

[Cite as *State v. Carson*, 2004-Ohio-3775.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 03CA11

vs. : T.C. CASE NO. 00CR283

BRETT WILLIAM CARSON, JR., II : (Criminal Appeal from  
Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 9<sup>th</sup> day of July, 2004.

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GRADY, J.

{¶1} Defendant, Brett Carson, appeals from an order denying his Crim.R. 32.1 motion to withdraw a plea of no contest to a charge of aggravated vehicular homicide.

{¶2} On April 23, 2000, Defendant Carson drove a vehicle in which his girlfriend, Christie Pendell, was a

passenger, traveling at speeds of up to 100 miles per hour through the streets of Xenia. A crash resulted and Pendell was killed. Carson was charged with aggravated vehicular homicide, in that he had caused the death of another while operating a motor vehicle "recklessly." R.C. 2903.06(A)(2). Carson entered a plea of no contest to the charge on August 27, 2001. We affirmed the conviction on appeal, but remanded the case to correct an error in the court's restitution order. *State v. Carson* (Nov. 7, 2003), Greene App. No. 2002-CA-73.

{¶3} The victim's family subsequently filed a wrongful death action against Carson. A proposed witness in that civil action, Janet Kamp, was deposed on September 4, 2002.

{¶4} On January 9, 2003, Defendant Carson filed a motion for leave to withdraw his plea of no contest. He argued that statements in Kamp's deposition testimony conflicted with evidence the State had said it intended to offer at trial through another witness, and that the variance made Kamp's statements exculpatory evidence which the State had a duty to disclose to him under the rule of *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.ed2d 215, and Crim.R. 16(B)(1)(f).

{¶5} The trial court denied Carson's motion to withdraw his plea, without a hearing. Carson filed a timely notice of appeal.

{¶6} As a preliminary matter, we note that Carson's appellate counsel has filed a brief in which the text of the

argument is single-spaced. App.R. 19(A) requires the text of briefs to be double-spaced. Counsel is admonished to comply with the rule in the future.

ASSIGNMENT OF ERROR

{¶7} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT OVERRULED APPELLANT'S MOTION TO WITHDRAW PLEA OF NO CONTEST."

{¶8} A post-sentence motion to withdraw a plea of guilty or no contest will be granted only to correct a manifest injustice. Crim.R. 32.1; *State v. Stumpf* (1987), 32 Ohio St.3d 95, 104. Furthermore, the good faith, credibility and weight of the movant's assertions in support of such a motion are matters to be resolved by the trial court. *Stumpf, supra*. The decision whether to grant or deny a motion to withdraw a plea is within the trial court's sound discretion, and will not be disturbed on appeal absent an abuse of discretion. *State v. Barnett* (1991), 73 Ohio App.3d 244, 250. An abuse of discretion means more than simply an error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶9} Ordinarily, a hearing is required to determine whether there is a reasonable and legitimate basis to withdraw a guilty plea. *State v. Casas* (June 20, 2003), Montgomery App. No. 19049, 2003-Ohio-3237. However, an evidentiary hearing is not required in every case involving

a motion to withdraw a guilty plea, inasmuch as the burden is upon defendant to make a prima facie showing of merit before a trial court is required to hold an evidentiary hearing. *State v. Humphrey* (Nov. 27, 2002), Montgomery App. No. 19243, 2002-Ohio-6525. No hearing is required when Defendant's claim in support of his motion to withdraw his plea, is not supported by the record. *Casas, supra; State v. Davis* (January 5, 2001), Montgomery App. No. 18172. That is the case here.

{¶10} Defendant entered his plea of no contest on March 19, 2001. Kamp's deposition testimony was not given until September 4, 2002. Because it did not yet exist, the State could not have been aware of Kamp's deposition testimony when Carson entered his no contest plea. Therefore, no violation of a duty of disclosure is shown.

{¶11} Even had the State been aware of what Kamp might have said, there is no basis to find that the evidence she might have given is exculpatory: that is, that it tends to justify, excuse or clear the Defendant from criminal liability on the charge against him. *State v. Davis* (Jan. 5, 2001), Montgomery App. No. 18172.

{¶12} The State had indicated that it intended to call the victim's ex-husband as a witness at trial, and that he would testify that the Defendant on prior occasions forced the victim to ride with him while he drove at high rates of speed in order to frighten her. The State also asked the court to rule prior to trial that this evidence of his prior

acts was admissible pursuant to Evid.R. 404(B) to prove the Defendant's motive. The court ruled that the evidence was admissible for that purpose.

{¶13} It is unclear how Defendant's alleged motive was at issue in the aggravated vehicular homicide charge against him, which was that another person was killed as a result of Defendant's having operated his vehicle "recklessly" in violation of R.C. 2903.06(A)(2). If his motive was not in issue, evidence probative of his alleged motive was irrelevant and therefore inadmissible. See *State v. Smith* (1992), 84 Ohio App.3d 647. More importantly, neither does it appear from the record that Kamp's subsequent deposition testimony in any way refutes the charge of aggravated vehicular homicide. Kamp testified in her deposition that the Defendant and the victim generally got along well, and that they appeared to do so on the day of the accident. Kamp had no direct knowledge of the facts of the accident. Her statement might refute the suggestion that Defendant's motive in driving recklessly was in order to frighten the victim. However, because his alleged motive was irrelevant to the charge against him, Kamp's testimony is not exculpatory of Defendant's criminal liability on that charge.

{¶14} We cannot find that, on the "manifest injustice" standard for post-sentence motion to withdraw a plea of no contest that any manifest injustice arising from Defendant's plea and conviction have been shown.

{¶15} The assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. and YOUNG, J., concur.

Copies mailed to:

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Hon. Stephen A. Wolaver