

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

CITY OF FAIRFIELD/STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-06-171
 :
 - vs - : OPINION
 : 12/14/2009
 :
 JASON R. HAMILTON, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM FAIRFIELD MUNICIPAL COURT
Case No. 2008 CRB 02680

Gerald Froelke, Fairfield City Prosecutor, Stephen J. Wolterman, 530 Wessel Drive, Suite 2A, Fairfield, Ohio 45014, for plaintiff-appellee

Samuel D. Borst, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Jason R. Hamilton, appeals his conviction in the Fairfield Municipal Court for resisting arrest and disorderly conduct.¹

{¶2} On August 29, 2008, appellant was charged with assault, resisting arrest, and disorderly conduct. Appellant filed a written jury demand in the trial court. The state agreed to merge the assault charge in exchange for appellant entering a guilty plea for the remaining charges. At a plea hearing on April 21, 2009, a plea of guilty was

entered to the charges of resisting arrest and disorderly conduct. At the sentencing hearing, appellant entered an oral motion to withdraw the guilty plea. Without a hearing, the trial court denied appellant's motion. Appellant was then sentenced to 90 days in jail, with five days suspended, a fine of \$750, with \$150 suspended, and two years of probation. Appellant timely appeals, raising two assignments of error.

{¶3} Assignment of Error No. 1:

{¶4} "THE TRIAL COURT VIOLATED THE DUE PROCESS RIGHTS OF THE DEFENDANT-APPELLANT, CRIM.R. 23(A), AND R.C. 2945.05 BY DISHONORING HIS TIMELY-FILED WRITTEN JURY DEMAND, AND BY FAILING TO SECURE A R.C. 2945.05-COMPLAINT WRITTEN WAIVER OF HIS RIGHT TO A JURY TRIAL BEFORE PROCEEDING TO TAKE A GUILTY PLEA."

{¶5} In his first assignment of error, appellant argues the trial court erred by accepting the guilty plea in violation of his right to a jury trial after executing a written jury demand under Crim.R. 23(A). Appellant contends that because he did not sign a written waiver of his right to jury trial, as required by R.C. 2945.05, his plea was not effective.

{¶6} At the plea hearing, appellant's counsel withdrew the written jury demand. Further, a guilty plea was entered to the charges of resisting arrest and disorderly conduct. Ohio courts have consistently recognized that the entry of a plea of guilty by an accused constitutes a waiver of a jury trial and, as a result, the mandates of R.C. 2945.05 are no longer applicable. *Rodriguez v. Sacks* (1962), 173 Ohio St. 456, 457; *State v. West* (1999), 134 Ohio App.3d 45, 51; *State v. Kinebrew*, Hamilton App. No. C-060769, 2008-Ohio-812, ¶3. Accordingly, the failure to file a written waiver in this case did not deprive appellant of any of his constitutional rights.

1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

{¶7} Appellant's first assignment of error is overruled.

{¶8} Assignment of Error No. 2:

{¶9} "THE TRIAL COURT VIOLATED THE DEFENDANT-APPELLANT'S DUE PROCESS RIGHTS BY FAILING TO INFORM HIM OF HIS CRIM.R. 11(E) RIGHTS AT A PLEA HEARING, BY ENTERING A FINDING OF GUILT WITHOUT AN ACTUAL GUILTY PLEA AND FACTS CONSTITUTING THE OFFENSES BEING ENTERED, AND BY OVERRULING HIS CRIM.R. 32.1 MOTION FOR WITHDRAWAL OF HIS GUILTY PLEA WITHOUT A HEARING."

{¶10} In his second assignment of error, appellant argues that he never actually entered a guilty plea on the record. Additionally, appellant argues the trial court erred by denying his presentence motion to withdraw the guilty plea without a hearing.

Guilty Plea

{¶11} At the plea hearing, appellant's counsel entered the guilty plea on appellant's behalf. Although the preferred practice is for the trial court to have the accused personally vocalize a plea, a guilty plea entered by counsel has the same force and effect as a plea personally entered by the accused where the accused is present and the circumstances are such as to show clearly that the accused understands what is being done and acquiesces therein. *Petition of Morelli* (App. 1956), 76 Ohio Law Abs. 501, 501; *State v. Keaton*, Clark App. No. 98 CA 99, 2000 WL 20850, *5. See, also, *Garland v. State of Washington* (1914), 232 U.S. 642, 34 S.Ct. 456.

Motion to Withdraw Plea

{¶12} "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." Crim.R. 32.1.

{¶13} An appellate court will only reverse the denial of a motion to withdraw a guilty plea when the trial court abused its discretion. *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, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶14} A trial court, however, must hold a hearing before denying a presentence motion to withdraw a guilty plea. As the Ohio Supreme Court noted, "a presentence motion to withdraw a guilty plea should be freely and liberally granted. Nevertheless, it must be recognized that a defendant does not have an absolute right to withdraw a plea prior to sentencing. Therefore, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *State v. Xie* (1992), 62 Ohio St.3d 521, 527.

{¶15} Here, a presentence motion to withdraw appellant's plea was made to the trial court. The trial court summarily denied the motion without any hearing or discussion of the matter.

{¶16} Specifically, appellant's trial counsel requested, "I would like to make the oral motion to withdraw the formerly tendered plea of guilty, ask the matter be set for jury."

{¶17} THE COURT: "I already made a finding. Motion denied.

{¶18} THE DEFENDANT: "Your Honor, can I interject?"

{¶19} THE COURT: "Excuse me?"

{¶20} THE DEFENDANT: "Can I say something?"

{¶21} THE COURT: "Say anything you want, I'm going forward with sentencing today.

{¶22} THE DEFENDANT: "I mean, I wasn't - - I've been requesting a video of this for, you know, eight months.

{¶23} THE COURT: "Sir, there has been a plea of guilty, there has been a finding of guilty. I'm going to do a sentencing today, if you have issues with it, that's why we have gentlemen up at the Court of Appeals."

{¶24} Ohio courts have repeatedly held that failure by a trial court to hold a hearing on a presentence motion to withdraw a guilty plea is an abuse of discretion. *State v. Nicholson*, Cuyahoga App. No. 82825, 2004-Ohio-2394, ¶11; *State v. Mitchell*, Guernsey App. No. 07 CA 17, 2008-Ohio-101, ¶47; *State v. Orris*, Franklin App. No. 07-AP-390, 2007-Ohio-6499, ¶9; *State v. Whiteman*, Portage App. No. 2001-P-0096, 2003-Ohio-2229, ¶19. By failing to hold a hearing following appellant's presentence motion in this case, the trial court abused its discretion.

{¶25} Appellant's second assignment of error is sustained as it relates to the motion to withdraw the plea and is overruled in all other respects.

{¶26} The trial court's denial of defendant's motion to withdraw his plea is vacated and this case is reversed and remanded for a hearing on this motion.

YOUNG, P.J., and HENDRICKSON, J., concur.