[Cite as *State v. Elkins*, 2016-Ohio-8579.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 16CA15
vs.	:	
WILLIAM ELKINS, SR.,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Gene Meadows, Portsmouth, Ohio, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, Ironton, Ohio, for appellee.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-13-16
ABELE, J.

{¶ 1} This is an appeal from a Lawrence County Common Pleas Court judgment of conviction and sentence. The trial court found William Elkins, Sr., defendant below and appellant herein, guilty of voluntary manslaughter, in violation of R.C. 2903.03, with a firearm specification. Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT, WHEN IT FAILED TO CONDUCT A HEARING TO DETERMINE WHETHER THERE WAS A REASONABLE AND LEGITIMATE BASIS FOR THE WITHDRAWAL OF THE APPELLANT'S PREVIOUS PLEA OF GUILTY."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT, BY ACCEPTING A GUILTY PLEA WHICH WAS NOT GIVEN KNOWINGLY AND VOLUNTARILY."

{¶ 2} In June 2015, a Lawrence County grand jury returned an indictment that charged appellant with aggravated murder, in violation of R.C. 2903.01(A), with a firearm specification. Appellant and the state later reached a plea agreement. Pursuant to the agreement, the state would amend the indictment to charge voluntary manslaughter with a firearm specification and would recommend a total prison sentence of fourteen years.

{¶ 3} On April 15, 2016, the trial court held a change of plea hearing. The court informed appellant that he would need to answer questions regarding his guilty plea. Appellant responded: "I do this because I am told I have no other choice." Appellant's response prompted the court to state:

> Well, I suppose your [sic] referring to advice from counsel and attorney's [sic] and so forth. Um, eventually, I mean whether you take the advice of counsel or not it's certainly up to you. If you want to take the advice of counsel and follow what they are advising then...

The court asked appellant whether "based on [his counsel's] advice," "do you wish to sign [the guilty plea] documents[.]" The court explained that one of the documents is a guilty plea waiver and the other "is a four page proceeding on plea of guilty, [sic] form. It's twenty six questions that you go over with your defense attorney and I'll ask you at the bottom of the fourth page, is that your signature[.]" Appellant responded, "Yeah." The court asked whether the answers that appellant provided on the form were truthful to the best of his knowledge. Appellant replied that he "[d]idn't actually read all of them." The court then read the form and appellant's written

responses to the questions. The court asked appellant whether the answers he provided were "truthful to the best of [his] knowledge." Appellant replied, "Yes." The court later questioned appellant whether the plea was of his "own free will and accord." Appellant stated, "Yeah." The trial court subsequently found appellant guilty of voluntary manslaughter with a firearm specification.

{¶ 4} On April 20, 2016, the trial court held a sentencing hearing. At the start of the hearing, appellant's counsel informed the court that appellant advised counsel that appellant "now wishes to withdraw his plea. I don't know of any grounds that he's expressed to me that would be sufficient to allow a withdraw[al], but that is his indication to me this morning." The court stated that appellant's request to withdraw his plea was "serious enough that I feel it should be made in writing and then it can be * * * addressed at that point. * * * [B]eyond that, I'm going to proceed with the actual sentencing hearing that we are scheduled for today * * *."

{¶ 5} On April 20, 2016, the trial court sentenced appellant to serve eleven years in prison for his voluntary manslaughter conviction and three years in prison for the gun specification. This appeal followed.[1]

I

{¶ 6} In his first assignment of error, appellant asserts that the trial court erred by failing

[1] We recognize that on April 21, 2015, appellant filed a written motion to withdraw his guilty plea. Once appellant filed his timely notice of appeal, however, the trial court was divested of jurisdiction to consider appellant's motion to withdraw his guilty plea. *E.g., State v. Estep*, 4th Dist. Lawrence No. 11CA7, 2012-Ohio-6296, 2012 WL 6783609, ¶7; *accord State v. Rogers*, 8th Dist. Cuyahoga No. 101063, 2014-Ohio-3924, 2014 WL 4494475, ¶5, citing *State v. Maholtz*, 8th Dist. Cuyahoga No. 51096, 1991 WL 106034 (June 13, 1991), *2 ("If the trial court in the within action vacated the guilty plea, this court's jurisdiction would have been usurped as the trial court's action would have interfered with this court's jurisdiction and power to review, affirm, modify, reverse, or remand the case.").

to hold a hearing to consider his presentence motion to withdraw his guilty plea. We agree.

{¶ 7} Initially, we note that trial courts possess discretion when deciding whether to grant or to deny a presentence motion to withdraw a guilty plea. *E.g.*, *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992), paragraph two of the syllabus. Thus, absent an abuse of discretion, appellate courts will not disturb a trial court's ruling concerning a motion to withdraw a guilty plea. *Id.* at 527. "'A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.'" *State v. Keenan*, 143 Ohio St.3d 397, 2015–Ohio–2484, 38 N.E.3d 870, ¶7, quoting *State v. Darmond*, 135 Ohio St.3d 343, 2013–Ohio–966, 986 N.E.2d 971, ¶34. An abuse of discretion includes a situation in which a trial court did not engage in a "'sound reasoning process.'" *State v. Morris*, 132 Ohio St.3d 337, 2012–Ohio–2407, 972 N.E.2d 528, ¶14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). Moreover, "[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *Darmond* at ¶34.

{¶ 8} Crim.R. 32.1 permits a defendant to file a motion to withdraw a guilty plea before sentence is imposed. While trial courts should "freely and liberally" grant a presentence motion to withdraw a guilty plea, a defendant does not "have an absolute right to withdraw a guilty plea prior to sentencing." *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992); *accord State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶57; *State v. Spivey*, 81 Ohio St.3d 405, 415, 692 N.E.2d 151 (1998); *State v. Wolfson*, 4th Dist. Lawrence No. 02CA28, 2003-Ohio-4440, 2003 WL 21995244, ¶14. Instead, "[a] trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Xie*

at paragraph one of the syllabus; accord *State v. Boswell*, 121 Ohio St.3d 575, 906 N.E.2d 422, 2009-Ohio-1577, ¶10, superseded by statute on other grounds as stated in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958.

{¶ 9} While a trial court possesses discretion to determine whether to grant or to deny a presentence motion to withdraw a guilty plea, it does not have discretion to determine if a hearing is required. *See Wolfson* at ¶15. Instead, a trial court has a mandatory duty to hold a hearing regarding a presentence motion to withdraw a guilty plea. *State v. Leonhart*, 4th Dist. Washington No. 13CA38, 2014-Ohio-5601, 2014 WL 7251568, ¶50; *State v. Burchett*, 4th Dist. Scioto No. 11CA3445, 2013–Ohio–1815, 2013 WL 1867629, ¶13; *State v. Davis*, 4th Dist. Lawrence No. 05CA9, 2005-Ohio-5015, 2005 WL 2327600, ¶9; *Wolfson* at ¶15; *State v. Wright*, 4th Dist. Highland No. 94CA853, 1995 WL 368319 (June 19, 1995). In *Wright*, we explained:

> Without a hearing, it is not possible to determine whether a legitimate and reasonable basis exists for a motion to withdraw a guilty plea. Because a hearing is clearly required by *Xie, supra*, as the mechanism by which [the] trial court determines whether there is a reasonable and legitimate basis for a motion to withdraw a guilty plea, we hold that the denial of a hearing is reversible error as a matter of law.

Id. at *5.

{¶ 10} "While *Xie* states that a hearing is mandatory, it does not define the type of hearing that is required." *Wolfson* at ¶16. This court, however, has previously "concluded that a hearing complying with at least the minimum mandates of due process is necessary." *Id.*, citing *Wright*; *accord State v. Robinson*, 8th Dist. Cuyahoga No. 89651, 2008–Ohio–4866, 2008 WL 4356000, ¶24 (noting that although the *Xie* court did not define the type of hearing required, "it is axiomatic that such hearing must comport with the minimum standards of due process"). In *Wolfson*, we

explained that although a trial court "must afford the defendant meaningful notice and a meaningful opportunity to be heard," the court nonetheless retains discretion to define the scope of the hearing so as to "'reflect the substantive merits of the motion.'" *Id.* at ¶16, quoting *Wright* at *6, and citing *State v. Smith*, 8th Dist. Cuyahoga No. 61464, 1992 WL 369273 (Dec. 10, 1992), *5. Additionally, a trial court need not necessarily "schedule a separate hearing" in order to comply with minimum due process standards. *State v. Glavic*, 143 Ohio App.3d 583, 589, 758 N.E.2d 728 (11th Dist. 2001). Instead, as long as a trial court affords a defendant "an opportunity at a hearing to assert to the court the reasons why the [defendant] should be able to withdraw his plea, he has been given a 'full and actual hearing on the merits.'" *State v. Maistros*, 8th Dist. Cuyahoga No. 43835, 1982 WL 5253 (Mar. 25, 1982), *3, quoting *State v. Bates*, 8th Dist. Cuyahoga No. 31310 (April 28, 1972), pg. 2; *accord State v. Hall*, 8th Dist. Cuyahoga No. 55289, 1989 WL 42253 (Apr. 27, 1989), *2.

{¶ 11} We further point out that a trial court need not conduct a full evidentiary hearing if the defendant fails to "'make a *prima facie* showing of merit * * *. * * * * This approach strikes a fair balance between fairness to the accused and the preservation of judicial resources.'" *Smith* at *5, quoting *Hall*, at *1; *accord Wright* at *6. "[B]old assertions without evidentiary support" ordinarily will not merit a full evidentiary hearing. *Hall* at *1*; e.g., Davis, supra*, at ¶10; *Wolfson* at ¶16; *Smith, supra*; *Wright* at *6.

{¶ 12} In *Wolfson*, for example, we determined that the trial court adequately considered the defendant's presentence motion to withdraw her guilty plea, even though the court did not conduct a full evidentiary hearing. At the start of the *Wolfson* sentencing hearing, the defendant indicated that she wished to withdraw her guilty plea. The defendant stated that at the time she

entered her guilty plea (1) she was under the influence of medication that negatively impacted her ability to understand the plea proceedings, and (2) she mistakenly thought the court would sentence her to a drug rehabilitation program. The court inquired into the reasons underlying the defendant's request to withdraw her plea and determined that they lacked substantive merit. We concluded that the trial court sufficiently inquired into the defendant's reasons for seeking to withdraw her plea and did not err by failing to conduct a full hearing. *Id.* at ¶21.

{¶ 13} In a Twelfth District Court of Appeals decision that involved similar facts to those in the case at bar, the court determined that the trial court erred by proceeding to sentence the defendant without adequately inquiring into the defendant's statements, made during the sentencing hearing, suggesting that he wished to withdraw his guilty plea. *State v. Taylor*, 12th Dist. Butler No. CA2013-10-186, 2014-Ohio-3080, 2014 WL 3420485. In *Taylor*, at the sentencing hearing the defendant stated that he was "just ready to take it to trial and plead a not guilty plea." *Id.* at ¶6. The trial court did not inquire any further regarding whether or why the defendant wished to withdraw his guilty plea. Instead, the "court informed [the defendant] he was 'beyond that' point; he had already pled guilty, and his options were: (1) be sentenced that day and waive a presentence investigation, or (2) continue the sentencing hearing so a presentence investigation could take place." *Id.* at ¶8. The court of appeals determined that the defendant's statement, while not a formal motion to withdraw his guilty plea, "reflected his desire and intent to plead not guilty and take the matter to trial" and, thus, required the trial court to conduct a hearing to determine whether there was a reasonable and legitimate basis for the motion. *Id.* at ¶9. Consequently, the appellate court concluded that the trial court erred by failing to inquire into the defendant's statement that he wished to plead not guilty and proceed to a trial. *Id.* at ¶10. The

court remanded the matter to the trial court with instructions to hold a hearing regarding the defendant's oral request to withdraw his plea. *Id.*

{¶ 14} Likewise, in *State v. Hurlburt*, 10th Dist. Franklin No. 12AP-231, 2013-Ohio-767, 2013 WL 816488, the court of appeals determined that the trial court erred when it failed to conduct any inquiry into the defendant's statements that he wished to withdraw his guilty plea. During the *Hurlburt* sentencing hearing, the defendant's counsel asked the court whether counsel could address "'at least withdrawing the guilty plea and entering a plea[.]' The court immediately responded 'No, no, absolutely not' and proceeded to sentence defendant." *Id.* at ¶6. The appellate court determined that the trial court erred by failing to "hold any hearing or even allow defense counsel to explain the basis for the motion." *Id.* at ¶7. The appellate court thus remanded the matter to the trial court with instructions to hold a hearing regarding the defendant's request to withdraw his guilty plea. *Id.* at ¶9.

{¶ 15} In the case sub judice, the trial court, like the *Taylor* and *Hurlburt* courts, did not conduct any inquiry into appellant's oral, presentence request to withdraw his guilty plea. Instead, the court stated that appellant should file a written motion to withdraw his guilty plea and then proceeded to sentence appellant without conducting any inquiry into the reasons appellant wished to withdraw his plea. Consequently, the court's failure to conduct any inquiry into appellant's request to withdraw his guilty plea did not comply with the minimum due process standards. Although we recognize and appreciate the court's interest in "judicial economy, appellant's right to a hearing under *Xie, supra*, is paramount." *Wright* at *6.

{¶ 16} Accordingly, based upon the foregoing reasons, we sustain appellant's first assignment of error.

II

{¶ 17} In his second assignment of error, appellant asserts that the trial court erred by accepting his plea when he did not knowingly and voluntarily enter the plea. Appellant claims that he entered a guilty plea "because he was told that he had no other choice."

{¶ 18} Our disposition of appellant's first assignment of error renders his second assignment of error moot. *State v. Rinehart*, 6th Dist. Wood No. WD-08-015, 2010-Ohio-2259, 2010 WL 2025320, ¶12, and *Hurlburt*, *supra*, at ¶8 (both finding assignments of error challenging validity of guilty plea moot when case remanded due to trial court's failure to hold hearing regarding defendant's request to withdraw plea); *see State ex rel. Cincinnati Enquirer v. Hunter*, 141 Ohio St.3d 419, 2014-Ohio-5457, 24 N.E.3d 1170, ¶4 (internal quotations omitted) (explaining that issues are moot "when they are or have become fictitious, colorable, hypothetical, academic or dead"); *State v. Hudnall*, 4th Dist. Lawrence No. 15CA8, 2015-Ohio-3939, 2015 WL 5676859, ¶7 ("A[n issue] is moot when a court's determination on a particular subject matter will have no practical effect on an existing controversy."); *State v. Moore*, 4th Dist. Adams No. 13CA987, 2015-Ohio-2090, 2015 WL 3452607, ¶¶6 and 7 ("The principle of "judicial restraint" mandates that Ohio courts should not exercise jurisdiction over questions of law that have been rendered moot"; and "an issue is moot when it has no practical significance and, instead, presents a hypothetical or academic question."); *Schwab v. Lattimore*, 166 Ohio App.3d 12, 2006-Ohio-1372, 848 N.E.2d 912, ¶10 (1st Dist.) ("The duty of a court of appeals is to decide controversies between parties by a judgment that can be carried into effect, and the court need not render an advisory opinion on a moot question or a question of law that cannot affect the issues in a case."). We therefore need not address appellant's second assignment of error. App.R. 12(A)(1)(c).

{¶ 19} Accordingly, based upon the foregoing reasons, we hereby (1) reverse the trial court's judgment to the extent that it overruled appellant's request to withdraw his guilty plea and, (2) remand this matter with instructions to conduct a hearing that complies with due process standards.

JUDGMENT REVERSED AND CAUSE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and this cause remanded for further proceedings consistent with this opinion. Appellant shall recover of appellee the 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 Lawrence County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.