[Cite as *State v. Lausin*, 2006-Ohio-5649.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2005-A-0049**
- vs -	:	
ROBERT LAUSIN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court, Western Area, Case No. 2004 CRB 00824.

Judgment: Reversed and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Angela M. Scott*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Leo J. Talikka, Talidyne Building, Suite 100, 2603 Riverside Drive, Painesville, OH 44077 (For Defendant-Appellant).

WILLIAM M. O'NEILL, J.

{¶1} This is an accelerated calendar case, submitted to this court on the record and the briefs of the parties. Appellant, Robert Lausin, appeals the judgment entered by the Ashtabula County Court, Western Area. The trial court sentenced Lausin to 60 days in jail for his conviction for injuring animals.

{¶2} In December 2003, Lausin temporarily resided with his girlfriend, Luanne Baker. Also, Baker's dog, "Sunshine," lived with them. On December 11, 2003, the dog was injured. Baker suspected Lausin of causing the injuries.

{¶3} On September 16, 2004, Lausin was charged with one count of injuring animals, in violation of R.C. 959.02, a first-degree misdemeanor. Lausin initially entered a plea of not guilty to this charge.

{¶4} Attorney Joseph Humpolik from the Ashtabula County Public Defender's Office was appointed to represent Lausin. In October 2004, Attorney Humpolik filed a request for discovery, wherein he requested "all evidence favorable to the defendant," pursuant to Crim.R. 16(B)(1)(f).

{¶5} On March 2, 2005, Lausin withdrew his not guilty plea and entered a no contest plea to the injuring animals charge. Lausin was represented by Attorney Humpolik at this hearing. The trial court found Lausin guilty of the offense and continued the sentencing hearing for the preparation of a presentence investigation ("PSI") report.

{¶6} On March 31, 2005, Lausin retained Attorney Leo Talikka to represent him. That same day, through Attorney Talikka, Lausin filed a motion to withdraw his no contest plea. The basis of Lausin's motion was that he recently discovered the existence of two documents that suggested the dog was injured as a result of being hit by a car. One of the documents was a form for veterinary insurance. Handwritten on this form, by Dr. Lawrence Anson, the veterinarian, was "probable hit by car." The second document was a copy of a letter that was sent from Dr. Anson to Baker. In the letter, Dr. Anson stated, "[b]ased on the injuries and history, I suspected the trauma was

from being hit by a car but other causes of trauma could not be ruled out since I had no history of anyone directly observing an automobile striking Sunshine."

{¶7} The trial court held a hearing on Lausin's motion. Thereafter, the trial court denied Lausin's motion to withdraw his no contest plea.

{¶8} On May 10, 2005, Lausin filed an amended motion to withdraw his no contest plea. The trial court held a hearing on the matter that day. At the hearing, Lausin called Attorney Humpolik as a witness. Attorney Humpolik testified that he did not receive the documents indicating the dog had been hit by a car prior to Lausin entering his no contest plea. Further, he testified that, had he received those documents, he would have explained them to Lausin prior to the plea of no contest.

{¶9} The state called Baker as a witness. Baker testified that the dog ran away from Lausin's residence on December 1, 2003. Baker found the dog outside a neighbor's house on December 10, 2003. On December 11, 2003, Baker left the dog in the basement when she left for work in the morning. When she returned home from work that evening, the dog was injured. Baker then took the dog to a 24-hour veterinary clinic.

{¶10} The trial court orally denied Lausin's amended motion to withdraw his no contest plea. Thereafter, the trial court proceeded directly to sentencing. The trial court sentenced Lausin to 60 days in jail for his conviction. In addition, the trial court ordered restitution in the amount of $1,000. The trial court stayed Lausin's sentence pending his appeal to this court.

{¶11} Lausin raises the following assignment of error:

{¶12} "The trial court erred and abused its discretion to the prejudice of Mr. Lausin, when it refused to permit the accused to withdraw his 'no contest' plea prior to trial."

{¶13} "'[T]he general rule is that motions to withdraw guilty pleas before sentencing are to be freely allowed and treated with liberality[.]'"[1] However, this standard does not give a defendant "an absolute right to withdraw a guilty plea prior to sentencing."[2] Finally, we note that a decision on a motion to withdraw a guilty plea made prior to sentencing rests with the sound discretion of the trial court.[3] The term "abuse of discretion" implies that the court's decision was arbitrary, unreasonable, or unconscionable.[4]

{¶14} In determining whether a trial court abuses its discretion in denying a presentence motion to withdraw a plea, this court has adopted a four-prong test set forth by the Eighth Appellate District in *State v. Peterseim*.[5]

{¶15} "The *Peterseim* court held that the trial court does *not* abuse its discretion in denying the motion where: (1) the trial court, following the mandates of Crim.R. 11, ensured the defendant understood his rights and voluntarily waived those rights by entering the guilty plea; (2) the defendant was represented by highly competent counsel; (3) the defendant was given [an] adequate opportunity to be heard, by way of a hearing wherein he could assert all arguments in support of his motion to withdraw the

1. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, quoting *Barker v. United States* (C.A.10, 1978), 579 F.2d 1219, 1223.
2. *State v. Xie*, 62 Ohio St.3d 521, paragraph one the syllabus.
3. Id. at paragraph two of the syllabus.
4. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.
5. *State v. Gomez* (Dec. 5, 1997), 11th Dist. No. 97-L-021, 1997 Ohio App. LEXIS 5450, at *5, citing *State v. Peterseim* (1979), 68 Ohio App.2d 211.

plea; and (4) the trial court gave careful consideration to the merits of the defendant's motion to withdraw the plea."[6]

{¶16} Lausin does not challenge the second and third prongs of this test. In regard to the first prong, Lausin does not contend the trial court committed a procedural error at the Crim.R. 11 colloquy. The state notes that a transcript of the Crim.R. 11 colloquy has not been filed in this case. However, the events of the Crim.R. 11 exchange, itself, are not at issue in this matter.

{¶17} Any time a defendant enters a guilty or no contest plea, he is waiving certain statutory and constitutional rights.[7] This waiver must be made "knowingly, intelligently, and voluntarily."[8] The relevant issue in this case is whether Lausin "intelligently" entered his no contest plea. This implicates the first and fourth prongs of the *Peterseim* test.

{¶18} Lausin requested all exculpatory evidence from the state. There were veterinary reports indicating the dog's injuries were caused by an automobile. These reports were not revealed to Lausin or his attorney prior to his no contest plea.

{¶19} Making an "intelligent" waiver of statutory and constitutional rights by pleading guilty or no contest necessarily implies that the decision is based on all available information or, stated differently, is an "informed" decision. In this matter, Lausin had the right to make an *informed* decision as to whether to change his plea from not guilty to no contest. By definition, this meant he had the right to make his decision based upon all the evidence of the case, including the withheld veterinary

6. (Emphasis in original.) *State v. Gomez*, at *6, citing *State v. Peterseim*, 68 Ohio App.2d at 214.
7. See, e.g., *State v. Nero* (1990), 56 Ohio St.3d 106, 108.
8. Id., citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 92-93.

reports.

{¶20} In *State v. Gillespie*, this court held that the trial court erred by denying a presentence motion to withdraw a guilty plea, where the evidence demonstrated that the defendant entered a guilty plea based upon incorrect information regarding the length of his possible sentence.[9] Similarly, in the case at bar, Lausin entered his no contest plea based upon a lack of information, i.e., the exculpatory evidence. In both of these instances, the pleas were not "intelligently" entered, because the decisions to enter the pleas were based on inaccurate, or incomplete, information.

{¶21} In addition, the trial court erred by considering statements made in Lausin's PSI report. In support of its decisions to deny Lausin's motions to withdraw his no contest plea, the trial court noted that Lausin admitted kicking the dog in the PSI report. The PSI report was not admitted as an exhibit at either hearing on Lausin's motions to withdraw his no contest plea. Further, we note that PSI reports "may contain unsworn and hearsay information as they do not perform any evidentiary function."[10] The trial court erred by considering information in the PSI report in its determination as to whether to grant Lausin's motions to withdraw his no contest plea.

{¶22} Moreover, the trial court erred by permitting Baker to testify at the hearing on Lausin's second motion to withdraw his no contest plea. Baker testified that the dog was uninjured when she left for work, it was injured when she returned from work, and Lausin had access to the dog during the interim period. Such testimony suggested Lausin caused the injuries to the dog. While this testimony would be appropriate at trial

9. *State v. Gillespie*, 11th Dist. No. 2003-L-018, 2004-Ohio-2440, at ¶21-23.
10. *State v. Glenn* (1986), 28 Ohio St.3d 451, 459.

on the underlying charge, it was inappropriate at a hearing to determine whether Lausin should be permitted to withdraw his no contest plea.

{¶23} In denying both of Lausin's motions to withdraw his no contest plea, the trial court weighed the evidence and, essentially, independently determined that he was guilty of the charged crime. The trial court heavily weighed the "evidence" from the PSI report, that Lausin kicked the dog, against the reports indicating the dog may have been hit by a car, and concluded the dog's injuries were caused by Lausin's actions. Specifically, the trial court noted the following in regard to the veterinary reports suggesting that the dog's injuries were caused by a car:

{¶24} "The only - - only evidence, the only evidence, if you want to call it that, of any automobile accident or motor vehicle accident is some reference made to it by, I think, one veterinarian in maybe one or two different reports. The very initial report made to the first hospital where the animal was taken very clearly showed [the] dog [was] allegedly injured by [Baker's] boyfriend. Thereafter there was some medical notes showing possibly - - probably, maybe said, motor vehicle accident. Where they got that information, it's unclear.

{¶25} "I don't have any veterinarian who wrote those reports here before me right now to say upon what he based that information. Was it just an assumption based upon the records he had without talking to the dog's owner? Was it his professional opinion that's really what happened? Was it just a mistake? We don't know. We do know there is no other evidence of an automobile accident."

{¶26} The trial court was completely correct in its conclusion that it was unknown why the veterinarian concluded the dog had been hit by a car. This is precisely why this was an issue for a trier-of-fact to determine at Lausin's trial.

{¶27} Further, although not specifically raised by Lausin, the facts of this case are analogous to a *Brady* violation.[11] In *Brady v. Maryland*, the Supreme Court of the United States held that the due process rights of a defendant are violated when the state withholds evidence material to the guilt of the defendant and that information was requested by the defendant.[12] Had Lausin been found guilty after a jury trial, the state's failure to produce the veterinary reports may have resulted in his conviction being reversed.[13] In terms of judicial economy and prejudice to the state, it is much less burdensome to grant a presentence motion to withdraw a no contest plea than it is to conduct a second jury trial. This is especially true in light of the fact that presentence motions to withdraw pleas are to be "freely and liberally granted."[14]

{¶28} The uncontested evidence established that Lausin was not given expert reports that suggested that he may not have caused the extensive injuries to the dog at the time he entered his no contest plea. Thus, he filed two presentence motions to withdraw his no contest plea. Instead of "freely granting" Lausin's motions, the trial court engaged in a weighing of inadmissible evidence and concluded that Lausin was, in fact, guilty.

{¶29} The trial court's decisions to deny Lausin's motions to withdraw his no contest plea were unreasonable. Lausin's motions were based upon newly discovered

11. *Brady v. Maryland* (1963), 373 U.S. 83.
12. Id. at 87.
13. See, e.g., *State v. Scheidel*, 165 Ohio App.3d 131, 2006-Ohio-195, ¶8-17.
14. *State v. Xie*, 62 Ohio St.3d at 527.

evidence, which was material to the issue of Lausin's guilt. In addition, the motions were made prior to sentencing. Accordingly, the trial court abused its discretion by denying Lausin's motions to withdraw his no contest plea.

{¶30} Lausin's assignment of error has merit.

{¶31} The judgment of the trial court is reversed. This matter is remanded to the trial court for further proceedings.

COLLEEN MARY O'TOOLE, J., concurs,

CYNTHIA WESTCOTT RICE, J., dissents with Dissenting Opinion.

CYNTHIA WESCOTT RICE, J., dissents with a Dissenting Opinion.

{¶32} Appellant claims on appeal that the trial court's decision to deny his motion to withdraw his plea was an abuse of discretion. Specifically, appellant claims the trial court failed to comply with the fourth prong of the *Peterseim* test; the trial court's fair consideration of appellant's motion. *Peterseim*, supra, at 214. Appellant rejects the notion that he did not enter his plea voluntarily. To wit, appellant states that he "takes no issue with the trial court's Crim.R. 11 colloquy ***." Despite this acknowledgement by appellant that he entered into his plea voluntarily and armed with the knowledge of his rights, the majority claims that appellant did not do so and reverses on that basis. Since appellant only challenges the trial court's fair consideration of the motion as error on appeal; it is inappropriate to reverse on other grounds absent plain error.

{¶33} I write separately to point out that appellant was afforded all proper considerations by the trial court in accordance with *Peterseim*. The trial court was the ultimate finder of fact in the underlying case as appellant failed to request a trial by jury.

{¶34} Crim.R. 23 provides in part, "[i]n petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto."

{¶35} On December 29, 2004, notice was sent by the trial court that trial was set for February 23, 2005. Prior to this notice, appellant had not requested a trial by jury. Subsequent to this notice, appellant failed to request a trial by a jury. Therefore, the same trial judge that reviewed appellant's motion and newly discovered evidence, which he claimed afforded him a complete defense to the charge, was the same judge that would ultimately hear that same evidence in a trial setting and make a determination of guilt or innocence.

{¶36} In order for a trial court to properly consider a motion to withdraw a plea prior to sentencing, the defendant must articulate valid grounds for the withdrawal. *State v. Xie* (1992), 62 Ohio St.3d 521, 527. The determination as to whether appellant offered a reasonable and legitimate basis to withdraw the plea is also within the discretion of the trial court. *State v. Van Dyke*, 9th Dist. No. 02CA008204, 2003-Ohio-4788, at ¶10. One important factor to be considered when presented with a motion to withdraw based on newly discovered evidence is whether that evidence offered a

complete defense to the crime. Id. at ¶18.; see, also, *Xie*, supra at 528. The judgment entry of the trial court clearly shows that the judge considered the evidence and did not find that it offered a complete defense to appellant. Since the judge would have been the ultimate finder of fact in appellant's case, I cannot say this was an abuse of discretion. The record shows evidence that both supports the charge of injuring an animal and discredits the theory that appellant injured the animal. This is not a complete defense.

{¶37} Appellant was placed in no worse position as a result of the trial court denying his plea than he would have been on the day of trial. Ultimately, it was the trial court who would decide appellant's guilt or innocence. After examining the evidence, the trial court failed to agree with appellant that the new evidence afforded him a complete defense. The trial court properly considered all the factors under *Peterseim* and ultimately concluded that the evidence was not enough for appellant's motion to be meritorious. This is not an abuse of discretion. Therefore, I respectfully dissent.