

[Cite as *State v. Austin*, 2018-Ohio-3573.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 107129

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JAMES AUSTIN**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**REVERSED AND REMANDED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-16-608502-A

**BEFORE:** Kilbane, P.J., S. Gallagher, J., and Blackmon, J.

**RELEASED AND JOURNALIZED:** September 6, 2018

**APPELLANT**

James Austin  
Inmate No. 700507  
Trumbull Correctional Institution  
P.O. Box 901  
Leavittsburg, Ohio 44430

**ATTORNEYS FOR APPELLEE**

Michael C. O'Malley  
Cuyahoga County Prosecutor  
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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, James Austin (“Austin”), appeals, pro se, from the trial court’s denial of his motion to withdraw his guilty plea. The state concedes that the trial court erred in denying the motion. The state’s concession, however, is not based on the arguments raised by Austin. Rather, the state contends the trial court was without jurisdiction to rule on the motion while Austin’s direct appeal was pending. We agree with the state.

{¶2} Accordingly, we reverse and remand to the trial court with instructions to vacate its denial of Austin’s motion to withdraw his guilty plea and hold the motion in abeyance pending our resolution of Austin’s direct appeal.

#### Facts and Procedural History

{¶3} In June 2017, Austin received an eight-year prison sentence after pleading guilty, pursuant to a plea agreement with the state, to two counts each of aggravated burglary and intimidation of a crime victim or witness, as well as a single count each of kidnapping, having a weapon while under disability, and carrying a concealed weapon.

{¶4} In July 2017, Austin filed a notice of appeal from the trial court’s judgment of conviction and sentence. *State v. Austin*, 8th Dist. Cuyahoga No. 105981. Austin’s direct appeal is a companion case to the instant case. *Id.* In January 2018, Austin’s appointed appellate counsel filed a brief under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and requested leave to withdraw as counsel. Appellate counsel indicated that he had thoroughly reviewed the record and determined

that proceeding with the appeal would be frivolous. *Id.* Upon our independent review of the record, we found that nonfrivolous issues exist as to the knowing nature of Austin's guilty plea. *See* 8th Dist. Cuyahoga No. 105981. We granted appellate counsel's motion to withdraw, appointed Austin new counsel, and returned the matter to the court's active docket for briefing. *Id.* Thus, Austin's direct appeal is still pending.

{¶5} While Austin's direct appeal was pending before this court, Austin filed a motion to withdraw his guilty plea pursuant to Crim.R. 32.1 with the trial court, and the trial court denied Austin's motion without hearing.

{¶6} It is from this order that Austin appeals, raising a single assignment of error for our review:

Assignment of Error

The trial court erred to [Austin's] prejudice when [it] denied [Austin's] motion to withdraw his guilty plea pursuant to Crim.R. 32.1 when he suffered a violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, [10 L.Ed.2d 215 (1963)] and [the trial court] did not hold a hearing on the issues.

{¶7} In the sole assignment of error, Austin argues that the trial court erred in denying his motion to withdraw his guilty plea because the state withheld critical evidence from him \_ specifically, surveillance video footage. Austin further argues that the state's failure to provide him with the surveillance video amounted to a *Brady* violation that caused him to "wrongfully accept a plea agreement," resulting in a manifest injustice.

{¶8} As explained above, the state concedes that the trial court erred in denying Austin’s motion, but for a different reason. The state, relying on *State v. Moon*, 8th Dist. Cuyahoga No. 101930, 2015-Ohio-1648, argues the trial court was without jurisdiction to rule on Austin’s motion while his direct appeal was pending before this court.

{¶9} In *Moon*, this court found that the trial court lacked jurisdiction to rule on the defendant’s motion to withdraw his guilty plea because the trial court ruled on his motion during the pendency of his direct appeal, which involved his guilty plea. *Moon* at ¶ 7. As a result, the trial court’s ruling on the motion was a nullity. *Id.*, citing *State v. Lauharn*, 2d Dist. Miami No. 2011 CA 10, 2012-Ohio-1572, ¶ 9-10.

{¶10} This court has explained “[w]hen a notice of appeal is filed, the trial court loses jurisdiction except to take action in aid of the appeal.” *State v. Drake*, 8th Dist. Cuyahoga No. 105908, 2017-Ohio-7328, ¶ 2, citing *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978). The trial court retains jurisdiction over issues “‘not inconsistent with the appellate court’s jurisdiction to reverse, modify, or affirm the judgment from which an appeal is taken’ — what is characterized as acts ‘not in conflict’ with appellate jurisdiction.” *Id.*, quoting *Yee v. Erie Cty. Sheriff’s Dept.*, 51 Ohio St.3d 43, 44, 553 N.E.2d 1354 (1990).

{¶11} In *Drake*, we explained that an exception to the rule in *Special Prosecutors* exists for collateral attacks to a judgment of conviction. *Id.* at \_ 3. Specifically, “R.C. 2953.21(D) states: ‘the court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending.’” *Id.*, quoting

R.C. 2953.21(D). “However, ‘R.C. 2953.21 and 2953.23 do not govern a Crim.R. 32.1 postsentence motion to withdraw a guilty plea.’” *Id.*, quoting *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, syllabus. “Given that a postsentence Crim.R. 32.1 motion is not collateral[,] but is filed in the underlying criminal case and \* \* \* targets the withdrawal of a plea, it is not a ‘collateral challenge to the validity of a conviction or sentence.’” *Bush* at ¶ 13, quoting *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999-Ohio-102, 714 N.E.2d 905.

{¶12} In the instant case, Austin plainly styled his motion as a motion to withdraw a guilty plea under Crim.R. 32.1. The trial court ruled on this motion while Austin’s direct appeal concerning his guilty plea was pending before this court. As a result, the trial court was without jurisdiction to rule on this motion. *Drake* at \_ 4; *Moon* at \_ 7. Therefore, the trial court’s denial of the motion was a nullity. *Id.*, citing *Lauharn* at \_ 13.

On remand, the trial court is to vacate its denial of Austin’s motion to withdraw his guilty plea and hold the motion in abeyance until Austin’s direct appeal is decided, at which time it may proceed to rule on the motion. *Drake* at \_ 4.

{¶13} Based on the foregoing, the sole assignment of error is sustained in part on other grounds.

{¶14} Judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY EILEEN KILBANE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and  
PATRICIA A. BLACKMON, J., CONCUR