[Cite as *State v. Matthews*, 2011-Ohio-1265.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio	Court of Appeals No. WD-10-025
Appellee	Trial Court No. 09TRC09323
v.	
Ronald R. Matthews, Sr.	**DECISION AND JUDGMENT**
Appellant	Decided: March 18, 2011

* * * * *

Matthew L. Reger, Municipal Prosecutor, for appellee.

Amber L. Wagner, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Ronald R. Matthews appeals the denial by the Bowling Green Municipal Court of his Crim.R. 32.1 motion to withdraw his no contest plea. Matthews pled no contest to driving while intoxicated, a violation of R.C. 4511.19(A)(1)(a), on April 12, 2010. Matthews and the state made a joint recommendation as to sentence.

{¶ 2} The trial court did not follow the sentencing recommendation. At sentencing, and after the court announced that it was imposing the recommended fine but a longer term of imprisonment and longer license suspension than jointly recommended by the parties, Matthews orally moved to withdraw his plea:

{¶ 3} "Counsel: Your Honor, my client is indicating he wants to withdraw his plea.

{¶ 4} "The Court: Well, it is unfortunate but I think he is too late.

{¶ 5} "Mr. Matthews: That wasn't the agreement that I had, Judge. I was under the impression there was an agreement reached here.

{¶ 6} "Counsel: I explained –

{¶ 7} "The Court: It is a recommendation, it is not an agreement. And let me finish the sentence."

{¶ 8} After the court completed pronouncing sentence, appellant further explained:

{¶ 9} "Mr. Matthews: Based upon what I was told, it was two years unsupervised probation. Thirty days in jail, three days suspended – or thirty days suspended, three days in jail, a year's license suspension, six months of that is suspended, and a thousand dollar fine and four hundred dollars of that suspended. That is what I was told. That is what I have been told since the very beginning of this case. That is what they offered.

{¶ 10} "The Court: That is what the recommendation was, the Court is not bound by the recommendations.

{¶ 11} "Counsel: I will explain that.

{¶ 12} "The Court: Thank you.

{¶ 13} "Counsel: Thank you, Your Honor."

{¶ 14} Matthews asserts one assignment of error on appeal:

{¶ 15} "Assignment of Error

{¶ 16} "The trial court abused its discretion by denying appellant's oral motion to withdraw his plea."

{¶ 17} The central issue in this appeal is whether appellant's motion is to be treated as a presentence motion under Crim.R. 32.1 or as a postsentence motion. The distinction is significant. Different standards apply both as to the motion and as to whether a hearing is required on the motion, depending on whether a Crim.R. 32.1 motion is made before or after imposition of sentence.

{¶ 18} The rule provides for a manifest injustice standard for postsentence motions to withdraw guilty or no contest pleas. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. Postsentence motions under Crim.R. 32.1 are granted only in "extraordinary cases." *State v. Smith* (1977), 49 Ohio St.2d 261, 264. A hearing on a postsentence Crim.R. 32.1 motion to withdraw a no contest plea is not required unless the facts as alleged by the appellant, taken as true, would require the court to permit withdrawal of the plea. *State v. Blatnik* (1984), 17 Ohio App.3d 201, 204.

{¶ 19} Presentence motions, however, "should be freely and liberally granted." *State v. Xie* at 527. In considering a presentence motion, "[a] trial court must conduct a

hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." Id. at paragraph one of the syllabus.

{¶ 20} Crim.R. 32.1 provides:

{¶ 21} "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." (Emphasis added.)

{¶ 22} Appellant argues that he made his motion before imposition of sentence by the court, because the motion was made prior to the trial court's filing of the sentencing judgment entry. Appellant argues that Ohio courts are courts of record and courts of record speak through their journals. *State ex rel. Indus. Comm. v. Day* (1940), 136 Ohio St. 477, 479. A trial court, following proper procedure, retains authority to modify a sentence until it is journalized. *State v. Detamore* (Mar. 20, 2001), 4th Dist. No. 00CA035; *State v. Jones* (Mar. 18, 1999), 10th Dist. No. 98AP-639.

{¶ 23} Appellant's argument fails to recognize the purpose for the differing standards for presentence and postsentence motions under Crim.R. 32.1. The manifest injustice standard for postsentence motions "rests upon practical considerations important to the proper administration of justice and seeks to avoid the possibility of a defendant pleading guilty to test the weight of potential punishment. *Kadwell v. United States* (C.A. 9, 1963), 315 F.2d 667, 670." *State v. Smith*, 49 Ohio St.2d at 264. The U.S. Ninth District Court of Appeals in *Kadwell* reasoned:

{¶ 24} "Before sentencing, the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. But if a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe. The result would be to undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentencing process." *Kadwell v. United States* at 670. (Footnote omitted.)

{¶ 25} The Second District Court of Appeals in the cases of *State v. McComb*, 2d Dist. Nos. 22570 and 22571, 2008-Ohio-295 and *State v. Sylvester*, 2d Dist. No. 22289, 2008-Ohio-2901, followed the analysis in *Kadwell* and ruled that the postsentence standard applied to Crim.R. 32.1 motions made after defendants learned of the sentence the trial court intended to impose and before the court filed a sentencing judgment. *McComb* at ¶ 6-8; *Sylvester* at ¶ 9-11. The court of appeals applied the postsentence standard to avoid concerns raised in *Kadwell v. United States* that defendants otherwise could take procedural advantage to plead to an offense, determine the nature of the sentence the court would impose, and then withdraw pleas where they found the sentences unexpectedly severe. Id.

{¶ 26} We agree with the reasoning of the Second District Court of Appeals in *McComb* and *Sylvester* in the circumstances presented here. Where a Crim.R. 32.1 motion is made after the trial court pronounced sentence at the sentencing hearing but

before a sentencing judgment is filed, the motion is to be treated as a postsentence motion under the rule. As a practical matter, as presentence motions are to be liberally granted, treating appellant's motion as a presentence motion would effectively eliminate trial court discretion on whether to impose a recommended sentence.

{¶ 27} Treating imposition of sentence for purposes of Crim.R. 32.1 as occurring upon pronouncement of sentence at the sentencing hearing is consistent with use of the term "imposition of sentence" under Crim.R. 32 and 43. Under Crim.R. 32.1, presentence motions are those made before imposition of sentence. Under Crim.R. 43(A)(1), imposition of sentence is identified as a stage of the proceedings where a defendant must be physically present. Crim.R. 32(A) sets forth procedures for imposition of sentence, including opportunities for defense counsel, the defendant, and prosecuting attorney to speak and affording victims an opportunity to exercise their rights as provided by law at sentencing.

{¶ 28} Having determined the applicable standard, we address its application to appellant's appeal. A trial court's decision to grant or deny a Crim.R. 32.1 motion to withdraw a guilty or no contest plea is reviewed on appeal under an abuse of discretion standard. *State v. Blatnik* at 202-203; *State v. Peterseim* (1980), 68 Ohio App.2d 211, 213-214. We find no abuse of discretion here.

{¶ 29} As we have determined that the motion is to be treated as a postsentence motion under Crim.R. 32.1, appellant's arguments based upon the contention that appellant's motion was to be treated as a presentence motion fail. Appellant's argument

that the trial court erred in failing to conduct a full *State v. Peterseim* analysis on the motion is without merit as *Peterseim* concerns the analysis to be undertaken on Crim.R. 32.1 presentence motions. *Peterseim*, 68 Ohio App.2d at 213-214.

{¶ 30} Appellant's argument that the trial court abused its discretion in failing to conduct a hearing on the motion also fails. No hearing is required on postsentence motions under the rule unless the facts as alleged by the appellant, taken as true, would require the court to permit withdrawal of the plea. *State v. Blatnik*, 17 Ohio App.3d at 204. The fact that a sentence imposed pursuant to a guilty or no contest plea is unexpectedly more severe than anticipated does not present a manifest injustice for which a postsentence Crim.R. 32.1 motion to withdraw a plea is to be granted. *State v. McComb*, supra, at ¶ 9; *State v. Blatnik* (1984), 17 Ohio App.3d 201, 203-204. Accordingly, we conclude that the trial court did not abuse its discretion in denying a hearing on the motion or denying the motion itself.

{¶ 31} Although appellant argues that the trial court erred in failing to provide an opportunity to more fully present his motion at the sentencing hearing, appellant raised no additional facts or any additional grounds in the trial court to support granting of the motion whether at the time of sentencing or afterwards, either orally or in writing. We conclude that appellant was not denied a fair opportunity to fully present the motion to withdraw his no contest plea.

{¶ 32} Accordingly, we find appellant's sole assignment of error is not well-taken.

{¶ 33} We conclude that substantial justice has been afforded the party complaining and affirm the judgment of the Bowling Green Municipal Court. Pursuant to App.R. 24, we order appellant to pay the court costs of this appeal.

JUDMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE