

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-08-015

Appellee

Trial Court No. 2007CR0389

v.

Timothy Rinehart

DECISION AND JUDGMENT

Appellant

Decided: May 21, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Heather M. Baker and
Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Eric J. Allen, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Wood County Court of Common Pleas which, on October 30, 2007, following a plea of no contest to a bill of information filed on October 18, 2007, found appellant, Timothy Rinehart, guilty of one count of unlawful sexual conduct with a minor, in violation of

R.C. 2907.04(A), a felony of the third degree, one count of pandering sexually oriented matter involving a minor, in violation of R.C. 2907.322(A)(1), a felony of the second degree, and one count of importuning, a violation of R.C. 2907.07(B), a felony of the fifth degree. The matter was continued to January 15, 2008, for a sexual classification hearing and sentencing. However, on January 9, 2008, appellant filed a motion to withdraw his plea. On January 31, 2008, without conducting a hearing, the trial court denied appellant's presentence motion to vacate his plea. On February 12, 2008,¹ appellant was sentenced to three years incarceration as to the count of unlawful sexual conduct, four years as to the pandering count, and one year as to the importuning count, for a total term of incarceration of eight years.

{¶ 2} Appellant timely appealed the decision of the trial court and raises the following assignments of error on appeal:

{¶ 3} "1. The bill of information fails to comport with the constitutional requirements of notice under the Fifth Amendment made applicable to the states by the fourteenth amendment and the Ohio State Supreme Court case of *State v. Colon*.

{¶ 4} "2. The trial court erred in denying appellant's motion to withdraw his guilty plea.

{¶ 5} "3. Appellant was denied effective assistance of counsel pursuant to the sixth amendment to the federal constitution made applicable to the states by the fourteenth amendment by failing to request discovery prior to a plea in this matter.

¹The judgment entry of sentencing was journalized on February 20, 2008.

{¶ 6} "4. The federal supreme court case of *Oregon v. Ice* has effectively overruled *State v. Foster* requiring trial courts to make 2929.14 determinations."

{¶ 7} As we find the outcome of appellant's second assignment of error is dispositive of his other assignments of error, we will consider it first. Appellant argues in his second assignment of error that the trial court erred in denying his motion to withdraw his plea and that he should have been afforded a hearing on his motion.

{¶ 8} Relying on *State v. Davis* (Jan. 5, 2001), 2d Dist. No. 18172, and *State v. Anderson* (Nov. 20, 1998), 2d Dist. No. 17040, the state argues that "[a]lthough a hearing is generally required for a presentence Crim.R. 32.1 motion, it has been held that a hearing need not be conducted when the criminal defendant presents no more than a conclusory assertion as to defense counsel's ineffectiveness." Upon our thorough review of the law, however, we find that the holding in *Davis* is incorrect. In *Anderson*, the appellate court compared the defendant's post-sentencing Crim.R. 32.1 motion to a petition for postconviction relief. As is the case with petitions for postconviction relief, the court found that Anderson "was required to submit something more than his own, self-serving affidavit to obtain the right to an evidentiary hearing upon his motion." *Anderson*, supra. Relying on its holding in *Anderson*, the Second District Court of Appeals held that no hearing was required in *Davis* because Davis presented no more than a conclusory assertion as to his counsel's ineffectiveness. The holding in *Davis*, however, is incorrect because Davis filed his motion *prior* to sentencing.

{¶ 9} It is well-settled that a trial court must conduct a hearing on presentence motions to withdraw a guilty plea. In *State v. Xie* (1992), 62 Ohio St.3d 521, paragraph one of the syllabus, the Ohio Supreme Court stated that although a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing, "[a] trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." This requirement that the trial court conduct a hearing when a motion to withdraw a plea has been made prior to sentencing is still the law in Ohio. See, e.g., *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, ¶ 10, superseded by statute on other grounds as stated in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434. This court also has recently recognized this requirement. See *State v. Strong*, 6th Dist. No. WD-08-009, 2009-Ohio-1528, ¶ 27.

{¶ 10} In this case, appellant's motion to withdraw his plea was made prior to sentencing. The general rule is that "a presentence motion to withdraw a guilty plea should be freely and liberally granted." *Xie*, 62 Ohio St.3d at 527. Nevertheless, an offender has no absolute right to withdraw his plea prior to sentencing and, thus, the final decision is "within the sound discretion of the trial court." *Id.* In reviewing a trial court's decision regarding a motion to withdraw a plea, we are required to weigh a number of non-exhaustive factors to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. *State v. Baumgartner*, 6th Dist. No. E-07-034, 2008-Ohio-5794, ¶ 13. However, because the trial court failed to conduct a hearing on appellant's

motion, it would be premature for this court to consider whether the trial court abused its discretion in denying appellant's motion.

{¶ 11} Accordingly, we find that the trial court erred in failing to conduct a hearing on appellant's presentence motion to withdraw his plea. Appellant's second assignment of error, therefore, is found well-taken.

{¶ 12} Having determined that this case must be remanded to the trial court to conduct a hearing prior to ruling on appellant's Crim.R. 32.1 motion, we find that it is inappropriate to rule on the remainder of appellant's assignments of error. A change in the trial court's ruling on appellant's motion could affect the outcome of appellant's assignments of error. Thus, until the trial court properly determines appellant's motion, following a hearing, any rulings by this court would be advisory. Accordingly, at this time, the merits of the balance of appellant's assignments of error will not be considered by this court. For purposes of appellate procedure we, therefore, find appellant's first, third, and fourth assignments of error to be moot.

{¶ 13} On consideration whereof, this court finds that appellant was prejudiced by the trial court's failure to conduct a hearing on appellant's presentence motion to withdraw his plea. The judgment of the Wood County Court of Common Pleas is reversed. This matter is remanded to the trial court to conduct a hearing on appellant's motion and to proceed with the case thereafter. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
