

[Cite as *State v. Hines*, 2010-Ohio-3964.]

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

STATE OF OHIO,	:	APPEAL NO. C-090754
	:	TRIAL NO. 09CRB-18070A
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
	:	
ANTHONY HINES,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed.

Date of Judgment Entry on Appeal: August 25, 2010

John Curp, Cincinnati City Solicitor, *Ernest F. McAdams, Jr.*, City Prosecutor, and *Lura Clark Teass*, Assistant City Prosecutor, for Plaintiff-Appellee,

Wendy R. Calaway, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

DINKELACKER, Judge.

{¶1} Defendant-appellant, Anthony Hines appeals from a conviction for obstructing official business under R.C. 2921.31, a second-degree misdemeanor. We find no merit in his two assignments of error, and we affirm the trial court's judgment.

I. Facts and Procedure

{¶2} Hines was originally charged with obstructing official business and possession of marijuana. He agreed to plead no contest to the obstructing charge, and the state agreed to dismiss the possession charge.

{¶3} At the plea hearing, the trial court told Hines, "No contest to the obstruction of official business means you're admitting the facts as true as alleged in the complaint against you; however, you're not admitting guilt to the charge." After Hines acknowledged that he understood, the court went on to state, "Since you're admitting the facts are true, there's not going to be a trial. The prosecutor will read the facts into the record, and then I'll make a finding. After that, I will proceed with sentencing if there's a finding of guilty."

{¶4} Finally, the court informed Hines of the maximum sentence he could have received as a result of the plea. After Hines indicated that he understood, the court accepted the plea and found him guilty. The court did not inform him about the constitutional rights that he would be waiving by pleading no contest.

{¶5} The trial court sentenced Hines to 90 days' incarceration, which it suspended, one year of community control, 100 hours of community service, and alcohol and drug treatment as recommended by the probation department. Subsequently, he filed a motion to withdraw his plea. The trial court held a hearing on the motion, at

which Hines contended that he did not commit the offense. He said that he only entered the plea because his attorney told him it was “the only way [he] would be able to leave and not go to jail for 90 days.” The trial court denied the motion.

{¶6} A short time later, Hines filed another motion to withdraw his plea in which he asserted his innocence and asked for a trial. The trial court denied that motion without a hearing. This appeal followed.

II. Crim.R. 11 in Misdemeanor Cases

{¶7} In his first assignment of error, Hines contends that the trial court erred in accepting his plea because it was not made knowingly, intelligently and voluntarily. He argues that because the court did not comply with Crim.R. 11(C), including informing him of the constitutional rights he would waive by entering the plea, the plea was invalid. This assignment of error is not well taken.

{¶8} Obstructing official business is a second-degree misdemeanor,¹ which allows for a maximum jail term of 90 days.² Because the maximum term is less than 180 days, it is a petty offense.³ Crim.R. 11(E) states that “[i]n misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept any such pleas without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.”

{¶9} Hines relies on a case from another appellate district in which the court held that because a no contest plea waives several constitutional rights, part of the effect

¹ R.C. 2921.31(B).

² R.C. 2929.24(A)(2).

³ Crim.R. 2(C) and (D); *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, ¶11.

of the plea is the waiver of those rights. Therefore, before accepting the plea, the court must inform the defendant of those rights.⁴

{¶10} But this court has held exactly the opposite. We stated that “before accepting a plea of guilty or no contest under Crim.R. 11(E), a trial court need not inform an offender of the offender’s constitutional rights that are being waived.”⁵ Absent guidance from the Ohio Supreme Court, we follow our own precedent.⁶

{¶11} In accepting a plea, a court must substantially comply with the provisions of Crim.R. 11(E).⁷ To satisfy the requirement of informing the defendant of the effect of a plea, the court must inform the defendant of the appropriate language under Crim.R. 11(B).⁸ Failure to comply will not invalidate a plea unless the defendant suffered prejudice. The test for prejudice is whether the plea would otherwise have been made.⁹

{¶12} Under Crim.R. 11(B)(2), the court must inform the defendant that “the plea of no contest is not an admission of guilt but is an admission of the truth of the facts alleged in the complaint, and that such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.”¹⁰ In this case the court followed the language of the rule except for the language stating that a no-contest plea cannot be used against the defendant in a later proceeding.

{¶13} This court has previously addressed the same issue. We stated, “The trial court did not inform [the defendant] that the no-contest plea could not be used

⁴ See *Garfield Hts. v. Brewer* (1984), 17 Ohio App.3d 216, 217-218, 479 N.E.2d 309. Accord *Westlake v. Kilbane* (2001), 146 Ohio App.3d 308, 311-312, 765 N.E.2d 986; *State v. Kamal* (May 25, 2001), 6th Dist. No. L-00-1360; *State v. James*, 3rd Dist. No. 13-2000-44, 2001-Ohio-2200.

⁵ *State v. Nichelle Anderson*, 1st Dist. Nos. C-050785 and C-050786, 2006-Ohio-4602, ¶30. Accord *State v. Watkins*, 2nd Dist. No. 2001-CA-15, 1001-Ohio-1841.

⁶ See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶43-44.

⁷ *State v. Dewes* (Apr. 27, 2001), 1st Dist. No. C-000703.

⁸ *Jones*, supra, at ¶25.

⁹ *Id.* at ¶52.

¹⁰ *Id.* at ¶23.

against him. But such information, rather than dissuading a defendant from pleading, is an incentive to enter a no-contest plea. [The defendant] was not prejudiced by the trial court's failure to mention it."¹¹

{¶14} The trial court substantially complied with Crim.R. 11(E). Hines was not prejudiced by the omission, and the record does not show that but for the error, he would not have entered his plea. Because Hines's plea was voluntary, we overrule his first assignment of error.

III. Hines's Motions to Withdraw His Plea

{¶15} In his second assignment of error, Hines contends that the trial court erred in failing to hold a hearing on his motions to withdraw his plea. He argues that where he indicated his intention to withdraw his plea before sentencing, the trial court's failure to hold a hearing was an abuse of discretion. This assignment of error is not well taken.

{¶16} Hines contends that because he indicated before sentencing that he wished to withdraw his plea and actually filed his first motion three days after sentencing, it should have been treated as a presentence motion to withdraw his plea. We disagree. Nothing in the record shows that Hines expressed dissatisfaction with his plea before sentencing, and his motion was not filed until after sentencing. While a delay in the filing of a motion can be relevant,¹² it does not convert a post-sentence motion into a presentence one. Consequently, we treat Hines's motions as post-sentence.¹³

¹¹ *State v. Robert Anderson*, 1st Dist. No. C-070098, 2007-Ohio-6218, ¶12.

¹² See *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph three of the syllabus.

¹³ See Crim.R. 32.1.

{¶17} A defendant may withdraw a plea after sentencing only “to correct a manifest miscarriage of justice.”¹⁴ It should occur only in extraordinary cases.¹⁵ The decision whether to grant a post-sentence motion to withdraw a plea lies within the trial court’s discretion.¹⁶ The trial court need not hold a hearing on a post-sentence motion to withdraw a plea unless the facts alleged by the defendant show that a manifest miscarriage of justice would occur if the plea were to stand.¹⁷

{¶18} Hines filed two post-sentence motions to withdraw his plea on the same basis. The trial court held a hearing on the first motion, which, while not an evidentiary hearing, allowed Hines to argue his motion. He claimed that he did not commit the offense and that he only entered the plea on the advice of his attorney. This claim was insufficient to show a manifest miscarriage of justice. The trial court overruled Hines’s second motion without a hearing.

{¶19} The trial court’s decisions to overrule both of Hines’s motions to withdraw his plea were not so arbitrary, unreasonable or unconscionable as to connote an abuse of discretion.¹⁸ Consequently, we overrule Hines’s second assignment of error and affirm his conviction.

Judgment affirmed.

CUNNINGHAM, P.J., and HILDEBRANDT, J., concur.

Please Note:

The court has recorded its own entry this date.

¹⁴ *Id.*; *State v. Simmons*, 1st Dist. No. C-050817, 2006-Ohio-5760, ¶21.

¹⁵ *State v. Atkinson*, 9th Dist. No. C-05CA0079-M, 2006-Ohio-5806, ¶11.

¹⁶ *Smith*, *supra*, at paragraph two of the syllabus; *Robert Anderson*, *supra*, at ¶14; *Simmons*, *supra*, at ¶16.

¹⁷ *State v. Bell*, 8th Dist. No. 87727, 2007-Ohio-3276, ¶20; *Atkinson*, *supra*, at ¶12; *State v. Beck*, 1st Dist. Nos. C-020432, C-020449, and C-030062, 2003-Ohio-5838, ¶7.

¹⁸ See *State v. Clark*, 71 Ohio St.3d 466, 470, 1994-Ohio-43, 644 N.E.2d 331.