

[Cite as *State v. Nxumalo*, 2012-Ohio-2528.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-984
v.	:	(C.P.C. No. 09CR-08-5140)
	:	
Sekie S. Nxumalo,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on June 7, 2012

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*Ron O'Brien*, Prosecuting Attorney, and *Sheryl L. Prichard*,  
for appellee.

*Amy M. Bittner*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, Sekie S. Nxumalo ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which denied his motion to withdraw his guilty plea. For the following reasons, we reverse that judgment and remand the matter to the trial court.

**I. BACKGROUND**

{¶ 2} Appellant pleaded guilty to attempted felonious assault as part of a plea bargain. The trial court accepted his plea and sentenced him to two years in prison.

Thereafter, appellant filed a motion to withdraw his plea. He noted that he is not a United States citizen, and he said that he pleaded guilty because his attorney advised him that he would not be deported for being convicted of attempted felonious assault. That advice was incorrect, according to appellant, because immigration officials began deportation proceedings after his conviction. He argued that he is entitled to withdraw his plea because of his attorney's erroneous advice. The trial court denied the motion on grounds that it was untimely pursuant to statutes governing petitions for post-conviction relief.

## II. ASSIGNMENTS OF ERROR

{¶ 3} Appellant filed a timely notice of appeal and now assigns the following as error:

I. Mr. Nxumalo's July 26, 2010 guilty plea to the charge of attempted felonious assault in violation of O.R.C. 2923.02 as it relates to O.R.C. 2923.11, a felony of the third degree, should be vacated because his trial counsel's incorrect legal advice constitutes ineffective assistance of counsel and manifest injustice.

II. The trial court erred by failing to hold an evidentiary hearing on Mr. Nxumalo's motion to withdraw his guilty plea and vacate his conviction despite Mr. Nxumalo's clear and unequivocal request.

## III. DISCUSSION

### **A. First Assignment of Error: The Trial Court's Decision to Deny Appellant's Motion to Withdraw His Guilty Plea on Grounds that it was Untimely**

{¶ 4} In his first assignment of error, appellant contends that we must reverse the trial court's decision to deny his motion to withdraw his guilty plea. We agree.

{¶ 5} We review the trial court's decision under an abuse of discretion standard. *See State v. Hill*, 10th Dist. No. 10AP-634, 2011-Ohio-2869, ¶ 6. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 6} The trial court concluded that appellant's motion was untimely under statutes governing petitions for post-conviction relief. But as both parties recognize, the motion must be considered under Crim.R. 32.1, which specifically addresses plea withdrawals. *See State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, ¶ 14. Unlike the post-conviction relief statutes, Crim.R. 32.1 does not impose a time limit for filing a motion to withdraw a guilty plea. *Bush* at ¶ 14. Therefore, the trial court abused its discretion when it denied appellant's motion as untimely.

{¶ 7} Next, appellant contends that his plea must be set aside, pursuant to *State v. Yahya*, 10th Dist. No. 10AP-1190, 2011-Ohio-6090. In *Yahya*, this court recognized the possibility of allowing a defendant, who is not a United States citizen, to withdraw a guilty plea if it was entered on his attorney's erroneous advice that he would not be deported after his conviction. *Id.* at ¶ 11-23. Because the trial court did not determine the merits of appellant's challenge to his plea, however, we, as a reviewing court, decline to do so now. Instead, we remand this case for the trial court to consider appellant's challenge in the first instance. We sustain appellant's first assignment of error.

#### **B. Second Assignment of Error: Evidentiary Hearing**

{¶ 8} In his second assignment of error, appellant argues that the trial court erred by not holding an evidentiary hearing on his motion. Given our decision to remand this case to the trial court, however, we render moot appellant's second assignment of error. *See App.R. 12(A)(1)(c)*.

#### **IV. CONCLUSION**

{¶ 9} To conclude, to the extent that the trial court erred in determining that appellant's motion was untimely, we sustain appellant's first assignment of error and render moot his second assignment of error. We reverse the judgment of the Franklin County Court of Common Pleas and remand the matter for the trial court to consider the merits of appellant's motion to withdraw his guilty plea.

*Judgment reversed;  
cause remanded with instructions.*

SADLER and CONNOR, JJ., concur.

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