Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-305

OCTOBER TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
Robert Bushey	}	
	}	DOCKET NOS. 3960-7-04, 3961-7-04 & 3962-7-04 CnCr

Trial Judge: Michael S. Kupersmith

In the above-entitled cause, the Clerk will enter:

Defendant Robert Bushey appeals from a judgment of conviction, based on a jury verdict, of burglary, aggravated operation of a motor vehicle without the owner=s consent, and operation without consent. He contends that the trial court: (1) erroneously denied his right to counsel when entertaining and granting his pro se motion to withdraw his plea; and (2) improperly permitted the jury to pose an allegedly irrelevant and prejudicial question. We affirm.

The charges arose from a series of incidents that occurred on June 14, 2004 in the city of Burlington. At approximately 5:15 p.m., Jennaway Pearson reported to the police that her white Pontiac Sunfire with Connecticut license plates had been stolen from a Mobil gas station on South Winooski Avenue. Later that evening, the police discovered the vehicle in a lot and dusted it for prints, one of which, taken from near the driver=s door handle, matched defendant=s left thumbprint. While following the truck that was towing Ms. Pearson=s car to her residence, the investigating officer was flagged down by a woman named Donna Sdankus, who reported that a man had tried unsuccessfully to steal her truck from Cumberland Farms, and had the fled across the street. Ms. Sdankus and another patron provided a description of the man, and shortly thereafter police stopped defendant, who matched the description. Ms. Sdankus identified defendant in a police drive-by, and he was taken into custody.

Ms. Pearson later called the police to report that she had found a purse in her vehicle that did not belong to her. The police subsequently determined that it belonged to Megan Parrott, who lived in the same apartment building as defendant=s father. Defendant had been in Ms. Parrott=s apartment during the earlier part of the day in question and had left, but Ms. Parrott testified that she heard someone enter the apartment later that day while she was in the bathroom. She saw defendant walking away from the building toward a white car around 6:00 p.m. Two other witnesses, including defendant=s father, also saw defendant that day in a white vehicle with out-of-state plates.

The police theorized that defendant had stolen Ms. Pearson=s vehicle, driven it to Ms. Parrott=s apartment where he stole her purse and abandoned the vehicle, and subsequently attempted to steal Ms. Sdankus=s truck. He was charged with one count of burglary, one count of aggravated operation without the consent of the owner, and one count of operation without consent. In December 2004, following notice that the public defender had a conflict of interest, the court appointed attorney Harley Brown to represent defendant. In February 2005, while represented by attorney Brown, defendant entered into a plea agreement under which he agreed to plead guilty to the amended charge of petit larceny and two misdemeanor charges of operating a motor vehicle without the owner=s consent. In return, the State agreed to argue for a sentence of no more than

eighteen months to five years to serve. The court accepted the plea, ordered a PSI, and set the matter for sentencing.

Several weeks later, however, defendant filed a notice of pro se appearance and a motion to waive counsel and withdraw his guilty plea. In a supporting affidavit, defendant stated that he had Aencouraged@ counsel to seek a trial and that counsel had Aavoided this endeavor@ and failed to consult with defendant. The court held a hearing on the motions in late March 2005. Defendant and attorney Brown were both present. In response to questioning by the court, defendant indicated that he wanted to represent himself because he had been pressured into accepting the plea agreement. Defendant further indicated that he understood that, if the withdrawal motion was granted, the felony charges would be reinstated and he would face a maximum sentence of twenty-two years. After a number of further warnings from the court about the risks of self-representation, the court granted the motion to withdraw the guilty plea, but denied the motion to appear pro se. The court indicated that defendant would continue to be represented by attorney Brown, and defendant responded Athat=s fine with me.@ The case proceeded to trial in May 2005. The jury returned a verdict of guilty on all counts, and defendant was later sentenced to an aggregate term of three to fifteen years. This appeal followed.

Defendant first contends the court violated his statutory and constitutional right to counsel when, without having granted the motion to waive counsel, it nevertheless granted the motion to withdraw the plea without consulting counsel or ensuring that defendant had done so. Defendant notes correctly that defense counsel has a duty not only to communicate the terms of any plea offer but also to advise about its merits compared to the chances of success at trial. State v. Bristol, 159 Vt. 334, 338 (1992). What defendant overlooks here is that his attorney had plainly rendered such advise in counseling defendant to accept the State=s offer to reduce the charges and argue for a reduced sentence, and defendant had initially accepted this advice by entering into the plea agreement. It is the defendant who ultimately controls the decision on how to plead, however, and he was thus entitled to seek to withdraw his plea here on the ground that he was improperly pressured to accept it. See In Trombly, 160 Vt. 215, 218 (1993) (decisions as to whether to testify and how to plead are made by the defendant).

Under the circumstances, we are hard pressed to fault the court for not Ainvolving counsel when addressing the [withdrawal] motion,@ as urged by defendant, when counsel=s view of the plea agreement and advice were obvious from his prior actions, and defendant=s motion was based on a claim of undue pressure and improper preparation by counsel. In addition, we note that counsel was present at the hearing and available to render further advice to defendant on his decision to withdraw the plea, had defendant so desired. Indeed, nothing in the record before us shows that such a consultation did not occur. Furthermore, the record shows that the court carefully inquired as to defendant=s reasons for seeking to withdraw his plea, and ensured that defendant understood the consequences of doing so. Accordingly, even if the court erred in some respect in failing to ensure that counsel had been consulted, we are satisfied that defendant=s decision was knowing and voluntary. See State v. Mears, 170 Vt. 336, 343-44 (2000) (finding that record was adequate to show a knowing and intelligent withdrawal of plea where court personally addressed defendant to ascertain the reasons for changing his plea to not guiltyChe claimed to have felt Apressured@Cand ensured that he understood the consequences of withdrawal). Accordingly, we discern no basis to disturb the judgment.

Defendant further contends the court erred by overruling an objection on relevance grounds and allowing a jury question to Ms. Pearson inquiring as what had been stolen from her car. She testified, in response, that she assumed a number of items had been taken because they were missing and had never been found, including a passport, a checkbook, some CD=s, her keys, and about $60 in cash. Although the court found the evidence to be relevant to the question of whether Ms. Pearson had consented to the use of her car, defendant contests the finding on the ground that Ms. Pearson=s lack of consent was undisputed, the only issue being the identity of the person who took the vehicle. We need not resolve the issue, however, for it is apparent that any possible error was entirely harmless beyond a reasonable doubt. Ms. Pearson had previously testified without objection that, when the police returned her car, she noticed that some of her personal items were missing. The information provided in response to the jury question added nothing of substance, and provides no support to defendant=s claim that he was prejudiced by the improper question. See State v. Sweeney, 2005 VT 11, & 14, 178 Vt. 1 (finding erroneous admission of evidence to be harmless where it was cumulative of testimony previously admitted without objection).

Affirmed.

BY THE COURT:

_____

Paul L. Reiber, Chief Justice

_____

John A. Dooley, Associate Justice

_____

Marilyn S. Skoglund, Associate Justice