

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

STATE OF OHIO,	:	APPEAL NO. C-150283
	:	TRIAL NO. B-1406386
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
EMMANUEL BRITT,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Emmanuel Britt was indicted for one count of harassment with a bodily substance, a fifth-degree felony, in violation of R.C. 2921.38(B). Following his no-contest plea, the state dismissed the related misdemeanor charges, and Britt was released on a recognizance bond pending sentencing. On the day of sentencing, Britt sought to withdraw his plea pursuant to Crim.R. 32. After a hearing, the trial court overruled Britt's motion and sentenced him to two years of community control.

In his first assignment of error, Britt argues the trial court erred in overruling his motion to withdraw his no-contest plea. In his second assignment of error, Britt argues that his no-contest plea was not knowingly, voluntarily, and intelligently

entered. Because these assignments of error are interrelated, we address them together.

Generally, a presentence motion to withdraw a plea is to be freely and liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992). However, a defendant does not have an absolute right to withdraw a plea prior to sentencing. *Id.* at paragraph one of the syllabus. Rather, “[a] trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for withdrawal of the plea.” *Id.* The decision to grant or deny a presentence motion to withdraw a plea is within the sound discretion of the trial court. *Id.* at paragraph two of the syllabus. When reviewing a trial court’s decision regarding a motion to withdraw a plea, this court weighs a number of nonexhaustive factors to determine whether an abuse of discretion occurred. *See State v. Haywood*, 1st Dist. Hamilton No. C-130525, 2014-Ohio-2801, ¶ 5.

The record reveals that prior to taking Britt’s no-contest plea, the trial court addressed Britt personally. During the plea colloquy, Britt told the trial court that he had discussed the plea with his attorney prior to signing the plea form; that he was pleading of his own free will; that he was not under the influence of drugs or alcohol; that he was satisfied with his attorney’s performance; and that he understood all the Crim.R. 11 rights he would be waiving by virtue of his no-contest plea. The trial court informed Britt of the maximum possible sentence and fine for the offense, including postrelease control. The trial court then accepted Britt’s no-contest plea, found him guilty, and deferred sentencing. In the interim, defense counsel withdrew and Britt was appointed new counsel.

On the day of sentencing Britt's newly-appointed counsel informed the court that Britt wanted to withdraw his no-contest plea. The trial court stated it had received Britt's handwritten letter seeking to withdraw his plea and asked Britt why he wanted to withdraw his plea. Britt replied that he had a meritorious defense to the charges; he had been confused at the time of the plea, because he thought he had been pleading to a misdemeanor offense instead of a felony; and his former counsel had not represented him to the best of his ability. Britt, however, did not provide the trial court with any evidence to substantiate his claims.

The trial court then heard from Britt's current counsel, and the assistant prosecuting attorney, who opposed the motion. The trial court, which had its notes from Britt's plea hearing, discussed its plea colloquy with Britt. The trial court told Britt that it was denying his motion because there was no evidence in the record, other than his own assertions, to support his claim that he had been confused at the plea hearing, and Britt had been represented by highly-competent counsel.

Our review of the plea-hearing transcript reveals that the trial court complied with the requirements of Crim.R. 11. Britt's claims on appeal are insufficient to rebut the record on review, which shows that his plea was voluntarily, intelligently, and knowingly entered. As the state points out in its brief, Britt merely had a change of heart about his plea, which is insufficient to permit the withdrawal of his plea. *See State v. Jones*, 1st Dist. Hamilton No. C-110603, 2012-Ohio-2075, ¶ 9. As a result, the trial court did not err in denying his presentence motion to withdraw his no-contest plea. We, therefore, overrule his first and second assignments of error.

In his third assignment of error, Britt argues he was deprived of his constitutional right to the effective assistance of counsel because his former counsel had

failed to properly inform him of the consequences of his no-contest plea and had failed to move the court to withdraw his no-contest plea.

To succeed on this claim, Britt must show that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's substandard performance. *See Strickland v. Washington*, 466 U.S. 668, 686-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

Britt's claims regarding his former counsel's deficient performance are belied by the record. Britt conferred with his former counsel during the plea hearing and even took a short recess to ask counsel questions prior to entering his no-contest plea. Britt, moreover, can demonstrate no prejudice from his former counsel's failure to file the presentence motion to withdraw his plea, where Britt had filed his own motion to withdraw his plea and the trial court had entertained the merits of the motion and had fully considered his arguments before ultimately denying it. *See State v. Leonard*, 1st Dist. Hamilton No. C-130474, 2014-Ohio-3828, ¶ 30-32. We, therefore, overrule the third assignment of error, and affirm the judgment of the trial court.

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

FISCHER, P.J., HENDON and CUNNINGHAM, JJ.

To the clerk:

Enter upon the journal of the court on January 27, 2016
per order of the court _____.
Presiding Judge