[Cite as *State v. Cramer*, 2010-Ohio-2591.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- ANDREW J. CRAMER Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. 2009-CA-00099 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 05-CR-652
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 8, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH W. OSWALT Licking County Prosecutor 20 S. Second Street, Fourth Floor Newark, Ohio 43055	ANDREW J. CRAMER, PRO SE Lebanon Correctional Institution P.O. Box 56 - 3791 State Route 63 Lebanon, Ohio 45036-0056

Hoffman, J.

{¶1} Defendant-appellant Andrew J. Cramer appeals the July 9, 2009 Judgment Entry entered by the Licking County Court of Common Pleas which denied his Motion to Withdraw Guilty Plea and Vacate Sentence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE[1]

{¶2} On December 9, 2005, the Licking County Grand Jury indicted Appellant on three counts of rape, in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree; and three counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), felonies of the third degree. Appellant entered pleas of not guilty to the charges at his arraignment on December 12, 2005. The matter was scheduled for jury trial on May 10, 2006.

{¶3} On the morning of the trial, Appellant appeared before the trial court and asked to withdraw his former pleas of not guilty and entered pleas of guilty to all of the charges. The trial court conducted a Crim.R. 11 colloquy with Appellant. Thereafter, the trial court accepted Appellant's pleas and found him guilty as charged. The trial court deferred sentencing and ordered a presentence investigation report. The trial court subsequently sentenced Appellant to an aggregate term of imprisonment of eighteen years. The trial court further adjudicated Appellant a sexually oriented offender.

[1] A Statement of the Facts underlying Appellant's convictions is not necessary to our disposition of this appeal.

{¶4} On June 22, 2009, Appellant filed a Motion to Withdraw a Guilty Plea and Vacate Sentence pursuant to Crim.R. 32.1. In his motion, Appellant asserted he entered the guilty pleas based upon defense counsel's advising him he would be eligible for judicial release within six months. Appellant claimed he would not have entered the guilty pleas but for defense counsel's assurance of judicial release. Via Judgment Entry filed July 9, 2009, the trial court denied Appellant's motion.

{¶5} It is from this judgment entry Appellant appeals, raising the following assignment of error:

{¶6} "I. THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA PURSUANT TO CRIM.R. 32.1, VIOLATING MR. CRAMER'S RIGHT TO DUE PROCESS."

I

{¶7} Ohio Crim.R. 32.1 governs the withdrawal of guilty pleas and provides:

{¶8} "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."

{¶9} Our review of the trial court's decision under Crim.R. 32.1 is limited to a determination of whether the trial court abused its discretion. *State v. Caraballo* (1985), 17 Ohio St.3d 66, 477 N.E.2d 627. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. "A motion made pursuant to Crim.R. 32.1 is addressed to the

sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph two of the syllabus. A hearing on a post-sentence motion to vacate a prior plea is not required unless the facts as alleged by the defendant, if accepted as true, would require the plea to be withdrawn. *City of Uhrichsville v. Horne* (Dec. 26, 1996), Tuscarawas App. No. 96AP090059 2001.

{¶10} As an initial matter, we note Appellant's motion to withdraw plea raises issues which could have been raised in a petition for post-conviction relief couched as a claim of ineffective assistance of counsel. The statutory time frame for such filing has since passed, and Appellant also has not filed a proper application for a delayed petition. See R.C. 2953.21(A)(2). Nonetheless, we must follow the Ohio Supreme Court's holding post-conviction relief pursuant to R.C. 2953.21 is a remedy independent of Crim.R. 32.1. *State v. Bush,* 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, syllabus. The *Bush* Court was asked to decide whether R.C. 2953.21 and 2953.23 govern a Crim.R. 32.1 postsentence motion to withdraw a guilty plea. In reaching its holding the postconviction relief statutes do not govern Crim. R. 32.1 motions, the Supreme Court explained:

{¶11} "Crim.R. 32.1 provides that '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.' The majority of appellate districts, however, have at times rejected the viability of postsentence Crim.R. 32.1 motions concerned with constitutional error. Those courts relied on our more recent pronouncement in *Reynolds.* There, we

decided that a motion styled 'Motion to Correct or Vacate Sentence' was a postconviction relief petition subject to the postconviction statutes, R.C. 2953.21 and 2953.23, and thus barred by res judicata because the movant could have raised the issues on direct appeal. We held:

{¶12} " 'Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21.' Id., syllabus.

{¶13} "The *Reynolds* syllabus must be read in the context of the facts of that case. When we decided *Reynolds,* our rules provided that '[t]he syllabus of a Supreme Court opinion states the controlling point or points of law decided in and *necessarily arising from the facts of the specific case before the Court for adjudication.*' (Emphasis added.) Former S.Ct.R.Rep.Op. 1(B), 3 Ohio St.3d xxi. Thus, when read in context, the rule of *Reynolds* reaches *only* a motion *such as the one in that case* -a 'Motion to Correct or Vacate Sentence' -that fails to delineate specifically whether it is a postconviction release petition or a Crim.R. 32.1 motion. Such irregular 'no-name' motions must be categorized by a court in order for the court to know the criteria by which the motion should be judged. Our decision in *Reynolds* set forth a means by which courts can classify such irregular motions. See *State v. Reynolds,* 3d Dist. No. 12-01-11, 2002-Ohio-2823, at ¶ 24, 2002 WL 1299990 (plurality opinion) ('[I]n *Reynolds* the Supreme Court was considering a vaguely titled "Motion to Correct or Vacate Sentence" and not a motion filed pursuant to a specific rule of criminal procedure. Since there was no controlling rule or statutory provision governing or providing for a Motion to

Correct or Vacate Sentence, the Ohio State Supreme Court looked at the contents of the defendant's motions [sic] and determined that substantively it was a petition for post conviction relief and then treated it as such'). *Reynolds* therefore does not obviate Crim.R. 32.1 postsentence motions. Instead, *Reynolds* sets forth a narrow rule of law limited to the context of that case.

{¶14} "Our precedent distinguishes postsentence Crim.R. 32.1 motions from postconviction petitions. * * * We have continued to recognize a Crim.R. 32.1 postsentence motion to withdraw a guilty plea as a distinct avenue for relief following our decision in *Reynolds.* * * * And we confirm today that our holding in *Reynolds* continues to be narrow.

{¶15} " * * *

{¶16} "R.C. 2953.21(J), part of the postconviction relief statutory scheme, provides that 'the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case * * *.' Given that a postsentence Crim.R. 32.1 motion is not collateral but is filed in the underlying criminal case and that it targets the withdrawal of a *plea,* it is not a 'collateral challenge to the validity of a *conviction or sentence.*' See *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 714 N.E.2d 905 ('a postconviction proceeding is * * * a collateral civil attack on the judgment'); Black's Law Dictionary (7th Ed.Rev.1999) 255 (defining 'collateral attack' as '[a]n attack on a judgment entered in a different proceeding'). We thus reject the state's contention that the statutory scheme set forth in R.C. 2953.21 and 2953.23 provides the exclusive means by which a criminal

defendant can raise a constitutional attack on his or her plea." Id. at paras. 8-13. (Footnote omitted).

{¶17} Upon review of the record in this matter, we find the trial court did not abuse its discretion in declining to find a manifest injustice warranting the withdrawal of Appellant's guilty plea. Appellant states defense counsel informed him he would be out on judicial release within six months, and had he known he was not eligible for judicial release, Appellant would not have pled guilty. The record before this court belies such an assertion. First, during the Crim.R. 11 colloquy, the trial court informed Appellant, under no uncertain circumstances, would he be eligible for judicial release. Further, Appellant did not apply for judicial release until January, 2009, calling into question the credibility of his statement he believed he would be eligible for judicial release in six months.

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

{¶19} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ANDREW J. CRAMER	:	
	:	
Defendant-Appellant	:	Case No. 2009-CA-00099

For the reasons stated in our accompanying Opinion, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE