

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-231 (C.P.C. No. 09CR-03-1205)
Carl K. Hurlburt,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on March 5, 2013

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*Ron O'Brien*, Prosecuting Attorney, and *Michael P. Walton*,  
for appellee.

*Yeura Venters*, Public Defender, and *Timothy E. Pierce*, for  
appellant.

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APPEAL from the Franklin County Court of Common Pleas.

CONNOR, J.

{¶1} Defendant-appellant, Carl K. Hurlburt ("defendant"), appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to a guilty plea, of one count of nonsupport of dependents in violation of R.C. 2919.21. Because the trial court failed to hold a hearing on defendant's presentence motion to withdraw his guilty plea, we reverse and remand.

{¶2} Plaintiff-appellee, the State of Ohio ("State"), filed an indictment against defendant on March 2, 2009, charging defendant with one count of nonsupport of dependents, a felony of the fifth degree. The indictment alleged that defendant had failed to make support payments for a total accumulated period of 26 weeks out of 104

consecutive weeks. Although defendant initially entered a plea of not guilty, defendant changed his plea to guilty at the July 21, 2011 plea hearing. During the plea hearing the court engaged in a plea colloquy with defendant, but did not inquire into defendant's citizenship status or otherwise advise defendant regarding the possible immigration consequences of his guilty plea, as required by R.C. 2943.031(A). Following two continuances, the court held the sentencing hearing on February 10, 2012. The court sentenced defendant to five years community control, ordering as a condition of community control that defendant pay \$15,788.67 in arrearages to the Franklin County Child Support Enforcement Agency.

{¶3} Defendant appeals, assigning the following errors:

[1.] The trial court abused its discretion in denying Appellant's motion to withdraw his guilty plea prior to sentencing.

[2.] The trial court erred in failing to advise Appellant, who is not a United States citizen, of the consequences of his guilty plea to a felony charge, in violation of R.C. 2943.031, Crim.R. 11, and the state and federal Constitutions.

{¶4} Defendant's first assignment of error asserts the trial court erred in denying his presentence motion to withdraw his guilty plea. A defendant may move to withdraw his guilty plea "before sentence is imposed." Crim.R. 32.1. "[A] presentence motion to withdraw a guilty plea should be freely and liberally granted." *State v. Xie*, 62 Ohio St.3d 521, 527 (1992). "Nevertheless, it must be recognized that a defendant does not have an absolute right to withdraw a plea prior to sentencing." *Id.* Therefore, "[a] trial court *must* conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." (Emphasis added.) *Id.* at paragraph one of the syllabus. "The decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court." *Id.* at paragraph two of the syllabus.

{¶5} At the February 10, 2012 sentencing hearing, the court discussed defendant's plea agreement with the prosecutor and defense counsel. The prosecutor informed the court that the plea agreement required defendant to pay \$10,000 toward his child support arrearage by the date of the sentencing hearing, in addition to his monthly support payments. In return, the State would allow defendant "to withdraw

the guilty plea to the felony and enter a plea to a misdemeanor." (Tr. 14.) The prosecutor further indicated that, in November 2011, defendant paid \$6,200 toward the arrearage. Defense counsel informed the court that he had a \$3,085 check in his office to further apply toward the agreed upon \$10,000 payment. The State also informed the court that, if the court would agree to continue the sentencing hearing again, defendant promised to pay \$915 prior to the next hearing date, thus satisfying his obligation to pay \$10,000 toward his arrearage as well as his monthly support obligations.

{¶6} The court stated that, to its understanding, "the deal didn't include continuing the sentencing date over and over and over." (Tr. 17.) After discussing the status of defendant's custody action in domestic court, the court stated "I am not going to continue this any longer, \* \* \* he says he is going to come up with ten grand by sentencing. He doesn't do that." (Tr. 20.) The court indicated it was "going to go ahead and sentence him. I am not going to wait 14 times until he makes installments." (Tr. 23.) Defense counsel responded, "Your Honor, can we discuss at least withdrawing the guilty plea and entering a plea?" (Tr. 23.) The court immediately responded "No, no, absolutely not" and proceeded to sentence defendant. (Tr. 23.)

{¶7} Because defendant made a request to withdraw his plea prior to sentencing, *Xie* required the trial court to hold a hearing to determine whether there was a reasonable and legitimate basis for the motion. Although the court in *Xie* did not set forth the type of hearing required for a presentence motion to withdraw a guilty plea, the trial court here did not hold any hearing or even allow defense counsel to explain the basis for the motion. *See State v. Robinson*, 8th Dist. No. 89651, 2008-Ohio-4866, ¶ 24 (noting that "[w]hile the *Xie* court failed to specifically set forth what type of hearing is required, it is axiomatic that such hearing must comport with the minimum standards of due process"). Based on the foregoing, defendant's first assignment of error is sustained to the extent that the trial court failed to conduct a hearing on defendant's oral motion to withdraw his guilty plea.

{¶8} Our resolution of defendant's first assignment of error renders defendant's second assignment of error moot. Defendant contends in his second assignment of error that the trial court erred by failing to advise defendant, a non-citizen, prior to accepting his guilty plea regarding the possible negative immigration consequences

which his plea might entail, as required by R.C. 2943.031(A). Due to the court's summary rejection of defendant's motion to withdraw his guilty plea, defense counsel was unable to develop the facts or law to support a R.C. 2943.031(D) motion to withdraw. *See State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶ 35, quoting *State ex rel. White v. Suster*, 101 Ohio St.3d 212, 2004-Ohio-719, ¶ 7 (noting that "a motion under R.C. 2943.031(D) 'and an appeal from the denial of the motion provide the exclusive remedies' for a trial court's alleged failure to comply with R.C. 2943.031(A)"). At the hearing on remand, defendant may formally move to withdraw his plea, pursuant to R.C. 2943.031(D), and make the showing necessary to support such a motion. *See State v. Weber*, 125 Ohio App.3d 120, 126 (10th Dist.1997); *Francis* at ¶ 45 (in order to prevail on a R.C. 2943.031(D) motion "a defendant must demonstrate that he or she was prejudiced by the trial court's alleged failure to comply with R.C. 2943.031(A)").

{¶9} Defendant's first assignment of error is sustained to the extent the trial court failed to hold a hearing on defendant's oral presentence motion to withdraw his guilty plea. On remand, the trial court is instructed to hold a hearing on defendant's motion "to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Xie* at paragraph one of the syllabus. *See also State v. Benson*, 5th Dist. No. 11 CA 10, 2012-Ohio-230, ¶ 11 (finding reversal and remand appropriate "[i]n light of *Xie*, \* \* \* for a hearing on the motion to withdraw no contest plea").

{¶10} Having sustained defendant's first assignment of error, rendering defendant's second assignment of error moot, we hereby reverse the judgment of the Franklin County Court of Common Pleas and remand this matter for further proceedings consistent with this decision.

*Judgment reversed;  
cause remanded with instructions.*

TYACK and SADLER, JJ., concur.

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