The Supreme Court of Ohio

CASE ANNOUNCEMENTS

November 24, 2021

[Cite as *11/24/2021 Case Announcements #3*, 2021-Ohio-4109.]

APPEALS NOT ACCEPTED FOR REVIEW

2021-1100. State v. Harmon.
Pickaway App. No. 20CA6, 2021-Ohio-2610.
Donnelly, J., dissents, with an opinion joined by Stewart and Brunner, JJ.

DONNELLY, J., dissenting.

{¶ 1} This court needs to tackle the topic of presentence motions to withdraw guilty pleas and provide much-needed guidance to Ohio's courts to ensure that they apply Crim.R. 32.1 correctly and consistently. It should do so in this case.

{¶ 2} Our careful examination of the law governing presentence motions to withdraw guilty pleas is long overdue; it has been almost 30 years since this court directly addressed the subject. *See State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992). Given the dearth of guidance from this court over the years, Ohio's appellate courts have cobbled together their own standards for reviewing plea-withdrawal motions, primarily relying on the set of considerations credited to the First District Court of Appeals' decision in *State v. Fish*, 104 Ohio App.3d 236, 661 N.E.2d 788 (1st Dist.1995), *overruled on other grounds*, *State v. Sims*, 2017-Ohio-8379, 99 N.E.3d 1056, ¶ 15 (1st Dist.). And although we have provided to the lower courts the rather limited instruction that a "presentence motion to withdraw a guilty plea should be freely and liberally granted," *Xie* at 527, I fear that courts considering the factors articulated in *Fish* now focus on only the fact that the decision to grant or deny a presentence-plea-withdrawal motion is " 'within the sound discretion of the trial court,' " *Xie* at 526, quoting *Barker v. United States*, 579 F.2d 1219, 1223 (10th Cir.1978).

{¶ 3} The considerations articulated in *Fish* account for the defendant's due-process right to a full and fair plea hearing and plea-withdrawal hearing, any prejudice to the state's ability to try the case, and the defendant's possible innocence. Those considerations include (1) whether the trial court conducted a full Crim.R. 11 hearing before accepting the defendant's plea, (2) whether the defendant was represented by highly competent counsel during the Crim.R. 11 hearing, (3) whether the defendant understood the nature of the charges and the possible penalties, (4) whether the defendant filed the plea-withdrawal motion within a reasonable time, (5) whether the motion stated specific reasons for withdrawing the plea, (6) whether the trial court afforded the defendant a full hearing on the motion, (7) whether the trial court gave full and fair consideration to the motion, (8) whether the delay in proceeding to trial would unduly prejudice the prosecution, and (9) whether it is possible that the defendant is innocent. *Fish* at 240.

{¶ 4} We should either adopt the foregoing *Fish* factors or articulate our own for the sake of consistency across all of Ohio's appellate districts and stress that the freely-and-liberally-granted standard for presentence plea withdrawal still applies. Most important to the case of appellant, Richard P. Harmon, we should articulate the standard for requiring a court to afford a full evidentiary hearing on a defendant's presentence-plea-withdrawal motion.

{¶ 5} In Harmon's motion, which was filed by new counsel, he asserted that his previous counsel had misinformed him that he would receive the maximum sentence if he proceeded to trial and was found guilty, causing him to misunderstand the possible penalties that he faced. 2021-Ohio-2610, ¶ 3, 21. He further asserted that he was not guilty of the charge that he faced (operating a motor vehicle while under the influence of drugs or alcohol), that he had medical evidence to refute the state's evidence, and that he suffered from an intellectual dysfunction caused by serious brain damage. *Id.* Harmon also filed his plea-withdrawal motion within a reasonable time, and the state conceded that it would not be particularly prejudiced by the plea withdrawal. *Id.* at ¶ 29, 34.

{¶ 6} Although Harmon's allegations, if true, would seem to require that he be allowed to withdraw his guilty plea, the trial court did not allow the parties to present evidence on the motion, despite Harmon's offer to do so. *Id.* at ¶ 21, 24. Instead, the trial court stated that it personally knew Harmon's prior counsel and did not believe that he would have told Harmon that a conviction following a trial would have led to the maximum sentence. *Id.* at ¶ 23. The court concluded that Harmon had only had a change of heart. *Id.* In affirming the trial court's judgment,

the court of appeals repeatedly cited Harmon's lack of evidentiary support, even though Harmon had not been permitted to present his evidence at a full hearing on the motion. *See id.* at ¶ 26, 30, 33.

{¶ 7} There is a huge difference between a presentence-plea-withdrawal case in which a defendant uses the plea- and plea-withdrawal process as a delay tactic or refuses to articulate a potential defense to the charges and a case like this one in which the defendant made very specific assertions about his innocence and problems with the plea process, did so without delay, and there was no assertion of prejudice by the state. Such cases should not be treated the same—as an afterthought shoehorned into the defendant's sentencing hearing.

{¶ 8} A guilty plea "is more than an admission of past conduct; it is the defendant's * * * waiver of his right to trial." *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). A presentence motion to withdraw a guilty plea is not a procedural annoyance; it is the defendant's invocation of his constitutional right to a jury trial. We should ensure that defendants' due-process rights are protected during the presentence-plea-withdrawal process by accepting this appeal for review and providing guidance to promote the consistent application of the principles underlying Crim.R. 32.1. Accordingly, I dissent.

STEWART and BRUNNER, JJ., concur in the foregoing opinion.