IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 11-20224-STA**
	)	
MAURICE MAXWELL,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE GUILTY PLEA

Before the Court is Defendant Maurice Maxwell's Motion to Set Aside Guilty Plea (D.E. # 33) filed on May 12, 2012. The United States filed a response in opposition (D.E. # 37) on June 21, 2012. The Court conducted a hearing on the Motion on June 26, 2012, and concluded the hearing on January 22, 2013. Both parties have filed post-hearing memoranda. For the reasons set forth below, Defendant's Motion is **DENIED**.

BACKGROUND

I. Procedural History

On July 28, 2011, the government filed a sealed criminal complaint against Defendant, in the matter of *United States v. Maurice Maxwell*, case number 11-20202-JTF ("no. 11-20202").[1] The sealed complaint alleged one count of making false statements to the FBI in violation 18 U.S.C. §

[1] Case no. 11-20202 was reassigned to United States District Judge John T. Fowlkes on August 3, 2012. The government's motion to unseal the case was granted at Defendant's initial appearance on August 2, 2011.

1001. The sealed complaint was supported by the affidavit of FBI Special Agent Jaime Wilson Corman ("Agent Corman").

On August 2, 2011, the government filed a criminal complaint against Defendant, in the matter of *United States v. Maurice Maxwell, a/k/a "Little D.C." a/k/a "Mo"*, case number 11-20205-STA ("no. 11-20205"). The complaint alleged one count of interstate transportation of a minor for purposes of prostitution and/or sexual activity in violation of 18 U.S.C. § 2423. The complaint was also supported by the affidavit of Agent Corman. The same day, August 2, 2011, Defendant had his initial appearance before the United States Magistrate Judge who appointed the Federal Public Defender to represent Defendant in the proceedings.

On August 23, 2011, Defendant pleaded guilty to an information in the matter of *United States v. Maurice Maxwell*, case number 11-20224-STA ("no. 11-20224"). The information charged Defendant with one count of recruiting, enticing, harboring, transporting, providing, and obtaining a minor for the purpose of gaining financial benefit with the knowledge that the minor would be caused to engage in a commercial sex act in violation of 18 U.S.C. § 1591(a)(1) & (2). At that time Defendant waived formal indictment and filed a written plea agreement in open court. Under the terms of the plea agreement in case no. 11-20224, the government agreed to dismiss the sealed criminal complaint in case no. 11-20202, charging Defendant with making a false statement to the FBI. The plea agreement was silent as to the complaint in case no. 11-20205, charging Defendant with interstate transportation of a minor for prostitution. On August 30, 2011, the Court entered an order on the guilty plea (D.E. # 5) and set sentencing for January 21, 2012.

The United States Probation Office prepared a presentence report ("PSR"), and on January 3, 2012, the government filed its position paper on the PSR (D.E. # 8). On January 4, 2012, the First

Assistant Federal Defender Doris Randle-Holt ("Ms. Randle-Holt") filed a motion to withdraw as counsel for Defendant (D.E. # 9), asserting that a conflict had arisen between counsel and her client. The United States Magistrate Judge granted counsel's motion to withdraw on January 12, 2012, and appointed Defendant replacement counsel pursuant to the Criminal Justice Act ("CJA"). Thereafter, the Court granted Defendant three continuances of the sentencing hearing and finally set the matter for April 4, 2012 (D.E. # 24).

Defendant initially filed *pro se* motions to withdraw his plea on April 2, 2012 (D.E. # 26) and April 4, 2012 (D.E. # 29). Defendant filed identical *pro se* motions (D.E. # 16, 17) in case no. 11-20202 and in case no. 11-20205 on the same dates. At the April 4, 2012 hearing, the Court denied Defendant's *pro se* motions to withdraw filed in both case no. 11-20224 and case no. 11-20205 on April 2, 2012.[2] The Court went on to deny counsel for Defendant's oral motion to withdraw the guilty plea but granted counsel's motion to continue the sentencing. In the course of the proceedings, Defendant persisted in his attempts to speak when told by the court not to do so and was subsequently removed from the courtroom.

On May 12, 2012, Defendant filed the Motion now before the Court, and the Court set a

[2] Defendant's April 4, 2012 *pro se* motions (D.E. # 29, no. 11-20224; D.E. # 17, no. 11-20205) are likewise denied. Local Rule 83.1(d) states that "[a] party represented by counsel who has appeared in a case may not act on his or her own behalf unless that party's attorney has obtained leave of the court to withdraw as counsel of record, provided that the court may, in its discretion, hear a party in open court, notwithstanding the fact that the party is currently represented by counsel of record." Local R. 83.1(d). Because Defendant was represented at the time he filed his *pro se* motions and continues to be represented by counsel, his *pro se* motions are not properly before the Court. Furthermore, the Court finds that Defendant has had a full and fair opportunity to raise all of the issues relevant to his Motion to Set Aside Guilty Plea in the briefing prepared by appointed counsel. Therefore, Defendant's *pro se* motions are **DENIED**. The Court further notes that the same *pro se* motions in case no. 11-20202 remain pending in that matter.

motion hearing for June 26, 2012. At the hearing Defendant made an oral motion for a mental evaluation and requested that the Court hold his Motion to Set Aside Guilty Plea in abeyance. The government stated that it was unopposed to the motion for a mental evaluation. The Court directed counsel for Defendant to file a written motion within thirty days of the hearing. The Court proceeded with the motion hearing and received testimony from Ms. Randle-Holt about her representation of Defendant. Defendant also made his *pro* se motion to withdraw plea and affidavit in support filed on April 4, 2012, in case no. 11-20202, an exhibit to the hearing. Then on June 29, 2012, Defendant filed his motion for mental evaluation (D.E. # 38), which the Court granted (D.E. # 41) on July 5, 2012.

On January 22, 2013, the Court reconvened the hearing on Defendant's Motion to Set Aside Guilty Plea and heard testimony from Defendant himself. The government also introduced the following exhibits at the hearing: FBI Form FD-302 documenting Agent Corman's interview with Defendant and Ms. Randle-Holt on August 4, 2011 (ex. 1), FBI Form FD-302 documenting Special Agent Philip Neilson's interview with Defendant on July 31, 2011, in Tupelo, Mississippi (ex. 2), and a transcript of Defendant's recorded statement given to investigators from the Las Vegas Metropolitan Police Department on August 9, 2011, in Memphis, Tennessee (ex. 3). At the conclusion of the hearing, the Court granted the parties an opportunity to file additional briefs. Defendant filed his post-hearing memorandum (D.E. # 50) on February 24, 2013, and the United States filed its brief on March 11, 2013.[3] Defendant's Motion to Set Aside Guilty Plea is now ripe for determination.

[3] The government actually filed its brief (D.E. # 20) in case no. 11-20205, and not in no. 11-20224.

II. Motion to Set Aside Guilty Plea

In his opening brief, Defendant argues that the Court should grant him leave to withdraw his guilty plea as to the charge in case no. 11-20224. Defendant asserts that at the outset of the proceedings, Ms. Randle-Holt never explained to him the difference between the criminal complaint against him in case no. 11-20202 and the charge in the information to which he pleaded guilty in case no. 11-20224.[4] Defendant claims that Ms. Randle-Holt failed to provide him with any discovery for either case or advise him about a possible sentence for the § 1591 offense. Defendant argues that Ms. Randle-Holt failed to compile a record of any plea negotiations on Defendant's behalf in this case, an omission that falls short of the standard announced in *Frye v. Missouri*. Defendant also argues that Ms. Randle-Holt promised him that he would be able to return to his home in California for medical treatment if he entered a guilty plea.[5] According to Defendant, he realized that he would not be allowed to go back to California only in January 2012 when he received the PSR and understood for the first time the substantial sentence he could face. Defendant argues then that the Court should measure the length of the delay between his plea and his desire to withdraw the plea from January 3, 2012, the date on which Defendant instructed Ms. Randle-Holt to file a motion to withdraw the plea. Defendant further maintains his innocence of the charge, alleging that he

[4] The Court notes that Defendant's brief includes the following disclaimer: "The present counsel for Defendant would submit that while the above dates [concerning the procedural history of the case] are extrapolated from the docket entries of this Court, the facts below [concerning events surrounding Defendant's guilty plea] is [sic] based on what the Defendant told his present counsel and does not necessarily reflect counsel's views on what the facts may be." Def.'s Mot. to Set Aside Guilty Plea 2 (D.E. # 33).

[5] Defendant later testified during the evidentiary hearing that Ms. Randle-Holt did not promise that he would go home for medical treatment but that he would go home if he cooperated with the government in its investigation of a person named Donovan Mayfield. Evid. Hr'g Tr. 25:24-26:12, Jan. 23, 2013 (D.E. # 47).

believed the victim to be an adult. Defendant claims that he has had limited exposure to the criminal justice system. Finally, Defendant believes that because there is only one victim in this case, the government cannot show how withdrawal would prejudice the prosecution. Therefore, Defendant contends that all of the *Bashara* factors favor permitting Defendant to withdraw his plea.

In response to Defendant's opening brief, the government argues that Defendant has fabricated his claims about deficiencies in Ms. Randle-Holt's performance. The government asserts that Defendant's decision to withdraw his plea coincides with Defendant's first look at the PSR and suggests that Defendant simply has a case of buyer's remorse. The United States submits that the length of delay in this case alone, a matter of four months, is sufficient grounds for denial of Defendant's Motion. The government responds that Defendant's other claims about his lack of understanding of the proceedings against him are simply false. The government cites for support Defendant's responses during the plea colloquy, indicating that Defendant appreciated the charges against him, comprehended the dismissal of the charge in case no. 11-20202 and the waiver of his right to an indictment, the recitation of the facts in the case, and Defendant's admission to the charge in the information. As for Defendant's claim of innocence, the government states that Defendant confessed to FBI agents that he knew the victim was a minor. Moreover, the government contends that it need not prove that Defendant knew the victim to be in fact a minor, only that Defendant had the reasonable opportunity to observe that the victim was a minor. The United States further argues that allowing Defendant to withdraw his plea will prejudice the government. Following Defendant's guilty plea, the prosecution released the victim to foster care services in the state of California. According to the United States, the victim is a "chronic runaway," and the government has no information about whether the victim would be available to testify at trial. The government argues

that Defendant has failed to carry his burden.

In his post-hearing brief, Defendant emphasizes that he received ineffective assistance of counsel leading up to this plea of guilty. Defendant argues that he pleaded guilty to the information only 18 days after the Magistrate Judge appointed counsel for him in case nos. 11-20202 and 11-20205. Defendant claims that counsel never explained the interstate element of the offense to him and that the government did not address the element in the plea colloquy. At the evidentiary hearing, Defendant testified that Ms. Randle-Holt never produced any discovery, never discussed possible defenses, and never advised him of his right to a probable cause hearing. Concerning his understanding of the proceedings at the plea hearing, Defendant believed that he was pleading guilty to the false information charge in case no. 11-20202, and not the sex trafficking charge in case no. 11-20224. Defendant testified that he did not see the plea agreement until he arrived at court for the plea hearing and that he never actually read the agreement. Defendant maintains that Ms. Randle-Holt never reviewed the sentencing guidelines with him and never discussed his possible sentence. In his post-hearing brief, Defendant also argues that Ms. Randle-Holt never explained the sentencing enhancements applicable to his case. Defendant goes on to assert that the Court did not adequately assess Defendant's competence at the time of the plea hearing. Defendant informed the Court during the colloquy that he had taken oxycodone for pain in the past (but was no longer taking it) and had taken ibuprofen the day before the hearing. Defendant complained to the Court that his back was hurting at the time of the hearing. Defendant also continues to claim that he has had limited exposure to the criminal justice system and that withdrawal of his plea will not prejudice the government.

The government has filed a post-hearing brief in opposition in which the government reviews

the factual record submitted during the hearings. The record shows that Defendant admitted his guilt. According to the United States, Defendant confessed to FBI Special Agent Philip Neilson in July 2011. Defendant admitted that he had traveled with the minor victim from California to Tupelo, Mississippi. Defendant admitted that he had prostituted the minor in Tennessee and had received information that victim was in fact a minor. Ms. Randle-Holt testified that soon after she was appointed to represent Defendant, Defendant immediately stated his intention to plead guilty and cooperate with the government. Ms. Randle-Holt counseled Defendant to wait until he saw the government's evidence against him before he decided to change his plea. As discussed more fully below, Defendant also admitted his guilt to the Court during the plea colloquy.

Second, the United States stresses that time was of the essence in this case because Defendant's cooperation was needed to assist authorities in Nevada where Defendant could possibly testify in a case pending there. As a result, the government communicated its willingness to make a 5K1.1 motion on Defendant's behalf but only if he could offer assistance right away. To expedite the process, the government provided discovery to Ms. Randle-Holt in fairly short order and even permitted her to interview the minor victim. Ms. Randle-Holt testified that the minor appeared to be very young. More importantly, the minor corroborated the details of Defendant's own confession to the FBI, including Defendant's knowledge of the victim's age and his activities to prostitute the victim. Based on this interview, Ms. Randle-Holt concluded that the victim would be a credible trial witness.

Third, the record establishes that Ms. Randle-Holt properly represented Defendant at all times. Following her interview with the victim, Ms. Randle-Holt provided Defendant with all of the discovery in the case and advised him on the relevant sentencing guidelines and enhancements. Ms.

Randle-Holt also discussed the possibility of making his proffer on the record as the government considered the likelihood of a future 5K1.1 motion. Defendant decided to make the proffer. At the proffer session, Ms. Randle-Holt again advised Defendant that he did not have to make a statement. Ms. Randle-Holt and AUSA Stephen Parker reviewed the sentencing guideline ranges for Defendant's offense by using the sentencing guidelines manual to give Defendant a complete explanation of his options. Counsel further advised Defendant that this proffer was on the record and could be used against him and that he had no immunity or agreement from the government that the statement would not be used. Having been advised of his options, Defendant agreed to proceed with his proffer and made a full confession. After the proffer session, the government prepared the plea agreement and a hearing was initially set for August 9, 2011. Ms. Randle-Holt expressed concerns about the speed of the case and requested a continuance. The Court continued the change of plea hearing to August 23, 2011. Ms. Randle-Holt testified that having receive the continuance, she traveled to the facility where Defendant was being housed in Mason, Tennessee, and met with Defendant to go over the plea agreement and the applicable sentencing guidelines. Ms. Randle-Holt explained to Defendant that he had a sentencing guidelines range of 360 months to life. At the evidentiary hearing, Ms. Randle-Holt denied that she ever threatened Defendant or his grandmother.

Fourth, Defendant entered the guilty plea after a full hearing and plea colloquy before the Court. The Court explained all of Defendant's rights to him, including his right to an indictment. The Court reviewed with Defendant the potential penalties for his offense. Defendant responded that he understood his rights and the possible sentence he was facing. When the Court asked Defendant whether he had taken any medications prior to the hearing, Defendant indicated that he had taken only ibuprofen the two days before and fully understood the proceedings. The Court then gave

Defendant the original copy of the plea agreement, asked Defendant to authenticate his signature, and had the agreement read into the record. The United States explained that Defendant was pleading guilty to one count of 18 U.S.C. § 1591 and that the government agreed to dismiss the criminal complaint in case no. 11-20202. Defendant responded that the terms of the agreement as read were the terms to which he had agreed. Defendant stated in response to questions from the Court that Ms. Randle-Holt had reviewed the sentencing guidelines ranges with him and that he understood his waiver of any rights to appeal or file a § 2255 petition. The government went on to state for the record the factual basis for the § 1591 charge including proof that Defendant had prostituted the minor victim in California, Mississippi, and Tennessee, with the knowledge that she was a minor. When the Court asked if the facts set out by the government were substantially true, Defendant answered in the affirmative. The Court asked Defendant directly whether he had knowingly recruited, enticed, harbored, transported, provided, and obtained by any means the minor victim and benefitted financially from encouraging and enticing the minor to participate in commercial sex acts, and Defendant again responded in the affirmative.

Based on the record, the United States argues that the Court should deny the Motion to Set Aside Guilty Plea. The government stresses that Defendant's allegations are simply not credible. The Court must assess the credibility of Defendant against the credible testimony of Ms. Randle-Holt and the thorough plea colloquy conducted by the Court. The government argues that the *Bashara* factors all weigh against permitting Defendant to withdraw his guilty plea. Additionally, the United States contends that Defendant should not receive credit for acceptance of responsibility and that the Court should impose a two-level increase for obstruction of justice for perjury based on Defendant's false statements under oath to the Court during the evidentiary hearing. The United States requests

that the Court identify the specific statements that the Court finds to be false. For these reasons the government argues that the Court should deny Defendant's Motion.

STANDARD OF REVIEW

Under Federal Rule of Criminal Procedure 11(d)(2)(B), a district court may grant a motion to withdraw a guilty plea before sentencing if the defendant shows "a fair and just reason for requesting the withdrawal."[6] The purpose of the rule "is to allow a hastily entered plea made with unsure heart and confused mind to be undone."[7] The burden is on the defendant to present proper grounds for granting the motion.[8] "Fair and just reason is determined at the discretion of the district court, which should consider certain factors:

> (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 entry of 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."[9]

No one factor controls; the list is general and nonexclusive.[10] The relevance of each factor will vary according to the "circumstances surrounding the original entrance of the plea as well as the

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[6] Fed. R. Civ. P. 11(d)(2)(B).

[7] *United States v. Martin*, 668 F.3d 787, 794 (6th Cir. 2012) (citation omitted).

[8] *United States v. Fitzmorris*, 429 F. App'x 455, 458 (6th Cir. 2011) (citing *United States v. Bazzi*, 94 F.3d 1025, 1027 (6th Cir. 1996)).

[9] *Martin*, 668 F.3d at 794 (quoting *United States v. Bashara*, 27 F.3d 1174, 1181 (6th Cir. 1994)).

[10] *United States v. Haygood*, 549 F.3d 1049, 1052 (6th Cir. 2009).

motion to withdraw."[11]

ANALYSIS

As an initial matter, Defendant pleaded guilty to the charge in the information after a full plea colloquy. During the plea hearing, Defendant testified that he had reviewed his case with Ms. Randle-Holt,[12] that she had explained to his satisfaction the underlying facts of his case and the applicable law,[13] that she had explained his right to a trial,[14] and that he was satisfied with Ms. Randle-Holt's representation.[15] The Court carefully reviewed with Defendant the difference between an indictment and an information and then explained that Defendant had the right to seek an indictment from a grand jury.[16] Having satisfied itself that Defendant understood his right to an indictment, the Court accepted Defendant's signed waiver of indictment.[17] Defendant then listened to the government's recitation of the offense with which we was being charged. Defendant testified that he understood the offense and that Ms. Randle-Holt had discussed the charge with him fully and completely.[18] Defendant further testified that he understood the possible penalty for his offense was

[11] *Id.*

[12] Plea Hr'g Tr. 5:5-13 Aug. 23, 2011 (D.E. # 25).

[13] *Id.*

[14] *Id.*

[15] *Id.* at 5:15-17.

[16] *Id.* at 6:3-9:19.

[17] *Id.* at 9:20-11:6.

[18] *Id.* at 12:6-16.

no less than ten years and up to life in prison.[19] Defendant later stated to the Court that Ms. Randle-Holt had discussed the possible sentencing guidelines range with him and that he understood the information she had given to him.[20]

Defendant did inform the Court that he was experiencing pain in his back, neck, arm and that he had not received any ibuprofen for pain since the day before the plea hearing.[21] The Court asked Defendant whether the medication he had had the day before would in any way impair his ability to understand the change of plea proceedings, and he answered in the negative.[22] The Court further inquired about Defendant's pain level and asked whether the pain would interfere with his ability to understand the proceedings, and he again answered in the negative.[23] Defendant went on to testify that he understood the terms of his plea agreement including the potential 5K1.1 motion to be filed by the government.[24] Defendant testified that he had signed the plea agreement of his own free will and that no one had coerced or threatened him to sign it.[25] After the United States recited the evidence against Defendant, Defendant admitted that the facts were true and admitted that he had committed the sex trafficking offense.[26]

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[19] *Id.* at 13:1-15.

[20] *Id.* at 25:3-18.

[21] *Id.* at 17:13-25.

[22] *Id.* at 18:1-13.

[23] *Id.* at 18:17-22.

[24] *Id.* at 23:6-24:9.

[25] *Id.* at 27:19-28:7.

[26] *Id.* at 29:21-30:23.

Based on this record, it is clear that the Court exhaustively reviewed with Defendant his rights, the charges against him, the government's proof and the factual basis for the offense, the assistance he received from counsel in arriving at his decision to plead guilty, and his knowing decision to enter a guilty plea to the single count of sex trafficking in violation of 18 U.S.C. § 1591. The Sixth Circuit has held that "a defendant's statements at a plea hearing should be regarded as conclusive as to truth and accuracy in the absence of a believable, valid reason justifying a departure from the apparent truth of those statements."[27] Therefore, the Court holds at the outset of its analysis that Defendant's statements at the plea hearing are conclusive as to truth and accuracy. It is Defendant's burden then to establish a valid reason for disregarding the truth of his own statements to the Court and setting aside his guilty plea.

Defendant has not met this burden. Based on the testimony received at the two evidentiary hearings on Defendant's Motion,[28] the Court finds the testimony of Ms. Randle-Holt about her representation of Defendant to be credible and the testimony of Defendant about Ms. Randle-Holt's representation and the circumstances of his guilty plea to be not credible.[29] The Court further holds that none of the *Bashara* factors weighs in favor of allowing Defendant to withdraw his guilty plea. Under all of the circumstances then, Defendant's Motion must be denied.

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[27] *United States v. Owens*, 215 F. App'x 498, 502 (6th Cir. 2007) (citations and internal brackets omitted).

[28] *Martin*, 668 F.3d at 795 ("Although a defendant is not entitled to an evidentiary hearing or the withdrawal of her plea as a matter of right, the district court must take some steps to ensure that it has the information necessary to conduct a proper inquiry into the *Bashara* factors.") (citing *United States v. Woods,* 554 F.3d 611, 613 (6th Cir. 2009)).

[29] *United States v. York*, 405 F. App'x 943, 950 (6th Cir. 2010) (recognizing the district court's discretion to make credibility determinations on a motion to withdraw a guilty plea).

With respect to the first *Bashara* factor, the amount of time between Defendant's change of plea and his motion to withdraw weighs against him. "The shorter the delay, the more likely a motion to withdraw will be granted."[30] The change of plea hearing occurred on August 23, 2011. It appears that Defendant first informed Ms. Randle-Holt about his desire to withdraw the plea in early January 2012. Ms. Randle-Holt filed her motion to withdraw as counsel on January 4, 2012. Measuring the length of the delay from January 3, 2012, the Court finds that Defendant waited 133 days after his guilty to plea to raise the issue of withdrawing the plea with his attorney. The Sixth Circuit has affirmed denials of motions to withdraw in cases involving delays far shorter than the delay in the case at bar. For example, in *United States v. Valdez*, the Sixth Circuit held a seventy-five (75) day delay justified the denial of a motion to withdraw,[31] and in *United States v. Durham* the court noted that a seventy-seven (77) day delay was "the strongest factor supporting the district court's denial of [defendant's] . . . motion to withdraw."[32] As such, the Court finds that the first *Bashara* factor weighs strongly against Defendant.

The Court further finds that Defendant does not have a valid reason for his failure to move for withdrawal earlier in the proceedings. Defendant claims that after entering his guilty plea, he remained unaware that he had pleaded to the § 1591 charge in the information and that he wrongly believed that he had pleaded guilty to the charge of making a false statement to the FBI in case no. 11-20202. According to Defendant, he learned of the actual charge and the sentence he might receive only when he saw the PSR some months after his plea hearing. The Court finds this

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[30] *United States v. Baez,* 87 F.3d 805, 808 (6th Cir. 1996).

[31] *United States v. Valdez*, 362 F.3d 903, 912-13 (6th Cir. 2004).

[32] *United States v. Durham*, 178 F.3d 796, 798-99 (6th Cir. 1999).

testimony to be not credible. Ms. Randle-Holt testified that she went over the charge and the sentencing guidelines range for Defendant's offense with him more than one time prior to the change of plea hearing. At the plea colloquy, the Court went over the charges and thoroughly questioned Defendant about his understanding of the proceedings, his rights, and the conduct to which he was pleading guilty. Under the terms of the plea agreement, which Defendant signed and the United States read into the record in Defendant's presence at the plea hearing, the government agreed to dismiss the false statement charge in case no. 11-20202 in consideration of Defendant's guilty plea to the § 1591 charge in case no. 11-20224. In light of these facts, Defendant has not carried his burden to demonstrate a valid reason for waiting over 130 days to move to withdraw. Thus, the second *Bashara* factor weighs against allowing Defendant to withdraw his guilty plea.

Next, the Court finds that Defendant has not consistently maintained his innocence. The Supreme Court has held that a defendant's admission of guilty at a change of plea hearing carries a presumption of truth.[33] Moreover, "an appellant's transparent claim of innocence at the withdrawal hearing is not sufficient to overcome that presumption."[34] At the evidentiary hearing, Defendant clearly and unequivocally testified under oath that he did not prostitute the minor victim and that he believed her to be an adult. Even so, Defendant first raised his claim of actual innocence after he received the PSR and only in the most conclusory fashion. During his hearing testimony, Defendant

[33] *Blackledge v. Allison,* 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.").

[34] *United States v. Dumersier*, 19 F.3d 20 (6th Cir. 1994).

was simply asked whether he was innocent of the charge to which he responded "Yes."[35] Defendant went on to deny that he ever prostituted the minor victim or that he ever confessed to anybody that he did.[36] Defendant's testimony asserting his innocence is contradicted by his statements to FBI agents, recorded statements to Las Vegas Metropolitan Police detectives, and even the testimony of his own attorney. When a defendant enters a guilty plea but later tries to assert his innocence, the "weight given his present profession of innocence must be balanced in its historical context."[37] The Court simply finds Defendant to be not credible on this point. His "transparent claim of innocence" is insufficient to overcome his previous admission of guilt at the change of plea hearing. Therefore, the third *Bashara* factor clearly weighs against him.

The circumstances underlying Defendant's plea of guilty also weigh against his attempt to withdraw the plea. The Court recognizes that the very brief amount of time between Defendant's arrest and his guilty plea makes this case somewhat unusual. Defendant was taken into custody in Tupelo, Mississippi, and provided a statement on July 31, 2011. The criminal complaint was filed against Defendant in case no. 11-20205 on August 2, 2011, and Defendant pleaded guilty to the information in case no. 11-20224 on August 23, 2011. Nevertheless, the Court finds that Defendant's guilty plea "was a tactical decision, not the product of an 'unsure heart and confused mind.'"[38] It is undisputed that the case proceeded at this pace by consent of the parties in order to

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[35] Evid. Hr'g Tr. 30:7-9, Jan. 26, 2013 (D.E. # 47).

[36] *Id.* at 39:2-15.

[37] *United States v. Wilder*, 161 F. App'x 545, 549-50 (6th Cir. 2006) (quoting *United States v. Fofana,* 50 F. App'x 725, 729 (6th Cir. 2002)).

[38] *United States v. Mendoza-Almendarez*, 437 F. App'x 394, 399 (6th Cir. 2011 ("[T]the circumstances underlying the entry of Mendoza's guilty plea indicate that it was a tactical

obtain valuable cooperation from Defendant as to another criminal matter pending at that time in Nevada. His cooperation was apparently a significant aspect of his plea bargain with the United States. While it is clear that Defendant had only weeks and not months to contemplate his plea, the Court finds that Defendant had ample information about his charge and the possible consequences of his guilty plea. The record contains three different statements Defendant made to authorities prior to pleading guilty to the information. As already discussed, before the change of plea hearing, Ms. Randle-Holt reviewed with Defendant his charges, the discovery provided by the government, and the guidelines range sentence. At the plea hearing, the Court addressed the nature of the charge and the facts supporting the guilty plea with Defendant, and Defendant admitted his guilt to the charge. Defendant has not met his burden to show how these circumstances support his request to withdraw his plea.[39] As such, the fourth *Bashara* factor weighs against Defendant.

Likewise, Defendant's nature and background do not suggest grounds for setting aside his guilty plea. Defendant argues that the portion of the plea colloquy addressing Defendant's medication was insufficient to determine his competence. Defendant informed the Court that he was taking ibuprofen for back pain and that he had previously taken oxycodone. Defendant also informed the Court that he was experiencing some pain in his back, neck, and arm at the time of the plea hearing. However, the Court addressed Defendant's medication and pain level at some length during the hearing. Defendant stated under oath that his medication and physical pain had no effect

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decision, not the product of an 'unsure heart and confused mind.'").

[39] Defendant asserts that Ms. Randle-Holt threatened him and his grandmother and thereby coerced him into signing the plea agreement. The Court finds this accusation to be incredible and wholly unsupported. Therefore, Defendant has not shown that his guilty plea was the product of coercion. *Durham*, 178 F.3d at 799.

on his ability to understand the proceedings. Defendant was rational and lucid during the plea hearing and repeatedly stated to the Court that he understood the nature of the charges and the proceedings against him.[40] The Court would add that Defendant subsequently moved for a mental evaluation and was found to be competent. As for his intellectual capacity to understand the proceedings, Defendant has provided inconsistent information about his education. The PSR indicates that Defendant graduated from Olympic High School in Santa Monica, California, in 1999. However, at the plea hearing, Defendant testified that he had obtained his GED in 2000.[41] During the evidentiary hearing, Defendant testified that he attended school through the ninth grade and had some learning difficulties with reading and writing.[42] Even so, the Court finds that Defendant has not provided a valid reason to disregard his statements at the plea hearing, indicating that he understood the charge against him and that counsel had advised him fully of the consequences of his actions. This *Bashara* factor weighs against withdrawal of Defendant's guilty plea.

Furthermore, Defendant's experience with the criminal justice system also weighs against him in this regard. The PSR reports that Defendant has a lengthy criminal history involving a variety of offenses, even if only for crimes less serious than the § 1591 charge. It is true that Defendant has not previously faced federal charges, and many of Defendant's previous convictions are motor vehicle violations. The fact remains that Defendant has other convictions for domestic violence,

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[40] *United States v. Peppard*, 762 F.2d 1013, at *1 (6th Cir. 1985) (unpublished table decision) (holding that district court did not abuse its discretion by finding that "the fact that defendant was not taking medication when he entered his guilty plea" did not support motion to withdraw his guilty plea).

[41] Plea Hr'g Tr. 4:16-25, Aug. 23, 2011 (D.E. # 25).

[42] Evid. Hr'g Tr. 30:17-25, Jan. 22, 2013 (D.E. # 47).

disorderly conduct, contributing to the delinquency of a minor, and carrying a loaded firearm in a public place. It is also evident that Defendant has many more arrests. Defendant claims that several of the charges listed in the PSR were actually brought against a family member living in Mississippi who had assumed Defendant's name. Other than his own testimony, Defendant has adduced no evidence in support of this claim. Even if the Court accepted this assertion as true, Defendant does not deny his convictions and multiple arrests in his home state of California. Therefore, Defendant's personal characteristics and criminal history weigh against his request to withdraw his plea.

Defendant largely bases his request to withdraw the plea on his allegations about Ms. Randle-Holt's ineffective assistance.[43] The Sixth Circuit has recently remarked that a claim of ineffective assistance of counsel as grounds for withdrawal of a guilty plea "does not fit neatly into one of the seven [*Bashara*] factors."[44] In the habeas context, the Sixth Circuit has held that "[a] guilty plea can be involuntary as a result of the ineffective assistance of counsel."[45] For reasons already discussed, the Court finds no credible evidence in this case that Ms. Randle-Holt's representation was ineffective. Even if Defendant had credibly established that Ms. Randle-Holt did not fully and accurately explain his criminal exposure to him in advance of the change of plea hearing, the Sixth

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[43] Defendant also argues that Ms. Randle-Holt's representation fell below the professional standard of care prescribed in *Missouri v. Frye*, 132 S. Ct. 1399 (2012). The issue presented in *Frye* was "whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both." *Id.* at 1408. Defendant has not shown that Ms. Randle-Holt failed to communicate to Defendant any plea offer, much less an offer that would have been more favorable to Defendant. Therefore, the Court holds that *Frye* is inapposite here.

[44] *United States v. Catchings*, 708 F.3d 710 (6th Cir. 2013).

[45] *United States v. Ashurst*, 464 F. App'x 514, 515 (6th Cir. 2012) (quoting *United States v. Gardner*, 417 F.3d 541, 545 (6th Cir. 2005)).

Circuit has held that an attorney's misrepresentation or a defendant's misunderstanding of "the nature of the sentence he would likely receive is insufficient to justify granting his motion to withdraw."[46] Rule 11 does not "allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty."[47] In other words, Defendant may not "rescind a guilty plea simply because he realizes in hindsight that he made a poor choice."[48] The Court concludes then that Defendant has failed to meet his burden as to any of the *Bashara* factors.[49] Therefore, Defendant's Motion to Set Aside Guilty Plea is **DENIED**.

As a final matter, the government has argued that Defendant perjured himself during the evidentiary hearings on his Motion. The United States intends to seek a two-level increase for obstruction of justice for perjury based on Defendant's false statements under oath to the Court. The government requests that the Court make special findings as to the particular statements the Court finds to be false. The Court will take this request under advisement and reserve its findings for the sentencing hearing.

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[46] *United States v. Hairston*, 205 F.3d 1342, at *3 (6th Cir. 2000) (unpublished table decision) (citing *United States v. Sweeney,* 878 F.2d 68, 71 (2d Cir. 1989)).

[47] *Brady v. United States*, 397 U.S. 742, 756 (1970) ("A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended . . . the likely penalties attached to alternative courses of action."); *United States v. Wynn*, 663 F.3d 847, 850 (6th Cir. 2011) (citation and quotation omitted).

[48] *Hairston*, 205 F.3d at *3 (citation omitted).

[49] As for the seventh and final factor, "[t]he government need not establish prejudice if the defendant has failed to show cause to withdraw a plea." *Martin*, 668 F.3d at 797 (citation omitted).

IT IS SO ORDERED.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

Date: April 5, 2013.