NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1624

STATE OF LOUISIANA

VERSUS

KENNETH PERRY

Judgment Rendered: FEB 1 4 2007

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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 01-06-0708, Section VIII

Honorable Wilson Fields, Judge Presiding

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Doug Moreau
District Attorney
Kory T. Tauzin
Assistant District Attorney
Baton Rouge, LA

Counsel for Appellee
State of Louisiana

Prentice L. White
Baton Rouge, LA

Counsel for Defendant/Appellant
Kenneth Perry

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

HUGHES, J.

Defendant, Kenneth Perry, was charged by bill of information with one count of second degree battery (count I), a violation of LSA-R.S. 14:34.1, and one count of unauthorized entry of an inhabited dwelling (count II), a violation of LSA-R.S. 14:62.3. He initially pled not guilty on both counts. In exchange for the dismissal of count II (the unauthorized entry), he pled guilty to count I (the second degree battery). On count I, he was sentenced to three years at hard labor. Thereafter, he moved to withdraw his guilty plea on count I, but the motion was denied. He now appeals, designating one assignment of error. We affirm the conviction and sentence on count I.

ASSIGNMENT OF ERROR

The defendant claims that the district court committed reversible error when it denied the defendant's motion to withdraw his guilty plea because the record obviously indicates that the defendant was unsure of what he was doing when he entered the guilty plea. Moreover, the defendant's plea was not given voluntarily since his attorney, although present, was virtually silent during this phase of the proceeding.

FACTS

Due to the defendant's guilty plea, there was no trial testimony concerning the facts in this matter. However, at the **Boykin** hearing, the State indicated count I arose out of the defendant's biting off the thumb or finger of a thirteen or fourteen-year-old child. The defendant claimed the child was his stepson and they had been fighting.

MOTION TO WITHDRAW GUILTY PLEA

In his sole assignment of error, the defendant argues he entered the plea agreement without the full benefit of counsel. He claims he pled guilty

because he wanted to conclude the case as quickly as possible, not because he understood the ramifications of the guilty plea.

Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969), requires that a trial court ascertain, before accepting a guilty plea, that the defendant has voluntarily and knowingly waived his right against self-incrimination, his right to a jury trial, and his right to confrontation. A guilty plea is a conviction and, therefore, should be afforded a great measure of finality. **State v. Ridgley**, 96-0680, p. 3 (La. App. 1 Cir. 2/20/98), 708 So.2d 793, 794, writ denied, 98-0759 (La. 7/2/98), 724 So.2d 206.

A trial court may permit the withdrawal of a guilty plea at any time before sentencing. LSA-C.Cr.P. art. 559(A). The court's decision is discretionary, subject to reversal only if that discretion is abused or arbitrarily exercised. Even after sentencing, if a trial court finds either that a plea of guilty was not entered freely and voluntarily or that the **Boykin** colloquy was inadequate, and that the plea, therefore, is constitutionally infirm, the trial court retains the authority to vacate the sentence and set aside the plea. **State v. Davis**, 588 So.2d 1234, 1237 (La. App. 1 Cir. 1991). However, a defendant may not withdraw a guilty plea simply because the sentence to be imposed is heavier than anticipated. It is not unreasonable for a trial court to deny a defendant the luxury of gambling on his sentence, then withdrawing his plea if and when he discovers, before imposition, the sentence is not to his liking. **State v. West**, 97-1638, p. 3 (La. App. 1 Cir. 5/15/98), 713 So.2d 693, 695.

On February 8, 2006, the defendant appeared at the **Boykin** hearing with counsel. Counsel advised the court that the defendant had advised him that the defendant wished to resolve the matter. The State indicated that if the defendant pled guilty to count I (the second degree battery), the State would

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dismiss count II (the unauthorized entry), but that the misdemeanor domestic battery charge would not be dismissed. The court advised the defendant that the State was willing to dismiss one felony charge in exchange for his pleading guilty to the other felony charge.

The court further advised the defendant that it could not release the defendant from custody without knowing something about his background, that a pre-sentence investigation (PSI) would be ordered, and that it would take approximately sixty days for the PSI to be returned to the court. Additionally, the court advised the defendant that he could stay in jail until the PSI was received or the matter could be set for trial.

The defendant asked the court to explain what "choices" were available to him. The court told the defendant that the defendant's case could be set for trial, and at that trial, the defendant would be presumed to be innocent, and "we'll see what the jury has to say about [the defendant's] case." The defendant indicated he wanted to go to trial.

The court advised the defendant that if he won at trial, he would go home, and if he lost at trial, the court would order a PSI into his background to assist in determining the appropriate sentence. The defendant asked "so either way, you would have to do the investigation?" and the court answered affirmatively. The defendant asked how long it would take to go to trial, and the court advised him that trial could be as early as the next week.

After conferring with his attorney, the defendant stated he wanted to plead to "that domestic abuse."[1] The court indicated there were two charges, the domestic abuse charge, a misdemeanor, and the second degree

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battery charge, a felony, and asked if the defendant wanted to plead to both charges. The defendant stated, "Yes, sir."

The court advised the defendant that the maximum sentence that he could receive on the second degree battery charge was five years at hard labor, and the maximum sentence that he could receive on the domestic abuse charge was parish jail for no more than six months. The defendant indicated he understood.

The court advised the defendant that by pleading guilty to the felony charge, the second degree battery, the defendant would be giving up his right to be tried by a jury or by a judge. The defendant indicated he understood. The court advised the defendant that by pleading guilty to the domestic abuse battery charge the defendant would be giving up his right to be tried by a judge. The defendant indicated he understood.

The court advised the defendant that in both cases the defendant would be giving up his right to appeal. The defendant indicated he understood. The court advised the defendant that in both cases the defendant would be giving up other constitutional rights, namely, his right to confront and cross-examine the witnesses who had accused him of the offenses, his right to compulsory process or to subpoena witnesses, and his privilege against self-incrimination by admitting the charges. The defendant indicated he understood.

Thereafter, in response to questioning by the court, the defendant indicated no one had forced, threatened, or intimidated him to plead guilty; and no one had promised him anything to make him plead guilty. He also indicated he was satisfied with how defense counsel had handled himself and how he had represented the defendant in the proceedings. Additionally, the defendant indicated he was pleading guilty to the charges because he was guilty of the charges.

When given an opportunity to tell the court anything about himself or about the case, the defendant reported that the attorney he had previously hired and paid to represent him had never shown up or appeared to represent him in this matter. The court advised the defendant to contact the bar association and request an investigation. The court then announced the defendant's guilty plea, ordered the defendant to serve six months in parish jail on the domestic abuse battery misdemeanor charge, and ordered a PSI with reference to the second degree battery felony charges.

On May 10, 2006, on count I, the second degree battery charge, the defendant was sentenced to three years at hard labor. On May 18, 2006, the defendant moved to withdraw his guilty plea to this charge. In his motion, the defendant claimed that the plea was made without a clear understanding of the punishment, that his court-appointed counsel never informed the defendant that he could be sentenced to five years in prison, and that he did not have knowledge of the charge. The motion was denied.

After a review of the record, we conclude that the trial court did not abuse or arbitrarily exercise its discretion in refusing to allow the defendant to withdraw his guilty plea. Contrary to the defendant's argument, the transcript of the **Boykin** hearing indicates the defendant pled guilty to count I with the benefit of counsel,[2] after being thoroughly advised of his rights, after the consequences of pleading guilty had been thoroughly explained to him, and after he had indicated he understood those consequences. The guilty plea to count I was entered freely and voluntarily and was constitutionally firm.

This assignment of error is without merit.

AFFIRMED.

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[2] The transcript indicates at least two instances where defendant and counsel conferred together during the proceeding.