

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 2013

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

JAMES M. MCINTURFF,

Appellant,

v.

Case No. 5D12-1863

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed April 19, 2013

Appeal from the Circuit Court
for Orange County,
Heather Pinder Rodriguez, Judge.

James S. Purdy, Public Defender, and
Michael S. Becker, Assistant Public
Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Robin A. Compton,
Assistant Attorney General, Daytona
Beach, for Appellee.

EVANDER, J.

James McInturff appeals his judgment and sentence for trafficking in hydrocodone. He contends that the trial court erred in denying his motion to withdraw his guilty plea without affording him the opportunity to be heard on the motion. We agree and reverse.

After entering a guilty plea, McInturff subsequently appeared before the trial court for sentencing. Prior to imposition of sentence, defense counsel requested the trial court permit McInturff to withdraw his plea. The State responded by arguing that a motion to withdraw plea must be in writing:

A [Motion to Withdraw Plea] needs to be brought to the Court in the form of a written motion and giving the State time to prepare. . . . In this case, I would like to see the written motion that the Defense would be bringing on this, if that's truly what they're asking for, so I can prepare a response accordingly.

The trial court then summarily denied the motion, finding that it was "untimely" and didn't "follow the requirements."

We initially observe that McInturff's motion was not untimely. Florida Rule of Criminal Procedure 3.170(f) provides that "[t]he court may in its discretion, and shall on good cause" permit a guilty plea to be withdrawn at any time before sentencing. See *Lehmkuhle v. State*, 20 So. 3d 971 (Fla. 2d DCA 2009) (defendant entitled to be heard on his presentence motion to withdraw plea made during sentencing hearing); see also *Morales v. State*, 973 So. 2d 679 (Fla. 2d DCA 2008); *Gunn v. State*, 643 So. 2d 677 (Fla. 4th DCA 1994). Additionally, there is no requirement that a motion to withdraw a guilty plea be in writing. See *Hughen v. State*, 96 So. 3d 1114, 1115 (Fla. 2d DCA 2012); *Lehmkuhle*; *Morales*.

We vacate McInturff's judgment and sentence and remand this case to the trial court to give McInturff an opportunity to be heard on his motion to withdraw the guilty plea.

REVERSED and REMANDED.

COHEN, J., concurs.

LAWSON, J., dissents, with opinion.

LAWSON, J., dissenting.

After James McInturff violated his substantial assistance agreement with the State and absconded, he was arrested and brought before the court for sentencing on the charge to which he had earlier pled. McInturff's attorney asked the trial judge to allow McInturff to withdraw his plea and proceed to trial, but offered no legal grounds to support a motion to withdraw plea and did not request an additional opportunity to present argument or evidence in support of the motion. Then, when the State erroneously argued that the motion to withdraw plea was technically deficient (because it was not in writing), defense counsel presented no argument to the contrary. Because the arguments for reversal presented on appeal were not first made to the trial court, I would affirm. See, e.g., *Johnson v. State*, 969 So. 2d 938, 954 (Fla. 2007) ("An argument is preserved for appeal only if the same argument was made below.") (citations omitted).¹

¹ In addition, I question the majority's assertion that the trial court "summarily denied" the motion. After the prosecutor argued that the motion should be in writing and requested time to respond to the motion, the court observed that the oral motion was "untimely" and "didn't follow the requirements." Defense counsel did not challenge the prosecutor or the court's statements. However, instead of proceeding directly to sentencing, the court entertained discussion (both on and off of the record), and nevertheless considered the substance of McInturff's conduct after the plea, as stipulated to by the defense, before proceeding to sentencing.