

[Cite as *State v. Rhoades*, 2005-Ohio-391.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 84358

STATE OF OHIO	:	
	:	JOURNAL ENTRY
Plaintiff-Appellee	:	
	:	AND
vs.	:	
	:	OPINION
MAURICE RHOADES	:	
	:	
Defendant-Appellant	:	
	:	
DATE OF ANNOUNCEMENT	:	
OF DECISION	:	<u>February 3, 2005</u>
	:	
CHARACTER OF PROCEEDINGS	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-444534
	:	
JUDGMENT	:	SENTENCE VACATED; REMANDED.
	:	
DATE OF JOURNALIZATION	:	
APPEARANCES:		
For plaintiff-appellee		WILLIAM D. MASON, ESQ. Cuyahoga County Prosecutor By: CHIPPER XAVIER, ESQ. Assistant County Prosecutor Justice Center - 8th Floor 1200 Ontario Street Cleveland, Ohio 44113
For defendant-appellant		ROBERT L. TOBIK, ESQ. Cuyahoga County Public Defender By: JOHN T. MARTIN, ESQ. Assistant Public Defender 1200 West Third Street 100 Lakeside Place Cleveland, Ohio 44113

MAURICE RHOADES, pro se
2463 Woodhill Road, Apt. G
Cleveland, Ohio 44104

SEAN C. GALLAGHER, J.:

{¶ 1} Defendant-appellant Maurice Rhoades appeals from the decision of the Cuyahoga County Court of Common Pleas that denied Rhoades' motion to withdraw guilty plea and motion to suppress. For the reasons outlined below, we vacate the sentence and remand for further proceedings.

{¶ 2} The following facts give rise to this appeal. On November 3, 2003, Rhoades was indicted for possession of crack cocaine, a felony of the fifth degree; resisting arrest, a misdemeanor of the first degree; and possession of cocaine, a felony of the fifth degree. After a standard Crim.R. 11 hearing, Rhoades pled guilty to possession of crack cocaine and resisting arrest. The state dismissed the possession of cocaine count. Rhoades was referred to the probation department for a presentence investigation.

{¶ 3} On March 1, 2004, Rhoades filed, pro se, a motion to withdraw guilty plea and a motion to suppress. The motions detailed that Rhoades was not satisfied with his attorney, that he only pled guilty because he was having an anxiety attack, and that he believed the police conduct was unreasonable and the evidence should be suppressed.

{¶ 4} On March 4, 2004, Rhoades appeared with counsel before

the trial court for sentencing. The court was advised that Rhoades had filed the above motions, which had not made it to the court file yet. The trial court read Rhoades' personal copy, which did not include his exhibits, and then made its ruling, stating that the motion to suppress became moot when he pled guilty and that Rhoades did not state sufficient reasons to withdraw his guilty plea.

{¶ 5} Rhoades appeals this decision, advancing one assignment of error for our review.

{¶ 6} "The trial court abused its discretion when it refused to allow Mr. Rhoades to withdraw his guilty plea prior to sentencing, after Mr. Rhoades had advised the trial court that his decision to plead guilty was the product of an anxiety attack and that he desired to challenge the admissibility of evidence via motion to suppress evidence."

{¶ 7} When reviewing a trial court's ruling on a motion to withdraw a guilty plea, an appellate court should apply an abuse of discretion standard. *State v. Xie* (1992), 62 Ohio St.3d 521, 527.

Crim.R. 32.1, governs the withdrawal of guilty pleas and states in pertinent part: "A motion to withdraw guilty plea or no contest may be made only before sentence is imposed * * *."

{¶ 8} Generally, a presentence motion to withdraw a guilty plea should be freely and liberally granted. *Xie*, 62 Ohio St.3d at 527.

However, a reviewing court will not overturn a trial court's denial of this motion absent an abuse of discretion. *State v.*

Peterseim (1980), 68 Ohio App.2d 211, 213-214. Indeed, it must be recognized that a defendant does not have an absolute right to withdraw a plea prior to sentencing. *Id.*

{¶ 9} Before denying a motion to withdraw a plea, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. *Xie*, 62 Ohio St.3d 521, at paragraph one of the syllabus. When "considering a motion to set aside a plea the trial court should consider: (1) prejudice to the prosecution; (2) whether the accused is represented by highly competent counsel; (3) whether a full Crim.R. 11 hearing took place; (4) whether a full hearing on the motion took place; (5) whether the court gave full and fair consideration to the motion; (6) whether the motion was made in a reasonable time; (7) whether the motion states specific reasons for withdrawal; (8) whether the accused understood the nature of the charges and the possible penalties; and (9) whether the accused was perhaps not guilty or had a complete defense." *State v. Pinkerton* (1999), Cuyahoga App. Nos. 75906-75907, citing *State v. Fish* (1995), 104 Ohio App.3d 236.

{¶ 10} Before sentence was imposed, Rhoades informed the court that he had filed a motion to withdraw guilty plea and a motion to suppress. The trial court reviewed a copy and stated:

"I've read the motion for leave to withdraw your guilty plea and I'm going to deny it. A motion like this is not supported by sufficient information. If you want to withdraw your guilty plea it's got to be more than: I changed my mind. And as you'll recall, at the time that

I took your plea I asked you a number of questions to which you all - you indicated you understood them and then I asked you how you wanted to plead and you, in fact, entered a plea of guilty. You said no one had forced you in any way, no one threatened you, nobody promised you anything, you indicated that you understood your constitutional rights, as well as the charge itself, as well as potential penalties. So I'm going to deny the motion for leave to withdraw the guilty plea. And since there is a guilty plea, the motion to suppress is moot.

"So we're going to proceed to sentencing."

{¶ 11} While the trial court attempted to sentence him, Rhoades continuously asserted that he never wanted to plead guilty and that he only did so because he had an anxiety attack. Although there is no evidence in the record to support Rhoades' assertion that he had an anxiety attack¹ and thus his plea was not knowingly, intelligently, and voluntarily entered into, or that Rhoades had a complete defense via the motion to suppress, the trial court erred by denying the motion without a hearing.

{¶ 12} We find that Rhoades' sentence must be vacated and the matter must be remanded for disposition of Rhoades' motion to withdraw his guilty plea. The court may then proceed to trial or resentence appellant, depending upon whether it grants or denies the motion.

Sentence vacated; case remanded.

¹ The record reflects that the trial court did not have a copy of Rhoades' exhibits at the time of sentencing; however, the letter from Social Security attached as an exhibit does not in any way substantiate his claim that he suffered an anxiety attack at the sentencing hearing.

This cause is vacated and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, ordered that said appellant recover of said appellee 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

ANTHONY O. CALABRESE, JR., J., AND

JOSEPH J. NAHRA, J.*, CONCUR.

SEAN C. GALLAGHER
PRESIDING JUDGE

*Sitting by assignment: Judge Joseph J. Nahra, retired, of the Eighth District Court of Appeals.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

