[Cite as *State v. Rice*, 2014-Ohio-3487.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 2013CA00197
	:	
JORDAN C. RICE	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Canton Municipal Court Case Nos. 2007CRB05976 and 2007TRC11117
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	August 4, 2014

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
JOSEPH MARTUCCIO CANTON LAW DIRECTOR BRANDEN L. DICKERSON 218 Cleveland Ave. SW P.O. Box 24218 Canton, OH 44701-4218	JORDAN C. RICE, pro se 116 – 17th St. NE Canton, OH 44714

Delaney, J.

{¶1} Appellant Jordan C. Rice appeals from the May 28, 2013 Judgment Entry of the Canton Municipal Court overruling his motion to withdraw pleas of no contest. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} A statement of the facts underlying appellant's criminal convictions is not necessary to our resolution of this appeal.

{¶3} On November 21, 2007, appellant was cited for O.V.I. as a first-time offender with a B.A.C. result of .184 [R.C. 4511.19(A)(1)(a)(A)(1)(h), a first-degree misdemeanor]. He was also cited for driving under suspension [R.C. 4510.11(A), a first-degree misdemeanor], giving false information [R.C. 4513.361, a first-degree misdemeanor], no front plate [R.C. 4503.21, a minor misdemeanor], and no seat belt [R.C. 4513.263(B)(1), a minor misdemeanor].

{¶4} Appellant was also cited for possession of marijuana, a minor misdemeanor pursuant to R.C. 2925.11(C)(3)(a).

{¶5} On January 20, 2008, appellant appeared with counsel and entered a plea of no contest to the charges. The trial court found appellant guilty and referred him for a pre-sentence investigation. Appellant was duly sentenced on January 30, 2008.

{¶6} The following facts of appellant's subsequent felony convictions are not contained in the record but are outlined in appellee's brief. Appellant was charged by indictment with one count of cocaine possession and one count of having weapons under disability on October 20, 2008 in Stark County Court of Common Pleas case number 2008CR1596. The underlying disability on the weapons charge was appellant's

minor-misdemeanor drug possession conviction. Appellant entered pleas of guilty to those offenses and was convicted and sentenced on December 26, 2008.

{¶7} On May 1, 2013, appellant filed a motion to withdraw his no-contest pleas in the Canton Municipal Court and to vacate his convictions and sentence, arguing his jury demand was never withdrawn, the trial court did not properly advise him of the consequences of his pleas pursuant to Crim.R.11, and the no-contest pleas were involuntary because he received ineffective assistance of counsel. Specifically, appellant alleged the trial court and defense trial counsel failed to advise him the plea to possession of marijuana would "require[] an automatic 'disability' to own a firearm, as defined by former Ohio Rev. Code Sec. 2923.13(A)(3)."

{¶8} On May 28, 2013, the trial court overruled appellant's motion to withdraw his pleas of no contest.

{¶9} Appellant first appealed from the trial court's judgment entry on July 3, 2013, and we sua sponte dismissed that appeal as untimely.[1] On September 30, 2013, appellant filed a motion for leave to file a delayed appeal and we granted the motion, resulting in the within appeal.

{¶10} Appellant raises three assignments of error:

ASSIGNMENTS OF ERROR

{¶11} "I. WHEN A TRIAL COURT FAILS TO FULLY ADVISE A DEFENDANT ON THE EFFECTS OF THE PLEA AND THAT HE IS WAIVING BY ENTERING A PLEA OF 'NO CONTEST' TO THE CHARGES THE PLEA IS NOT MADE KNOWINGLY WILLINGLY AND VOLUNTARILY AND THEREBY VIOLATES HIS CONSTITUTIONAL

[1] Fifth District Court of Appeals, Stark County Case No. 2013CA00131.

RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION AND RULE 11 OF THE OHIO RULES OF CRIMINAL PROCEDURE."

{¶12} "II. THE TRIAL COURT COMMITTED JURISDICTIONAL ERROR, IN VIOLATION OF OHIO CRIMINAL RULE 23; AND IN VIOLATION OF THE 5TH, 6TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, RESULTING FROM THE TRIAL COURT'S ACCEPTANCE OF THE DEFENDANT'S 'NO CONTEST' PLEA, WHERE A WRITTEN JURY DEMAND WAS MADE AND FILED, BUT NEVER WAS SUBSEQUENTLY WITHDRAWN."

{¶13} "III. THE DEFENDANT'S NO CONTEST PLEA MADE IN CONNECTION TO THE MISDEMEANOR CHARGES, AMOUNT TO A MANIFEST INJUSTICE, ON GROUNDS THAT PLEAS WERE NOT MADE KNOWINGLY, VOLUNTARILY, OR INTELLIGENTLY, AND ARE THE PRODUCT RESULTING FROM INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, IN VIOLATION OF THE 5TH, 6TH, AND 14 AMENDMENTS RIGHTS, AS GUARANTEED BY THE U.S. CONSTITUTION, AND ARTICLE I, SEC. 10, OF THE OHIO CONSTITUTION."

ANALYSIS

I.

{¶14} In his first assignment of error, appellant argues his pleas of no contest were not knowing, intelligent, and voluntary because the trial court failed to fully advise him of the consequences of his pleas and therefore should have allowed him to withdraw his pleas of no contest. We disagree.

{¶15} Pursuant to Ohio Crim.R. 32.1, "[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." The defendant bears the burden of proving "manifest injustice." *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. Whether the defendant has sustained that burden is within the sound discretion of the trial court and we review the trial court's decision for an abuse of discretion. Id. at paragraph two of the syllabus.

{¶16} "[A]n undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *Smith*, supra, 49 Ohio St.2d 261 at paragraph three of the syllabus. We note appellant filed his motion over five years after he entered his pleas of no contest to the misdemeanor charges.

{¶17} Despite appellant's assertions at oral argument, his alleged involuntary plea to minor-misdemeanor drug possession is not the sole reason he ultimately served 65 months in prison. Appellant pled guilty to the felony offenses of cocaine possession and having weapons while under disability, was convicted as charged, and sentenced to a term of community control. Appellant's intensive supervision was revoked or modified once, with appellant returning to community control. His community control was again revoked on August 15, 2011, and appellant was sentenced to a total prison term of 65 months. Appellant was granted judicial release to intensive supervision on May 7, 2014.

{¶18} Under the manifest injustice standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. *State v. Aleshire*, 5th Dist. Licking No. 09–CA–132, 2010–Ohio–2566, ¶ 60, citing *State v. Smith*, supra, 49 Ohio St.2d at 264. We have previously looked to the decision of the Second District Court of Appeals in *Xenia v. Jones*, which defined a manifest injustice as "a clear or openly unjust act" that involves "extraordinary circumstances." *State v. Weaver*, 5th Dist. Holmes No. 11CA023, 2012-Ohio-2788, at ¶ 3, citing *Xenia v. Jones*, 2nd Dist. Greene No. 07–CA–104, 2008–Ohio–4733, ¶ 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 any form of application reasonably available to him." *State v. Shupp*, 2nd Dist. Clark No. 06CA62, 2007-Ohio-4896, at ¶ 6. A defendant seeking to withdraw a post-sentence guilty plea bears the burden of establishing manifest injustice based on specific facts either contained in the record or supplied through affidavits attached to the motion. *State v. Hummell*, 5th Dist. Richland No. 12CA64, 2013-Ohio-2422 at ¶ 13, citing *State v. Orris,* 10th Dist. Franklin No. 07AP–390, 2007–Ohio–6499.

{¶19} Appellant's claim of manifest injustice is premised upon his argument the trial court did not tell him he "would not be permitted to own a firearm." (Appellant's Brief, 5, 7). At the time of appellant's misdemeanor no-contest pleas, a conviction for minor misdemeanor drug possession was sufficient to create a disability preventing the legal possession of a firearm. See *State v. Robinson,* 187 Ohio App.3d 253, 2010-Ohio-

543, 931 N.E.2d 1110, ¶ 20.[2] We find this circumstance does not create a manifest injustice.

{¶20} The trial court is not required to advise a defendant of every possible effect of his plea of no contest. The most serious offenses to which appellant pled were first-degree misdemeanors punishable by a maximum six months in jail. For a petty offense, the trial court "may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty." Crim.R. 11(E). In petty misdemeanor offenses, the trial court is required to inform the defendant that a plea of guilty is a complete admission of guilt. *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, at ¶ 25. The trial court is not required to advise a defendant of every conceivable consequence of his plea.

{¶21} We further find the trial court satisfied the requirements of Crim.R. 11 in accepting appellant's pleas of no contest. The record of the plea hearing is brief: through counsel, appellant entered pleas of no contest to the misdemeanor charges and stipulated to a finding of guilt. The trial court thereupon found appellant guilty as charged and referred appellant for a pre-sentence investigation. Although the trial court did not follow the letter of Crim. R. 11, we find the plea colloquy sufficient pursuant to direction from the Ohio Supreme Court.

{¶22} The Ohio Supreme Court has found the right to be informed that a guilty plea is a complete admission of guilt is nonconstitutional and therefore is subject to review under a standard of substantial compliance. *State v. Nero*, 56 Ohio St.3d 106,

[2] Effective September 30, 2011, R.C. 2923.13(A)(3) now requires that a prior drug conviction be a felony offense to qualify as a disability.

107, 564 N.E.2d 474 (1990). Though failure to adequately inform a defendant of his constitutional rights would invalidate a guilty plea under a presumption that it was entered involuntarily and unknowingly, failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice. Id. at 108. The test for prejudice is "whether the plea would have otherwise been made." Id. We are instructed to "review the totality of circumstances surrounding [appellant's] plea and determine whether he subjectively understood that a guilty plea is a complete admission of guilt." Id.

{¶23} A defendant who entered a guilty plea without asserting actual innocence is presumed to understand he has completely admitted his guilt; in such circumstances, the trial court's failure to inform the defendant of the effect of his guilty plea as required by Crim.R. 11 is presumed not to be prejudicial. *State v. Griggs*, 103 Ohio St.3d 85, 814 N.E.2d 51 (2004), syllabus. In this case, the record is devoid of any evidence appellant did not understand that he would be found guilty as a result of his no-contest pleas. The record is likewise devoid of any assertion by appellant of actual innocence to the misdemeanor counts.

{¶24} As appellee points out, we have only appellant's assertion he would not have entered the plea of no contest to minor misdemeanor drug possession if he had known of the potential firearm disability, a claim which comes over six years after the misdemeanor convictions at issue. Appellant has not shown he was prejudiced by the trial court's failure to strictly comply with Crim.R. 11 in these circumstances.

{¶25} The trial court therefore did not abuse its discretion in overruling appellant's motion to withdraw his pleas of no contest. Appellant's first assignment of error is overruled.

II.

{¶26} In his second assignment of error, appellant argues the trial court should not have accepted his pleas of no contest because he never withdrew his jury demand. We disagree.

{¶27} Appellant's argument here is inconsistent with his underlying theory that his plea of no contest to a minor misdemeanor drug possession resulted in his later conviction of having weapons under disability. Appellant was not entitled to a jury trial on the minor misdemeanor charge and the jury demand applied only to the first-degree misdemeanors, to wit, O.V.I., D.U.S., and giving false information to an officer.

{¶28} Moreover, appellant's argument is premised upon Crim.R. 23(A), the pertinent portion of which states:

> In petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto.

{¶29} The Rule does not require withdrawal of a written jury demand prior to entering a plea of no contest, and the cases cited by appellant are inapposite. In *State*

v. Fish, the defendant filed a written jury demand, then entered a plea of no contest, then attempted to withdraw his no-contest plea and reinstate the jury demand. Under those circumstances the First District Court of Appeals held the trial court should not have accepted appellant's no-contest plea in the absence of a waiver of the jury demand. *State v. Fish*, 104 Ohio App.3d 236, 239, 661 N.E.2d 788 (1st Dist.1995). In *State v. Smith*, the trial court accepted defendant's counsel's oral waiver of a jury trial and proceeded to bench trial, but the appellate court found the waiver of jury trial must be in writing and signed by the defendant. 38 Ohio App.3d 149, 151, 528 N.E.2d 591 (2nd Dist.1987).

{¶30} The trial court was not required to accept a written waiver of the jury demand prior to accepting appellant's plea of no contest. Appellant's second assignment of error is overruled.

III.

{¶31} In his third assignment of error, appellant argues the trial court should have permitted him to withdraw his pleas of no contest because he received ineffective assistance of counsel. We disagree.

{¶32} Appellant argues his plea was not voluntary due to the ineffectiveness of trial counsel. Ineffective assistance may constitute manifest injustice requiring post-sentence withdrawal of a no-contest plea. *State v. Tovar*, 10th Dist. Franklin No. 11AP-1106, 2012-Ohio-6156, at ¶ 9. In *State v. Bishop*, 1st Dist. Hamilton No. C-130074, 2014-Ohio-173, 7 N.E.3d 605, at ¶ 5, the Court examined the standard for allowing a defendant to withdraw his plea on the basis of ineffective assistance of counsel:

> The due-process protections afforded by Article I, Section 16 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution require that a guilty or no-contest plea "represent[ ] a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford,* 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); *State v. Engle,* 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). A defendant who seeks to withdraw his plea on the ground that the plea was the unintelligent product of his counsel's ineffectiveness must demonstrate that counsel's representation was constitutionally deficient, *Strickland v. Washington,* 466 U.S. 668, 687–688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and that "there is a reasonable probability that, but for [this deficiency, the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *see State v. Xie,* 62 Ohio St.3d, 521, 524, 584 N.E.2d 715 (1992); *State v. Blackwell,* 1st Dist. Hamilton No. C–970150, 1998 WL 212753 (May 1, 1998).

{¶33} Appellant's ineffectiveness claim is based upon his argument defense trial counsel should have told him a minor misdemeanor drug possession conviction would result in a disability preventing him from possessing a firearm. Although appellant asserts counsel did not advise him of this consequence, appellant has not presented any evidence of this fact. Appellant did not file an affidavit in support of his motion and

presented no evidence establishing trial counsel failed to advise him of consequences of his plea. *See*, *State v. Martinez*, 10th Dist. Franklin No. 13AP-704, 2014-Ohio-2425, ¶ 28.

{¶34} Because appellant has not presented any evidence establishing ineffective assistance, we decline to reach the issue whether counsel's failure to advise appellant of this consequence was ineffective. "Where the defendant fails to 'carry his burden of presenting facts from the record or supplied through affidavit that establish manifest injustice * * *,' we are not required to permit withdrawal of the plea." *Martinez*, supra, 2014-Ohio-2425 at ¶ 29, citing *State v. Muhumed,* 10th Dist. Franklin No. 11AP–1001, 2012–Ohio–6155 ¶ 47.

{¶35} Appellant's third assignment of error is overruled.

CONCLUSION

{¶36} Appellant's three assignments of error are overruled and the judgment of the Canton Municipal Court is affirmed.

By: Delaney, J. and

Gwin, P.J.

Baldwin, J., concur.