ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Sup. Ct. No. 09-1441
Plaintiff Appellee,		App. Ct No L-08-131 & L-08-1312
Vs.	:	AND L-08-1313
Ronald R. Smith,	:	ON APPEAL FROM THE LUCAS COUNTY COURT
Defendant Appellant	:	OF APPEAL, SIXTH APPELLATE DISTRICT

****

MEMORANDUM IN SUPPORT OF JURISDICTION

****

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DEFENDANT-APPELLANT --- IN PRO SE

Michael J. Loisel (Reg. No. 0070117)
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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The trial court committed error as a matter of law in overruling the appellant's motion to withdraw guilty plea when the uncontroverted evidence showed the appellant did not knowingly and voluntarily enter his guilty plea.

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct a manifest injustice the court after sentence may set aside judgement of conviction and permit a defendant to withdraw his plea.

In the case at bar, the appellant moved to withdraw his plea before the sentence was imposed, therefore, the court before the imposition of sentence, at the very least should have considered allowing the appellant to withdraw his guilty plea. Failure to liberally grant such a motion by a defendant is a violation of due process of law.

Unlike a defendant who waits until after the sentence is imposed, (i.e. one who tests the waters), the appellant moved before the sentence was imposed. Therefore, there was no testing of the water. He moved to withdraw because he had been misled by counsel, and his plea was obtained unknowingly and involuntarily, thus the court should have allowed him to withdraw.

WHEREFORE, the Appellant believe his case is a case of public or great general interest and involves a substantial constitutional question.

STATEMENT OF CASE AND FACTS:

A plea hearing was conducted on June 13th, 2008. At that time the Appellant entered the following pleas;

1.) Guilty to Bill of Information in case No. CR08-2352, charging the Appellant with Aggravated Robbery, a felony of the first degree, with a firearm specification that carries a three (3) year mandatory consecutive sentence;

2.) Guilty to Bill of Information in case No. CR08-2353, charging the Appellant with Robbery, a felony of the second degree;

3.) Guilty to the following in case No. CR08-2332: (A re-indictment) Count 1 to the lesser included offense of Robbery, a felony of the second degree, and Count 2 to Felonious Assault, a felony of the second degree.

Prior to the sentencing date, on August 19th, 2008, Appellant filed a Motion to Withdraw his guilty pleas. A hearing on the Appellant's motion was held on August 20th, 2008, wherein the trial court denied the Appellant's Motion to Withdraw.

On the same day, the trial court sentenced the Appellant to the following terms of incarceration;

1.) In regards to Case No. CR08-2352, the Court sentenced the Appellant to nine (9) years, with the mandatory three (3) year consecutive period of incarceration imposed for the firearm specification;

2.) In regards to case No. CR08-2353, the Court sentenced the Appellant to four (4) years and ran this consecutive to case No. CR08-2352;

3.) In regards to case No. CR08-2332, the Court sentenced the Appellant to eight (8)years on both counts to be ran concurrent with one another but consecutive to case No(s). CR08-2352 and CR08-2353;

4.) The Court granted Appellant 212 days of jail time credit, time which he had previously served.

A timely appeal ensued, and on the 30th day of June, 2009, the Court of Appeal affirmed the decision of the lower court in refusing to allow the Appellant to withdraw his guilty plea. Pursuant to the Supreme Court Rules of Practice and Procedure, the Appellant has forty five (45) days from the decision of the appellate court to appeal the decision. Appellant's has complied with the Rules of Practice and Procedure, and a timely appeal to the decision of the appellate court now ensues.

FIRST PROPOSITION OF LAW

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE APPELLANT'S REQUEST TO WITHDRAW HIS GUILTY PLEA, VIOLATIVE OF THE APPELLANT'S FEDERAL DUE PROCESS RIGHTS

Ohio Criminal Rule 32.1 allows a criminal defendant to move to withdraw a guilty plea before sentence is imposed upon him. The case law in this area is well settled that, a Motion to Withdraw Guilty Plea before sentencing should be freely and liberally granted **State v. Xie** (1992), 62 Ohio St. 3d 521, at 527. It is a well established matter of law that in criminal cases, a plea must be made knowingly, intelligently, and voluntarily.

Furthermore, failure on any of these points renders enforcement of the plea unconstitutional under both the United States and Ohio Constitution. **State v. Engle** (1996), 74 Ohio st.3d 525, at 527, 660 N.E.2d 450, at 451. However, withdraw is not an absolute right. The trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis to request the withdrawl of the guilty plea. id.

The trial court's decision regarding the same is reviewed under an abuse of discretion standard. An abuse of discretion is more than an error in judgement or a mistake of law, the term connotes the court's attitude as arbitrary, unreasonable or unconscionable. **beck v. Methews** (1990), 53 Ohio St. 3d 161, at 169. Under Ohio law, Criminal Rule 32.1 provides that "the trial court may set aside a conviction and allow a defendant to withdraw his guilty plea, **State v. Smith** (1977), 49 Ohio St.3d 261, 306 N.E.2d 1324.

In the case at bar the defendant moved to withdraw the plea before the imposition of sentence, thus, the standard for review of the motion isn't an stringent as it would be after sentence is imposed. The Appellant does not have to show a manifest miscarriage of justice incurred, he simply has to give a reasonable explanation as to why he wishes to withdraw his plea. A reasonable explanation could be anything from a disagreement between the state and defense over the amount of time to be recomended by the state to the sentencing judge at sentencing, up to Appellant's belief he stands a good chance of succeeding at trial. Determining what constitutes good reason is at the discretion of the trial court, and sometimes that discretion as to what constitutes good reason is not always evenly applied in Ohio. Some of those factors a court must consider, prior to sentencing are as follows;

1.) Whether the state will be prejudiced by the withdraw;

2.) The representation afforded the defendant by counsel;

3.) The extent of the Criminal rule 11 plea hearing;

4.) The extent of the hearing on a motion to withdraw;

5.) Whether the trial court gave full and fair consideration to the motion;

6.) Whether the timing of the motion was reasonable (which we must assume it is, if the motion is made before sentencing.);

7.) The reasons for the motion;

8.) Whether the defendant understood the nature of the charges and the potential sentencing;

9.) Whether the accused was perhaps not guilty or had a complete defense to the charge.

See: **State v. Murphy**, 6th Dist. No. OT-07-041, 2008 Ohio 2382, citing **State v. Griffin** (2001), 141 Ohio App. 3d 551, at 554. See also; **State v. klotz**, 6th Dist. no. WD-04-079, 2005 Ohio 3864 paragraph 15; **State v. Dellinger**, 6th Dist. No. H-02-007, 2002 Ohio 4652.

In the within matter, the Appellant meets most of the criteria when considering whether or not the court abused its discretion when the Appellant requested to withdraw his guilty plea prior to sentencing.

As indicated above, Appellant entered a guilty plea on June 13th, 2008. It is important to note, when asked if Appellant understood all the ramifications of entering the relevant pleas, it was not the Appellant but Appellant's counsel that answered, "Yes it is Judge." And I (Counsel) should add, there has been a flurry of negotiations today, as the court of well aware..." (See: June 13th, transcript at p. 11, L. 4.)

It was almost immediately after the plea was entered that, the Appellant was questioning the plea, questioning counsel representation of him. By the 19th day of August the Appellant had formally filed a motion to withdraw his plea, and requested leave of the court to present grounds in support of that request.

Sentencing was set for August 20th, 2008. On the same date, the trial court held a hearing on Appellants Motion to withdraw the guilty plea, which had been filed to previous day. Appellant stands by the reasons stated in his motion, as well as the arguments counsel offered at the hearing itself. Throughout the entire plea hearing, as it related to the firearm specification, Appellant stated repeatedly that he was never in the possession of a firearm, and that he was never aware of every time his codefendant possessed a firearm. (See June 13th, 2008 Transcript at P. 24, L. 1, p. 28, L. 1; p. 29, L. 7; and p. 30, L. 13) As such the Appellant offereda complete defense, that he did not have the requisite intent to commit any of the alleged crimes.

First, Appellant stated that he was innocent of the charges that were brought against him, and he offered a complete defense in regards to the intent element of the crime which he pleaded guilty to committing.

Second, the Appellant stated that he did not have a true understanding of the concept of complicity when he entered the plea regarding the same. This is evidenced by the above referenced page and line numbers, which pertain to Appellant's responses to the Court's questions regarding the firearms specifications. it is important to note that Appellant has only a ninth grade education. (See June 13, 2008 transcript p. 11, L. 20). considering his education, it is plausible that the Appellant did not understand the proceedings.

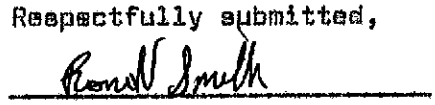
Third, had the Court allowed the Appellant to withdraw his guilty plea, the State would not have been prejudiced by such a withdraw. As indicated by trial counsel, the cases that the appellant pled were only eight months old, and the Appellant would have been willing to waive the time in regards to proceeding forward, had the motion to withdraw been granted. (See. August 20th, 2008 transcript at p. 3, L. 15).

In sum, the State would not have been prejudiced by Appellant's withdraw, thus the timing of Appellant's motion was reasonable. Moreover, the reasons set forth in the motion were factually true and accurate, the Appellant did not understand the true nature of the complicity charge, which is complicated at best to even a trained attorney. Lastly, the Appellant offered a complete defense to the charges, which make the circumstance of this case such that the court would have been obligated consider the Appellant request to withdraw reasonable.

CONCLUSION

For all the foregoing reasons the Appellant prays this Court will grant him the relief that he seek, and grant him whatever other relief that this Court deems to be just and appropriate.

Respectfully submitted,



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RS:/slk

CERTIFICATE OF SERVICE

I, Ronald L. Smith, hereby certify that a true and correct copy of the foregoing has been forwarded via First Class U S Mail to opposing counsel on this 7th day of August, 2009.

Respectfully submitted

Ronald Smith

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COURT OF APPEALS
2009 JUN 30 A 8:03
COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Ronald R. Smith

Appellant

Court of Appeals Nos. L-08-1311
L-08-1312
L-08-1313

Trial Court Nos. CR0200802332
CR0200802352
CR0200802353

DECISION AND JUDGMENT

Decided: JUN 30 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael J. Loisel, Assistant Prosecuting Attorney, for appellee.

Nicole Y. Fech, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Ronald R. Smith, appeals the Lucas County Court of Common Pleas decision on a motion to withdraw his guilty pleas, which was filed before

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sentencing. Because we conclude that the trial court committed no reversible error, we affirm.

{¶ 2} On June 16, 2008, appellant entered guilty pleas to the following charges: (1) aggravated robbery with a firearm specification, a first degree felony; (2) two counts of robbery, second degree felonies; and (3) one count of felonious assault, a second degree felony. On August 7, 2008, he filed a motion to withdraw his guilty pleas. Following a hearing, the trial court denied his motion and appellant now appeals setting forth the following assignment of error:

{¶ 3} "The trial court abused its discretion when it denied appellant's request to withdraw his plea."

{¶ 4} A presentence motion to withdraw a plea of guilty should be freely and liberally granted. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. A defendant, however, does not have an absolute right to withdraw a guilty plea prior to sentencing. There must be a reasonable and legitimate basis for the withdrawal of the plea. Id. at paragraph one of the syllabus. The decision to grant or deny a defendant's motion lies within the sound discretion of the trial court. Id. at paragraph two of the syllabus. Absent an abuse of discretion, the decision of the trial court must be affirmed. Id. at 527. In order to find an abuse of discretion, a reviewing court must find more than error; the reviewing court "must find that the trial court's ruling was 'unreasonable, arbitrary or unconscionable.'" Id., quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 5} To determine whether a trial court abused its discretion, we look to, inter alia, "(1) whether the state will be prejudiced by withdrawal; (2) the representation afforded to the defendant by counsel; (3) the extent of the Crim.R. 11 plea hearing; (4) the extent of the hearing on the motion to withdraw; (5) whether the trial court gave full and fair consideration to the motion; (6) whether the timing of the motion was reasonable; (7) the reasons for the motion; (8) whether the defendant understood the nature of the charges and potential sentences; and (9) whether the accused was perhaps not guilty or had a complete defense to the charge." *State v. Dellinger*, 6th Dist. No. H-02-007, 2002-Ohio-4652, ¶ 18; quoting *State v. Griffin* (2001), 141 Ohio App.3d 551, 554, 2001-Ohio-3203.

{¶ 6} Appellant contends that he wanted to withdraw his guilty pleas because he is innocent of all of the charges. Appellant also contends that he wanted to withdraw his guilty pleas because he did not fully understand the nature of complicity as it pertained to the firearm specification. The state maintains that appellant wanted to withdraw his pleas only after his co-defendant was sentenced to prison for 41 years for similar crimes.

{¶ 7} Under Crim.R. 11(C), a trial court is required to determine whether an offender's plea of guilty is knowing, intelligent, and voluntary. *State v. Engle* (1996), 74 Ohio St.3d 525, 526. The record of this case discloses that on June 13, 2008, the trial court conducted a full Crim.R. 11 hearing before accepting appellant's guilty plea. Appellant stated that he understood the nature of the charges against him and the possible sentences. He stated that he understood the language that the court was using and that his

mind was clear. Appellant told the court he was entering the pleas of his own free will. He then admitted to the charges and described the incidents leading up to his charges. With regards to the gun specification, he admitted he knew his co-defendant had a gun. Throughout the colloquy, appellant repeatedly responded that he understood the trial court's explanations and that he was not impaired or unduly pressured. Consequently, we find that appellant has failed to establish a reasonable and legitimate basis for granting his motion to withdraw his plea. Finding no abuse of discretion, appellant's sole assignment of error is found not well-taken.

{¶ 8} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

State v. Smith
C.A. Nos. L-08-1311
L-08-1312
L-08-1313

Peter M. Handwork, J. _____ _____
JUDGE

Arlene Singer, J. _____ _____
JUDGE

Thomas J. Osowik, J. _____ _____
CONCUR. JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.