

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,
Appellee

: Case No. C-090508
: Trial No. B-0901863
:
:
:
:
:
:

vs.

JAMES THOMAS,
Appellant

10-0914

APPEAL FROM THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

MEMORANDUM OF APPELLANT
IN SUPPORT OF JURISDICTION

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FILED
MAY 20 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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ISSUES OF THIS CASE ARE OF GREAT PUBLIC INTEREST

This matter raises questions of great public interest concerning withdrawal of guilty pleas and sentencing.

STATEMENT OF THE CASE AND PROCEDURAL POSTURE

At some time after January 6, 2009 in Hamilton County, Ohio, Appellant James Thomas allegedly failed to report his change of address.

Mr. Thomas was indicted for 1 count of failing to register a change of address on March 24, 2009. The case was set for trial on May 19, 2009, but Mr. Thomas then entered a Plea of Guilty to Count 1 which was reduced by the State from a felony of the second degree to a felony of the third degree. This plea also included an agreed sentence between Mr. Thomas, his attorney, the prosecutor, and the trial judge for a 3-year community control sentence; also in the plea form was the agreement that he would receive a 5-year prison sentence if he violated his community control. However, not contained in the plea form was a statement by the trial judge that Mr. Thomas had to do 4 things: stay in touch with his lawyer, stay out of trouble, come back on his sentencing date, and be on time. On July 16, 2009, the trial judge indicated that he was not going to abide by the agreed sentence because Mr. Thomas had been convicted of a misdemeanor charge of disorderly conduct. Trial counsel for Mr. Thomas then made an oral Motion to Withdraw Plea of Guilty, which was overruled. Mr. Thomas was then sentenced to 2 years in prison. An appeal was timely filed with the First District Court of Appeals on July 21, 2009. A Decision affirming the judgment of the trial court was entered on April 21, 2010 by the First District Court of Appeals; it is from that Decision which Appellant appeals.

FIRST ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

The trial court erred to the prejudice of Appellant by overruling his Motion to Withdraw Guilty Plea.

Ohio Crim. Proc. Rule 32.1 governs motions to withdraw guilty pleas:

A motion to withdraw a plea of guilty. . . may be made only before sentencing is imposed. . . but to correct manifest injustice the court after sentence may set aside the judgment of conviction. . . .

As Mr. Thomas' motion was made prior to sentencing, the general rule is that such motions should be freely allowed and treated with liberality. State v. Xie (Ohio 1992), 62 Ohio St.3d 521, 584 N.E.2d 715.

In the case at bar, Mr. Thomas presented a compelling reason to grant his Motion to Withdraw Guilty Plea, as the trial court was not going to abide by the recommended agreed-upon sentence. Therefore, the trial court erred in not granting Mr. Thomas' Motion to Withdraw Guilty Plea.

SECOND ASSIGNMENT OF ERROR AND PROPOSITION OF LAW

The trial court erred to the prejudice of Defendant-Appellant by not imposing the agreed sentence.

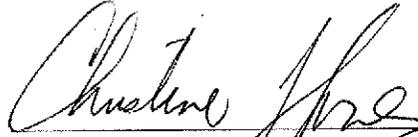
Sentences jointly recommended by the prosecution and defendant and imposed by the trial judge are generally not subject to appellate review under R.C. Section 2953.08(D)(1). However, in the case at bar, the trial judge failed to impose the recommended and agreed-upon sentence. This was erroneous. The trial court erred in so sentencing Mr. Thomas. Therefore, Mr. Thomas' sentence should be vacated or modified by this Court.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court take

jurisdiction of this matter.

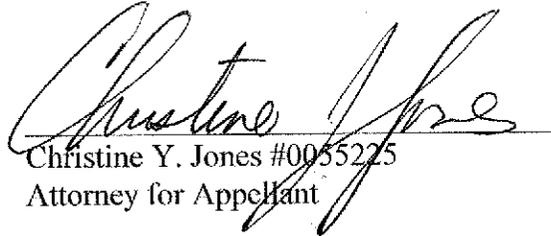
Respectfully submitted,



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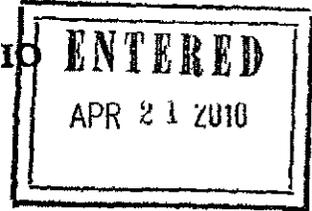
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was personally served upon Scott M. Heenan,
Hamilton County Assistant Prosecutor, this 18th day of May, 2010.



Christine Y. Jones #0055225
Attorney for Appellant

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**



STATE OF OHIO,	:	APPEAL NO. C-090508
	:	TRIAL NO. B-0901863
Plaintiff-Appellee,	:	
	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
	:	
JAMES THOMAS,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant James Thomas appeals the trial court's judgment convicting him of attempt² (failure to register³) a third-degree felony, and sentencing him to a two-year prison term. For the following reasons, we affirm.

Thomas entered a guilty plea to attempt. As part of the plea, the state and Thomas recommended an agreed sentence of three years of community control. At the plea hearing, the trial court told Thomas that it would honor the agreed sentence as long as Thomas did the following four things: "[s]tay[ed] in touch with [his] lawyer; stay[ed] out of trouble; c[ame] back on the date assigned; c[ame] back on time." The court stated that it would imprison Thomas for up to five years if he failed

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² R.C. 2923.02.

³ R.C. 2950.05(E)(1).



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to do even one of those four things. Thomas indicated that he understood. The trial court then accepted his guilty plea, and sentencing was deferred for the preparation of a presentence-investigation report.

Prior to sentencing, while he remained unincarcerated, Thomas was convicted of disorderly conduct. At his sentencing hearing for the attempt charge, Thomas moved to withdraw his guilty plea after his attorney told him that the court would not honor the agreed sentence. The trial court denied the motion. The court refused to honor the agreed sentence because Thomas had been convicted of disorderly conduct and had failed to appear at a scheduled meeting with the probation department to complete the presentence-investigation report. Thomas was sentenced to a two-year prison term.

In his first assignment of error, Thomas now argues that the trial court erred by denying his "pre-sentence motion" to withdraw his guilty plea.

It is well settled that the trial court has discretion to grant or deny a presentence motion to withdraw a guilty plea, and on appeal, its decision will not be disturbed unless it is unreasonable, arbitrary, or unconscionable.⁴ While Thomas accurately states that presentence motions to withdraw guilty pleas should be freely granted, a defendant "does not have an absolute right to withdraw a plea prior to sentencing."⁵ Instead, the trial court "must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea."⁶

Upon review of the record, we cannot say that the trial court abused its discretion in denying Thomas's motion to withdraw his guilty plea. Thomas's

⁴ *State v. Xie* (1992), 62 Ohio S.t3d 521, 527, 584 N.E.2d 715.

⁵ *Id.*

⁶ *Id.*

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argument at the hearing on the motion to withdraw was simply that his motion should have been granted because he had only entered the guilty plea because he thought that he was going to receive community control rather than a prison term. But the plea hearing belies that assertion, demonstrating instead that Thomas entered his guilty plea knowingly, intelligently, and voluntarily. At the plea hearing, the trial court specifically conditioned its acceptance of the agreed sentence on four things. Thomas acknowledged at the hearing that he understood those conditions. Accordingly, Thomas did not demonstrate that there was a legitimate basis for the withdrawal of his guilty plea.

The first assignment of error is overruled.

In his second and final assignment of error, Thomas contends that the trial court erred by not imposing the recommended sentence. We are unpersuaded.

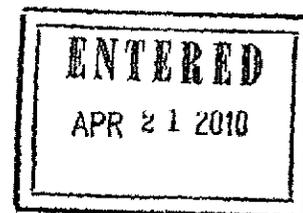
First, a trial court is not bound by any agreement a defendant makes with the state regarding an appropriate sentence. Second, the trial court did not abuse its discretion in imposing the two-year prison term.⁷ The term was within the appropriate range for a third-degree felony.⁸ Further, the trial court specifically told Thomas that it would honor the agreed sentence only if Thomas "stay[ed] out of trouble." Thomas did not abide by that condition, as he was convicted of disorderly conduct.

Therefore, the second assignment of error is overruled.

The judgment of the trial court is affirmed.

⁷ *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶4.

⁸ R.C. 2929.14(A)(3).



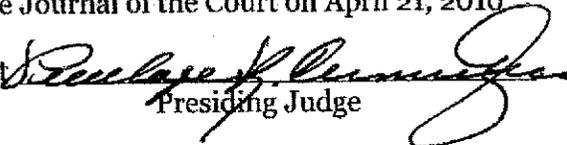
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Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on April 21, 2010

per order of the Court 
Presiding Judge

