**[Cite as *State v. Dillon*, 2009-Ohio-2971.]**

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

-vs-

JOSEPH R. DILLON

Defendant-Appellee

JUDGES:
Hon. John W. Wise, P. J.
Hon. Julie A. Edwards, J.
Hon. Patricia A. Delaney, J.

Case No. CT2009-0016

O P I N I O N

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| CHARACTER OF PROCEEDING: | Criminal Appeal from the Court of Common Pleas, Case No. CR2007-0088 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | June 17, 2009 |

APPEARANCES:

For Plaintiff-Appellant

ROBERT L. SMITH
ASSISTANT PROSECUTOR
27 North Fifth Street
Zanesville, Ohio 43701

For Defendant-Appellee

BENJAMIN WHITACRE
3808 James Court
Zanesville, Ohio 43701

*Wise, P. J.*

**{¶1}** Plaintiff-Appellant State of Ohio appeals the February 13, 2009, decision of the Muskingum County Court of Common Pleas granting Defendant-Appellee's motion to withdraw his guilty pleas.

**{¶2}** Defendant-Appellee has not filed a brief in this matter.

**{¶3}** This case comes to us on the accelerated calendar. App.R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

**{¶4}** "(E) Determination and judgment on appeal. The appeal will be determined as provided by App.R. 11.1. It shall be sufficient compliance with App.R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form."

**{¶5}** This appeal shall be considered in accordance with the aforementioned rule

## STATEMENT OF THE CASE AND FACTS

**{¶6}** The State submits the following facts:

**{¶7}** CR2007-0088

**{¶8}** On or about March 28, 2007, Defendant-Appellee, Joseph R. Dillon, was indicted by the Muskingum County Grand Jury in case number CR2007-0088. The Indictment alleged the following charges:

**{¶9}** Count 1: Possession of Drugs (Crack Cocaine), in violation of R.C. §2925.11(A), F5;

**{¶10}** Count 2: Possession of Drug Paraphernalia, in violation of R.C. §2925.14(C), M4;

**{¶11}** Count 4: Trafficking in Drugs (Crack Cocaine), in violation of R.C. §2925.03(A)(1), F5, with a forfeiture specification;

**{¶12}** Count 5: Possession of Drugs (Crack Cocaine), in violation of R.C. §2925.11(A), F1 ;

**{¶13}** Count 6: Possession of Drugs (Cocaine), in violation of R.C. §2925.11(A), F2;

**{¶14}** Counts One and Two relate to an arrest of Defendant-Appellee on March 11, 2007, by Zanesville Police Officers. Officer Sean Beck (later determined to be the subject of a federal investigation) was not involved in this arrest or investigation and Defendant-Appellee never challenged this arrest or the State's evidence by motion or during the suppression hearing of June 18, 2007. Counts Four, Five, and Six relate to an arrest on March 19, 2007 in which Officer Beck was involved.

**{¶15}** On April 4, 2007, Defendant-Appellee appeared in court and entered pleas of "not guilty" to all charges set forth in the Indictment.

**{¶16}** On or about April 10, 2007, Defendant-Appellee filed a Motion to Suppress Evidence related to Counts Four, Five, and Six, wherein he sought to suppress evidence obtained by police as the result of their entry into a residence on May 18, 2007.

**{¶17}** On June 18, 2007, the trial court held a suppression hearing. Officer Beck testified at this suppression hearing regarding his involvement in the investigation of

Counts Four, Five, and Six. Ultimately, the trial court denied the Motion to Suppress Evidence.

**{¶18}** CR2007-0108

**{¶19}** On or about April 18, 2007, Defendant-Appellee was indicted by the Muskingum County Grand Jury in case number CR2007-0108. The Indictment alleged the following charges relating to the arrest of Defendant-Appellee on March 30, 2008:

**{¶20}** Count 1: Possession of Drugs, in violation of R.C. §2925.11(C)(4)(A), F5;

**{¶21}** Count 2: Possession of Drug Paraphernalia, in violation of R.C. §2925.14(C), M4;

**{¶22}** On April 25, 2007, Defendant-Appellee appeared in court and entered pleas of “not guilty" to all charges set forth in the Indictment.

**{¶23}** Defendant-Appellee filed no pretrial motions and did not challenge the State's evidence in this case. The suppression hearing held in case number CR2007-0088 did not address the evidence in this case.

**{¶24}** On July 16, 2007, Defendant-Appellee appeared before the trial court with his attorney and entered pleas of "guilty" to both counts of the Indictment in case CR2007-108.

**{¶25}** On July 24, 2007, Defendant-Appellee appeared before the trial court with his attorney and, after reviewing his Constitutional rights with the court, Defendant-Appellee entered pleas of "guilty" to all counts of the Indictment in case CR2007-0088.

**{¶26}** On August 27, 2007, Defendant-Appellee appeared before the trial court for sentencing in both cases. In case CR 2007-0088, the trial court ordered Defendant-Appellee serve a stated prison term of five (5) years on the felonies of the first and

second degree and a stated prison term of one (1) year on the felonies of the fifth degree. Said sentences were ordered to be served concurrent with one another.

**{¶27}** In case CR2008-108, the trial court ordered Defendant-Appellee serve a stated prison term of one (1) year and further ordered that such sentence be served consecutive to the sentence in case CR2007-0088.

**{¶28}** No direct appeal was filed by or on behalf of the Defendant-Appellee from his convictions and sentences in either case.

**{¶29}** On or about September 10, 2007, Defendant-Appellee filed a Motion to Withdraw Guilty Pleas Made after the Imposition of Sentence in both cases.

**{¶30}** On January 20, 2008, this matter came on for hearing before the trial court. During the hearing, facts were developed that suggested that possibly, as early as June, 2007, a federal undercover investigation commenced into the activities of two (2) Zanesville Police Officers, (Beck and Fusner), and that civilian informants as well as Muskingum County Sheriffs Deputies were being employed in an undercover investigation. Defendant-Appellee alleged that this investigation would have been ongoing at the time of the suppression hearing in this case, which took place on June 18, 2007. The officers involved in this case, who were the subject of the federal investigation, were subsequently indicted in federal court on or about October 25, 2007, for crimes which were alleged to have occurred between August 16, 2007, and September 25, 2007, over two (2) months after the suppression hearing took place.

**{¶31}** The trial court directed the parties to brief the following question:

**{¶32}** “Whether the fact of an investigation into criminal activity of one or more of the State's witnesses, although unknown to the prosecutor at the time of the

suppression hearing, by federal authorities with the cooperation and assistance of the Muskingum County Sheriffs Department, is imputable to the State of Ohio, for purposes of Ohio Rule of Criminal Procedure 16, and/or the *Brady v. Maryland* doctrine, and, if so, is the failure to provide such information to Defendant-Appellee prior to the suppression or change of plea a basis for this Court to permit Defendant-Appellee to withdraw his plea of "guilty."

**{¶33}** Thereafter, the parties submitted written memoranda and supplements thereto.

**{¶34}** On Friday, February 13, 2009, the trial court issued a judgment entry granting Defendant-Appellee's Motion to Withdraw Plea as to Case CR2007-0088 without setting forth any findings of fact or conclusions of law. The State of Ohio formally requested that the trial court issue findings of facts or conclusions of law, but the trial court denied this motion. The State of Ohio has also formally requested that the trial court issue a stay of the proceedings in the trial court until this matter can be resolved in the Court of Appeals. The stay was granted by the trial court.

**{¶35}** Appellant State of Ohio now appeals, assigning the following sole error for review:

**ASSIGNMENT OF ERROR**

**{¶36}** "I. THE TRIAL COURT ERRED WHEN IT PERMITTED THE DEFENDANT-APPELLEE TO WITHDRAW HIS GUILTY PLEAS."

**I.**

**{¶37}** Appellant State of Ohio argues that the trial court erred in granting Appellee's motion to withdraw his guilty pleas. We disagree.

**{¶38}** Crim.R. 32.1 provides: "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." Thus, a defendant seeking to withdraw a guilty plea after sentence has been imposed, as Appellee did in the instant case, has the burden of demonstrating a "manifest injustice." *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus. This Court has previously defined a "manifest injustice" as a "clear or openly unjust act." *State v. Walling,* 3d Dist. No. 17-04-12, 2005-Ohio-428, ¶ 6. Notably, a post-sentence withdrawal of a guilty plea is only available in "extraordinary cases." *Smith,* 49 Ohio St.2d at 264, 361 N.E.2d 1324.

**{¶39}** Furthermore, a trial court maintains discretion in determining whether a defendant established a "manifest injustice." Id*.,* at paragraph two of the syllabus. As such, this Court will not reverse a trial court's decision absent an abuse of discretion. *State v. Nathan* (1995), 99 Ohio App.3d 722, 725, 651 N.E.2d 1044. An abuse of discretion suggests a decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. After a review of the record, we find that the trial court did not abuse its discretion when it granted Appellee's motion to withdraw his guilty pleas.

**{¶40}** In the case sub judice, the trial court held an oral hearing on Appellee's motion to withdraw and further allowed both sides to submit supplemental post-hearing briefs.

**{¶41}** The trial court, in granting Appellee's motion to withdraw his guilty pleas, did not set forth its reasons for the same. However, it is well settled that Crim.R. 32.1

does not require the trial court to issue findings of fact and conclusions of law when ruling on a motion to withdraw a plea. *State ex rel. Chavis v. Griffin* (2001), 91 Ohio St.3d 50, 51, 741 N.E.2d 130, 2001-Ohio-241.

**{¶42}** In the absence of findings of fact and conclusions of law, a reviewing court will presume regularity in the trial below and assume the trial court followed the proper application of the rules of evidence and procedure in arriving at the decision. See *Cox v. Cox* (1929), 34 Ohio App. 192, 170 N.E. 592; *Pettet v. Pettet* (1988), 55 Ohio App.3d 128, 562 N.E.2d 929

**{¶43}** Ultimately, it is within the sound discretion of the trial court to evaluate the credibility and weight of the movant's assertions. *State v. Smith* (1977), 49 Ohio St.2d at 264, 361 N.E.2d 1324. The trial court had before it all of the information presented both at the oral hearing and through the written brief submitted post-hearing and apparently gave great weight to the arguments of Appellee. We will not second-guess the trial court's credibility and weight determinations.

**{¶44}** Further, Appellant State of Ohio did not file a transcript of withdrawal of plea hearing. Absent a transcript, this Court will presume regularity of the proceedings in the trial court. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197.

**{¶45}** We find no evidence of an abuse of discretion in the trial court’s granting of Appellee’s motion to withdraw his guilty pleas.

**{¶46}** Appellant's sole assignment of error is overruled.

**{¶47}** For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is affirmed.

By: Wise, P. J.

Edwards, J., and

Delaney, J., concur.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S/ PATRICIA A. DELANEY

JUDGES

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IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| STATE OF OHIO | : | |
| Plaintiff-Appellant | : | |
| -vs- | : | JUDGMENT ENTRY |
| JOSEPH R. DILLON | : | |
| Defendant-Appellee | : | Case No. CT2009-0016 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ PATRICIA A. DELANEY_____

JUDGES