

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
DEFIANCE COUNTY**

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 4-05-14

v.

LEE BREININGER

OPINION

DEFENDANT-APPELLANT

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas
Court**

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: September 12, 2005

ATTORNEYS:

**LEE E. BREININGER
In Propria Persona
#335-100, A.C.I.
P. O. Box 4501
Lima, Ohio 45802-4501
Appellant**

**JEFFREY A. STRAUSBAUGH
Reg. #0032970
RUSSELL R. HERMAN
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Defiance Prosecutor's Office
607 West Third Street
Defiance, Ohio 43512
For Appellee**

SHAW, J.

{¶1} The defendant-appellant, Lee Breininger (“Breininger”), appeals the judgment of the Court of Common Pleas of Defiance County, Ohio denying his motion to withdraw a previously tendered plea. Although originally placed on our accelerated calendar, we have elected, pursuant to Local Rule 12(5), to issue a full opinion in lieu of a judgment entry.

{¶2} On March 14, 1996, the Defiance County Sheriff’s Office received a report from Williams County, Ohio Department of Job and Family Services that Breininger’s eight-year old granddaughter had been sexually abused by him during the period of July 1995 through September 1995. Breininger was arrested at his residence and was taken to the Defiance County Sheriff’s Department along with the juvenile victim. After questioning the juvenile victim and Breininger, it was found that Breininger had engaged in numerous instances of sexual conduct and contact with his eight-year old granddaughter in Defiance County, Ohio, while he was babysitting her. Specifically, Breininger admitted that he had touched the vaginal area of the juvenile victim with his fingers 15 to 20 times; that he had attempted to engage in vaginal intercourse on at least six occasions; and that he had oral vaginal intercourse with the victim on 10 to 15 occasions. Breininger further admitted that he had viewed a pornographic video with the juvenile victim on at least four occasions.

{¶3} On March 18, 1996, Breininger was arrested and charged with four (4) counts of rape, each an aggravated felony of the first degree. Breininger appeared before the Defiance Municipal Court on March 20, 1996 for arraignment, at which time he waived his right to a preliminary hearing and requested that the case be bound over to the Grand Jury of Defiance County, Ohio.

{¶4} On April 9, 1996, Breininger was indicted by the Defiance County Grand Jury on twenty-six (26) counts. These charges included ten (10) counts of rape, each an aggravated felony of the first degree, punishable by life imprisonment, pursuant to R.C. 2907.02(A)(1)(b); five (5) counts of attempted rape, each an aggravated felony of the second degree, pursuant to R.C. 2907.02 and 2923.02; ten (10) counts of gross sexual imposition, each a felony of the third degree, pursuant to R.C. 2907.05; and one (1) count of disseminating matter harmful to juveniles, a felony of the third degree, pursuant to R.C. 2907.31.

{¶5} Breininger was arraigned in the Court of Common Pleas of Defiance County, Ohio in April of 1996. Breininger appeared with his counsel, Charles Bates, tendered not guilty pleas to all counts and the matter was set for pre-trial conference. After the exchange of numerous pleadings, pre-trials and other hearings, Breininger entered guilty pleas to five (5) counts of rape; two (2) counts of gross sexual imposition; and one (1) count of disseminating matter harmful to juveniles. The Court accepted the pleas and found Breininger guilty of those

offenses based upon the pleas, and a statement of facts by the prosecutor demonstrating that the State's evidence would support a finding that Breininger had committed the offenses, including all of the essential elements associated therewith.

{¶6} Prior to accepting Breininger's pleas to the eight (8) offenses, the trial court informed Breininger of the minimum and maximum penalties that could be imposed for the offenses. The court also informed Breininger of his constitutional rights that he was waiving by tendering his pleas, including the right to trial; the right to confront the witnesses against him; the right to use the court's subpoena power to bring in any witnesses there might be for his side; the right to require the State to prove the charges beyond a reasonable doubt at a trial at which Breininger cannot be compelled to testify against himself. Breininger acknowledged his rights and responded to each question asked. Furthermore, he stated that he was not under the influence, that he was satisfied with his legal representation and that he was not compelled by any duress to enter the pleas.

{¶7} The Court then proceeded to sentencing and sentenced Breininger to a term of imprisonment of ten (10) years on each count of rape, two (2) years on each count of gross sexual imposition, and two (2) years for disseminating matter harmful to juveniles. A combination of concurrent and consecutive sentences was imposed resulting in an aggregate minimum term of thirty-four (34) years and a

possible maximum term of seventy-nine (79) years at the Ohio Department Rehabilitation and Corrections at Orient, Ohio.

{¶8} On September 24, 2004, nine years later, Breininger filed his Motion to Withdraw a Previously Tendered Plea. On May 4, 2005, the Court found the motion to be not well taken and denied Breininger's motion without a hearing.

{¶9} On May 16, 2005, the defendant-appellant filed a notice of appeal alleging the following assignment of error in his pro se brief:

THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT'S POST CONVICTION CRIMINAL RULE 32.1 MOTION TO WITHDRAW HIS PLEA, AFTER DEFENDANT SHOWED THE TRIAL COURT THAT IT HAD WRONGLY ENTERED FINDINGS OF GUILT ON SEVERAL COUNTS THAT WERE NOT FOUND BY A JURY OR ADMITTED TO BY THE DEFENDANT

{¶10} A motion to withdraw a guilty plea is governed by standards set forth in Crim.R. 32.1, which states:

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.

Breininger filed his motion to withdraw his guilty plea nine years after the imposition of his sentence. Therefore, the trial court could only grant his motion to withdraw his plea if it found a manifest injustice.

{¶11} The Ohio Supreme Court has stated that the requirement in Crim.R. 32.1 that there be manifest injustice before the court can allow a withdraw of a guilty plea should be interpreted so as to limit the availability of withdrawals to “extraordinary cases.” *State v. Smith* (1977), 49 Ohio St.2d 261. The burden of demonstrating a “manifest injustice” rests with the defendant. The decision whether there is a manifest injustice to grant a motion to withdraw a guilty plea rests within the sound discretion of the trial court. *Id.* In exercising that discretion, the trial court is the court to resolve issues of credibility and the weight of the defendant’s assertions in his motion. *Id.* Accordingly, “this court will not reverse a trial court’s denial of a motion to withdraw a plea of guilty absent an abuse of discretion on the part of the trial court.” *State v. Nathan* (3rd Dist. 1995), 99 Ohio App.2d 722, 725, 651 N.E.2d 1044, 1046.

{¶12} In his assignment of error, Breininger alleges manifest injustice in that the trial court wrongly entered findings of guilt on several counts that were not found by a jury or admitted by him. However, as his only grounds for this claim Breininger argues that his plea was not knowingly, voluntarily or intelligently entered into in this case and not conducted pursuant to Crim.R. 11. Ordinarily Crim.R. 11 issues become res judicata upon lapse of the direct appeal and are not within the purview of Crim.R. 32.1 claims of manifest injustice. *State*

v. Rexroad, 9th Dist. No.22214, 2004-Ohio-6271, at ¶9. However, in the interest of justice, we will address the Crim.R. 11 issues raised by appellant.

{¶13} Crim.R. 11(C) states:

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilty beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

Breininger was properly advised under Crim.R. 11 in the instant case. Regarding

Crim.R. 11(C)(2)(a), the record states:

The Court: ... Your intent, Mr. Bates, to withdraw your guilty pleas previously entered to Counts I and II [Gross Sexual Imposition], Counts XI, XII, XIII, XIV, XV, rape, as amended, an ag felony of the first degree, and Count XXVI disseminating matter harmful to juveniles, a felony of the third degree as well. Mr. Bates: That is my understanding, Your Honor.

The Court: Mr. Breininger, you understand what your lawyer is saying on your behalf there?

The Defendant: Yes, sir.

The Court: You understand these charges in Counts I and II, gross sexual imposition, what those are about? What the State would have to prove to convict you of those?

The Defendant: Yes

The Court: Each of those carries possible determinate term of imprisonment in the State facility of one year, one and one-half years, or a maximum of two years, fine of up to \$5,000 on each of those counts imposed as well. Each of the Counts XI, XII, XIII, XIV, and XV, as amended, are ag felonies of the first degree, punishable by an indeterminate term of imprisonment as to each count, the range being not less than five nor more than 25 years, up to a possible not less than ten nor more than 25 years. That is, the Court would choose a sentence five, six, seven, eight, nine, or ten to 25. Additionally, you should understand, the Court could impose those as actual incarceration, the front end which would, in fact, you would be ineligible for any kind of probationary treatment or early release.

With respect to the third-degree felony charged in the last count, Count XXVI, that also carries a possible determinant term of one year, one and one-half years, or a maximum of two years and/or a fine of up to \$5,000. The aggravated felonies, Counts XI through XV inclusive, carry a potential fine of up to \$10,000. You understand the nature of these charges and possible penalties here?

The Defendant: Yes, sir.

The Court: It would be up to the Court if you are convicted of all these offenses, as to whether the sentences should run concurrently; that is, at the same time or consecutively; that is, one after the other. ***

So, in the event all of these offenses would run consecutively, you would have an effective sentence of not less than 15 nor more than 131 years. That would be five times 25 plus six on the three, third-degree felonies. You understand that is potentially what could be imposed here?

The Defendant: Yes.

The Court: You understand specifically you are not eligible for probation? You are not eligible for shock probation; you understand that?

The Defendant: Yes, Sir.

The Court: You will go to state prison.

The Defendant: (Whereupon, the Defendant moves his head vertically.)

The Court: If you enter these pleas, you understand that?

The Defendant: Yeah.

Hearing Tr. at pp. 5-8.

{¶14} The record in this case establishes that Crim.R. 11(C)(2)(a) has been satisfied. The trial court personally addressed Breininger regarding his pleas of guilty in accordance with Crim.R. 11(C)(2). Breininger responded that he did understand the nature of the charges that he was pleading guilty to. The trial court informed the defendant of the maximum penalty that may be involved in the sentencing by the trial court. The trial court also stated that Breininger would not be eligible for probation but rather would be required to go to state prison.

{¶15} With respect to Crim.R. 11(C)(2)(b), the record states:

The Court: It is within the Court's authority to immediately go ahead and sentence you if I accept your pleas of guilty; you understand that?

The Defendant: Yes.

Hearing Tr. at pp. 7-8.

{¶16} Pursuant to Crim.R. 11(C)(2)(c), the record states:

The Court: Normally, to convict you of criminal offenses, the State has to prove every element of the offense beyond a reasonable doubt. That is a very high standard of proof. You

enter pleas of guilty, you are admitting that the charges are true. The State will not have to prove anything, there will be no trial. Your guilty pleas will result in your conviction and you will be exposed to the penalties I have described; you understand that?

The Defendant: Yes, sir.

The Court: If you did choose to go to trial in this matter, it would be your choice, not the State's choice, as to whether there was a trial to a Judge sitting alone or a Judge with a jury of 12. In either case, Judge trial or jury trial, the State would have to prove the charges beyond a reasonable doubt to convict you. You chose a jury trial, unanimous verdict would be required; that is, each and every juror would have to agree before they could find you guilty. You are giving up your right to trial to the Court or trial by jury if you enter these pleas of guilty; you understand that?

The Defendant: Yes, sir.

The Court: At trial, you would have the right to confront the witnesses against you. That is, to face your accusers in open court. You have the right to the help of your lawyer at trial, including the right to cross-examine witnesses. You could not be forced to testify against yourself, but you would have the right to testify in your own behalf if you choose to.

Also have the right to use Court's subpoena power to bring in any witnesses there might be for your side. You are effectively giving up all those rights if you enter the plea of guilty; you understand that?

The Defendant: Yes.

The Court: In a case like this, you have the right to appeal to a higher court. You have the right to appeal through a Court-appointed lawyer. While you still have the right to appeal, the Court has not made any evidentiary rulings or legal rulings in this matter that you can assign as error. And if you admit these charges by entering pleas of guilty, you are unlikely to succeed on appeal. *; you understand that?**

The Defendant: Yes, sir.

The Court: * Taking all those things into account, you think these pleas are in your best interest.**

The Defendant: I do, sir.

The Court: Are you clear in your own mind as to the effect of entering these pleas?

The Defendant: Yes.

The Court: You understand how serious these matters are?

The Defendant: Yes.

The Court: Any questions you want to ask me about these plea proceedings?

The Defendant: No.

Hearing Tr. at pp. 8-11.

{¶17} In sum, the record establishes that Crim.R. 11(C)(2)(a) has been satisfied. Moreover, the record indicates that in determining the motion to withdraw the plea the trial court did obtain and review a complete transcript of the prior plea proceedings from nine years earlier. Based on this record it is our conclusion that Breininger was properly advised under Crim.R. 11 and that the pleas were knowingly, intelligently and voluntarily entered.

{¶18} There being no other indication of manifest injustice supported in the record, we find no error in the trial court's denial of the motion to withdraw the plea in this case. Accordingly, Breininger's assignment of error is overruled and the judgment and sentence of the Court of Common Pleas of Defiance County is affirmed.

Judgment affirmed.

CUPP, P.J. and BRYANT, J., concur.

/jlr