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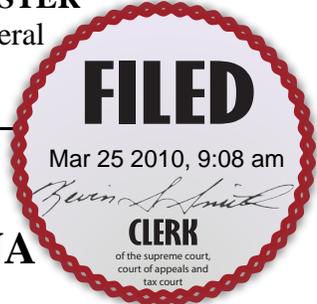
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**IN THE
COURT OF APPEALS OF INDIANA**

ANTHONY HERBERT LEE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A03-0908-CR-374

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0904-FC-40

March 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Anthony Herbert Lee appeals the trial court's denial of his motion to withdraw guilty plea. We affirm.

Issue

Did the trial court abuse its discretion when it denied Lee's motion to withdraw his guilty plea?

Facts and Procedural History

On April 1, 2009, Lee went to the apartment of his estranged wife, Felicia Lee, in Hammond, in violation of a no contact order which enjoined him from, among other things, going near Felicia's residence or place of employment. As Felicia entered her apartment, Lee approached her and attempted to take her purse. On April 3, 2009, the State charged Lee with class C felony criminal confinement, class D felony domestic battery, class A misdemeanor interference with the reporting of a crime, and class A misdemeanor invasion of privacy. On April 29, 2009, the State amended the information to add an allegation that Lee was a habitual offender. On May 21, 2009, the State further amended the information to add class D felony attempted theft.

On June 11, 2009, Lee and the State entered into a plea agreement. Lee agreed to plead guilty to class D felony attempted theft and habitual offender, and the State agreed to dismiss the other charges. The trial court took the plea under advisement pending review of the pre-sentence investigation report. On July 2, 2009, Lee sent a letter to the trial court expressing his desire to withdraw his guilty plea. At a July 9, 2009 hearing, the trial court

denied Lee's request to withdraw his guilty plea and sentenced Lee to thirty-six months for class D felony attempted theft and forty-two months for the habitual offender determination. The trial court ordered the sentences to run consecutively. Lee now appeals.

Discussion and Decision

Lee argues that the trial court erred in denying his motion to withdraw his guilty plea. Indiana Code Section 35-35-1-4(b) governs the withdrawal of guilty pleas prior to sentencing:

After entry of a plea of guilty, or guilty but mentally ill at the time of the crime, but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea. The motion to withdraw the plea of guilty or guilty but mentally ill at the time of the crime made under this subsection shall be in writing and verified. The motion shall state facts in support of the relief demanded, and the state may file counter-affidavits in opposition to the motion. The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea of guilty, or guilty but mentally ill at the time of the crime, whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

Lee was required to demonstrate (1) a fair and just reason for withdrawal of the guilty plea, and (2) no reliance by the State that resulted in substantial prejudice. *Davis v. State*, 770 N.E.2d 319, 327 (Ind. 2002). The State seems to concede that it suffered no substantial prejudice as a result of relying on Lee's guilty plea. The primary issue, then, is whether Lee showed the trial court a fair and just reason for withdrawing his plea.

At his plea hearing on June 11, 2009, Lee pled guilty to attempted theft as a class D felony and the habitual offender determination. In response to the court's questions, he

stated that he was doing so freely and voluntarily, that he was not under the influence of drugs or alcohol, and that he had not been coerced into pleading guilty. He expressed his understanding that by pleading guilty, he forfeited his right to a jury trial and his right to appeal his conviction. He agreed that no changes were necessary with regard to the stipulated factual basis he signed on that date. That document stated that Lee had attempted to take Felicia's purse, thus exerting unauthorized control over it with the intent to deprive Felicia of any part of its value or use. *See Appellant's App.* at 34. The trial court concluded that Lee's plea was "free and voluntarily made" and that there was a factual basis for it and took it under advisement. *Tr.* at 12.

One week before sentencing, Lee submitted a letter to the trial court asking to withdraw his guilty plea. In the letter, he stated that he was innocent and had been persuaded by his attorney to plead guilty because his attorney thought he was guilty. At the sentencing hearing, Lee again proclaimed his innocence. He conceded that at the guilty plea hearing, he had admitted the factual basis for the attempted theft charge, but he explained that while the factual basis was "pretty much okay[.]" he had taken the purse from Felicia only for the purpose of defending himself because she was hitting him with it. *Id.* at 25-26. He stated that when Felicia calmed down, he gave the purse back to her.

In denying Lee's motion to withdraw his guilty plea, the trial court stated, in pertinent part, as follows:

The Court, knowing that on June 11 when the Court took the defendant's plea of guilty, the Court spent a great deal of time on taking that Plea Agreement to make sure that that was, in fact, what Mr. Lee wanted to do. He in fact indicated that that is what he wanted to do and he admitted the facts in the

Stipulated Factual Basis, and even today, he doesn't necessarily dispute it, he appears to want to split factual hairs, which in this Court's view, would not carry the day at a trial.

Id. at 35.

An adequate factual basis for the acceptance of a guilty plea may be established in several ways, including by the defendant's admission of the truth of the allegations in the information read in court. *Madden v. State*, 697 N.E.2d 964, 967 (Ind. Ct. App. 1998), *trans. denied*. Even at the sentencing hearing, Lee did not deny that the stipulated facts were "pretty much okay." Tr. at 25. In our view, Lee failed to present a fair and just reason for withdrawing his plea; as the trial court observed, it appears that he simply changed his mind. At the very least, the trial court did not abuse its discretion in denying Lee's motion to withdraw his guilty plea.

Affirmed.¹

RILEY, J., and VAIDIK, J., concur.

¹ The State also argues that Lee's motion to withdraw was not verified as required by statute. Ind. Code § 35-35-1-4. The State did not raise this issue below, and thus it is waived for appeal. *But see Bunch v. State*, 778 N.E.2d 1285, 1289 (Ind. 2002) ("Because the waiver the State asserts is of the procedural default variety, it may be raised by an appellate court sua sponte.").