

COURT OF APPEALS
COSHOCOTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

SCOTT A. HOLMES

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

: Case No. 2014CA0020

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Coshocton County
Court of Common Pleas, Case No. 09-
CR-123

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

February 10, 2015

APPEARANCES:

For Plaintiff-Appellee:

JASON W. GIVEN
Coshocton County Prosecutor

BENJAMIN E. HALL
318 Chestnut Street
Coshocton, OH 43812

For Defendant-Appellant:

SCOTT A. HOLMES, Pro Se, #638-858
Le. C.I.
P.O. Box 56
Lebanon, OH 45036

Delaney, J.

{¶1} Defendant-Appellant Scott A. Holmes appeals the August 21, 2014 judgment entry of the Coshocton County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶2} In 2009, Defendant-Appellant Scott A. Holmes was indicted by the Coshocton County Grand Jury on nine counts of rape, first-degree felonies in violation of R.C. 2907.02(A)(1)(b) and 2907.02(A)(2). Holmes was accused of engaging in sexual conduct with his daughter whom was less than thirteen years of age. On September 10, 2010, Holmes pleaded guilty to five counts of rape, a first-degree felony in violation of R.C. 2907.02(A)(2).

{¶3} On October 28, 2010, the trial court issued its sentencing entry. The trial court sentenced Holmes to nine years in prison on each count, to be served consecutively. Holmes was sentenced to a total prison term of 45 years.

{¶4} Holmes did not file a direct appeal of his conviction and sentence.

{¶5} On March 12, 2012, Holmes filed with the trial court a pro se Motion for Concurrent Sentencing. The trial court considered the motion to be a Petition for Post-Conviction Relief. On July 31, 2012, the trial court denied the Petition for Post-Conviction Relief.

{¶6} On October 19, 2012, Holmes filed a notice of appeal of the July 31, 2012 judgment entry. This court dismissed Holmes's appeal as untimely. *See State of Ohio v. Scott A. Holmes*, 5th Dist. Coshocton No. 2012CA0017.

{¶7} On January 8, 2014, Holmes filed a motion of delay of appeal pursuant to App.R. 5. We dismissed Holmes's appeal on March 3, 2014 for failure to file a docketing

statement and the judgment entry being appealed. See *State of Ohio v. Scott A. Holmes*, 5th Dist. Coshocton No. 2014CA0001.

{¶8} On March 6, 2014, Holmes filed a notice of appeal and motion for delayed appeal. On April 18, 21014, this court denied his motion for appeal. See *State of Ohio v. Scott A. Holmes*, 5th Dist. Coshocton No. 2014CA0005.

{¶9} On April 7, 2014, Holmes filed a Petition for Writ of Mandamus requesting this court grant Holmes the right to appeal his sentence in his criminal case. On October 20, 2014, this court denied the petition for writ of mandamus. See *State ex rel. Holmes v. State*, 5th Dist. Coshocton No. 2014CA0010, 2014-Ohio-4642.

{¶10} On July 24, 2014, Holmes filed in the trial court a pro se motion to withdraw his guilty plea. He also filed a motion for counsel. The trial court denied his motion to withdraw guilty plea and motion for counsel by judgment entry on August 21, 2014. It is from the August 21, 2014 judgment entry Holmes now appeals.

ASSIGNMENTS OF ERROR

{¶11} Holmes raises five Assignments of Error:

{¶12} "I. CORPUS DELICTI

{¶13} "II. THE FALSE IMPRESSION WAS CREATED WHEN THE ALLEGED VICTIM STATED THAT SHE COULD NOT REMEMBER WHEN THE ALLEGED CRIME HAD ACCURED [SIC] AND THAT THE INDICTMENT ONLY SHOWED THAT THERE WAS A CRIME COMMITTED IN A ONE YEAR SPAN, AND WAS NOT SPECIFIED THE EXACT TIME OR DATE FOR A DEFENSE.

{¶14} "III. INEFFECTIVE ASSISTANCE OF COUNSEL, HAS BEEN CREATED IN THIS CASE WHICH VIOLATED U.S.C.A. 6TH, 14TH AMENDMENT, THE

ATTORNEY NEVER INVESTIGATED NEVER ADMITTED ARGUMENT AT SENTENCING, NEVER INVESTIGATED THAT THE INDICTMENT WAS FALSE.

{¶15} "IV. AT SENTENCING THE SENTENCE MUST HAVE BEEN UNDER THE ALLIED OFFENSES OF SIMILAR IMPORTS, AND MUST HAVE MERGED, THIS SENTENCE ALSO VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

{¶16} "V. THE INDICTMENT WAS NOT UP TO COMPLIANCE."

ANALYSIS

State's Motion to Dismiss Holmes's Appeal

{¶17} Plaintiff-Appellee State of Ohio filed a motion to dismiss Holmes's most recent appeal. The State argues the trial court was without jurisdiction to rule on a motion to withdraw a guilty plea once an appeal has been ruled on, pursuant to *State ex rel. Special Prosecutors v. Judges, Belmont Cty. Court of Common Pleas*, 55 Ohio St.2d 94, 97-98, 378 N.E.2d 162 (1978). In *Special Prosecutors*, the Ohio Supreme Court held that "Crim.R. 32.1 does not vest jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent to an appeal and an affirmance by the appellate court. While Crim.R. 32.1 apparently enlarges the power of the trial court over its judgments without respect to the running of the court term, it does not confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court, for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do." *Id.* at 97-98.

{¶18} A review of the record in the present case shows that while Holmes has filed multiple appeals, this court dismissed his appeals on procedural grounds. His sentence has not been affirmed on appeal.

{¶19} Further, this appeal is based on Holmes's post-sentence motion to withdraw his guilty plea under Crim.R. 32.1. In *State v. Tinney*, 5th Dist. Richland No. 13CA18, 2014-Ohio-3053, ¶ 23-24, we held:

In reviewing whether the doctrine of res judicata was applicable to a post-sentence motion to withdraw a guilty plea, filed after the time for direct appeal and postconviction relief, our brethren from the Third District in *State v. Daniel Reynolds*, 3rd Dist. Putman No. 12–01–11, 2002-Ohio-2823, ¶ 16–17, explained Crim.R. 32.1 permits in limited circumstances a criminal defendant who has pled guilty a third avenue to address error:

In the limited circumstances where a criminal defendant has plead guilty, there is a third avenue by which to address error in a conviction or sentence. The criminal defendant who has plead guilty may collaterally attack his conviction or sentence by bringing a motion for a post-sentence withdrawal of a guilty plea pursuant to Crim.R. 32.1 which requires a showing of manifest injustice.

A post-sentence motion to withdraw a guilty plea is permitted only in extraordinary cases and left to the sound discretion of the trial court with the burden of establishing manifest injustice borne by the defendant. *State v. Smith* (1977), 49 Ohio St.2d at 264, 361 N.E.2d 1324. Unlike petitions for post conviction relief, Crim.R. 32.1

does not require the showing of a constitutional violation. Nor does Crim.R. 32.1 require that the manifest injustice occur within or outside the record. Rather, Crim.R. 32.1 leaves the defendant free to show manifest injustice in any manner that it may arise thus begging the question: does res judicata apply to motions filed pursuant to Criminal Rule 32.1? We find that answer to be in the affirmative.

We concur with the Third District's rationale that a Crim.R. 32.1 motion, after a determination on the issue of res judicata, can address the issue of manifest injustice "in any manner that it may arise." See, *State v. Watkins*, 5th Dist. Richland No. 94CA20, 1995 WL 557012 (Aug. 24, 1995).

{¶20} Based on this record, we deny the State's motion to dismiss and consider the merits of Holmes's appeal.

Holmes's Motion to Withdraw Guilty Plea

{¶21} Holmes argues the trial court abused its discretion when it denied his motion to withdraw his guilty plea. We disagree.

{¶22} Crim.R. 32.1 governs the withdrawal of pleas. The rule states as follows: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." *State v. Congrove*, 5th Dist. Delaware No. 09CA090080, 2010–Ohio–2933, ¶ 30, quoting *State v. Copeland–Jackson*, 5th Dist. Ashland No.

02COA018, 2003–Ohio–1043, ¶ 6. The standard upon which the trial court is to review a request for a change of plea after sentence is whether there is a need to correct a manifest injustice. *Congrove, supra*. Under the manifest injustice standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. *State v. Williams*, 5th Dist. Tuscarawas No. 2013 AP 04 0020, 2014-Ohio-5727, ¶ 13 citing *State v. Aleshire*, 5th Dist. Licking No. 09-CA-132, 2010-Ohio-2566, ¶ 60. A manifest injustice has been defined as a “clear or openly unjust act.” *Congrove, supra*, quoting *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 2983 (1998). “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. Williams*, 5th Dist. Tuscarawas No. 2013 AP 04 0020, 2014-Ohio-5727, ¶ 13 citing *State v. Shupp*, 2nd Dist. Clark No. 06CA62, 2007-Ohio-4896, at ¶ 6.

{¶23} The accused has the burden of showing a manifest injustice warranting the withdrawal of a guilty plea. *Id.*; *State v. Rockwell*, 5th Dist. Stark No. 2008CA00009, 2008–Ohio–2162, ¶ 40, citing *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1234 (1977), paragraph one of the syllabus.

{¶24} Appellate review of a trial court's decision under Crim.R. 32.1 is limited to a determination of whether the trial court abused its discretion. *Congrove, supra* at ¶ 32, citing *State v. Caraballo*, 17 Ohio St.3d 66, 477 N.E.2d 627 (1985). “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.” *Congrove, supra*, quoting *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324, (1977), paragraph two of the syllabus.

{¶25} In *State v. Williams, supra*, and *State v. Tinney*, 5th Dist. Richland No. 13CA18, 2014-Ohio-3053, we held the factors used to determine whether to grant a Crim.R. 32.1 motion were applicable to determining whether manifest justice existed:

(1) whether the accused is represented by highly competent counsel, (2) whether the accused was given a full Crim.R. 11 hearing before entering the plea, (3) whether a full hearing was held on the motion, and (4) whether the trial court gave full and fair consideration to the motion. We would also add: (5) whether the motion was made within a reasonable time, (6) whether the motion sets out specific reasons for the withdrawal (see *State v. Mathis* [May 30, 1990], Hamilton App. No. C-890286, unreported), (7) whether the accused understood the nature of the charges and possible penalties, and (8) whether the accused was perhaps not guilty of or had a complete defense to the charge or charges (see *State v. Cloud* [1993], 91 Ohio App.3d 366, 632 N.E.2d 932).

Williams, supra; Tinney, supra quoting *State v. Fish*, 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1st Dist.1995).

{¶26} Holmes makes multiple arguments as to why he should be permitted to withdraw his guilty plea. In his appellate brief, Holmes summarizes his arguments into one theory: “[w]ho is their sane mind would plead to 45 years on a plea?” In support of his argument that manifest injustice occurred, he first argues the facts and evidence were insufficient to indict or to convict him of rape. He next argues the sentence must

be considered as allied offenses of similar import. Third, he argues the indictment was not in compliance. Holmes finally argues he was denied the effective assistance of counsel. Holmes was represented by counsel at his change of plea and sentencing hearings.

{¶27} Holmes did not provide this court with a transcript of the change of plea and sentencing hearings. In *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980), the Supreme Court of Ohio held the following:

[t]he duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. See *State v. Skaggs* (1978), 53 Ohio St.2d 162, 372 N.E.2d 1355. This principle is recognized in App.R. 9(B), which provides, in part, that ‘ * * * the appellant shall in writing order [from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record.* * *.’ When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm. (Footnote omitted.)

{¶28} Without a transcript of the proceedings, Holmes cannot demonstrate any error or irregularity in connection with the trial court's decision. *Knapp v. Edwards Laboratories, supra*. A presumption of regularity applies to the trial court's acceptance of Holmes's plea, and Holmes has shown us nothing to overcome the presumption.

{¶29} We stated in *State v. Williams, supra*, 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 any form of application reasonably available to him.” Based on our review of the record before us, we find Holmes did not meet his burden to demonstrate manifest injustice. His arguments do not support his claim that the alleged errors were a fundamental flaw in the path of justice that resulted in Holmes’s conviction and sentence of 45 years for engaging in sexual conduct with his daughter whom was under the age of thirteen. The trial court did not abuse its discretion in denying Holmes’s post-sentence motion to withdraw his guilty plea.

{¶30} Holmes’s five Assignments of Error are overruled.

CONCLUSION

{¶31} The judgment of the Coshocton County Court of Common Pleas is affirmed.

By: Delaney, J.,
Farmer, P.J. and
Wise, J., concur.