[Cite as *State v. Wornstaff*, 2003-Ohio-2035.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Hon. William Hoffman, P. J.
	:	Hon. Sheila Farmer, J.
Plaintiff-Appellee	:	Hon. Julie Edwards, J.
	:	
-vs-	:	
	:	Case No. 02CA F 07 035
AARON WORNSTAFF	:	
	:	
Defendant-Appellant	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from Delaware County Court of Common Pleas, Juvenile Division, Case 02-01-0135-01E
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 22, 2003

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DAVID A. HEJMANOWSKI Asst. Prosecuting Attorney 140 North Sandusky Street Delaware, OH 43015	DAVID H. BIRCH 2 West Winter Delaware, OH 43015

Edwards, J.

{¶1} Defendant-appellant Aaron Wornstaff appeals his conviction and sentence from the Delaware County Court of Common Pleas, Juvenile Division, on one count of contributing to the unruliness of a child. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 29, 2002, a complaint was filed in the Delaware County Court of Common Pleas, Juvenile Division, charging appellant with contributing to the unruliness of a child in violation of R.C. 2919.24(A)(1), a misdemeanor of the first degree. On the same date, a separate complaint was filed charging appellant with interference with custody in violation of R.C. 2151.02, also a misdemeanor of the first degree. At his arraignment on March 5, 2002, appellant entered a plea of not guilty the charge of contributing to the unruliness of a child.

{¶3} Thereafter, on May 14, 2002, appellant, who was represented by counsel, appeared again before the trial court and entered a plea of guilty to the charge of contributing to the unruliness of a child. The following is an excerpt from such hearing:

{¶4} "THE COURT: Mr. Long, have you had the opportunity to review with Mr. Wornstaff his rights on the complaint?

{¶5} "Mr. Long: Yes, I have, Your Honor.

{¶6} "THE COURT: And how do you wish to proceed this afternoon?

{¶7} "MR. LONG: We are prepared to enter a guilty pleas to the contributing to unruliness.

{¶8} "THE COURT: And you are Aaron Wornstaff?

{¶9} "MR. WORNSTAFF: Yes.

{¶10} "THE COURT: Mr. Wornstaff, the complaint that's been filed is a first degree misdemeanor. I know I did go over these rights with you before, but if you enter a guilty

plea, you would be giving up your right to challenge evidence that's presented and testimony; giving up your right to remain silent, and giving up your right to call witnesses to testify on your behalf; giving up your right to require the State to prove your guilt beyond a reasonable doubt at a trial to the court or jury on a jury demand. Any questions about your rights on the complaint?

{¶11} "MR. WORNSTAFF: No, Your Honor.

{¶12} "THE COURT: The complaint does charge that on or about June 1st, 2001 through July 31, 2001 in Delaware County, you did, knowing you were not privileged to do so or being reckless in that regard, entice, encourage or harbor from her parents, guardian or custodian a child under the ago [sic] of 18 as defined in section 2151.02 and in violation of section 2919.24(A)(1), charging that you did entice Jessica - - is that pronounced right?

{¶13} "MR. HEMMETER: I believe so.

{¶14} "THE COURT: To run away from her parents, a first degree misdemeanor. How old is Jessica?

{¶15} "MR. LONG: Fifteen, Your Honor at that time.

{¶16} "THE COURT: Any questions about the complaint, Mr. Wornstaff, or your rights as I have explained them? Are you satisfied you understand the charge?

{¶17} "MR. WORNSTAFF: Yes, sir.

{¶18} "THE COURT: And what plea do you wish to enter at this time?

{¶19} "MR. WORNSTAFF: Guilty." Transcript of May 14, 2002 hearing at 2 - 4. Upon motion of the Prosecuting Attorney, the remaining charge was dismissed. As memorialized in a Judgment Entry filed on July 3, 2002, appellant was placed on supervised probation for a period of five years and fined $1,000.00, with $550.00 of the fine suspended. In addition, the trial court ordered appellant to serve 180 days in jail, with 90 days of such sentence suspended.

{¶20} On July 3, 2002, after his sentencing, appellant filed a Motion to Set Aside Plea. Appellant, in his motion, specifically alleged that his plea was not knowingly, intentionally and voluntarily made and also requested an oral hearing on his motion. No affidavits or evidentiary materials were attached to the same. Appellee, on July 5, 2002, filed a response to appellant's motion, arguing, in part, as follows:

{¶21} "...Defendant claims no manifest injustice. Nothing is forwarded to support his claim. Defendant was not forced into entering his plea and could previously have demanded a jury trial. Defendant's plea of guilty complied with all applicable criminal rules and is unassailable. This Court should deny the unsupportable motion of the Defendant."

{¶22} Thereafter, pursuant to a Judgment Entry filed on July 9, 2002, the trial court overruled appellant's motion without hearing "[f]or the reasons stated in the State's response".

{¶23} It is from the trial court's July 9, 2002, Judgment Entry that appellant now appeals, raising the following assignments of error:

{¶24} "I. THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION TO SET ASIDE HIS PLEA.

{¶25} "II. APPELLANT WAS DENIED DUE PROCESS WHEN HIS MOTION TO WITHDRAW HIS PLEA WAS DENIED WITHOUT A HEARING.

{¶26} "III. APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT ERRED IN ACCEPTING HIS PLEA WITHOUT FOLLOWING CRIMINAL RULE 11."

{¶27} For purposes of judicial economy, we shall address appellant's assignments of error out of sequence.

III

{¶28} Appellant, in his third assignment of error, argues that he was denied due

process since the trial court failed to comply with Crim. R. 11 in accepting appellant's guilty plea. Appellant specifically contends that the trial court failed to "ascertain and make certain that the appellant's plea was voluntary."

{¶29} Crim. R. 11(E), captioned "Misdemeanor Cases Involving Petty Offense," provides as follows: "In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty." (Emphasis added). Crim. R. 2(D) defines "petty offense" as "a misdemeanor other than serious offense." In turn, Crim.R. 2(C) defines "serious offense" as "any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months." Since appellant was convicted of contributing to the unruliness of a child, a first degree misdemeanor punishable by up to six months imprisonment, appellant was convicted of a petty offense.

{¶30} In turn, Crim.R. 11 (B), captioned "Effect of guilty or no contest pleas", states as follows:

{¶31} "With reference to the offense or offenses to which the plea is entered:

{¶32} "(1) The plea of guilty is a complete admission of the defendant's guilt.

{¶33} "(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

{¶34} "(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32."

{¶35} While appellant argues that the trial court violated Crim. R. 11 by failing to

"ascertain and make certain that the appellant's plea was voluntary", there is "no requirement [in Crim. R. 11(E)] that a trial judge personally determine that a defendant is making a plea of guilty or no contest voluntarily in a misdemeanor case involving a petty offense." *State v. Lane*, Greene App. Nos. 2001-CA-92, 2001-CA-93, 2002-Ohio-1893.[1] In short, determining that a plea is voluntary is not part of the "effect" of a guilty plea in such a case.[2]

{¶36} Appellant's first assignment of error is, therefore, overruled.

I, II

{¶37} Appellant, in his first assignment of error, argues that the trial court erred in overruling appellant's "Motion to Set Aside Plea." In his second assignment of error, appellant contends that he was denied due process of law when the trial court overruled such motion without a hearing.

{¶38} As is stated above, appellant filed a motion to withdraw his guilty plea shortly after he was sentenced, arguing that his plea was not knowingly, intelligently and voluntarily made. Crim. R. 32.1 governs withdrawal of a guilty plea and states "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Because appellant's request was made post-sentence, the standard by which the motion was to be considered was "to correct manifest injustice." The accused has the burden of showing a manifest

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[1] In contrast, Crim. R. 11(C), captioned "Pleas of guilty and no contest in felony cases," requires a trial court to determine that the defendant is making the plea voluntarily before accepting a guilty or no contest plea in a felony case.

[2] Similarly, in *State v. Songer* (May 30, 2002), Richland App. No. 01CA82, this Court held that the nature of the offense and the potential penalties are not part of the "effect" of a no contest plea.

injustice warranting the withdrawal of a guilty plea. *State v. Smith* (19770, 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus. A reviewing court will not disturb a trial court's decision whether to grant a motion to withdraw a plea absent an abuse of discretion. *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶39} An evidentiary hearing on a post-sentence motion to withdraw a guilty plea "is not required if the facts as alleged by the defendant, and accepted as true by the court, would not require that the guilty plea be withdrawn." *State v. Blatnik* (1984), 17 Ohio App.3d 201, 204, 478 N.E.2d 1016, 1020.

{¶40} Upon our review of the record, we find that the trial court did not abuse its discretion in overruling appellant's motion without a hearing since such decision was not arbitrary, unconscionable or unreasonable. In the case sub judice, appellant, in his motion, did not allege facts or submit affidavits or evidentiary materials which established manifest injustice and warranted an evidentiary hearing. Rather, appellant, in his July 3, 2002, motion, simply stated in full as follows: "Now comes the defendant,... and moves this honorable court to set plea aside as not knowingly, intelligently and voluntarily made." Since appellant failed to demonstrate a manifest injustice warranting the withdrawal of his guilty plea, we find that the trial court did not abuse its discretion by failing to conduct a hearing on appellant's motion or by denying the same. *State v. Boshko* (2000), 139 Ohio App.3d 827, 833, 745 N.E.2d 1111, 1116.[3]

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[3] We note that appellant, on July 17, 2002 (the date the Notice of Appeal was filed), filed a second Motion to Set Aside Plea. Appellant, in the affidavit attached to such motion, stated that he was coerced into entering a guilty plea and that the trial court misled him by telling him that he would receive community control sanctions if he

{¶41} Appellant's first and second assignments of error are, therefore, overruled.

{¶42} Accordingly, the judgment of the Delaware County Court of Common Pleas, Juvenile Division, is affirmed.

By Edwards, J.

Hoffman, P.J. and

Farmer, J. concur

In Re: Contributing to Unruliness of child - Set aside plea.

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pled guilty. However, such motion is not the subject of this appeal.