

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2008-05-057
	:	CA2008-05-058
- vs -	:	<u>OPINION</u>
	:	5/18/2009
MARK E. HUFFER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM LEBANON MUNICIPAL COURT
Case No. CRB 0700196

Matthew J. Graber, 423 Reading Road, Mason, Ohio 45040, for plaintiff-appellee

H. Fred Hoefle, 810 Sycamore Street, Cincinnati, Ohio 45202, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Mark Huffer, appeals his convictions in the Lebanon Municipal Court for domestic violence and violation of a temporary protection order.

{¶2} On January 6, 2007, appellant was arrested and charged with domestic violence in violation of R.C. 2919.25(A). At the time, appellant was on diversion from previous domestic violence case. An additional count alleging violation of a temporary protection order in violation of R.C. 2919.27(A)(1) was later charged against appellant. A docket entry filed January 11, 2007 directed that appellant be held without bond. Appellant

remained incarcerated until March 5, when his counsel filed a motion to set aside and/or reduce bond. On that day, appellant entered guilty pleas to domestic violence and violation of a temporary protection order, and the remaining charges were dismissed. Appellant was sentenced to 180 days in jail for each count, with credit for 42 days served, and the remainder of his sentence was suspended. The court also ordered appellant to pay a \$500 fine in each case, but suspended the entire amount.

{¶3} Thereafter, appellant filed a motion to withdraw his guilty pleas, requesting a hearing and urging that the pleas were only entered so he could get out of jail. In an accompanying affidavit, appellant stated that he owned and operated his own business which employs 15 people, his children were forced to stay with their mother, his father had a stroke, and his mother suffered a nervous breakdown during his incarceration. Appellant also argued that he was not adequately informed that a conviction of domestic violence as a first-degree misdemeanor could enhance any subsequent charge for that offense to felony charges, and he entered his pleas without knowledge or understanding of that fact.

{¶4} The lower court denied appellant's motion by written entry, stating "[t]he Court has reviewed the transcript all rights were read to Defendant and the Defendant's plea was voluntary and knowing. Motion to set aside the plea and set aside the judgment is overruled." Appellant timely appeals the denial of his motion, raising three assignments of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTIONS TO WITHDRAW HIS GUILTY PLEAS AND FOR AN ORDER VACATING AND SETTING ASIDE THE CONVICTIONS BASED ON SUCH PLEAS, IN VIOLATION OF APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW, AND ITS COUNTERPART IN THE OHIO CONSTITUTION, ART. I § 16."

{¶7} Assignment of Error No. 2:

{¶8} "THE TRIAL COURT ERRED IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY DENYING HIM A HEARING ON HIS MOTION TO WITHDRAW GUILTY PLEAS AND TO VACATE AND SET ASIDE THE CONVICTIONS RESULTING FROM THOSE PLEAS."

{¶9} Assignment of Error No. 3:

{¶10} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY ADJUDICATING HIM GUILTY OF CRIMINAL OFFENSES ON PURPORTED GUILTY PLEAS WHERE THE RECORD FAILS TO REFLECT THAT THE ACCUSED, IN FACT, PLEADED GUILTY TO THE OFFENSES."

{¶11} In his assignments of error, appellant argues that there is no record that he actually entered a plea of guilty, his guilty plea was not entered knowingly, intelligently, and voluntarily, and his due process rights were violated because the lower court failed to conduct a hearing on his motion to withdraw.

{¶12} Withdrawal of a guilty plea is controlled by Crim.R. 32.1, which provides, "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; 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."

{¶13} An appellate court reviews a trial court's decision to deny a motion to withdraw a plea under an abuse-of-discretion standard. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶32. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶14} When a defendant enters a plea in a criminal case, the plea must be made

knowingly, intelligently, and voluntarily. *State v. Engle*, 74 Ohio St.3d 525, 527; *McCarthy v. United States* (1969), 394 U.S. 459, 466, 89 S.Ct. 1166. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution. *Id.*

{¶15} As a preliminary matter, we take notice of the very limited record provided by the municipal court in this case. Additionally, the transcript of the combined plea and sentencing hearing is less than five pages in length with significant "inaudible" portions. The only portions of the hearing transcribed in the record before this court are pre-plea statements by the lower court informing appellant of what his potential sentence would be if he enters a guilty plea and statements about monitoring by the probation department. The transcript is devoid of any Crim.R. 11 colloquy between the judge and appellant, no statement on the record by appellant entering a guilty plea, nor does the transcript contain the actual imposition of sentence by the court.

{¶16} The state urges that Crim.R. 22 prevents appellant from relying upon any deficiencies in the transcript; he proceeded as if he entered a guilty plea; and that appellant is not entitled to a hearing on his motion to withdraw under *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894.

{¶17} In *Francis*, the Ohio Supreme Court "acknowledged the importance of a hearing to aid in developing a record that could be examined by a reviewing court to determine whether a trial court properly exercised its discretion in ruling on a motion to withdraw a plea." *Id.* at ¶51. The court noted that "[t]here is no specific requirement to hold a hearing on a motion to withdraw guilty plea." *Id.* at ¶50. However, "it sometimes is difficult for an appellate court to review a trial court's ruling on a motion to withdraw a plea to determine whether an abuse of discretion occurred when no hearing was held." *Id.* The *Francis* court cited a previous Ohio Supreme Court decision, *State v. Xie* (1992), 62 Ohio St.3d 521, for the

proposition that "unless it is clear that denial of the motion is warranted, a trial court should hold a hearing." *Id.* at ¶51. See, also, *State v. Boswell*, Slip Opinion No. 2009-Ohio-1577, ¶10. "In some situations when a hearing should have been held, a trial court's failure to have held a hearing amounts to an abuse of discretion." *Francis* at ¶51. The *Francis* court ultimately found an abuse of discretion by the trial court because the court failed to hold a hearing and failed to explain its reason for denial of the motion. *Id.* at ¶56.

{¶18} We are similarly troubled by the lower court's decision denying appellant's motion to withdraw in this case. First, the conclusions made by court are not supported by the record. In the written decision denying the motion to withdraw, the court claimed that it "reviewed the transcript" of the proceedings, "all rights were read to Defendant," and, as a result, found that the appellant's "plea was voluntary and knowing."

{¶19} As discussed previously, however, there is no indication in the transcript that any rights were read to appellant. In fact, the transcript includes no colloquy between the lower court and appellant, and no plea entered by appellant on the record. Based upon the transcript before this court, we are unsure how the lower court could conclude that appellant entered a knowing and voluntary plea.

{¶20} We are further troubled by the pre-plea statements by the lower court at the March 5 hearing. In this case, appellant was incarcerated without bond on the misdemeanor charges for nearly two months. Over that period, the trial judge never held a hearing to set bail. At the beginning of the hearing, the lower court addressed appellant, stating, "if you end up making an admission today on these two cases, what I'm going to do is release you from jail. I'm going to suspend a jail term in each one of the two cases. * * * You're going to have, really, a jail term of about 272 days that is suspended. So you'll have suspended jail time over your head. I'm going to suspend a fine of \$500 in each one of the two cases, and in each one of the cases, I'm going to put you on probation for a couple of years. * * * That's

what's going to happen if you end up making an admission to the domestic violence claim and the admission to the violating a TPO claim. The other cases here would be dismissed."

{¶21} Due to appellant's lengthy incarceration, these statements tend to support appellant's claim that the pleas he entered were involuntary. Appellant was incarcerated from early January until March 5. At the March 5 hearing, the lower court stated that, if appellant entered guilty pleas, the court would release him from jail; inducing appellant to enter the pleas. These actions and statements by the court vitiate the voluntariness required for a valid plea.

{¶22} Although the state urges that appellant is estopped from relying upon deficiencies in the record due to Crim.R. 22, this is a unique case. The lower court claimed that it reviewed a transcript where appellant was read his rights and found that the plea was entered was knowing and voluntary. As described above, the transcript before this court does not support the lower court's findings. Moreover, coupled with the statements by the lower court to appellant at the hearing, we find the lower court abused its discretion in denying appellant's motion to withdraw his guilty plea.

{¶23} Appellant's first assignment of error is sustained. Appellant's remaining assignments of error are overruled as moot.

{¶24} Judgment reversed and remanded for further proceedings. Appellant's motion to withdraw his guilty pleas is granted.

BRESSLER, P.J., and HENDRICKSON, J., concur.

[Cite as *State v. Huffer*, 2009-Ohio-2336.]