apply when reviewing whether a defendant should be allowed to withdraw a guilty plea instead of the "freely and liberally granted" standard.

There are two facets to unconscionability: procedural and substantive. *Riggs v. Patriot EnergyPartners, LLC*, 7th Dist. No 11 CA 877, 2014-Ohio-558, ¶46. Substantive

[1] *State v. Perry*, 8th Dist. No. 101141, 2015-Ohio-304, ¶10.
[2] *State v. Bennett*, 8th Dist. No. 101206, 2015-Ohio-173.
[3] *State v. Slater*, 8th Dist. No. 101358, 2014-Ohio-5552, ¶11.
[4] *State v. Ward*, 8th Dist. No. 101041, 2014-Ohio-4579, ¶10.
[5] *State v. Harris*, 8th Dist. No. 100002, 2014-Ohio-1423, ¶3.

unconscionability is determined by examining the reasonableness of a contract's terms; procedural unconscionability entails a consideration of the circumstances surrounding the parties' bargaining. But ultimately, a decision on whether a contract should be avoided as unconscionable comes down to one question: Is it unfair to hold the contracting party to its bargain? To put it another way – and to quote the United States Supreme Court in *Kercheval*, *supra* – is the withdrawal of the guilty plea the only "fair and just" outcome? In Townsend's cases and Hamilton's case that question must be answered in the negative.

Townsend knew of the charges against him in case number 585375 since the time of his arrest on May 8, and he was aware of the charges in the other case no later than mid-June. He knew of his trial date three months in advance. He has pled guilty in two past felony cases involving conduct similar to that charged here and was not a plea bargaining novice. His maximum prison sentence was reduced from seven years if found guilty of all charges at trial to two years. There is no evidence to support his claim that he was informed that pleading guilty was the only way he could get out of jail. To the contrary, he was told that pleading guilty could result in two years of prison.

In summary, he has not demonstrated a reasonable and legitimate basis to withdraw his guilty plea and it is not unfair to hold him to it.

Hamilton knew for at least three months before his guilty plea that Powell accused him of rape and intimidation. He had all that time to consider – even dwell on, since he was in jail – the state's prospects of defeating his presumption of innocence and proving him guilty beyond a reasonable doubt. He was aware that those prospects depended in large part on Powell's credibility. He knew his trial date three weeks in advance. There is no evidence that the plea bargain was hurriedly crafted and proposed to him at the last minute. Had Hamilton been found

guilty of all counts at trial his potential maximum prison term was 36 years.[6] In exchange for giving up the possibility of a complete acquittal he reduced the potential maximum prison term to six years. Since 1990, Hamilton has been a defendant in criminal lawsuits in juvenile, municipal and common pleas courts 18 times. He too is an experienced plea bargainer who has pled guilty to felonies in common pleas court on at least five separate occasions. Finally, he knew that he could not maintain his innocence and plead guilty at the same time, and he chose to plead guilty after being fully informed of the potential consequences.

In summary, he has also failed to demonstrate a reasonable and legitimate basis to withdraw his guilty plea and it is not unfair to hold him to it.

CONCLUSION

For these reasons, the defendants' motions to withdraw their guilty pleas are denied. Sentencing hearings will be scheduled in each case by separate entries.

IT IS SO ORDERED:

_____ _____

Judge John P. O'Donnell Date

[6] Assuming that: counts 1 and 2 are allied offenses of similar import; counts 3 and 5 are allied offenses of similar import; and counts 4, 6 and 7 are allied offenses of similar import.

SERVICE

A copy of this journal entry was sent by email on February 12, 2015, to the following:

Daniel J. Cleary, Esq.
dcleary@prosecutor.cuyahogacounty.us
Eleina Thomas, Esq.
ethomas@prosecutor.cuyahogacounty.us
Attorneys for plaintiff The State of Ohio

Patti London, Esq.
plondon@cuyahogacounty.us
Attorney for defendant Antione R. Townsend

Valerie Arbie-McClelland, Esq.
varbiemcclelland@cuyahogacounty.us
Attorney for defendant Quincy Hamilton

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Judge John P. O'Donnell