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NO. COA12-128
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 09 CRS 213019

ADRIAN LAMONT PENDERGRASS

Appeal by Defendant from judgment entered 9 September 2011 by Judge F. Lane Williamson and order entered 20 July 2011 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 May 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard Slipsky, for the State.

Megerian & Wells, by Franklin E. Wells, Jr., for Defendant.

STEPHENS, Judge.

On 31 January 2011, following his indictments for (1) assault with a deadly weapon with intent to kill inflicting serious injury and (2) having attained habitual felon status, Defendant Adrian Lamont Pendergrass entered a no contest plea to a lesser assault charge and to having attained habitual felon status. Sentencing was continued, and on 22 March 2011,

Pendergrass filed a motion to withdraw his pleas. After a hearing on Pendergrass' motion in Mecklenburg County Superior Court, the Honorable W. Robert Bell presiding, Pendergrass' motion was denied. Thereafter, Pendergrass was sentenced to 107 to 138 months imprisonment. Pendergrass appeals.

Pendergrass' sole argument on appeal is that the trial court erred in denying his motion to withdraw his plea. We disagree.

On appeal from a presentence motion to withdraw a guilty plea, "[w]e review the record independent of the trial court's action and we must determine, 'considering the reasons given by the defendant and any prejudice to the State, if it would be fair and just to allow the motion to withdraw.'" *State v. Graham*, 122 N.C. App. 635, 637, 471 S.E.2d 100, 101 (1996) (quoting *State v. Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993)). It is the defendant's burden to show "that his motion to withdraw his plea is supported by some fair and just reason." *State v. Chery*, 203 N.C. App. 310, 313, 691 S.E.2d 40, 43 (2010).

Some of the factors which favor withdrawal include whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused

has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

State v. Handy, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990) (citations omitted). In this case, Pendergrass argues that the length of time between entry of his plea and his attempted withdrawal, his assertions of innocence, the strength of the State's proffer, and the hasty entry of his plea warrant a finding that his motion should have been allowed.

As for the length of time between entry and the attempted withdrawal, we first note that although Pendergrass indicated to his attorney his desire to change his plea three weeks after entry of his plea, he testified that such desire was only formed after he was able to "do some research and go through the law library." Further, Pendergrass' motion was not filed until seven weeks after his plea was entered. Quoting *United States v. Barker*, 514 F.2d 208, 222 (D.C. Cir. 1975) (en banc), our Supreme Court has stated that while "[t]he standard for judging the movant's reasons for delay remains low where the motion comes only a day or so after the plea was entered," "if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons

given to support withdrawal must have considerably more force." *Handy*, 326 N.C. at 539, 391 S.E.2d at 162-63. As Pendergrass' motion was filed much later than "a day or so after" entry of his plea, his reasons supporting withdrawal must be of "considerably more force." We conclude they are not.

Pendergrass contends that his "continued assertion of innocence, standing alone, represents a fair and just reason to allow him to withdraw his plea." However, our review of the record reveals that Pendergrass has not continually asserted his innocence as he claims. Rather, during his plea hearing where he pled no contest – which evidences an unwillingness to admit guilt, *cf. North Carolina v. Alford*, 400 U.S. 25, 36, 27 L. Ed. 2d 162, 171 (1970) (noting that one pleading no contest is "an accused who is unwilling expressly to admit his guilt") – Pendergrass agreed that "there are sufficient facts on which a jury could have found [him] guilty" and he stated that "I'm not admitting any guilt." An unwillingness to expressly admit guilt, however, is not an assertion of innocence. Further, this Court has previously rejected the argument that a plea of no contest is "equated to a conclusive assertion of innocence" and held that "the fact that the plea that defendant seeks to withdraw was a no contest [] plea does not conclusively

establish the factor of assertion of legal innocence for purposes of the *Handy* analysis." *Chery*, 203 N.C. App. at 314-15, 691 S.E.2d at 44. Accordingly, Pendergrass' alleged assertion of innocence does not support his argument for withdrawal.

Pendergrass also argues that the strength of the State's proffer of evidence "has not been shown to be overwhelming." We are unpersuaded. The State's proffer was brief, but indicated that Pendergrass shot the victim several times and was seen after the shooting picking up shell casings. We find this proffer sufficiently strong such that it does not support a finding that the trial court erred in denying Pendergrass' motion.

Finally, Pendergrass argues that his motion should have been allowed because "the plea was made hastily and [he] was being pressured." Again, we are unpersuaded. During the plea colloquy, Pendergrass indicated that nobody had "promised [him] anything or threatened [him] in any way to cause [him] to enter [the] plea against [his] wishes" and that he was entering the plea "of [his] own free will, fully understanding what [he was] doing." Further, the record indicates that Pendergrass decided to plead guilty after approximately an hour of discussion among defense counsel, his family, and the trial judge. While

Pendergrass expressed some reservations at the hearing on his motion to withdraw regarding the fact that the judge who accepted Pendergrass' plea had previously represented him on an unrelated matter, neither Pendergrass nor his counsel raised this issue at the plea hearing and there is nothing in the record to indicate that the judge exerted any undue influence on Pendergrass. Indeed, there is nothing in the record to indicate that Pendergrass was pressured, in any way, to make a hasty decision to plead no contest to the charges.

Based on our review of the record, we conclude that Pendergrass has failed to satisfy his burden of showing the existence of a fair and just reason for withdrawal of his plea of no contest. The ruling of the trial court is

AFFIRMED.

Judges BRYANT and THIGPEN concur.

Report per Rule 30(e).