

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090042
	:	TRIAL NO. B-0801182
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
JOHNNY MOORE,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant, Johnny Moore, appeals convictions for two counts of violating an antistalking protection order under R.C. 2919.27(A). The trial court sentenced him to 12 months' imprisonment on each count, to be served consecutively, for a total of two years. We find no merit in his two assignments of error, and we affirm his convictions.

The record shows that Moore pleaded guilty to two counts of violating a protection order. At the plea hearing, the trial court stated that it would place Moore on community control, but that, if he violated the terms of community control by contacting the victim, the court would sentence him to two years' imprisonment. Moore agreed to those terms.

Moore did not return to court for the sentencing hearing, so the court issued a warrant for his arrest. Subsequently, he was arrested and charged with more offenses for contacting the victim despite the court's warning. When the sentencing

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

hearing was finally held, Moore moved to withdraw his guilty plea. The court denied the motion. It then imposed the two-year sentence that it had previously stated it would impose.

In his first assignment of error, Moore contends that the trial court erred in overruling his motion to withdraw his plea. He argues that when a motion to withdraw a plea is made prior to sentencing, the court should grant it freely and liberally. He also argues that the court should have held a hearing on his motion. This assignment of error is not well taken.

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 a reasonable and legitimate basis exists for the withdrawal of the plea.² The decision whether to grant or deny a presentence motion to withdraw a guilty plea lies within the trial court's discretion.³

In this case, after numerous delays caused by Moore's counsel withdrawing, competency hearings, and Moore's absconding, a sentencing hearing finally occurred. The trial court had specifically stated at the plea hearing that it would place Moore on community control, but that if he violated the terms of community control by contacting the victim, it would sentence him to the maximum prison term. After the plea hearing, Moore had absconded and contacted the victim. Consequently, he had been charged with more offenses.

At the sentencing hearing, Moore's counsel stated that Moore wanted to withdraw his plea because "the terms of the plea were that he would be placed on

² *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715, paragraph one of the syllabus; *State v. Hunter*, 1st Dist. No. C-080730, 2009-Ohio-3259, ¶13.

³ *Xie*, supra, at paragraph two of the syllabus; *Hunter*, supra, at ¶13.

community control for a period of three years, and that if he violated the terms of community control, he would agree to serve two years in prison. It's his position that he was never placed on community control, and, therefore, that plea should be held null and void and he wishes to withdraw it on those grounds."

The trial court asked why Moore had not appeared for sentencing. Counsel could not answer the question, so the court asked Moore, "[D]o you want to address the court on that?" Moore shook his head that he did not. The court went on to say that "it was understood that if he did not show up for sentencing that he would be sent to the penitentiary on this old charge, and in spite of that, he also got arrested on new charges. So I'm going to impose sentence today on the old charge."

Thus, the record shows that the court was aware of the basis for the motion to withdraw the plea, and that it did give Moore a chance to address the court. The court held a full plea hearing. Moore had indicated at that hearing that he understood the nature of the charges against him and the possible penalties. He also indicated that he understood and agreed that if he contacted the victim, he would be sentenced to serve two years in prison. Yet, he still absconded and contacted the victim. He only asked to withdraw his plea when he realized that he was going to go to prison.

Under the circumstances, we cannot hold that the trial court's decision to overrule Moore's motion to withdraw his plea was so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion.⁴ Consequently, the trial court did not err in denying his motion to withdraw his plea, and we overrule his first assignment of error.

⁴ See *State v. Clark*, 71 Ohio St.3d 466, 470, 1994-Ohio-43, 644 N.E.2d 331.

In his second assignment of error, Moore contends that the trial court erred when it failed to request or consider mitigation evidence before imposing sentence. He contends that the court failed to give him the right to address the court before sentencing in violation of Crim.R. 32(A). This assignment of error is not well taken.

The Ohio Supreme Court has held that, under Crim.R. 32(A), the trial court must address the defendant personally before imposing sentence and ask whether he wishes to make a statement on his own behalf or present any information in mitigation of punishment.⁵ Where the court has imposed sentence without asking the defendant whether he wishes to exercise the right of allocution, resentencing is required unless the error is invited error or harmless.⁶

While the trial court did ask Moore if he wanted to address the court about why he had not appeared for sentencing, it did not specifically give him an opportunity to exercise his right of allocution. But this court has held that a trial court's failure to do so is harmless error when the defendant does not specify what he would have said to the court in mitigation if he had been given the opportunity.⁷ Given that Moore did not respond when the court asked him why he had not appeared for sentencing and openly stated that he would not cooperate with competency evaluations, we have difficulty envisioning what he would have said in mitigation, and he has not specified what mitigation evidence he would have presented.

Further, the trial court made clear and Moore agreed that if he contacted the victim, he would be sentenced to the two years in prison. Even though he was never

⁵ *State v. Campbell*, 90 Ohio St.3d 320, 2000-Ohio-183, 738 N.E.2d 1178, paragraph one of the syllabus; *State v. Brown*, 1st Dist. No. C-010755, 2002-Ohio-5813, ¶21.

⁶ *Campbell*, supra, at paragraph three of the syllabus.

⁷ *State v. Mynhier* (2001), 146 Ohio App.3d 217, 223, 765 N.E.2d 917, overruled on other grounds in *State v. Giles*, 1st Dist. No. C-010582, 2002-Ohio-3297.

formally put on community control because he absconded, Moore knew exactly what would happen if he contacted the victim. The remedy for a violation of the right to allocution is resentencing,⁸ but resentencing in this case would not result in a different sentence. Consequently, the trial court's failure to afford Moore his right to allocution was harmless error. We overrule his second assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on November 4, 2009

per order of the Court _____
Presiding Judge

⁸ *Brown*, supra, at ¶21.