

[Cite as *State v. Sasso*, 2010-Ohio-3602.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 93540**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**BRIAN A. SASSO**

DEFENDANT-APPELLANT

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**JUDGMENT:  
REVERSED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-521735

**BEFORE:** Cooney, J., McMonagle, P.J., and Stewart, J.

**RELEASED AND JOURNALIZED:** August 5, 2010

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**COLLEEN CONWAY COONEY, J.:**

{¶ 1} Defendant-appellant, Brian A. Sasso (“Sasso”), appeals the trial court’s denial of his oral motion to withdraw his guilty plea. We find merit to the appeal and reverse.

{¶ 2} In March 2009, Sasso was charged with one count of harassment by an inmate in violation of R.C. 2921.38(A). In May, the trial court held a

change-of-plea hearing, at which Sasso pled guilty to the indictment. Immediately after accepting the plea, the court refused to grant Sasso's request for a personal bond, so Sasso stated that he wished to withdraw his guilty plea. The court denied his oral motion without a hearing.

{¶ 3} In June 2009, the court held a sentencing hearing at which it sentenced Sasso to the maximum of 12 months imprisonment. Sasso appeals, raising two assignments of error.

{¶ 4} In the first assignment of error, Sasso claims the trial court failed to substantially comply with Crim.R. 11 because it never inquired as to whether any promises were made to induce him to plead guilty. In the second assignment of error, he argues the trial court erred in denying his presentence motion to withdraw his guilty plea because the court refused to hold a hearing on it. Because these two assignments of error are interrelated, we will address them together.

{¶ 5} In order for a plea to be made knowingly and voluntarily, the trial court must follow the mandates of Crim.R. 11(C). If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is void. *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274.

{¶ 6} A trial court must strictly comply with Crim.R. 11 as it pertains to the waiver of federal constitutional rights. These include the right to trial by jury, the

right of confrontation, and the privilege against self-incrimination. *Id.* at 243-44. However, substantial compliance with Crim.R. 11(C) is sufficient when waiving nonconstitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. The nonconstitutional rights that a defendant must be informed of are the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a) and (b); *State v. Philpott* (Dec. 14, 2000), Cuyahoga No. 74392, citing *McCarthy v. United States* (1969), 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418. Substantial compliance means that under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving. *Nero* at 108.

{¶ 7} A defendant who challenges his guilty plea on nonconstitutional grounds must show a prejudicial effect. *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 364 N.E.2d 1163; Crim.R. 52(A). The test is whether the plea would have been otherwise made. *Id.* at 108.

{¶ 8} In *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715, the Ohio Supreme Court held that a presentence motion to withdraw a guilty plea should be freely and liberally granted. *Id.* at 527. However, “[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing.” *Id.* at paragraph one of the syllabus. Therefore, “a trial court must conduct a hearing

to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.” *Id.*

{¶ 9} Crim.R. 32.1 provides no guidelines for a trial court to use when ruling on a presentence motion to withdraw a guilty plea. Nevertheless, the Ohio Supreme Court has ruled that the decision to grant or deny a presentence motion to withdraw a guilty plea is within the sound discretion of the trial court. *Xie* at paragraph two of the syllabus. Therefore, absent an abuse of discretion, a trial court’s decision to grant or deny a presentence motion to withdraw a guilty plea must be affirmed. *Id.* at 527.

{¶ 10} Further, a trial court does not abuse its discretion in denying a motion to withdraw a guilty plea (1) where the accused is represented by competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim.R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request. *State v. Roark* (Sept. 14, 2000), Cuyahoga App. No. 76878, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863, paragraph three of the syllabus.

{¶ 11} Although the *Xie* court did not specifically set forth what type of hearing is required, this court has held that such hearing must comport with the minimum standards of due process, i.e., meaningful notice and opportunity to be

heard. *Roark* at 2, citing *Fuentes v. Shevin* (1972), 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556. In *State v. Smith* (Dec. 10, 1992), Cuyahoga App. No. 61464, this court also held that the scope of a hearing on an appellant's motion to withdraw his guilty plea should reflect the substantive merits of the motion. *Id.* at 6. The *Smith* court stated that:

{¶ 12} “[B]old assertions without evidentiary support simply should not merit the type of scrutiny that substantial allegations would merit. \* \* \* This approach strikes a fair balance between fairness for an accused and preservation of judicial resources.” *Id.*

{¶ 13} The scope of the hearing is within the sound discretion of the trial judge, subject to appellate review for an abuse of that discretion. *Id.*, citing *State v. Hall* (Apr. 27, 1989), Cuyahoga App. No. 55289.

{¶ 14} In the instant case, the record reflects that the trial court did not hold a hearing on the motion nor did it consider the plea withdrawal request.

{¶ 15} After the court accepted the plea, Sasso's trial counsel asked the court to consider a personal bond. When the court refused, the following dialogue occurred:

“THE DEFENDANT: I'd like to withdraw my plea because I was told that –

“THE COURT: You know what? We're done, Mr. Sasso. Leave.

“THE DEFENDANT: I want paperwork to withdraw my plea.

“THE COURT: No.

“THE DEFENDANT: That’s my constitutional rights.

“THE COURT: I’m not doing it now. I just went through a colloquy with you explaining your rights. You have –

“THE DEFENDANT: Yeah, and I was told I would be –

“THE COURT: You had an attitude this morning.

“THE DEFENDANT – on a personal bond.”

{¶ 16} Sasso moved to withdraw his plea within minutes of entering it and days before he was sentenced. Thus, the request was timely. Sasso claims he was promised that the court would place him on personal bond pending sentencing if he agreed to plead guilty to the indictment. It is not clear from the record whether there is any merit to Sasso’s claim that a promise was made. These questions are unanswered because the court did not hold a hearing on the motion to withdraw the guilty plea and gave no substantive reasons for denying the motion.

{¶ 17} During the colloquy at the plea hearing, the trial court tested Sasso’s understanding of all the constitutional rights he was relinquishing as required by Crim.R. 11. The court also inquired whether anyone coerced Sasso into pleading guilty. However, the court noticeably neglected to ask whether any promises were made to induce his guilty plea. Normally, the failure to ask whether any promises were made would not necessarily render the plea

defective, so long as the court substantially complied with the mandates of Crim.R. 11.

{¶ 18} However, in this case, Sasso immediately asserted that he was promised he would be placed on personal bond in exchange for his guilty plea. The court expressly indicated that it would not hold a hearing on Sasso's motion or even consider it. Based on the totality of the circumstances, including the lack of a hearing on the motion to withdraw that left many questions unanswered, we cannot say whether Sasso's plea was entered knowingly and voluntarily.

{¶ 19} Accordingly, the first and second assignments of error are sustained.

{¶ 20} Judgment is reversed, and the case is remanded to the trial court for a hearing and full consideration of the motion to withdraw the plea.

It is ordered that 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 common pleas court 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.

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COLLEEN CONWAY COONEY, JUDGE

CHRISTINE T. McMONAGLE, P.J., and



MELODY J. STEWART, J., CONCUR