

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2009-P-0071</b>
DALE BRANDON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2007 CR 0423.

Judgment: Reversed and remanded.

*Victor V. Vigluicci*, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

*Jill K. Fankhauser*, 231 South Chestnut Street, P.O. Box 489, Ravenna, OH 44266 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Dale Brandon, filed a pro se notice of appeal from the September 1, 2009 judgment entry of the Portage County Court of Common Pleas, in which he was sentenced for gross sexual imposition and labeled a Tier II sex offender. While that is the final, appealable order, it is clear from the assignment of error that the issue at hand is the court’s denial, without any meaningful hearing, of appellant’s presentence motion to vacate his guilty plea by its entry of August 26, 2008.

{¶2} On August 2, 2007, appellant was indicted by the Portage County Grand Jury on two counts: count one, gross sexual imposition, a felony of the third degree, in violation of R.C. 2907.05(A)(4) & (B); and count two, attempted rape, a felony of the second degree, in violation of R.C. 2923.02, with a subsequent attempted child rape specification. On October 19, 2007, appellant entered an oral and written plea of guilty to count one, gross sexual imposition. The trial court accepted appellant's guilty plea with respect to count one and entered a nolle prosequi on count two, including the specification. The trial court notified appellant about post-release control, referred the matter to the Adult Probation Department for a statutory investigation and written report, and amended his bond to \$50,000 on the condition that he have no contact with the complaining witness or family and that he not leave the state of Ohio.

{¶3} On November 28, 2007, appellant, through defense counsel, filed a motion to vacate his guilty plea. A hearing was scheduled for January 7, 2008. Assistant Prosecutor Eric Finnegan appeared on behalf of appellee, the state of Ohio, and Attorney Timothy Hart appeared on behalf of appellant, who was not present for the hearing. It does not appear that an actual hearing took place on this date, and on January 9, 2008, the trial court forfeited appellant's bond and issued a warrant for his arrest.

{¶4} Appellant was arrested on a capias at some point in Las Vegas, Nevada. Thereafter, he filed a pro se motion to withdraw his guilty plea on August 3, 2009, alleging a discovery violation and that he received ineffective assistance of counsel at the time of his plea. This motion was apparently filed by appellant from jail in Nevada. A hearing was scheduled for August 24, 2009. The court's docket indicates a failure of

service on the defendant for this hearing. Present at the hearing was Assistant Prosecutor Finnegan. Neither appellant nor any counsel on his behalf were in attendance. The trial court overruled appellant's pro se motion to vacate his guilty plea by judgment entry on August 26, 2009.

{¶5} Meanwhile, appellant was extradited to Ohio. On August 27, 2009, the trial court sent out another notice to the state and appellant's counsel that a "motion to vacate" hearing was scheduled for August 31, 2009. Assistant Prosecutor Finnegan appeared on behalf of the state and Attorney Hart appeared on behalf of appellant, who was present for the hearing.

{¶6} At the beginning of that hearing, the trial judge stated:

{¶7} "This matter was set last week for a hearing on a motion to vacate the plea which the Court overruled.

{¶8} "We're here today for the sentencing hearing. The defendant was extradited back from Las Vegas."

{¶9} In response, defense counsel acknowledged receipt of the presentence investigation report; stated that the accusations of abuse only included touching, not penetration; and indicated he was aware that appellant asked the court directly, as he had done about a year and a half ago, to withdraw or vacate appellant's guilty plea.

{¶10} The trial court then heard victim impact testimony from the victim's father. Following that testimony, the trial judge informed appellant of his Tier II sex offender status and notified him of the registration and verification requirements. The trial judge then asked appellant if there was anything he wished to say. Appellant replied in the affirmative and stated the following:

{¶11} “This case goes all the way from 2007. I can’t remember exactly what day - - July . . . . but when I supposedly came back to court I think was sometime in January, what happened is for me, I had a - - I was coming back here and I got a phone call and my father got real, real ill. I went to Vegas, I called my attorney. He wasn’t there. I called and got in contact with his secretary. I’m not trying to make an excuse for not coming, was just one of these things that happened. I felt when I went back to go take care of my dad that he would have did the same thing for me and when I got back here on Wednesday after being sent back they told me when I - - when the plane landed and I got to Portage County, I called to my niece and my nephews, told me my father had four days to live so that is the reason why I did not come back and I would have done the same thing if it was anybody in my family. I would have done the same thing, not no disrespect to this court, not no disrespect to nobody but that is exactly what happened. And if the Court can find it in its way just to - - I can understand it is two years ago but wasn’t, I never meant to not show up. I just felt that was my dad. My dad would have done anything, any way to do that for me. When I was a kid he took care of me, I think was my responsibility to take care of him in his last days. Right now my dad probably passed away right now, I don’t know, I haven’t made a phone call back to find out what happened but that is about it. I mean, like I said, I didn’t mean to. I have never ran from nothing in my life and not going to run from this. I am glad this is getting to be over with so thank you very much.”

{¶12} The trial judge then proceeded to sentence appellant.

{¶13} Pursuant to its September 1, 2009 judgment entry, the trial court found appellant to be a Tier II sex offender; sentenced him to four years in prison; notified him

that he would be supervised under post-release control for five years; and discharged his previous bond. It is from that judgment that appellant filed the present appeal, asserting the following assignment of error for our review:

{¶14} “The trial court abused its discretion when it summarily overruled [appellant’s] presentence motion to vacate plea without a hearing.”

{¶15} In his sole assignment of error, appellant argues that the trial court abused its discretion by overruling his pro se presentence motion to vacate his guilty plea.

{¶16} Crim.R. 32.1 governs the withdrawal of a guilty plea and provides: “[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.”

{¶17} Motions to withdraw a plea post-sentencing are governed by Crim.R. 32.1. “However, the rule itself gives no guidelines for a trial court to use when ruling on a presentence motion to withdraw a guilty plea.” *State v. Xie* (1992), 62 Ohio St.3d 521, 526. “Although a motion to withdraw a guilty plea, filed after sentence has been imposed, should be granted only to correct manifest injustice, a motion to withdraw filed before sentencing should be freely allowed.” *State v. Peterseim* (1980), 68 Ohio App.2d 211, paragraph one of the syllabus. “Appellate review of a trial court’s denial of a motion to withdraw is limited to a determination of abuse of discretion, regardless whether the motion to withdraw is filed before or after sentencing.” *Id.* at paragraph two of the syllabus. An abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶64, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11.

{¶18} “A trial court does not abuse its discretion in overruling a motion to withdraw: (1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim.R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request.” *Peterseim*, supra, paragraph three of the syllabus.

{¶19} In the case at bar, with regard to the first *Peterseim* factor, appellant was represented by highly-competent counsel. Generally, a properly licensed attorney practicing in this state is presumed to be competent. *State v. Lytle* (1976), 48 Ohio St.2d 391, 397. Our review of the record establishes that defense counsel provided highly-competent representation.

{¶20} Regarding the second *Peterseim* factor, there is simply nothing to indicate that appellant’s guilty plea was not made knowingly, intelligently, and voluntarily. At the October 19, 2007 hearing, the trial court conducted a thorough colloquy with appellant, determining that he understood each and every right he was waiving. The trial court made absolutely clear to appellant what the maximum sentence could be, including post-release control, if he pleaded guilty. Appellant informed the trial court that he understood the effect of his guilty plea, its consequences, and accepted the same. Appellant indicated he understood and waived his right to a jury trial, to confront and cross-examine witnesses, to subpoena witnesses for his defense, to have the state prove its case beyond a reasonable doubt, and to not testify. Without any promises, coercion, or threats, appellant freely entered a guilty plea. Appellant indicated he

reviewed the Crim.R. 11 plea negotiations with his counsel, understood the negotiations, and voluntarily accepted them before entering a guilty plea. The trial court accepted appellant's guilty plea after determining that it was made knowingly, intelligently, and voluntarily. Thus, the plea hearing was fully compliant with the requirements of Crim.R. 11.

{¶21} With respect to the third and fourth *Peterseim* factors, we note again that appellant failed to appear at the January 7, 2008 hearing on his motion to vacate his guilty plea. However, it is problematic that the state stresses in its appellate brief that appellant also failed to appear at the August 24, 2009 hearing on his August 3, 2009 pro se motion to withdraw his guilty plea, which was apparently filed by appellant while he was incarcerated in Nevada. The record before us shows a failure of service for the August 24, 2009 hearing. Thus, appellant was not aware of that hearing. In spite of this, the trial court entered a judgment on August 26, 2009, overruling appellant's "Pro Se Motion to Vacate Plea." The trial court later sent out a notice to the state and appellant's counsel that a "motion to vacate" hearing was scheduled for August 31, 2009. Assistant Prosecutor Finnegan appeared on behalf of the state and Attorney Hart appeared on behalf of appellant, who was present for the hearing. The problem is that there was no hearing on the "Pro Se Motion to Vacate" on that date, nor is there any indication in the record that appellant withdrew the motion or did not wish it to be heard. At the beginning of that hearing, however, the trial judge indicated that the matter was set the previous week for a hearing on the motion to vacate, which was overruled by the trial court. The trial judge then proceeded to sentence appellant. We stress that the record establishes that the trial court never actually conducted a hearing on appellant's

request and, more importantly, never afforded appellant the opportunity to address the court with respect to the motion. See *State v. Glavic* (2001), 143 Ohio App.3d 583, 589.

{¶22} Pursuant to the third and fourth *Peterseim* factors, the trial court abused its discretion in denying appellant's pro se presentence motion to vacate his guilty plea without a proper hearing.

{¶23} For the foregoing reasons, appellant's sole assignment of error is well-taken. The judgment of the Portage County Court of Common Pleas is reversed and the matter is remanded for further proceedings consistent with this opinion.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.