[Cite as *State v. North*, 2007-Ohio-5383.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. JOHN ROBERT NORTH Appellant	C. A. No. 06CA009063 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 05 CR 068099

DECISION AND JOURNAL ENTRY

Dated: October 9, 2007

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Presiding Judge.

{¶1} Defendant-Appellant John Robert North has appealed from the judgment of the Lorain County Court of Common Pleas which denied his motion to withdraw his guilty plea. We reverse.

I

{¶2} On March 31, 1997, Appellant pled guilty to aggravated robbery and aggravated burglary. The trial court sentenced Appellant to five years in prison. The trial court's journal entry appears to have struck any reference to post-release control. However, Appellant was placed on post-release control following his sentence. Appellant did not comply with the provisions of post-release control.

Consequently, he was indicted on one count of escape in violation of R.C. 2921.34. Appellant pled guilty to the charge of escape on September 28, 2004. Upon his release, Appellant was informed that his prior period of post-release control from his 1997 convictions was still in effect. Appellant again violated the terms of his release and was indicted for escape a second time on June 22, 2005. In the instant matter, Appellant violated the terms of his release by leaving the state without permission. Consequently, both of Appellant's escape charges resulted not from an "escape" in the traditional meaning of the word but through Appellant's failure to comply with the specific terms of post-release control.

{¶3} On August 29, 2005, Appellant pled guilty to escape. Appellant was sentenced to one year in prison by the trial court. In its entry, the trial court neglected to inform Appellant of post-release control. Accordingly, on October 20, 2006, the trial court conducted a new sentencing hearing in order to properly inform Appellant of post-release control. During that hearing, Appellant moved to withdraw his guilty plea. The trial court heard Appellant's arguments and then orally denied the motion. The trial court then sentenced Appellant to one year in prison and informed him of post-release control. Appellant has timely appealed from the trial court's judgment, raising two assignments of error for review.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED BY DENYING MR. NORTH'S PRESENTENCE MOTION TO WITHDRAW HIS GUILTY PLEA. ***"

{¶4} In his first assignment of error, Appellant has argued that the trial court erred in denying his presentence motion to withdraw his guilty plea. We agree.

{¶5} This Court reviews a motion to withdraw a guilty plea under the abuse of discretion standard. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. Crim.R. 32.1 permits a defendant to file a presentence motion to withdraw his plea. Although a presentence motion to withdraw a guilty plea is generally "to be freely allowed and treated with liberality" by the trial court, the decision to grant or deny such a motion is nevertheless within the sound discretion of the trial court. *Xie*, 62 Ohio St.3d at 526, quoting *Barker v. United States* (C.A.10, 1978), 579 F.2d 1219, 1223. Moreover, "[a defendant] who enters a guilty plea has no right to withdraw it." Id. To prevail on a motion to withdraw a guilty plea a defendant must provide a reasonable and legitimate reason for withdrawing his guilty plea. *State v. Dewille* (Nov. 4, 1992), 9th Dist. No. 2101, at *1, citing *Xie*, 62 Ohio St.3d at 527; *State v. Van Dyke*, 9th Dist. No. 02CA008204, 2003-Ohio-4788, at ¶10.

{¶6} During his hearing, Appellant introduced evidence that he was released from prison on March 18, 2005 for his initial escape conviction. Appellant's evidence indicated that he was not placed on the optional post-release

control that can accompany that offense. Appellant also introduced the judgment entry from his 1997 convictions for aggravated burglary and aggravated robbery. In that entry, the trial court did not impose post-release control on Appellant. Specifically, the trial court drew a line through the provision in its sentencing entry which discussed the imposition of post-release control.

{¶7} Based upon that evidence, Appellant argued to the trial court that he was actually innocent of the charge of escape because he was not legally under detention at the time the escape offense was committed. Specifically, Appellant asserted that *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, mandated a finding that the imposition of post-release control on him by the Adult Parole Authority was void. In *Hernandez*, the Court noted that "nothing in R.C. 2967.28 authorizes the Adult Parole Authority to exercise its postrelease-control authority if postrelease control is not imposed by the trial court in its sentence." (Emphasis omitted.) Id. at ¶18. On appeal, the State has conceded that *Hernandez* dictates a conclusion that the APA could not impose post-release control on Appellant from his 1997 convictions due to the trial court's failure to inform him of that sanction. The State, however, has urged that Appellant had notice of his post-release control and admitted to knowing those restrictions. This notice, however, does not cure the fact that Appellant's post-release control was void under *Hernandez* and that the APA lacked the authority to supervise Appellant as a result.

{¶8} Additionally, R.C. 2921.34(B), the statute defining escape, provides as follows:

> "Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority, is not a defense to a charge under this section if the detention is pursuant to judicial order or in a detention facility. In the case of any other detention, irregularity or lack of jurisdiction is an affirmative defense[.]"

Accordingly, the statute under which Appellant was indicted specified the defense he sought to raise in the trial court. Specifically, Appellant asserted that the APA lacked jurisdiction to impose post-release control on him because it was not contained in his 1997 sentencing entry. Based on *Hernandez*, Appellant's argument is legally correct. Moreover, without a valid form of detention, Appellant cannot be convicted of escape. As the trial court did not recognize the import of *Hernandez*, it abused its discretion. See *State v. Ross*, 9th Dist. No. 20980, 2002-Ohio-7317, at ¶27 (noting that "a mistake of law is equivalent to an abuse of discretion.").

{¶9} Appellant's first assignment of error, therefore, has merit.

Assignment of Error Number Two

> "MR. NORTH WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

{¶10} In his second assignment of error, Appellant has argued that he received ineffective assistance of trial counsel. Based upon this Court's resolution

of Appellant's first assignment of error, his second assignment of error is moot and we decline to address it. See App.R. 12(A)(1)(c).

III

{¶11} Appellant's first assignment of error is sustained. Appellant's second assignment of error is moot and we decline to address it. The judgment of the Lorain County Court of Common Pleas is reversed and the cause is remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

BETH WHITMORE
FOR THE COURT

CARR, J.
CONCURS

MOORE, J.
DISSENTS, SAYING:

{¶12} The majority assumes that a line drawn through the post-release control provision of a form sentencing entry evidences the trial court's intentional deletion of that provision. As it is not clear from the record that this was the court's intention, I respectfully dissent.

{¶13} At the outset, I would note the difficulty reviewing courts encounter based on some form journal entries. Clearly the volume of cases makes it impossible for trial judges to individually draft each sentencing entry. However, lines drawn through certain provisions, and circling or underlining of other provisions, without the initials or signature of the court, present challenges for the reviewing court to determine what the trial court actually ordered. A line on a page drawn through a provision certainly can mean that the document's drafter intended to strike the provision. Here, it is not clear whether the trial court struck the provision or whether the line was drawn before or after the trial court's signature. More troubling, the journal entry at issue has numerous subheadings. The paragraph containing the notice of post-release control does not have a

subheading. Rather, it is contained within the subheading, "Repeat Violent Offender or Major Drug Offender." Immediately following the post-release control paragraph is the subheading, "Drug Offenses."

{¶14} On appeal, we have not been presented with a transcript of the sentencing hearing which led to the issuance of this journal entry. The transcript of that hearing might well have shed light on the trial court's intent regarding Appellant's original sentence. To illustrate this fact, we need only examine our recent decision in *State v. Battle*, 9th Dist. No. 23404, 2007-Ohio-2475. In *Battle*, we held that it was appropriate for the trial court to nunc pro tunc its sentencing entry to include the proper term of post-release control. We based our decision upon the fact that the transcript of the trial court's sentencing hearing revealed the trial court's intent with respect to post-release control. See id. at ¶6. *Battle* is also persuasive as this Court noted therein as follows: "It is clear from the transcript excerpt supplied to this Court by the State that Appellant was informed of and understood that he was sentenced to two years of community control." Id. In the instant matter, Appellant also conceded that he knew of his existing post-release control obligation. Appellant must have acquired knowledge of this term of post-release control in some manner. Without further evidence in the record, the trial court was left to speculate about the origin of Appellant's knowledge of his post-release control.

{¶15} Moreover, as Appellant's offenses were wholly unrelated to the two subheadings which surrounded the paragraph giving notice of post-release control, it is possible that any striking through of that paragraph was entirely inadvertent. Consequently, it is troubling that we do not have a sentencing hearing transcript that would demonstrate the trial court's intent regarding post-release control. More troubling is that we are left with an insufficient record despite the fact that Appellant waited more than fourteen months to withdraw his plea. As it was Appellant's burden to demonstrate the validity of his request to withdraw his plea, I would find that the scant evidence he presented after such a substantial delay was not sufficient to justify granting his motion.

{¶16} The following facts compel a critical review of the relief sought by Appellant. Appellant filed no formal motion to withdraw his plea. Rather, after waiting fourteen months after pleading guilty, he orally moved to withdraw his plea at the inception of his sentencing hearing. See *State v. Van Dyke*, 9th Dist. No. 02CA008204, 2003-Ohio-4788, at ¶18 (finding that the length of delay is a relevant consideration when determining whether to permit withdrawal of a plea). This lengthy delay existed despite the fact that the statute under which Appellant was indicted specifically mentions the defense Appellant raised in his motion. See R.C. 2921.34. Additionally, as noted above, rather than providing the complete record from the offense resulting in his post-release control, Appellant provided only his initial journal entry, leaving the trial court to speculate about the intent of

that journal entry and leaving open the possibility that post-release control was properly imposed at a later date.

{¶17} The unique facts of this case raise some suspicion over Appellant's tactical decision to supply only the initial journal entry. Appellant conceded that he had previously pled guilty to escape charges based on the same post-release control he now claims has always been void and in fact served time in prison for that conviction. While I agree with the majority that motions to withdraw guilty pleas should be generally treated with liberality, I question whether this case merits such liberal treatment. Appellant waited more than a year to seek the withdrawal of his plea and even then sought only orally to do so. In support, he submitted an inconclusive journal entry. I cannot agree that the trial court was unreasonable or arbitrary in determining that evidence was insufficient to support Appellant's motion. Accordingly, I respectfully dissent and would find that the trial court did not abuse its discretion in overruling Appellant's motion to withdraw his plea.

APPEARANCES:

DAVID H. BODIKER, State Public Defender, and STEPHEN P. HARDWICK, Assistant Public Defender, for Appellant.

DENNIS WILL, Prosecuting Attorney and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.