[Cite as *State v. Green*, 2015-Ohio-2576.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-12-247
	:	O P I N I O N
- vs -		6/29/2015
	:	
DANNY M. GREEN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2013-02-196

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Danny M. Green, #A687591, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601, defendant-appellant, pro se

HENDRICKSON, J.

{¶ 1} Defendant-appellant, Danny M. Green, appeals from a decision of the Butler County Court of Common Pleas denying his motion to withdraw a guilty plea. For the reasons set forth below, we affirm.

{¶ 2} On March 6, 2013, appellant was indicted on four counts of rape in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree, one count of rape in violation of R.C.

2907.02(A)(2), a felony of the first degree, one count of gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree, and one count of attempted sexual battery in violation of R.C. 2923.02(A) and R.C. 2907.03(A)(5), a felony of the fourth degree. The charges arose out of allegations that appellant raped and sexually abused two minors.

{¶ 3} Appellant initially pled not guilty to the charges. However, on April 24, 2013, following plea negotiations with the state, appellant entered a guilty plea to two amended charges of rape in violation of R.C. 2907.02(A)(1)(c). Pursuant to the Plea of Guilty and Jury Waiver form executed by appellant, in exchange for appellant's guilty plea to amended counts one and six, the remaining counts (counts two, three, four, five, and seven) were to "merge." The trial court accepted appellant's guilty plea, and on July 22, 2013, appellant was sentenced to nine years on each rape count, to be run concurrently to one another. Appellant was given jail-time credit for 154 days, classified as a Tier III sex offender, and ordered to pay the costs of prosecution. A Judgment of Conviction Entry journalizing appellant's sentence was filed by the court on July 31, 2013. This entry did not mention counts two, three, four, five, or seven.

{¶ 4} Appellant did not directly appeal his conviction. On July 29, 2014, nearly a year after he was sentenced, appellant filed a "Motion to Withdraw Plea Pursuant to Ohio Crim.R. 32.1." In his motion, appellant argued that his plea and sentence should be vacated to "prevent a manifest injustice" as his guilty plea was not voluntarily, knowingly, or intelligently made. Appellant asserted that his plea was invalid as (1) the rape offenses he pled guilty to were not the same offenses charged in the indictment and were not lesser-included offenses of the charged offenses, (2) he was never advised of the nature of the charges to which he pled guilty, (3) the indictment did not support the elements of the amended offenses to which he pled guilty, and (4) he entered the plea only after receiving ineffective assistance of counsel. On August 4, 2014, appellant filed a supplemental memorandum in support of his

motion to withdraw his guilty plea in which he argued that the trial court's July 31, 2013 Judgment of Conviction Entry was not a final appealable order as it did not properly dispose of counts two, three, four, five, and seven. Absent a final appealable order, appellant argued that his motion to withdraw his guilty plea should be treated by the trial court as a presentence motion to withdraw.

{¶ 5} On November 13, 2014, the trial court issued its Decision and Entry Denying Defendant's Motion to Withdraw Guilty Plea without holding a hearing. The court treated appellant's motion as a post-sentence motion to withdraw and concluded that acceptance of appellant's guilty plea had not violated due process or resulted in a manifest injustice. The court further found that appellant's ineffective assistance of counsel claims were barred by res judicata as they were capable of being raised on direct appeal.

{¶ 6} Appellant appealed the denial of his motion, raising two assignments of error.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT IN NOT ADDRESSING THE FINALITY OF THE JUDGMENT OF CONVICTION THAT DID NOT DISPOSE OF EVERY PROSECUTED CHARGE.

{¶ 9} In his first assignment of error, appellant argues that the trial court erred in ruling on his motion to withdraw his guilty plea without first determining whether the July 31, 2013 Judgment of Conviction Entry was a final appealable order. Appellant contends that because the trial court failed to properly dispose of counts two, three, four, five, and seven in the Judgment of Conviction Entry, there was not a final appealable order. Without a final appealable order being issued, appellant argues that his motion should have been treated as a presentence motion to withdraw, which appellant contends would have resulted in a hearing on the motion and, likely, the grant of the motion since a presentence motion should be "freely and liberally granted."

{¶ 10} We begin by addressing the requirements for a final appealable order. Construing Crim.R. 32(C), the Ohio Supreme Court held that "[a] judgment of conviction is a final order subject to appeal under R.C. 2505.02 when it sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating entry upon the journal by the clerk." *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, paragraph one of the syllabus. The Supreme Court clarified that there need only be "'a full resolution of those counts *for which there were convictions*. [There is no requirement for] a reiteration of those counts and specifications for which there were no convictions, but were resolved in other ways, such as dismissals, nolled counts, or not guilty findings.'" (Emphasis sic.) *State ex rel. Rose v. McGinty*, 128 Ohio St.3d 371, 2011-Ohio-761, ¶ 3, quoting *State ex rel. Davis v. Cuyahoga Cty. Court of Common Pleas*, 127 Ohio St.3d 29, 2010-Ohio-4728, ¶ 2. Accordingly, a judgment of conviction entry does not need to include the dispositions of counts that were dismissed as a result of a guilty plea entered into by the defendant as long as the record demonstrates that all charged counts have been resolved. *See id.* at ¶ 2-3; *State v. McClanahan*, 9th Dist. Summit No. 25284, 2010-Ohio-5825, ¶ 7 ("So long as the record reveals that all of a defendant's counts have been resolved [*Lester*] does not require a sentencing entry to refer to counts that have been dismissed").

{¶ 11} In the present case, appellant's Judgment of Conviction Entry states that appellant pled guilty to counts one and six, rape in violation of R.C. 2907.02(A)(1)(c). The entry further states that appellant was sentenced to prison for nine years for each offense, to be served concurrently. The entry was signed by the trial court judge and was time stamped by the clerk of court on July 31, 2013. The entry is silent as to counts two, three, four, five, and seven. However, a review of the record demonstrates that those counts were resolved as they were dismissed at the time appellant entered his guilty plea.

{¶ 12} At appellant's April 24, 2013 plea hearing, appellant executed a Plea of Guilty

and Jury Waiver form, which specifically stated that in exchange for appellant's guilty plea to amended counts one and six, counts two, three, four, five, and seven were to "merge."[1] Appellant was then advised by the trial court as follows about the effect of his guilty plea:

> THE COURT: Very well. It's further my understanding, Mr. Green, that in exchange for your pleas of guilty as to Counts I and VI, the State has agreed to merge Counts II, III, IV, V and VII into pleas to Counts I and VI, *essentially dismissing the charges against the Counts II, III, IV, V and VII.* Is that your understanding, as well?
>
> [APPELLANT]: Yes, Your Honor.
>
> * * *
>
> THE COURT: All right. Now, Mr. Green, I think there was a question I forgot to take up with you and I just want to make sure that you understand that. Have any promises been made to you in exchange for your plea of guilty to those two charges of rape other than what I've already represented on the record here today, specifically that Counts II, III, IV, V and VII would be merged into your pleas to Counts I and VI *essentially dismissing the charges as to Counts II, III, [IV], V and VII*. Anything else been promised to you, sir?
>
> [APPELLANT]: No, sir.

(Emphasis added.) Following a Crim.R. 11(C) colloquy and the forgoing discussion, the court accepted appellant's guilty plea to counts one and six and entered a "Judgment Entry of Guilty" on the record. The Judgment Entry of Guilty entered by the trial court on April 24, 2013, was located on the bottom portion of the Plea of Guilty and Jury Waiver form executed by appellant, appellant's counsel, and the state. In accepting appellant's guilty plea to amended counts one and six, the trial court also accepted the state's dismissal (incorrectly labeled "merger") of counts two, three, four, five, and seven. *See* Crim.R. 48(A).[2]

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1. Specifically, the Plea of Guilty and Jury Waiver form executed by appellant stated that "[n]o promises have been made except as part of this plea agreement stated entirely as follows: 'Merge Cts. 2, 3, 4, 5, 7.'"

2. **{¶ a}** Compare the present case to *State v. Brewer*, 4th Dist. Meigs No. 12CA9, 2013-Ohio-5118, where the Fourth District Court of Appeals found that charges not formally terminated in a journal entry constitute "hanging charges" which preclude a judgment of conviction entry from being a final appealable order. In *Brewer*, the

{¶ 13} Given the information set forth in the Plea of Guilty and Jury Waiver form, the trial court's statements at appellant's plea hearing, and the court's Judgment Entry of Guilty, it is apparent that counts two, three, four, five, and seven were dismissed. Although the plea agreement form mistakenly contains the word "merge" and the trial court initially stated that counts two, three, four, five, and seven "merged," the court clarified that the counts were really being dismissed. *See, e.g., Gates Mills v. Yomtovian*, 8th Dist. Cuyahoga No. 88942, 2007-Ohio-6303, ¶ 29 ("[I]t is not possible to [both] dismiss a charge, and * * * merge it for purposes of sentencing. Once a count is dismissed, it is gone, and there is nothing to merge").

{¶ 14} In *Yomtovian*, the defendant was indicted for operating a vehicle under the influence of alcohol or drugs (OVI), operating a vehicle with a prohibited breath-alcohol level (BAC), driving upon the left side of the roadway, and operating a motor vehicle without a valid license. *Id.* at ¶ 2. The defendant's sentencing entry indicated the defendant entered no contest pleas to OVI, driving upon the left side of the roadway, and operating a motor vehicle without a valid license. The sentencing entry further stated that the defendant was sentenced to 90 days in jail, with 87 days suspended, was to pay a $500 fine, had her license suspended for 180 days, and was placed on community control for six months. *Id.* at ¶ 4-5. The sentencing entry also stated that the BAC charge had been "[n]olled and merged." *Id.* at ¶ 10.

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defendant entered into an agreement to plead guilty to one count of robbery in exchange for another count of robbery being dismissed, and the plea form executed by the parties stated, "State to dismiss CT. 1+ recommend a prison term not to exceed 4 yrs, 11 mos." *Id.* at ¶ 2, 8. Because no entry journalizing the dismissal of count one was ever filed, the Fourth District held that no final appealable order had been entered in the case and that it lacked jurisdiction over the matter. *Id.* at ¶ 8.

{¶ b} In the present case, unlike in *Brewer*, the trial court journalized its acceptance of appellant's guilty plea and the dismissal of counts two, three, four, five, and seven. Though the dismissal of the counts was mistakenly labeled "merger," the effect of the entry was that prosecution of counts two, three, four, five, and seven terminated. These counts, therefore, are not "hanging counts" precluding this court from exercising jurisdiction over the case.

{¶ 15} In addressing the BAC charge on appeal, the Eighth District stated the following:

> Nolle prosequi means "[t]o abandon (a suit or prosecution); to have (a case) dismissed by nolle prosequi." Black's Law Dictionary (8th Ed. Rev.2004) 1074. The Second District explained that, "[t]he obsolete term 'nolle' is now a dismissal." *State v. Flynt*, 156 Ohio App.3d 595, 2004-Ohio-1695, ¶ 16.
>
> * * * When a criminal case is voluntarily dismissed, it is terminated; i.e., done, finished, over, kaput." *Flynt* at ¶ 23.
>
> Conversely, "merge" in criminal law is defined as, "[t]he absorption of a lesser included offense into a more serious offense when a person is charged with both crimes, so that the person is not subject to double jeopardy." Black's Law Dictionary (8 Ed. Rev.2004) 1009. The General Assembly enacted R.C. 2941.25, the multiple-count provision, in an attempt to codify the judicial doctrine of merger. *State v. Logan* (1979), 60 Oho St.2d 126, 131.

Id. at ¶ 21-23. The court recognized that the term "convicted" as used in the merger statute, R.C. 2941.25(A), includes both a finding of guilt as well as the imposition of a sentence. *Id.* at ¶ 25, citing *State v. Blackman*, 8th Dist. Cuyahoga No. 88608, 2007-Ohio-4168 at ¶ 24. *See also State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, paragraph three of the syllabus ("Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing"). The *Yomtovian* court, therefore, concluded that "the law is well established that a charge cannot be nolled—dismissed—and then merged. Since the trial court did not enter a plea with respect to the BAC charge, or find Yomtovian guilty of the BAC charge, we construe the trial court's entry as nolling the charge, rather than merging it." *Yomtovian* at ¶ 26.

{¶ 16} Similar to *Yomtovian*, the trial court in the present case erroneously used both "merger" and "dismissal" language in dealing with counts two, three, four, five, and seven. Because "merger" requires a conviction on the underlying charge, and appellant never

entered a guilty plea on counts two, three, four, five, and seven, we find that that the trial court's reference to "merger" was erroneous. However, such error was harmless as the record indicates that counts two, three, four, five, and seven were dismissed pursuant to appellant's plea negotiations with the state.[3] *See McClanahan*, 2010-Ohio-5825 at ¶ 7.

{¶ 17} As there is no requirement for a judgment of conviction entry to set forth counts that were resolved by dismissal, we find that the trial court's July 31, 2013 Judgment of Conviction Entry was a final appealable order. *See McGinty*, 2011-Ohio-761 at ¶ 3. The trial court did not err in treating appellant's motion as a post-sentence motion to withdraw his guilty plea. Appellant's first assignment of error is, therefore, overruled.

{¶ 18} Assignment of Error No. 2:

{¶ 19} THE TRIAL COURT ERRED BY REFUSING TO APPLY ALL THREE PRONGS OF THE MANCINI TEST TO THE PLEA PROCESS AFTER DETERMINING THE SATISFACTION OF THE FIRST PRONG, DENYING DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS.

{¶ 20} In his second assignment of error, appellant contends that the trial court erred when it denied his motion to withdraw his guilty plea without addressing all three prongs of the test set forth in *State v. Mancini*, 8th Dist. Cuyahoga No. 63892, 1993 WL 4721 (Jan. 7, 1993). In *Mancini*, the Eighth District Court of Appeals held that the acceptance of a guilty plea violates a defendant's due process rights when the following three conditions are met: "(1) the defendant pleads to an offense which is not a lesser included offense of the charged crime; (2) there is a failure to explain the additional elements of the offense to which the defendant will plead; and (3) under the facts of the indictment, the defendant could not have committed nor been convicted of the offense." *Mancini* at *1; *see also State v. Fletchinger*,

3. Appellant cannot claim any prejudice from this dismissal.

51 Ohio App.2d 73, 75-77 (8th Dist.1977). Appellant contends that if the trial court had properly applied the *Mancini* test, it would have granted his motion to withdraw his guilty plea on the basis that his due process rights had been violated.

{¶ 21} Pursuant to Crim.R. 32.1, "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." A defendant who seeks to withdraw a plea after the imposition of a sentence has the burden of establishing the existence of a manifest injustice. *State v. Williams*, 12th Dist. Clermont No. CA2012-08-060, 2013-Ohio-1387, ¶ 11, citing *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph one of the syllabus. A manifest injustice is defined as "a fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Hobbs*, 12th Dist. Warren No. CA2012-11-117, 2013-Ohio-3089, ¶ 9.

{¶ 22} "A trial court's decision regarding a post-sentence motion to withdraw a guilty plea is reviewed on appeal under an abuse of discretion standard." *State v. Rose*, 12th Dist. Butler CA2010-03-059, 2010-Ohio-5669, ¶ 15. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *State v. Robinson*, 12th Dist. Butler No. CA2013-05-085, 2013-Ohio-5672, ¶ 14.

{¶ 23} In its decision denying appellant's motion to withdraw his guilty plea, the trial court considered application of the *Mancini* test, but rejected the test after considering the Ohio Supreme Court's decision in *Stacy v. Van Coren*, 18 Ohio St.2d 188 (1969). In *Van Coren*, the Supreme Court addressed the situation where a defendant was indicted for one crime (assault with the intent to commit rape) and, without further action by indictment or information, pled guilty to a different crime (assault with the intent to commit robbery). *Id*. at

188-189. The Court held as follows:

> The facts in the present case show that [defendant] was properly before the court as the result of the return of a valid indictment charging him with a felony, the basis of which crime was assault. Thus, the court had jurisdiction over both the [defendant] and the subject matter of the crime. Under such circumstances the [defendant], while represented by counsel, entered a plea of guilty to a crime created by the same section of the Revised Code as the one for which he had been originally indicted, and which also had assault as the principal element therein.
>
> The proper procedure in this case would have been either the return of another indictment or for the [defendant] to formally waive prosecution by indictment and agree to a prosecution by information. *However, the fact that he did not do so but proceeded to plead to a different offense does not void his conviction. The [defendant's] actions under the circumstances of this case, in voluntarily entering a plea of guilty while represented by counsel, constituted a waiver of his constitutional right to indictment or information*. Although such procedure may be erroneous it does not affect the validity of his conviction. *See Midling v. Perrini* (1968), 14 Ohio St.2d 106, 236 N.E.23 557 * * *.
>
> * * *
>
> The [defendant] in the instant case is in no position to urge such issue as error inasmuch as he voluntarily joined in the procedure. In other words, if error exists he induced or invited it by his own conduct, and under such circumstances he cannot rely upon it to attack his convictions. * * *

(Emphasis added.) *Id.* at 189-190.

{¶ 24} We agree with the trial court that *Van Coren* controls the disposition of appellant's motion to withdraw his guilty plea. *See also State v. Keaton*, 2d Dist. Clark No. 98 CA 99, 2000 WL 20850 (Jan. 14, 2000) (rejecting application of the *Mancini* test and applying the rationale expressed in *Van Coren* in upholding a defendant's guilty plea to the offense of robbery when the defendant was indicted on an aggravated robbery charge); *State v. Wooden*, 10th Dist. Franklin No. 02AP-473, 2002-Ohio-7363 (applying *Van Coren* in affirming the trial court's denial of the defendant's motion for relief from judgment where the defendant pled guilty to two counts of a corruption of a minor when the defendant was originally indicted

on two counts of rape); *State v. Williams*, 8th Dist. Cuyahoga No. 88737, 2007-Ohio-5073 (applying *Van Coren* in upholding a defendant's guilty plea to kidnapping when the defendant was indicted on aggravated murder).

{¶ 25} In the present case, appellant's actions in voluntarily entering a plea of guilty to two counts of rape in violation of R.C. 2907.02(A)(1)(c) while represented by counsel constituted a waiver of his constitutional right to indictment. Appellant voluntarily participated in plea negotiations to have the originally charged offenses, rape in violation of R.C. 2907.02(A)(1)(b), amended in order to reduce the maximum prison sentence he faced. If appellant had been convicted of the offenses he was originally indicted upon in counts one and six, he faced possible life sentences pursuant to R.C. 2907.02(B) and 2971.03. However, under the amended charges, the maximum sentence appellant faced as a result of his guilty plea to counts one and six was 10 years in prison for each count. Appellant's guilty plea to the amended charges, therefore, led to a favorable outcome for appellant, and "the waiver principle set forth in *Stacy* [*v. Van Coren*], applies to preclude appellant from challenging the indictment." *Wooden*, 2002-Ohio-7363 at ¶ 15. *See also Williams*, 2007-Ohio-5073 at ¶ 18; *Keaton*, 2000 WL 20850 at *3. Discussion of the *Mancini* test is, therefore, unnecessary.

{¶ 26} Moreover, the record reflects that appellant not only waived indictment on the amended offenses but he also specifically waived recitation of the facts to which he pled guilty. At appellant's April 24, 2013 plea hearing, the following discussion was held:

> [THE STATE]: It's the State's understanding that the Defendant will be entering guilty pleas to Counts I and VI of the indictment as amended to be a violations [sic] of Revised Code Section 2907.02(A)(1)(c). With the Court's permission, the remaining counts will be merged [sic] and a plea of guilty and jury waiver have been executed by all parties. * * *
>
> * * *

THE COURT: Is that an accurate recitation of the plea arrangement between your client and the State of Ohio, [defense counsel]?

[DEFENSE COUNSEL]: Yes, Your Honor.

THE COURT: * * * All right. Mr. Green, you've heard the recitation of the plea arrangement between you and the State of Ohio. And [defense counsel] has indicated that that's a true and accurate recitation of the plea arrangement between you and the State of Ohio; is that correct, to the best of your knowledge?

THE DEFENDANT: Yes, Your Honor.

* * *

THE COURT: [The plea of guilty and jury waiver form] reflects that you intend to withdraw your former plea of not guilty and enter pleas of guilty to two charges namely both of which are rape charges, both first degree felonies, in violation of Ohio Revised Code Section 2907.02(A)(1)(c) as charged in Counts I and VI of the indictment.

* * *

Is that your understanding of the two charges to which you intend to enter guilty pleas?

THE DEFENDANT: Yes, Your Honor.

* * *

THE COURT: All right. Very well. All right, Mr. Green, with respect to the charge then as to Count I, that being the charge of rape, a first degree felony, violation of Ohio Revised Code Section 2907.02(A)(1)(c), what is your plea?

THE DEFENDANT: Guilty.

THE COURT: And with respect to the charge as to Count VI that also being a charge of rape, a first degree felony in violation of Ohio Revised Code 2907.02(A)(1)(c), what is your plea?

THE DEFENDANT: Guilty.

THE COURT: Very well. Madam Prosecutor.

[DEFENSE COUNSEL]: *Your Honor, we will stipulate to the facts that are contained in the Bill of Particulars on these counts and*

> *waive any reading*. I discussed that with the prosecutor - -
>
> THE COURT: Very well. Were you satisfied with that stipulation, [prosecutor]?
>
> [THE STATE]: *Your Honor, we'd just ask that the stipulation also reflect that those facts in the Bill of Particulars do constitute the amended section that the Defendant has pled guilty to in violation of Revised Code Section 2907.02(A)(1)(c)*.
>
> THE COURT: *Are you prepared to accept that, as well, [defense counsel]?*
>
> [DEFENSE COUNSEL]: *Yes, Your Honor*.

(Emphasis added.) By waiving recitation of the facts to which he pled guilty, appellant relinquished the right to later challenge whether such facts supported the amended rape offenses for which he was convicted.

{¶ 27} Accordingly, as appellant has waived his right to challenge the indictment, and the record demonstrates that he knowingly, voluntarily, and intelligently entered a guilty plea to amended counts one and six of the indictment, we find no error in the trial court's denial of appellant's motion to withdraw his guilty plea. Appellant's second assignment of error is overruled.

{¶ 28} Judgment affirmed.

PIPER, P.J., and RINGLAND, J., concur.