

[Cite as *State v. Gibson*, 2010-Ohio-2505.]

IN THE COURT OF APPEALS OF CHAMPAIGN COUNTY, OHIO

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STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 09-CA-33
vs.	:	T.C. CASE NO. 2001-CR-155
	:	(Criminal Appeal from
DENNIS R. GIBSON, JR.	:	Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 4th day of June, 2010.

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GRADY, J.:

{¶ 1} Defendant, Dennis R. Gibson, Jr., appeals from a final judgment of the court of common pleas that denied Gibson's Crim. R. 32.1 motion to withdraw his guilty plea.

{¶ 2} On September 1, 2001, Gibson entered negotiated pleas of guilty to the offenses of rape, R.C. 2907.02(A)(2), a first

degree felony, and gross sexual imposition, R.C. 2907.05(A)(4), a third degree felony. On November 9, 2001, Gibson was sentenced to concurrent prison terms of nine years and four years, respectively, for the rape and gross sexual imposition offenses.

Gibson took no direct appeal from his convictions and/or sentences.

{¶3} On May 13, 2009, Gibson filed a Crim. R. 32.1 motion to withdraw his guilty pleas. (Dkt. 10). Relying on *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, Gibson argued that his sentences are void because the court failed to comply with R.C. 2929.19(B)(3)(c), in that it failed to advise him of the mandatory term of post-release control to which Gibson is subject pursuant to R.C. 2967.28. Gibson also argued that the alleged failure to advise him concerning post-release control violated Crim. R. 11(C)(2)(a), which was likewise violated when the court failed to advise him of the maximum penalties to which his guilty pleas would subject him.

{¶4} The common pleas court denied Gibson's motion on August 6, 2009. (Dkt. 14). The court expressly adopted the reasoning in the State's July 6, 2009 memorandum contra Gibson's motion (Dkt. 12). The State had argued that the court complied with R.C. 2929.19(B)(3)(c) because it gave the required notification. The State further argued that the notification the court gave

substantially complied with Crim. R. 11(C)(2)(a). *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748. The court also found that Gibson's Crim. R. 11 claim is barred by res judicata on the basis of several appellate decisions of this court, which found no Crim. R. 11 violations as grounds for relief in other motions to vacate that Gibson had filed.

{¶5} Gibson filed a timely notice of appeal from the final judgment denying his Crim. R. 32.1 motion. (Dkt. 15). Gibson's brief on appeal fails to comply with the requirement imposed by App.R. 16(A)(3) that an appellant's brief include "[a] statement of the assignments of error presented for review." Instead, Gibson makes a series of arguments, each set out under a separate Roman numeral. Nevertheless, we construe the error Gibson assigns to be that the trial court erred when it rejected the grounds for relief Gibson set out in his Crim. R. 32.1 motion to withdraw his guilty pleas.

{¶6} The two offenses of rape and gross sexual imposition of which Gibson was convicted are felony sex offenses. R.C. 2967.28(B)(1) mandates that each sentence to a prison term for a felony sex offense must include a requirement that the offender be subject to a five year period of post-release control imposed by the parole board after the offender's release from prison. The court that imposes the sentence of imprisonment must notify

the offender at the sentencing hearing of any term of post-release control to which the offender is subject by law. R.C. 2929.19(B)(3)(c). Failure to advise the offender as required by R.C. 2929.19(B)(3)(c) renders the sentence the court imposed void. *State v. Boswell*.

{¶ 7} The notice that R.C. 2929.19(B)(3)(c) requires must be given at the sentencing hearing. Gibson has not filed a transcript of the sentencing hearing which exemplifies his claim that the court failed to give the required notice. Gibson did file a transcript of the September 26, 2001 hearing at which the court accepted his guilty pleas. However, the notice requirement that R.C. 2929.19(B)(3)(c) imposes applies only to the sentencing hearing. On this record, we are unable to determine that the trial court failed to comply with R.C. 2929.19(B)(3)(c) when Gibson's sentences were imposed. The presumption of regularity we must accord to proceedings in the trial courts requires a finding that the court complied with that section and fully satisfied the notice requirements it imposes.

{¶ 8} In any event, Gibson misconstrues the holding in *State v. Boswell*. In his motion, Gibson quotes from the transcript of his plea hearing, citing passages in which the court notified him that he would be subject to post-release control for a period of five years. (Tr. 11-12). The court did not add that the

requirement is made mandatory by R.C. 2967.28(B)(1). *Boswell* holds that, when the term is mandatory, failure to give the notice that R.C. 2929.19(B)(3)(c) requires at the sentencing hearing renders the sentence that was imposed void. R.C. 2929.19(B)(3)(c) requires the court merely to "[n]otify the offender that he will be supervised under section 2967.28 of the Revised Code after the offender leaves prison" The court is not required, as Gibson's argument suggests, to specify that the term of post-release control to which a defendant will be subject is a "mandatory" term or requirement.

{¶ 9} Because Gibson's sentence is not void, per *Boswell*, his Crim. R. 32.1 motion is subject to the "manifest injustice" standard. The manifest injustice standard demands a showing of extraordinary circumstances. *State v. Smith* (1977), 49 Ohio App.2d 261. We have held that "[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.

{¶ 10} Gibson's motion to withdraw his guilty pleas contended that the trial court violated Crim. R. 11(C)(2)(a) because "it did not advise Gibson of the maximum penalty for his crimes before

he entered his guilty plea." (Dkt. 10, p. 5). On appeal, Gibson contends that he should have been permitted to withdraw his guilty pleas because, "[i]n sentencing Gibson, the trial court failed to inform him of the maximum penalty he could face for each count." (Brief, p. 7).

{¶ 11} Crim. R. 11(C)(2)(a) provides that the court may not accept a plea of guilty to a felony offense "without first addressing the defendant personally and . . . [d]etermining that the defendant is making the plea voluntarily, with (an) understanding . . . of the maximum penalty involved" The transcript of the plea hearing demonstrates that the trial court did precisely that. (Tr. 4-5, 7). The court was not required to do that again at the sentencing hearing. No error, much less manifest injustice, is demonstrated.

{¶ 12} Gibson made several other contentions regarding his plea or sentence in his Crim. R. 32.1 motion that he fails to argue on appeal. He also raises several issues on appeal in that regard that he failed to raise in the motion he filed. Those matters are not properly before us for review.

{¶ 13} Gibson's assignments of error are overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J. and RINGLAND, J. concur.

(Hon. Robert P. Ringland, 12th District Court of Appeals, sitting
by assignment of the Chief Justice of the Supreme Court of Ohio.)

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