



106194051

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

THE STATE OF OHIO  
Plaintiff

ANDRE PARKER  
Defendant

Case No: CR-18-629347-A

Judge: JOHN P O'DONNELL

INDICT: 2911.01 AGGRAVATED ROBBERY /FRM1 /FRM3  
/FR54 /NPC /RVOS  
2911.01 AGGRAVATED ROBBERY /FRM1 /FRM3  
/FR54 /NPC /RVOS  
2911.02 ROBBERY /FRM1 /FRM3 /NPC /RVOS /FR54  
ADDITIONAL COUNTS...

**JOURNAL ENTRY**

JUDGMENT ENTRY DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEAS. O.S.J.

11/05/2018  
CPJPO 11/05/2018 18:21:25

Judge Signature

Date

*[Handwritten Signature]*  
*11/6/2018*

2018 NOV - 6 A 9:03  
CLERK OF COURTS  
CUYAHOGA COUNTY

**FILED**

HEAR  
11/05/2018

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO	)	CASE NO. CR 18 629347 A
	)	
Plaintiff,	)	JUDGE JOHN P. O'DONNELL
	)	
vs.	)	<u>JUDGMENT ENTRY DENYING</u>
	)	<u>THE DEFENDANT'S MOTION TO</u>
ANDRE PARKER	)	<u>WITHDRAW HIS GUILTY PLEAS</u>
	)	
Defendant.	)	

*John P. O'Donnell, J.:*

*The indictment, pretrial proceedings and guilty pleas*

Andre Parker faces a six-count indictment arising from the April 22, 2018, aggravated robbery and felonious assault of Rashad Reed. The other charges in the indictment, all stemming from the same events on April 22, include the aggravated robbery of Leon Meredith, the robbery of Reed and Meredith, and having a weapon under disability. Codefendant Lee Hunter is charged in all of the same counts except having a weapon under disability. All counts except for the weapon under disability charge include three firearm specifications, a notice of prior conviction and a repeat violent offender specification. Among the firearm specifications is a 54-month specification under section 2941.145(D) of the Ohio Revised Code alleging that Parker used a firearm to commit the crimes alleged here when he had a prior firearm specification conviction from 2008.

Based on comments made by the prosecutor and defense counsel at hearings in the case, the facts supporting these charges can be summarized by saying that Parker and Hunter stole, at the point of a gun, Reed's 2007 Lincoln MKX at 7318 Superior Avenue in Cleveland.

Parker was indicted on June 7, 2018, and pled not guilty at an arraignment five days later. He retained Mark Mariotti, Esq. as his counsel and a first pretrial conference was held on June 19. At that conference a trial was set for August 29, 2018. In the meantime, and according to the court's docket, Parker demanded discovery pursuant to Rule 16(B) of the Ohio Rules of Criminal Procedure. The prosecutor produced written discovery to Parker on July 5, August 6, August 16 and August 28. The parties agree that the prosecutor produced to Mariotti in discovery a digital video disc containing recordings recovered from the video surveillance system of a Sunoco gas station at the scene of the crime.

The case was called for a trial as scheduled on August 29. All counsel and Parker were present – and a panel of prospective jurors was in the jury room – and the lawyers were asked whether a plea bargain was possible. Defense counsel informed the court that Parker was considering the possibility of assisting the prosecution of codefendant Hunter in exchange for a favorable plea bargain but that the trial would have to be continued for that to happen. The prosecutor, Jonathan Block, notified the court that a plea bargain not contingent upon Parker's assistance in the prosecution of Hunter had been offered but that, as far as Block understood, Parker was not of a mind to accept the offer.

Mariotti's suggestion that the trial be continued to allow time for Parker's cooperation with the prosecution to bear fruit was denied insofar as it may have constituted a motion for a continuance and the prosecutor then described the proposed plea bargain on the oral record in the

defendant's presence. I asked Parker if he was interested in a plea bargain and he said no. At that point, the following exchange occurred:

**The Court** (to the prosecutor): What if Mr. Parker agreed to plead guilty to the plea bargain you just proposed – count one as amended, six as charged – today, and then sometime between now and sentencing, let's say within four to six weeks, he led you to Hunter and then prior to sentencing he moved to vacate the plea in favor of a better plea bargain? Is that a motion you would be likely to join in?

**Mr. Block:** Your Honor, given his participation, truthful statements, and leading to the apprehension of the codefendant, I think the State would then be prepared to join in on that motion to renegotiate the potential plea deal.<sup>1</sup>

I then turned to Mariotti and asked whether Parker might consider proceeding in that fashion, i.e. accepting the current plea bargain but allowing for the possibility that the bargain could get better if he cooperated against Hunter, with measurable results, before sentencing. Parker and Mariotti then met privately and after that meeting, upon returning to the oral record in open court, Parker indicated he was interested in the plea bargain. A thorough Criminal Rule 11 colloquy was undertaken and Parker ultimately pleaded guilty to aggravated robbery with a single one-year firearm specification as charged in count one and having a weapon under disability as charged in six. All other counts and specifications were dismissed.

*The motions to withdraw the pleas*

On September 29, 2018, additional counsel Michael J. Cheselka, Jr., Esq. filed a notice of appearance for Parker and a motion to withdraw the guilty pleas. Mariotti filed a second motion

---

<sup>1</sup> Change of plea hearing transcript, page 18, line 19 through page 19, line 9.

to withdraw the guilty pleas, captioned as a motion to vacate plea, on October 1. Mariotti thereafter withdrew as counsel and a hearing on the motions to withdraw, construed together as a single motion, was held October 31.

Parker claims that his guilty pleas were not knowing and voluntary for essentially three reasons: first, ineffective assistance of counsel; second, the plea was too complicated to understand; and third, actual innocence.

### *Law*

A defendant who enters a guilty plea simultaneously waives several constitutional rights; for this waiver to be valid under the due process clause, it must be an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

To avoid violating a defendant's due process right, Criminal Rule 11(C)(2) prohibits a trial court from accepting a felony defendant's guilty plea until after personally addressing the defendant and 1) determining that the plea is made voluntarily with full understanding of the charges and the maximum penalty, 2) advising the defendant that a guilty plea is effectively an admission of the crime charged and 3) informing the defendant of the constitutional rights the defendant is waiving by pleading guilty. Moreover, the court must be persuaded that the defendant understands the advisements. The purpose of Criminal Rule 11 is to ensure that the defendant entering a plea of guilty does so knowingly, with the understanding that he is waiving his critical constitutional rights. *State v. Lane*, 8<sup>th</sup> Dist. Cuyahoga Co. No. 37066, 1978 Ohio App. LEXIS 9944, \*2-3 (March 16, 1978).

Motions to withdraw a guilty plea are allowed pursuant to Criminal Rule 32.1. The text of the rule does not set forth a particular standard a defendant must meet in order to justify granting a motion made, like Parker's, before sentencing. But the absence of an exact test for the sufficiency of a motion to withdraw a guilty plea does not mean that it will be granted automatically. *State v. Lambros*, 44 Ohio App. 3d 102, 103 (8<sup>th</sup> Dist. 1988). Instead, a ruling on the motion is left to the trial court's discretion. *Id.* And while it is true that the Ohio Supreme Court, in *State v. Xie*, 62 Ohio St. 3d 521 (1992), at 527, acknowledged that a presentence motion to withdraw a guilty plea should be freely and liberally granted, the decision in *Xie* also said that "it must be recognized that a defendant does not have an absolute right to withdraw a plea prior to sentencing." *Id.* Therefore, the purpose of the hearing on the motion is to permit a determination by the trial court of "whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Id.*

#### *Analysis*

At the outset, it has to be made clear that the evidence supporting Parker's assertions in favor of the motion is scant. The only evidence he proffered at the hearing is a copy of the DVD with the surveillance video produced by the prosecutor in discovery. My attempt to see the video using the computer on the courtroom bench was futile, an observation that inferentially supports a claim that Parker's lawyer never even looked at the video before recommending the plea bargain. Such an argument, however, is completely undercut by Mariotti's admission at the plea hearing that in spite of some initial difficulty accessing the video he "was able to view it and tell [Parker] fully what was in that video."<sup>2</sup> The only other record facts of evidentiary quality are the parties' stipulations that Parker, just after the plea hearing, gave the prosecutor an address for Hunter that

---

<sup>2</sup> Hearing transcript, p. 11, l. 1-2.

appeared to be correct (although Hunter was not there when the police got to the house) and that Parker, with counsel present, refused on September 28 to give the police a statement implicating Hunter in the April 22 crimes.

Otherwise, every reason Parker gives as the “reasonable and legitimate basis”<sup>3</sup> justifying the withdrawal of his guilty pleas is a mere assertion without evidence. These reasons include his claims that: his lawyer never showed or described the surveillance video to him; the plea bargain was too complicated for him to understand; his lawyer told him he had no choice but to enter into the plea bargain; he thought the plea was contingent on cooperating with the state against Hunter; and he “remains confused”<sup>4</sup> about the plea bargain. And even if I were inclined to accept the assertions as true for the purpose of deciding the motion, the patently untrue claims in the motion – that defense counsel never demanded discovery; that no pretrials were held; that Parker was unable to get a transcript of the plea colloquy<sup>5</sup> – are enough to defeat such an inclination.

Moreover, the record of the plea colloquy does not buttress Parker’s claims. As noted above, Mariotti mentioned during the plea hearing that he had seen the surveillance video and discussed it with Parker. Later, Parker was asked if he was “satisfied with the effort put forth on your case by” Mariotti and he answered yes. These moments offered Parker an opportunity to speak up and inform the court that his attorney had never shown him the vital evidence and that he was unwilling to proceed without actually seeing the video. Yet he did not say then what he is saying now. As to the lack of choices except the guilty plea, the presumption of Parker’s innocence

---

<sup>3</sup> *Xie.*, supra.

<sup>4</sup> September 29 motion to withdraw guilty pleas, second page. (The pages are not numbered.)

<sup>5</sup> *Id.*, first and second pages. See also the court’s docket: June 26, 2018, filing by the prosecutor acknowledging the defendant’s counsel’s Criminal Rule 16 discovery demand and the June 19 judgment entry re: a pretrial conference held that date. As for the transcript of the plea hearing, there is no evidence that Parker requested it before filing his motion to withdraw and it was nevertheless provided to his counsel by email on October 25.

was not merely acknowledged during the hearing, it was emphasized, and he was asked directly whether he preferred a trial or the plea bargain. He was also well aware that prospective jurors were present and waiting to be brought into the courtroom.

This leaves his claim that the plea bargain was contingent, complicated and confusing. When the parties came to court on the morning of trial there was a simple plea bargain offer pending: plead guilty to count one with a single one-year firearm specification and to count six as charged and everything else would be dropped. Parker countered that offer with a proposal that he cooperate with the prosecution – “turn state’s evidence” as it is occasionally called – in exchange for a more favorable plea bargain of uncertain detail. Parker’s counteroffer, however, required the court’s involvement in the form of a trial continuance of unknown duration so that he could provide the information he claimed to have and then the prosecutor and police could investigate the usefulness of that information, after which the better deal would be negotiated. When the continuance was denied, Parker’s two options were clear and uncomplicated, albeit grave: a trial on the indictment or the guilty pleas to an amended count one and count six.

It was at that point that I wondered aloud to the prosecutor whether, in essence, post-plea but presentence cooperation with law enforcement might result in a better plea bargain. This is the complication that Parker now claims confused him. Still, two things were ultimately unmistakably clear: that the change of plea entered on the day of trial was not contingent and that there was no guarantee that a presentence motion to withdraw the guilty pleas would be granted, even if the motion was premised on post-plea cooperation by Parker and joined by the prosecutor. At various points during the plea hearing, after the possibility of post-plea cooperation with the prosecutor was mentioned, Parker was told:



[The plea is] with the possibility but not the guarantee that between now and sentencing you might be allowed to withdraw your plea and enter a new plea bargain;<sup>6</sup>

You should consider that if you plead guilty as proposed today you will be going to prison for a minimum of four years;<sup>7</sup> and

I cannot guarantee you that such a motion [to withdraw today's pleas in favor of a better plea bargain] will be granted.<sup>8</sup>

So, while it is true that the possibility of, and discussion about, an escape hatch from the plea bargain was unusual it was nevertheless explicit that the guilty pleas would have full effect unless Parker productively cooperated with the prosecution *and* successfully moved, on the basis of the cooperation, to vacate the plea bargain. The pending motion to vacate does not fit that description.

It is finally worth noting that this is not the first time Parker has participated in a change of plea colloquy<sup>9</sup> and that he did agree during the change of plea hearing to ask for a clarification if something was said that he didn't understand.<sup>10</sup> He also had the opportunity to discuss the plea bargain privately with his lawyer after the prospect of post-plea cooperation was raised.

---

<sup>6</sup> Hearing transcript, p. 22, l. 4-9.

<sup>7</sup> *Id.*, p. 35, l. 4-7.

<sup>8</sup> *Id.*, p. 36, l. 24-25.

<sup>9</sup> *Id.*, p. 23, l. 3-4.

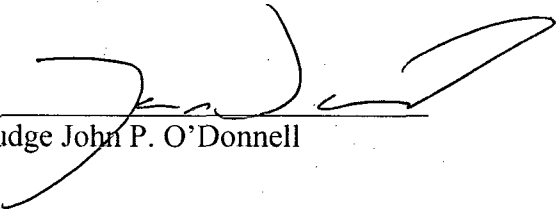
<sup>10</sup> *Id.*, p. 24, l. 9-13.

**Conclusion**

For the reasons given here, the defendant has failed to provide a reasonable and legitimate basis for his August 29, 2018, guilty pleas to be vacated and his motion is denied.

A sentencing date will be scheduled by a separate judgment entry.

**IT IS SO ORDERED:**

  
\_\_\_\_\_  
Judge John P. O'Donnell

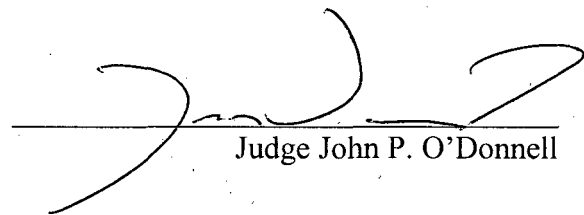
November 6, 2018  
Date

**SERVICE**

A copy of this judgment entry was emailed to the following on November 6, 2018:

Jonathan J. Block, Esq.  
[jblock@prosecutor.cuyahogacounty.us](mailto:jblock@prosecutor.cuyahogacounty.us)  
*Attorneys for the plaintiff State of Ohio*

Michael J. Cheselka, Jr., Esq.  
[Michael@mcheselka.org](mailto:Michael@mcheselka.org)  
Mark Mariotti, Esq.  
[mmariotti@hotmail.com](mailto:mmariotti@hotmail.com)  
*Attorneys for defendant Andre Parker*

  
\_\_\_\_\_  
Judge John P. O'Donnell