[Cite as *State v. Stewart*, 2013-Ohio-78.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
		No. 11AP-787
v.	:	(C.P.C. No. 09CR-09-5786)
Jonathan L. Stewart,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 15, 2013

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Yeura R. Venters, Public Defender, and *Timothy E. Pierce*, for appellee.

ON MOTIONS

KLATT, P.J.

{¶ 1} Plaintiff-appellant, the State of Ohio, and defendant-appellee, Jonathan L. Stewart, have filed requests for relief of one kind or another in the wake of this court's decision in which we concluded that the trial court did not abuse its discretion by granting Stewart's post-sentence motion to withdraw his guilty plea. *State v. Stewart*, 10th Dist. No. 11AP-787, 2012-Ohio-4500. Specifically, the state filed a combined application for reconsideration pursuant to App.R. 26(A)(1) and an application for en banc consideration pursuant to App.R. 26(A)(2). Stewart filed a motion to certify a conflict pursuant to App.R. 25(A) and Ohio Constitution, Article IV, Section 3(B)(4), which the state partially concedes and partially opposes. For the following reasons, we deny the state's applications as well as Stewart's motion to certify a conflict.

I. Factual and Procedural Background

{¶ 2} The background of this case is fully set forth in this court's opinion and will not be repeated here. This court, in a 2-1 opinion, held that the trial court did not abuse its discretion by allowing Stewart to withdraw a guilty plea he entered to a charge of failing to verify his address in violation of R.C. 2950.06, where that statute was later found to be unconstitutionally applied to him. We concluded that it was not an abuse of discretion for the trial court to find that those facts constituted a manifest injustice. *Stewart* at ¶ 17. We also rejected the state's argument that res judicata prohibited the trial court from granting Stewart's motion. Although we acknowledged that res judicata may, in some circumstances, bar claims filed in post-sentence motions to withdraw guilty pleas, we concluded that the application of res judicata is not absolute and may not apply in circumstances when to do so would result in an injustice. *Id*. at ¶ 18.

II. The State's Application for Reconsideration

A. Standard of Review

{¶ 3} The state initially asks this court to reconsider its opinion. When presented with an application for reconsideration, an appellate court must determine whether the application calls to the court's attention an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. *State v. Wade*, 10th Dist. No. 06AP-644, 2008-Ohio-1797, ¶ 2; *Columbus v. Hodge*, 37 Ohio App.3d 68, 69 (1987). " 'An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court.' " *Columbus v. Dials*, 10th Dist. No. 04AP-1099, 2006-Ohio-227, ¶ 3, quoting *State v. Owens*, 112 Ohio App.3d 334, 336 (1996). "App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *Owens* at 336.

B. The State's Arguments in Support of Reconsideration

{¶ 4} The state initially argues that this court failed to address the trial court's comments indicating its displeasure with the sexual offender registration laws. The state argues that these comments played a critical role in the trial court's decision to grant Stewart's motion and indicate the trial court's consideration of improper criterion in its

decision-making process. We noted the comments of the trial court as we recounted the facts of this case. *Stewart* at ¶ 7. In our legal analysis, however, we did not take those comments into consideration because we did not believe the comments were the basis for the trial court's decision. While the state argues otherwise, a disagreement over the rationale used by this court is not grounds for reconsideration.

{¶ 5} The state also argues that we failed to consider its argument that Stewart waived his as-applied constitutional challenges by entering a guilty plea. We considered and rejected the state's argument that Stewart waived constitutional challenges in our decision. *Id.* at ¶ 21.

{¶ 6} The state next argues that we improperly considered other comments the trial court made before making its ultimate ruling. We disagree. The state attempts to parse the comments the trial court made at the hearing on Stewart's motion into distinct segments, those made before the ruling and those made as part of the court's "ultimate ruling." State's application, at 14. In essence, the state again simply disagrees with our interpretation of the trial court's rationale, which is not a basis for reconsideration.

{¶ 7} Lastly, the state argues that this court improperly relied on case law from the Eighth District Court of Appeals to support our conclusion that a trial court does not abuse its discretion by granting a motion to withdraw a guilty plea in these circumstances. The state argues that these cases are not relevant because they dealt with void judgments and that instead, we should rely on cases from other appellate districts. Again, this is an argument that reflects the state's disagreement with the logic that this court used to support its conclusion. It does not address an obvious error or an issue that we did not consider and is, therefore, not grounds for reconsideration.

{¶ 8} For all these reasons, we deny the state's application for reconsideration.

III. The State's Application for En Banc Consideration

A. Who must decide the State's Application?

{¶ 9} We next consider the state's request for en banc consideration. We first reject the state's claim that all eight judges must initially consider the application. This court has previously rejected the same argument. *State v. Forrest*, 10th Dist. No. 11AP-291, 2012-Ohio-938, ¶ 4. In *Forrest*, we noted a conflict amongst our court and other appellate courts on this issue and certified a conflict to the Supreme Court of Ohio, where

the case is currently pending for consideration. *See State v. Forrest*, 131 Ohio St.3d 1551, 2012-Ohio-2263. Because our court has already rejected this requirement for en banc consideration, we do the same here.

B. Is En Banc Consideration proper in this case?

{¶ 10} App.R. 26(A)(2) provides for en banc consideration "[u]pon a determination that two or more decisions of the court on which they sit are in conflict * * *." "[I]f the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict." *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, paragraph two of the syllabus. *See also Greenspan v. Third Fed. S. & L. Assn.*, 122 Ohio St.3d 455, 2009-Ohio-3508, ¶ 21. Appellate courts have discretion to determine whether an intradistrict conflict exists. *McFadden* at paragraph two of the syllabus; *Greenspan* at ¶ 22.

{¶ 11} The state asserts that our refusal to apply res judicata to the facts of this case conflicts with holdings in a number of our previous cases that have applied res judicata "as a matter of law" in similar contexts. We disagree. The cases the state points to stand for the proposition that res judicata may bar claims asserted in motions to withdraw guilty pleas. We acknowledged the same proposition in this case. *Stewart* at ¶ 18. Those cases, while all applying res judicata to bar claims, did not involve or address the exception to the application of res judicata which this court applied in *Stewart*. *See State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 25 (concluding that res judicata does not prevent resentencing after sentence declared void because to do so "would achieve neither fairness nor justice"). Therefore, we find no conflict amongst these decisions and, accordingly, deny the state's application for en banc consideration.

IV. Stewart's Motion to Certify a Conflict

{¶ 12} Lastly, Stewart filed a motion to certify a conflict. Ohio Constitution, Article IV, Section 3(B)(4), gives the courts of appeals of this state the power to certify the record in a case to the Supreme Court of Ohio "[w]henever * * * a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals." Certification can be granted only where the judgments conflict upon the same question. *Johnson v. Indus. Comm.*, 61 Ohio App. 535, 537 (1939).

{¶ 13} Stewart claims that our decision creates two conflicts with other courts of appeals. First, he contends that our conclusion that he is subject to the enhanced statutory penalties found in the current version of R.C. 2950.99, as amended by Am.Sub.S.B. No. 97 which was effective after his original sex offense, conflicts with cases from other districts which have concluded that those enhanced penalties may not be imposed on offenders who committed their underlying sexual offenses before the current version of R.C. 2950.99 took effect. Second, if the current version of R.C. 2950.99 applies to him, whether such application violates the Ex Post Facto and Due Process Clauses of the United States Constitution and the Retroactivity Clause of the Ohio Constitution.

{¶ 14} The Supreme Court of Ohio recently considered and answered these exact questions. *State v. Howard*, Slip Opinion No. 2012-Ohio-5738, ¶ 20-28. Accordingly, we deny Stewart's motion to certify a conflict.

V. Conclusion

{¶ 15} For all these reasons, we deny the state's applications for reconsideration, en banc consideration, motion for review of application for en banc reconsideration, and the motion for procedural order. We also deny Stewart's motion to certify a conflict.

Appellant's application for reconsideration, application for en banc consideration, motion for review of application for en banc reconsideration, and motion for procedural order denied; and appellee's motion to certify a conflict denied.

TYACK and SADLER, JJ., concur.