

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs October 29, 2019, at Knoxville

**STATE OF TENNESSEE v. CLEOTRIS RUBEN**

**Appeal from the Criminal Court for Shelby County  
Nos. 15-04728, 17-00111 James M. Lammey, Judge**

---

**No. W2019-00507-CCA-R3-CD**

---

The Defendant, Cleotris Ruben, entered best interest pleas in two separate cases to one count of Class E felony theft of property and one count of Class A misdemeanor theft of property. Prior to a sentencing hearing, the Defendant filed motions to withdraw his guilty pleas, which the trial court denied. The trial court sentenced the Defendant to an effective sentence of one year in the workhouse and six years of supervised probation. On appeal, the Defendant contends that the trial court erred in denying his motions to withdraw his pleas because he provided sufficient evidence demonstrating that a “fair and just reason” justifies the withdrawal of his guilty pleas. After a review of the record, we reverse the judgment of the trial court and remand for appointment of new counsel and a new hearing on the Defendant’s motions to withdraw his pleas.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed;  
Case Remanded**

JOHN EVERETT WILLIAMS, P.J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., and J. ROSS DYER, JJ., joined.

Phyllis Aluko, District Public Defender; Harry E. Sayle III (on appeal) and Phoebe C. Sprague (at hearing), Assistant District Public Defenders; and Mitchell Wood (at hearing), Memphis, Tennessee, for the appellant, Cleotris Ruben.

Herbert H. Slatery III, Attorney General and Reporter; Zachary T. Hinkle, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Jamie Kidd, Assistant District Attorney General, for the appellee, State of Tennessee.

**FILED**

02/19/2020

Clerk of the  
Appellate Courts

## OPINION

### FACTS AND PROCEDURAL BACKGROUND

On September 22, 2015, a Shelby County Grand Jury indicted the Defendant for theft of property valued between \$10,000 and \$60,000, a Class C felony. The Defendant hired private counsel to represent him. In November 2017, while this charge was pending, the State also charged the Defendant by criminal information with a separate count of theft of property valued between \$1,000 and \$2,500, a Class E felony. The Defendant was represented by appointed counsel on the Class E felony theft charge. On January 29, 2019, the Defendant entered best interest pleas pursuant to an agreement reached between his two attorneys and the State. At the guilty plea hearing, the State announced that the Defendant was pleading guilty to one count of theft of property valued over \$1,000, a Class E felony, instead of the indicted offense of theft of property valued between \$10,000 and \$60,000, a Class C felony, and one count of theft of property valued \$1,000 or less, a misdemeanor, instead of the indicted offense of theft of property valued between \$1,000 and \$2,500, a Class E felony.<sup>1</sup> The State recommended a six-year supervision period for the Class E felony theft “if he is eligible for diversion.” For the misdemeanor theft conviction, the State recommended eleven months and twenty-nine days of supervision to run concurrently with the felony sentence. The State noted it did not oppose diversion or a continuance “in order to see if he is eligible for diversion.”

According to the State’s recitation of the facts concerning the circumstances surrounding the Defendant’s first indicted offense, between September 1, 2012, and November 30, 2014, the Defendant, on behalf of his realty company, assisted Ms. Jill Holmes and Mr. Gregory Holmes in attempting to negotiate the purchase of fourteen

---

<sup>1</sup> The offense underlying the Class E felony theft conviction was committed prior to the amendment of Tennessee Code Annotated section 39-14-105, the statute providing for the grading of theft offenses. The Defendant entered a best interest plea to the offenses after the amendment of the statute. The Tennessee Supreme Court recently determined that Tennessee Code Annotated section 39-11-112, the criminal savings statute, applies to the amendments of the theft grading statute. *State v. Menke*, No. M2017-00597-SC-R11-CD, 2019 WL 6336427, at \*1 (Tenn. Nov. 27, 2019). We note a discrepancy between the judgment form and the hearing transcript for the conviction offense of Class E felony theft. While the transcript states that the Defendant was pleading guilty to theft of property valued over \$1,000, described as a Class E felony, the plea agreement and judgment form both describe the conviction offense as theft of property valued over \$500 and under \$1,000, described as a Class E felony. The record is clear that the parties intended the Defendant to plead guilty to Class E felony theft as a lesser included offense of Class C felony theft for this offense. The conviction offense of Class A misdemeanor theft was committed, charged, and resolved after the amendment to the statute, and the judgment forms and hearing transcript are in accord regarding this offense.

properties. The victims gave the Defendant \$19,100 to “pay off bills in order to increase their chances of getting a contract on a home.” None of these real estate contracts were successfully negotiated, and the victims asked the Defendant to repay the money from escrow. Although the Defendant agreed to return approximately \$14,000 to the victims, he failed to do so.

According to the State’s recitation of the facts regarding the second theft charge, Ms. Tammy Cowans reported to law enforcement that she was “a victim of a con game by a person impersonating a licensed real estate professional.” On March 8, 2017, Ms. Cowans gave the Defendant \$1,200, and the following day she gave the Defendant an additional \$500. Ms. Cowans requested that the Defendant return her money because the Defendant was not a licensed real estate agent and could not assist her in purchasing a home.

The Defendant stipulated that those would have been the facts had the matters proceeded to trial. The Defendant then entered best interest pleas. The trial court explained that diversion was recommended and asked the Defendant, “Do you have anything in your background that you think would stop this?” The Defendant responded, “No, sir.” The trial court asked the Defendant if he had previously pleaded guilty to a criminal offense, and the Defendant informed the court that he had pleaded guilty to driving on a suspended license, approximately twenty years earlier. The Defendant acknowledged that he understood that by entering a guilty plea, he was waiving his right to a trial.

On February 20, 2019, the day that the sentencing hearing was set, defense counsel requested additional time so that they could file motions to withdraw to the Defendant’s guilty pleas. Defense counsel explained that at the time the Defendant entered the guilty pleas, counsel was “under the impression, after looking through Odyssey that [the Defendant] was diversion eligible.” However, since the time of the guilty plea hearing, counsel now knew that the Defendant was not eligible for diversion. Defense counsel requested that the sentencing hearing be scheduled the same day as the hearing on the motion to withdraw. The trial court granted defense counsel’s request.

On February 25, 2019, appointed counsel filed a motion to withdraw the Class A misdemeanor theft guilty plea pursuant to Tennessee Rule of Criminal Procedure 32(f)(1). The motion stated that after the Defendant entered the best interest plea, defense counsel requested a certificate of eligibility for diversion from the Tennessee Bureau of Investigation (“TBI”). The certificate showed that the Defendant had previously been placed on diversion in Shelby County related to an arrest on February 17, 1984. According to the motion, the online docket system showed that the Defendant was arrested for petit larceny on February 17, 1984, which was “held to State” on April 11,

1984. Defense counsel asserted that the Shelby County Criminal Court Clerk's Office initially informed her that a "dismissed warrant" had been entered in the 1984 case. Records obtained from the archived records, however, indicated that the Defendant entered into "an attorney general diversion agreement."

The Defendant argued that the court should grant his motion to withdraw his guilty plea because he had demonstrated that a "fair and just reason" justifies the withdrawal of the plea. He pointed out that less than a month passed between the time that he entered his guilty plea and when he moved to withdraw the guilty plea. The Defendant asserted that the reason for the delay in moving to withdraw was caused by defense counsel's uncertainty about the accuracy of the TBI certificate and that he maintained his innocence by entering a best interest plea. He believed, pursuant to the advice his two attorneys, that he was eligible for diversion at the time he entered his guilty pleas and that he would not have entered into the plea agreement if he had known that he was not eligible for diversion. The Defendant acknowledged that although he had prior experience with the criminal justice system, he had never faced felony charges before. He argued that the State would not face any prejudice if his motion were granted. On February 27, 2019, the Defendant's retained attorney also filed a motion to withdraw his plea regarding the felony theft conviction. The motion articulated the same argument as the motion discussed above.

The trial court held a hearing on the Defendant's motions on February 27, 2019. At the hearing, defense counsel stated that prior to receiving the TBI certificate, they believed that the Defendant was diversion eligible. Counsel maintained that the Defendant "was under the 100 percent full faith that he was going to be diversion eligible." Counsel argued that the trial court should allow the Defendant to withdraw his pleas because there was a fair and just reason to do so. Defense counsel summarized the argument by stating. "[e]ssentially, because he's not diversion eligible and but for the fact that he's – was diversion eligible he would not have entered a plea."

The trial court entered a written order denying the motions and incorporating its oral findings. At the conclusion of the hearing, the trial court found that it would be a "stretch" to find that it was unfair and unjust to allow the Defendant to withdraw his guilty pleas. The trial court repeatedly emphasized the fact that the Defendant was thirty-four years old when he entered into the 1984 diversion agreement, had signed that prior agreement, and should have been aware of it when he entered the current pleas. At the conclusion of the hearing, the trial court imposed the following sentence, "on the E felony I sentence him to – to one year in the workhouse, six years probation concurrent with the 11 months and 29 days on the theft, A misdemeanor." The trial court also imposed restitution. The Defendant filed two separate appeals that were consolidated.

## ANALYSIS

This court reviews a trial court's decision regarding a motion to withdraw a guilty plea for an abuse of discretion. *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010) (citing *State v. Crowe*, 168, S.W.3d 731, 740 (Tenn. 2005)). "A trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party." *Phelps*, 329 S.W.3d 443. (citing *State v. Jordan*, 235 S.W.3d 136, 141 (Tenn. 2007)). A trial court can also abuse its discretion when the court fails "to consider the relevant factors provided by higher courts as guidance for determining an issue." *Id.* (citing *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)).

Pursuant to Rule 32(f) of the Tennessee Rules of Criminal Procedure, "[b]efore [a] sentence is imposed, the court may grant a motion to withdraw a guilty plea for any fair and just reason." Rule 32 does not specify what constitutes a "fair and just reason" for withdrawing a guilty plea. In *Phelps*, our supreme court adopted a "non-exclusive multi-factor test" to be used in determining if there are fair and just reasons to allow withdrawal of a guilty plea. *Phelps*, 329 S.W.3d at 447. Those factors are:

- (1) the amount of time that elapsed between the plea and the motion to withdraw it;
- (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings;
- (3) whether the defendant has asserted or maintained his innocence;
- (4) the circumstances underlying the guilty plea;
- (5) the defendant's nature and background;
- (6) the degree to which the defendant has had prior experience with the criminal justice system;
- and (7) potential prejudice to the government if the motion to withdraw is granted.

*Id.* (quoting *United States v. Haygood*, 549 F.3d 1049, 1052 (6th Cir. 2008)) (internal quotations omitted). "[W]here a trial court applies the correct nonexclusive multi-factor analysis and determines that the balance of factors weighs in the defendant's favor, the trial court should allow the defendant to withdraw his plea, even if the defendant's reasons could be characterized as a 'change of heart.'" *Id.* at 448. However, "a defendant should not be allowed to pervert this process into a tactical tool for purposes of delay or other improper purpose." *Id.*

Although trial counsel addressed each of the factors both in the motions to withdraw the Defendant's guilty plea and during the hearing, the Defendant failed to present any evidence pertinent to his motions. The hearing consisted solely of the legal arguments of defense counsel and the State. The Defendant did not testify during the hearing and presented no other witnesses. "While it is true that a lawyer is an officer of

the court, his statement of extra-judicial facts made in the course of argument, when not under oath as a witness and not subject to cross-examination, proves nothing.” *Larry Jereller Alston v. State*, No. E2017-02528-CCA-R3-PC, 2018 WL 6992435, at \*4 (Tenn. Crim. App. Nov. 27, 2018) (quoting *Trotter v. State*, 508 S.W.2d 808, 809 (Tenn. Crim. App. 1974)), *perm. app. denied* (Tenn. Mar. 27, 2019). “Statements made by counsel during the course of a hearing or trial are not evidence.” *State v. James G. Huppe, Jr.*, No. M2003-00618-CCA-R3-CD, 2004 WL 1562539, at \*7 (Tenn. Crim. App. July 13, 2004) (quoting *State v. Burton*, 751 S.W.2d 440, 450 (Tenn. Crim. App. 1988)). This court has concluded that the “recitation of facts and the arguments contained in a brief or similar pleading” are also not considered evidence. *Id.* (quoting *Burton*, 751 S.W.2d at 450). Trial counsel argued during the hearing that the Defendant would not have pled guilty if he had known that he was not eligible for diversion.

According to the motions, the Defendant was represented at the hearing to withdraw his guilty pleas by the same attorneys who had advised him that he would be eligible for diversion. Both of the Defendant’s attorneys had a clear conflict of interest in the hearing on the motions to withdraw and should have requested to withdraw from the case. A conflict of interest “includes any circumstances in which an attorney cannot exercise his or her independent professional judgment free of ‘compromising interests and loyalties.’” *State v. Culbreath*, 30 S.W.3d 309, 312-13 (Tenn. 2000) (quoting Tenn. R. Supp. Ct. 8, EC 5-1). While the phrase “ineffective assistance of counsel” was not included in the motions to withdraw, both of the Defendant’s attorneys argued in the motions and during the hearing that but for their incorrect advice that the Defendant was diversion eligible, he would not have entered the guilty pleas. This argument is essentially a claim of ineffective assistance of counsel, and defense counsel had a conflict of interest in making such an argument. *See Frazier v. State*, 303 S.W.3d 674, 683 (Tenn. 2010) (citing *Velarde v. United States*, 972 F.2d 826, 827 (7th Cir. 1992) for the principle that trial counsel cannot be expected to challenge his or her own effectiveness).

Furthermore, the claims set forth in the Defendant’s motions and during the hearing concerned defense counsel’s advice to the Defendant and defense counsel’s actions regarding their verification or failure to verify the Defendant’s eligibility for diversion prior to the Defendant’s entering the pleas. These claims rendered counsel necessary witnesses in the hearing and prohibited continued representation of the Defendant. Rule 3.7 of the Tennessee Rules of Professional Conduct prohibits an attorney from acting as an advocate at a trial in which the attorney “is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work a substantial hardship on the client.” Tenn. R. Sup. Ct. Rule 8, RPC 3.7(a). None of the exceptions to the general rule prohibiting an attorney from acting as both an advocate and a necessary witness applies in the present

case. Accordingly, defense counsel should have sought to withdraw from representing the Defendant prior to the hearing on the motion to withdraw. Because the Defendant was represented by counsel who had a clear conflict of interest and who failed to present any evidence to support the Defendant's claims, we reverse the trial court's judgment and remand the matter to the trial court to appoint the Defendant new counsel and for an evidentiary hearing on the Defendant's motion to withdraw his pleas.

### **CONCLUSION**

For the foregoing reasons, we reverse the decision of the trial court and remand for appointment of new counsel and further proceedings consistent with this opinion.

---

JOHN EVERETT WILLIAMS, PRESIDING JUDGE