

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

State of Ohio

Court of Appeals No. L-08-1153

Appellee

Trial Court No. CR 07 2470

v.

Robert Lawhorn

**DECISION AND JUDGMENT**

Appellant

Decided: June 30, 2009

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
James E. Vail, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

\* \* \* \* \*

PIETRYKOWSKI, J.

{¶ 1} Appellant, Robert Lawhorn, appeals the denial of his presentence Crim.R. 32.1 motion to withdraw his no contest plea to felonious assault, a violation of R.C. 2903.11(A)(1) and a second degree felony. The Lucas County Court of Common Pleas denied the motion in a judgment journalized on May 9, 2008.

{¶ 2} Appellant asserts one assignment of error on appeal:

{¶ 3} "Assignment of Error No. 1:

{¶ 4} "The trial court abused its discretion when it denied Mr. Lawhorn's pre-sentence motion to withdraw his plea.

{¶ 5} "A. So long as there is a legitimate and reasonable basis for the motion, trial courts are instructed to freely and liberally grant pre-sentence motions to withdraw pleas. Appellant had a legitimate and reasonable basis for withdrawing his plea. The court denied the motion. Did the trial court abuse its discretion?"

{¶ 6} Appellant was originally indicted on July 13, 2007 on two counts. The first was felonious assault, a violation of R.C. 2903.11(A)(1) and second degree felony and the second was for kidnapping, a violation of R.C. 2905.01(A)(3) and a first degree felony. The state based the charges on a claim that appellant and others kidnapped and assaulted Anthony Pierson on or about May 30 through June 1, 2007.

{¶ 7} The case did not proceed to trial on the original trial date of October 9, 2007, because Pierson was unavailable to testify. The state learned that he was in Florida and made arrangements for his return to Ohio to testify.<sup>1</sup> At the state's request, the trial court continued trial until December 3, 2007.

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<sup>1</sup>The appellant was indicted for bribery, a violation of R.C. 2923.02, based upon claims of appellant's involvement in Pierson's failure to appear to testify on the original trial date. That charge was brought in the Lucas County Court of Common Pleas in case No. CR200703221.

{¶ 8} Pierson appeared at court to testify at trial on both of the following two scheduled trial dates—December 3, 2007 and February 4, 2008. Both those trial dates were continued at appellant's request. While the trial court agreed to grant the requested continuance of the February 4, 2008 trial date, it instructed the parties to complete any plea negotiations at that time. As summarized by the trial court, it "agreed to a short continuance but stated that, if no plea were tendered on February 4, the Court would grant no further time for plea-bargaining and trial would proceed 'in short order.'"<sup>2</sup>

{¶ 9} Upon advice of counsel, attorney Sheldon Wittenberg, appellant accepted a plea agreement on February 4, 2008. Under the plea agreement, he pled no contest to the felonious assault charge and agreed to forfeit money seized at the time of his arrest. In return, the state agreed to dismiss the kidnapping charge and the CR200703221 bribery charge. It also agreed to dismiss a drug charge against appellant that was pending in Toledo Municipal Court. Finally, the state agreed to recommend a four-year cap on sentencing for felonious assault.

{¶ 10} The trial court conducted a Crim.R. 11(C) hearing on February 4, 2008, and accepted appellant's no contest plea. It continued the case for sentencing. Anthony Pierson, as the victim, appeared at court on March 13, 2008, to attend appellant's sentencing. At appellant's request, sentencing was continued to March 20, 2008. Pierson disappeared sometime after March 14, 2008. His present whereabouts are unknown.

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<sup>2</sup>Judgment of May 9, 2008, denying motion to withdraw no contest plea.

{¶ 11} On March 20, 2008, attorney Wittenberg withdrew as counsel for appellant. Attorney Ronnie Wingate appeared as new counsel. New counsel advised the court of the intent of appellant to file a motion for leave to withdraw his no contest plea. Appellant filed the motion on March 27, 2008.

{¶ 12} The trial court conducted an oral hearing on the motion on April 17, 2008. It overruled the motion in a judgment journalized on May 9, 2008. This appeal followed.

{¶ 13} Generally, a Crim.R. 32.1 presentence motion to withdraw a guilty or no contest plea is to be freely and liberally granted. *State v. Xie* (1992), 62 Ohio St. 3d 521, 526; *State v. Spivey* (1998), 81 Ohio St.3d 405, 415 (applied *Xie* to no contest pleas). The Supreme Court of Ohio directed in *Xie* that the trial court conduct a hearing on such motions "to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *State v. Xie* at paragraph one of the syllabus. A trial court's denial of a presentence motion to withdraw a plea will not be reversed on appeal absent an abuse of discretion. *State v. Xie* at paragraph two of syllabus; *State v. Spivey* at 415. There is no absolute right to withdraw a plea prior to sentencing. *Xie* at paragraph one of syllabus.

{¶ 14} A reviewing court weighs a list of factors to determine whether a trial court abused its discretion in denying a presentence motion to withdraw a plea, including: "(1) whether the prosecution would be prejudiced if the pleas was vacated; (2) whether the accused was represented by highly competent counsel; (3) whether the accused was given a full Crim.R. 11 hearing; (4) whether a full hearing was held on the motion;

(5) whether the trial court gave full and fair consideration to the motion; (6) whether the motion was made within a reasonable time; (7) whether the motion set forth specific reasons for the withdrawal; (8) whether the accused understood the nature of the charges and possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense to the crime." *State v. Eversole*, 6th Dist. Nos. E-05-073, E-05-074, E-05-075, and E-05-076, 2006-Ohio-3988, ¶ 13, citing *State v. Fish* (1995), 104 Ohio App.3d 236, 240.

{¶ 15} The trial court considered each of the nine factors in its decision. It found that the state would be prejudiced by granting leave to withdraw the plea, because the state's chief witness, Anthony Pierson, would be unavailable to testify as his whereabouts are unknown. In its decision, the trial court recognized that Pierson is the "the only non-defendant witness to the alleged felonious assault, kidnapping, and bribery. Without Mr. Pierson, the State will be unable to present its case if forced to try this matter." Appellant's prior trial counsel testified that the probability of a conviction of appellant without the testimony of Anthony Pierson was "minimal."

{¶ 16} Appellant's counsel at the time of his plea had over 38 years experience in a trial practice. The trial court concluded in its opinion that appellant was represented by "highly competent counsel" when he changed his plea. No evidence was presented at the hearing on appellant's motion on which to claim that his counsel was deficient.

{¶ 17} Appellant agrees on appeal that the requirements of Crim.R. 11(C) were met at the plea hearing (factor three) and that he understood the nature of the charges and

possible penalties at the time he changed his plea to no contest (factor eight). The record reflects that the parties were given a full hearing on the motion to withdraw the plea with the opportunity to call and cross-examine witnesses (factor four).

{¶ 18} The trial court gave an extensive and studied review of the evidence and the nine factors to be weighed in considering the motion to withdraw the no contest plea. In our view, the trial court gave a full and fair consideration of appellant's motion (factor 5).

{¶ 19} The trial court found that appellant had expressed an interest to attorney Wittenberg within a week of the plea of a desire to withdraw the plea. The court concluded that the motion was filed within a reasonable time (factor six). The trial court also concluded that this factor weighed "heavily in favor of the accused."

{¶ 20} Considering factor nine, the trial court determined that no evidence was presented either at the plea hearing or at the motion hearing to indicate that appellant was not guilty of the charges or had a complete defense to the crimes charged. Appellant does not dispute that determination except to the extent that his plea was not an admission of guilt. He pled no contest to felonious assault, not guilty.

{¶ 21} Appellant has specified in the trial court and on appeal his reason to withdraw his plea. He has claimed that he has continually claimed his innocence and was pressured by his attorney to accept the plea agreement and to plead no contest to felonious assault. He argues that he was permitted less than two hours to decide whether to accept the plea bargain on February 4, 2008. February 4, 2008, however, was the third trial date. There had been prior plea negotiations.

{¶ 22} We have reviewed the record and conclude that the trial court did not abuse its discretion in overruling the motion to withdraw appellant's no contest plea. The validity of appellant's no contest plea is not in dispute. Appellant admits that the trial court conducted an appropriate Crim.R. 11(C) hearing. He admits that he understood the nature of the charges against him and possible penalties upon conviction when he pled no contest to felonious assault. He does not claim ineffective assistance of counsel.

{¶ 23} A change of heart alone is not a basis to withdraw a guilty or no contest plea. *State v. Gonzales*, 6th Dist. Nos. WD-06-084 and WD-06-085, 2007-Ohio-3565, ¶ 23; *State v. Eversole* at ¶ 16; *State v. Lambros* (1988), 44 Ohio App.3d 102, 103. Claims that counsel recommended the plea agreement and pressured the defendant to accept a plea bargain are of limited weight where the plea was knowingly and voluntarily made. See *State v. Mullins* (Dec. 31, 1998), 6th Dist. No. L-98-1059; *State v. Slover* (Mar. 17, 1995), 6th Dist. No. L-93-320.

{¶ 24} Under the circumstances presented in this case, including the prejudice that the state would suffer by granting the motion, we conclude that appellant failed to establish a legitimate and reasonable basis for withdrawing his plea. The trial court did not abuse its discretion in overruling the motion to withdraw appellant's plea. Appellant's sole assignment of error is not well-taken.

{¶ 25} On consideration whereof, the court finds that substantial justice has been done the party complaining and that appellant was not prejudiced or prevented from

having a fair trial. 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.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.  
CONCUR.

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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>.