[Cite as *State v. Minker*, 2009-Ohio-5625.]

IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 16
v.	:	T.C. NO. 2005 CR 224 2006 CR 81
MICHAEL ANDRE MINKNER	:	
Defendant-Appellant	:	(Criminal appeal from Common Pleas Court)
	:	

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O P I N I O N

Rendered on the 23rd day of October, 2009.

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NICK A. SELVAGGIO, Atty. Reg. No. 0055607, Prosecuting Attorney, 200 North Main Street, Urbana, Ohio 43078
Attorney for Plaintiff-Appellee

MICHAEL ANDRE MINKNER, #529-687, London Correctional Institution, P. O. Box 69, London, Ohio 43140
Defendant-Appellant

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FROELICH, J.

{¶ 1} Michael Andre Minkner appeals from a judgment of the Champaign County Court of Common Pleas, which denied his post-sentence motion to withdraw his plea. For

the following reasons, the trial court's judgment will be affirmed.

I

{¶ 2} On May 10, 2006, Minkner pled guilty to two counts of trafficking in cocaine (Counts 1 and 2), both fifth degree felonies, in Case No. 2005-CR-224 and, in Case No. 2006-CR-81, to engaging in a pattern of corrupt activity (Count 1), two counts of trafficking in cocaine, a fifth degree felony (Counts 4 and 10), and two counts of trafficking in cocaine, a fourth degree felony (Counts 6 and 8). With respect to Case No. 2005-CR-224, the State asked that the vicinity of a school specification be deleted and for the monetary and motor vehicle specifications in Counts 1 and 2 be dismissed. It further agreed to recommend that Counts 1 and 2 be served concurrently to each other and that the $764.29 seized in the investigation would be applied to any fines and costs imposed. As to 2006-CR-81, the State asked that Counts 2, 3, 5, 7, 9, and 11 be dismissed, and it agreed to a pre-sentence investigation prior to sentencing.

{¶ 3} During the plea hearing, the trial court reviewed the potential sentence that Minkner could receive. The court informed him about community control, stating in part:

{¶ 4} "The Court determines at the time of sentencing whether it is prison [that] would be imposed or whether it is community control. Community control means probation. In that situation the Court supervises your life. The Court can tell you where you can live, with whom you can live, what hours you keep, whether you can drive a motor vehicle, how you dress, how you look, how you conduct yourself, whether you have to pay fines or court costs, whether you have to perform community service, whether you have to spend time in jail or a halfway house type of facility, whether you have to perform

community service or engage in counseling, all of those and many other areas of your life are subject to the control of the Court." The court also told Minkner about the potential length of a community control sentence and of the consequences of violating community control.

{¶ 5} The court further indicated that, considering that Minkner had served an extended prison sentence in the past and was on post-release control when the new crimes were committed, "the odds would be against your receiving community control."

{¶ 6} The trial court also informed Minkner that, "[i]f you go to prison at any time, you need to remember the ideas of judicial release and post release control." The court defined judicial release for Minkner and told him that the court "can either grant or deny the request."

{¶ 7} Minkner asserts, and the State agrees, that he, in fact, was not eligible for community control or judicial release, because he had been previously convicted of engaging in a pattern of corrupt activity, a second degree felony. See R.C. 2929.13(F)(6). The court was required to impose a mandatory term of imprisonment. The trial court accepted Minkner's guilty pleas and ordered a pre-sentence investigation.

{¶ 8} Prior to sentencing, Minkner filed a motion to withdraw his pleas, arguing that he had not been given sufficient time to review important discovery materials and he did not have adequate information to knowingly, intelligently, and voluntarily enter his guilty pleas. The trial court denied his motion to withdraw his plea, concluding that his motion reflected a mere "change of heart." The court also concluded that allowing Minkner to withdraw his guilty pleas would prejudice the State by impairing the ability of the confidential informants involved to continue their investigations in other unrelated drug

cases. The court proceeded to sentence Minkner to an aggregate term of nine years in prison, a fine of $500, restitution in the amount of $230 to the Champaign County Sheriff's Department, a two-year driver's license suspension, and court costs.

{¶ 9} Minkner appealed from his conviction and sentences, claiming that the trial court erred in denying his pre-sentence motion to withdraw his plea. We overruled the assignment of error, and affirmed the trial court's judgment. *State v. Minkner*, Champaign App. No. 2006-CA-32, 2007-Ohio-5574.

{¶ 10} On March 24, 2008, Minkner filed a post-sentence motion to withdraw his guilty plea, claiming that a manifest injustice had occurred when the trial court misinformed him at the plea hearing that he was eligible for community control sanctions when, in fact, he was subject to mandatory imprisonment. Minker noted that his co-defendant, Quinton A. Howard, had filed a motion to withdraw his guilty plea based on the same misrepresentation and the trial court's denial of that motion was reversed on appeal in *State v. Howard*, Champaign App. No. 06-CA-29, 2008-Ohio-419.

{¶ 11} The State opposed Minker's motion. It argued that "it would seem that the doctrine of res judicata might apply," because Minker had previously appealed the denial of a motion to withdraw his plea and Minkner's judgment of conviction had been affirmed. The State acknowledged, however, that this appellate district has held that res judicata does not apply to motions to withdraw a guilty plea under Crim.R. 32.1. Alternatively, the State asserts that Minkner had not demonstrated a manifest injustice, because "the authority of *[State v.] Wolford* [(Sept. 17, 1999), Miami App. No. 99 CA 10], the trial court's failure to comply with the requirements of Criminal Rule 11(C) is not an extraordinary circumstance

demonstrating a form of manifest injustice required for Criminal Rule 32.1 relief."

{¶ 12} On April 10, 2009, the trial court denied, without a hearing, Minkner's motion to withdraw his plea, adopting the authority set forth in the State's memorandum and finding that Minkner had failed to demonstrate a manifest injustice. The court distinguished *Howard,* stating that *Howard* involved a direct appeal from the defendant's conviction and sentence whereas Minkner had previously appealed his conviction and sentence, including the denial of a pre-sentence motion to withdraw his plea. In a footnote, the court noted that res judicata might apply, citing *State v. Wheeler*, Montgomery App. No. 18717, 2002-Ohio-284.

{¶ 13} Five days after the trial court's decision was journalized, Minkner filed a reply memorandum. On April 17, 2009, he timely appealed the trial court's decision.

{¶ 14} Minkner raises two assignments of error. We will address them in reverse order.

II

{¶ 15} Minkner's second assignment of error states:

{¶ 16} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S CLAIMS RAISED IN A POST-MOTION TO WITHDRAW GUILTY PLEA PURSUANT TO CRIM.R. 32.1 RELIEF WITHOUT FIRST CONDUCTING A HEARING TO DETERMINE IF RELIEF WAS WARRANTED IN THE CRIMINAL CASE."

{¶ 17} In his second assignment of error, Minkner claims that the trial court should have held a hearing prior to ruling on his motion to withdraw his plea.

{¶ 18} "A trial court is not necessarily required to hold a hearing before deciding a post-sentence withdrawal motion. A hearing is required only if the facts alleged by the defendant, if accepted as true, would require the plea be withdrawn." *State v. McComb*, Montgomery App. Nos. 22570, 22571, 2009-Ohio-295, at ¶19.

{¶ 19} In this case, Minkner's basis for his post-sentence motion to withdraw his plea was misrepresentations made by the judge at the plea hearing regarding Minkner's eligibility for community control. Minkner attached a transcript of the plea hearing and a copy of our decision in *Howard* to his motion. Based on Minkner's submissions, of which the court could take judicial notice, the trial court could determine, without a hearing, whether the judge had made any misrepresentations that would necessitate the withdrawal of Minkner's pleas. The trial court did not abuse its discretion when it ruled on Minkner's motion without a hearing. See *State v. Smith*, Clark App. No. 07 CA 140, 2009-Ohio-164 (no hearing on post-sentence motion to withdraw plea was required where a lab report belied defendant's basis for his motion to withdraw his plea).

{¶ 20} The second assignment of error is overruled.

III

{¶ 21} Minkner's first assignment of error states:

{¶ 22} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT MICHAEL MINKNER POST-MOTION TO WITHDRAW GUILTY PLEA PURSUANT TO CRIM.R. 32.1 BASED ON CLAIMS THE TRIAL COURT HAD FAILED TO SUBSTANTIALLY COMPLY WITH THE REQUIREMENTS OF CRIM.R. 11(C)(2)(a), BY MISINFORMING HIM THAT HE WAS ELIGIBLE FOR

COMMUNITY CONTROL SANCTIONS THAT CAUSED THE EXTRAORDINARY CIRCUMSTANCES THAT FORM A MANIFEST INJUSTICE WARRANTING THE WITHDRAWAL OF APPELLANT'S GUILTY PLEAS BECAUSE HIS PLEAS WAS [SIC] NOT MADE KNOWINGLY AND INTELLIGENTLY UNDER DUE PROCESS OF THE LAW."

{¶ 23} In his first assignment of error, Minkner claims that the trial court erred in concluding that the misrepresentations made regarding Minkner's eligibility for community control did not constitute a manifest injustice.

{¶ 24} Crim.R. 32.1 provides that "[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."

{¶ 25} A defendant who files a post-sentence motion to withdraw his guilty plea thus bears the burden of establishing a "manifest injustice." *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus; *State v. Milbrandt*, Champaign App. No.2007-CA-3, 2008-Ohio-761, at ¶8. A manifest injustice has been defined as "a clear or openly unjust act" that involves "extraordinary circumstances." *State v. Stewart*, Greene App. No. 2003-CA-28, 2004-Ohio-3574, at ¶6. "[A] 'manifest injustice' comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her." *State v. Hartzell* (Aug. 20, 1999), Montgomery App. No. 17499. "Crim.R. 32.1 requires a defendant making a postsentence motion to withdraw a plea to demonstrate

manifest injustice because it is designed 'to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe.'" *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶9, quoting *State v. Caraballo* (1985), 17 Ohio St.3d 66, 67.

{¶ 26} We review a trial court's decision on a motion to withdraw a guilty plea for an abuse of discretion. *State v. Whitmore*, Clark App. No. 06-CA-50, 2008-Ohio-2226, at ¶38. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 27} The State claims that the trial court did not err in denying Minkner's post-sentence motion to withdraw his plea, because Minkner's conviction was affirmed on direct appeal and, alternatively, that his claim does not amount to a manifest injustice because he could have raised the trial court's alleged misstatement regarding his eligibility for community control in his earlier appeal. We agree that, because Minkner brought a pre-sentence motion to withdraw his plea and could have raised the alleged Crim.R. 11(C) violation in that motion and in his prior appeal, he cannot establish a manifest injustice.

{¶ 28} In *State v. Wolford* (Sept. 17, 1999), Miami App. No. 99 CA 10, we acknowledged that claims presented in R.C. 2953.21 may be barred by convictions in a prior criminal action under the res judicata doctrine. We stated, however, that "the same does not apply to a motion to withdraw a plea that is filed in the identical criminal proceeding which resulted in the conviction, as Crim.R. 32.1 motions are."

{¶ 29} Although *Wolford* found res judicata did not apply to Crim.R. 32.1 motions,

it held that the defendant could not establish a manifest injustice when the Crim.R. 32.1 motion was based on the trial court's failure to comply with the requirements of Crim.R. 11(C). *Wolford* relied on *Hartzell*, in which we commented:

{¶ 30} "Crim.R. 32.1 derives from the court's inherent power to vacate its own prior orders when justice so requires. In that regard, it is comparable to Civ.R. 60(B), which contemplates equitable relief from a final order subject to certain defects. In this context, it is noteworthy that Civ.R. 60(B) relief is not a substitute for appellate review of prejudicial error. *Doe v. Trumbull Cty. Children's Services Bd.* (1986), 28 Ohio St.3d 128, 502 N.E.2d 605. We believe that the same bar reasonably applies to Crim.R. 32.1.

{¶ 31} "Failure to comply with the requirements of Crim.R. 11(C) when taking a plea is a defect that may be the subject of a merit appeal which supports reversal of a defendant's conviction when prejudice results. *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115. Even when a timely appeal is not taken, a delayed appeal is available pursuant to App.R. 5(A), upon a proper showing. Therefore, a court's failure to comply with the requirements of Crim.R. 11(C) is not an extraordinary circumstance demonstrating a form of manifest injustice required for Crim.R. 32.1 relief." *Hartzell*, supra.

{¶ 32} Since *Wolford* and *Hartzell*, we have consistently held that a motion to withdraw a plea based on a failure to comply with Crim.R. 11(C) is not viable – regardless of whether the court's alleged failure to comply was raised in a direct appeal – where the court's alleged failure could be determined from the record and was properly the subject of a direct appeal.[1] *State v. Wheeler*, Montgomery App. No. 18717, 2002- Ohio-284; *State v.*

[1]Contrary to *Wolford*, we stated in *Wheeler* that the defendant's Crim.R.

Burt, Montgomery App. No. 22305, 2008-Ohio-3860, citing *Wheeler*.

{¶ 33} Here, Minkner argues that his guilty pleas were not knowingly, intelligently, and voluntarily given under Crim.R. 11(C)(2)(a), because the trial court failed to inform him that he was ineligible for community control and, to the contrary, told him that he was eligible for community control, although "the odds would be against [him] receiving community control." Minkner appealed from his conviction and could have raised the trial court's misrepresentation in that appeal. Because Minkner could have previously raised the alleged Crim.R. 11(C) violation in his prior direct appeal, he has not presented an extraordinary circumstance constituting a manifest injustice.

{¶ 34} Whether or not Minkner's first appellate counsel should have raised this issue is not appropriately before the court at this time.

{¶ 35} The first assignment of error is overruled.

IV

{¶ 36} The judgment of the trial court will be affirmed.

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DONOVAN, P.J. and WOLFF, J., concur.

(Hon. William H. Wolff, retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

32.1 arguments were barred by *res judicata* because "this issue either was raised and was resolved adversely to Wheeler in a direct appeal, or could have been." In *State v. Spencer*, Clark App. No. 2006 CA 42, 2007-Ohio-2140, we again stated, citing *Wolford*, that res judicata does not apply to motions to withdraw pleas. Although we have been inconsistent with our semantics, our cases have consistently determined that a defendant may not raise alleged failures to comply with Crim.R. 11(C) in a motion to withdraw a plea rather than on direct appeal.

Copies mailed to:

Nick A. Selvaggio
Michael Andre Minkner
Hon. Roger B. Wilson