

[Cite as *State v. Johnson*, 2009-Ohio-5821.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92364**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**HECTOR JOHNSON**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**REVERSED; VACATED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-487880

**BEFORE:** Sweeney, J., Gallagher, P.J., and Celebrezze, J.

**RELEASED:** November 5, 2009

**JOURNALIZED:**  
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Hector Johnson (“defendant”), appeals the court’s denial of his motion to withdraw his guilty plea. After reviewing the facts of the case and pertinent law, we reverse defendant’s conviction, vacate his plea, and remand for further proceedings.

{¶ 2} On August 4, 2008, defendant pled guilty to one count of rape in violation of R.C. 2907.02(A)(1)(b). On September 2, 2008, defendant filed a presentence motion to withdraw his guilty plea. The court denied the motion and defendant now appeals, raising two assignments of error for our review. We address the assignments of error together:

{¶ 3} “I. Appellant’s guilty plea was not knowingly and intelligently made.

{¶ 4} “II. The trial court erred in denying appellant’s motion to withdraw or vacate his guilty plea.”

{¶ 5} Motions to withdraw guilty pleas that are filed before sentencing are to be freely allowed and treated with liberality. *State v. Peterseim* (1979), 68 Ohio App.2d 211. See, also, Crim.R. 32.1. However, a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *State v. Xie* (1992), 62 Ohio St.3d 521. In ruling on a presentence withdrawal motion, the court must conduct a hearing and decide whether there is a reasonable and legitimate basis for the withdrawal of the plea. *Id.* at 527. The decision to grant or deny such a motion is within the sound discretion of the trial court. *Id.*

{¶ 6} The standard for appellate courts reviewing whether a criminal defendant voluntarily entered a guilty plea is strict compliance for constitutional rights and substantial compliance for non-constitutional rights. See *State v. Scruggs*, Cuyahoga App. No. 83863, 2004-Ohio-3732. Pursuant to Crim.R. 11(C)(2)(a), the court shall not accept a guilty plea without addressing the defendant and:

{¶ 7} “Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.”

{¶ 8} Additionally, R.C. 2929.13(F)(2) states that prison terms are mandatory when sentencing a defendant for a rape conviction. See, also, *State v. Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69.

{¶ 9} In the instant case, the record evidences confusion regarding the sentencing range defendant faced by pleading guilty during his Crim.R. 11 hearing. Specifically, the following colloquy took place:

{¶ 10} “THE COURT: It’s not a probationable offense, either. You should understand that as well. This is not a probationable offense.

{¶ 11} “[DEFENSE COUNSEL]: There’s a presumption.

{¶ 12} “[PROSECUTOR]: There’s a presumption, although it is within the discretion of the trial court to give community control. However, there is a presumption on the felony one.

{¶ 13} “THE COURT: Okay. So then it’s - okay. So that there’s a presumption of incarceration here but it’s not a mandatory sentence.

{¶ 14} “[DEFENSE COUNSEL]: Correct.”

{¶ 15} Defendant argues on appeal — and the State concedes — that the court did not comply with Crim.R. 11(C)(2)(a), because it did not advise defendant that incarceration is mandatory for rape convictions; rather, relying upon defense counsel and the State’s false information, it incorrectly advised defendant that imprisonment was discretionary. Defendant’s argument and the State’s concession is well taken. Defendant could not have understood the full effect of pleading guilty to rape, and the court erred by denying his motion to withdraw his plea.<sup>1</sup> See *State v. Chessman*, Greene App. No. 03CA100, 2006-Ohio-835 (finding reversible error when the court advised the defendant that he was eligible for community control sanctions despite the fact that one of the charges he was pleading guilty to was rape, which requires mandatory prison time under R.C. 2929.13(F)(2)).

{¶ 16} Defendant also argues that he should have been allowed to withdraw his guilty plea because he was not properly informed of postrelease control. Pursuant to App.R. 12(A)(1)(c), this argument is made moot. Defendant’s

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<sup>1</sup>We note that the trial judge who conducted the hearing on, and subsequently denied, defendant’s motion to withdraw guilty plea is not the same trial judge who oversaw the misleading colloquy in defendant’s plea hearing. Furthermore, defendant’s motion to withdraw his guilty plea is not based on the R.C. 2929.13(F)(2) mandate of a prison term. Nonetheless, we find that the court erred by denying defendant’s motion to withdraw his guilty plea, albeit for different reasons than defendant initially relied on in his Crim.R. 32.1 motion.

assignments of error are sustained and his plea is vacated. Defendant's convictions are reversed and the case is remanded to the trial court for proceedings consistent with this opinion.

Judgment reversed, vacated and remanded.

It is ordered that appellant recover from appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for further proceedings.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, P.J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR