

[Cite as *State v. Lopez*, 2010-Ohio-5926.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 10CA009771

Appellee

v.

MIGUEL A. LOPEZ

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 03CR064117

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 6, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Miguel Lopez, appeals from the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I

{¶2} In December 2003, a grand jury indicted Lopez on four counts of felonious assault and four attendant firearm specifications. Although he entered a no contest plea on September 20, 2005, Lopez wrote a letter to the trial court shortly thereafter, indicating that he did not want to enter a plea. The trial court construed Lopez’ letter as a motion to withdraw his plea and set the matter for a hearing. On October 25, 2005, the court denied Lopez’ motion. The court sentenced Lopez to a total of seventeen years in prison. Lopez appealed from the court’s judgment, but this Court dismissed his appeal because he failed to file an appellate brief. *State v. Lopez* (June 29, 2006), 9th Dist. No. 05CA008844.

{¶3} On July 2, 2009, Lopez filed a motion for resentencing, noting that his sentencing entry failed to include the manner of his conviction. Before the court responded to Lopez' motion, Lopez filed a second motion for resentencing, noting that his sentencing entry also failed to include a proper post-release control notification. The trial court set the matter for a de novo sentencing hearing. The hearing took place on January 20, 2010. The court sentenced Lopez to seventeen years in prison and issued his new sentencing entry on January 21, 2010.

{¶4} Lopez now appeals from his convictions and raises two assignments of error for our review.

II

Assignment of Error Number One

“THE TRIAL COURT ERRED WHEN IT DENIED MR. LOPEZ’S MOTION TO WITHDRAW HIS PLEA OF NO CONTEST.”

{¶5} In his first assignment of error, Lopez argues that the trial court erred by denying his motion to withdraw his plea. Specifically, he argues that he should have been permitted to withdraw his plea because he entered into it without fully appreciating the significance of the State’s ballistics reports.

{¶6} We first address the State’s argument that this Court lacks jurisdiction to consider this assignment of error because Lopez did not file an appeal within thirty days of the trial court’s ruling on his motion to withdraw his plea. Absent an unusual circumstance, see, e.g., *State v. Simone*, 9th Dist. No. 24966, 2010-Ohio-1824, at ¶5-12, the denial of a defendant’s pre-sentence motion to withdraw his plea is an interlocutory order from which the defendant may not appeal. *State v. Chamberlain* (1964), 177 Ohio St. 104, 105-07. Lopez’ first sentencing entry was not a final judgment because it failed to specify the manner of his conviction in accordance with *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, and failed to properly advise him of

post-release control in accordance with *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434. The court did not finalize Lopez' sentence until January 21, 2010, long after it denied his motion to withdraw his plea. As such, the court's denial of Lopez' motion was an interlocutory order. See *id.* Lopez' appeal from his motion is not untimely because it properly followed the pronouncement of his January 21, 2010 sentence. Thus, this Court has jurisdiction to consider Lopez' first assignment of error.

{¶7} A pre-sentence motion to withdraw should be freely and liberally granted. *State v. Xie* (1992), 62 Ohio St.3d 521, 527. Nevertheless, it is a defendant's burden to supply the trial court with a reasonable and legitimate basis for withdrawal. *State v. Carswell*, 9th Dist. No. 23119, 2006-Ohio-5210, at ¶8. "[T]he determination of whether a 'reasonable and legitimate basis' for the withdrawal of a plea exists [] lies within the trial court's sound discretion." *Id.* "[A] trial court does not abuse its discretion in denying a motion to withdraw a pre-sentence plea when a defendant had competent counsel, a full Crim.R. 11 hearing prior to the acceptance of the plea, and a hearing on [his] motion to withdraw." *State v. Thompson*, 9th Dist. No. 08CA009466, 2009-Ohio-2298, at ¶5, citing *State v. Mack*, 9th Dist. No. 05CA0024-M, 2005-Ohio-6325, at ¶8.

{¶8} The record reflects that the trial court held hearings when it accepted Lopez' plea and when he sought to withdraw it. Lopez had counsel with him when he entered his plea. It is unclear whether Lopez actually had counsel with him at the plea withdrawal hearing, but the record does reflect that Lopez still had an attorney of record at that time. Lopez relies upon testimony he gave at the hearing on his motion to withdraw in support of his argument on appeal. Yet, Lopez did not supply this Court with a transcript from either of his hearings. "[I]t is the duty of the appellant to provide a transcript for appellate review because the appellant bears the

burden of demonstrating error by reference to matters in the record.” *State v. Williams*, 9th Dist. No. 23560, 2008-Ohio-1048, at ¶10. Absent evidence to the contrary, this Court cannot conclude that the trial court abused its discretion by denying Lopez’ motion. See *Thompson* at ¶5 (concluding that court acts within its discretion in denying motion to withdraw where defendant had competent counsel, a full Crim.R. 11 hearing, and a hearing on the motion to withdraw). Lopez’ first assignment of error is overruled.

Assignment of Error Number Two

“THE TRIAL COURT ERRED WHEN IT FAILED TO CONDUCT A DE NOVO SENTENCING HEARING THEREBY MAKING MR. LOPEZ’S SENTENCE CONTRARY TO LAW.”

{¶9} In his second assignment of error, Lopez argues that the trial court erred by failing to afford him a de novo sentencing hearing. The transcript from the January 20, 2010 sentencing hearing does not support Lopez’ claim that he did not receive a de novo sentencing hearing. The trial court heard from both attorneys at the hearing as well as Lopez himself. The trial judge, who was not same judge that sentenced Lopez in 2005, indicated that he reviewed the entire file and “considered the record, the oral statements, any victim impact statements, *** the presentence report[,] and the principles and purposes of sentencing under Revised Code 2929.11 and [] balanced the recidivism factors under 2929.12.” The court then issued a sentence on each count. The trial court did not simply review and include the items that were absent from Lopez’ original sentencing entry. Compare *State v. Williams*, 9th Dist. No. 24990, 2010-Ohio-5110, at 7-8 (rejecting trial court’s attempt to correct defendant’s sentence by way of a nunc pro tunc entry). Rather, the court conducted the hearing anew. Lopez’ argument that he did not actually receive a de novo sentencing hearing lacks merit.

III

{¶10} Lopez' assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

KENNETH N. ORTNER, Attorney at Law, for Appellant.

DENNIS WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.