[Cite as *State v. Beachum*, 2012-Ohio-285.]

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

State of Ohio

Appellee

v.

Cardell Beachum

Appellant

Court of Appeals Nos. S-10-041
S-10-042

Trial Court Nos. 02 CR 553
05 CR 478

DECISION AND JUDGMENT

Decided: January 27, 2012

* * * * *

Jon M. Ickes, for appellant.

Cardell Beachum, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Cardell Beachum appeals judgments of the Sandusky County Court of Common Pleas filed on August 31, 2010. The judgments resentenced Beachum in two criminal cases to cure deficiencies in sentencing with respect to imposition of postrelease control. The judgments also overruled Beachum's motions to withdraw guilty pleas in

both cases. The cases are Sandusky County Common Pleas Court case Nos. 02CR553 and 05CR478.

{¶ 2} In case No. 02CR553, Beachum pled guilty to having weapons while under a disability (a violation of R.C. 2923.13(A)(3) and a fifth degree felony). On January 16, 2004, the trial court sentenced him to serve 11 months in prison for the offense. Subsequently the court granted Beachum judicial release, resentencing him to community control. Beachum violated community control. In a November 8, 2006 judgment, the trial court reimposed the original 11 month sentence (with credit for time served) and ordered that the sentence be served consecutive to sentences in an Erie County Common Pleas case and the sentence imposed under case No. 05CR478.

{¶ 3} In trial court case number No. 05CR478, Beachum pled guilty to trafficking in cocaine (a violation of R.C. 2925.03(A)(1) and (C)(4)(c) and a fourth degree felony). In a November 8, 2006 judgment, the court sentenced Beachum to serve 18 months in prison for the offense.

Pro Se Motions for Resentencing and to Withdraw Guilty Pleas

{¶ 4} Appellant filed the same pro se motion in case Nos. 02CR553 and 05CR478 on March 8, 2010. The motions sought resentencing due to claimed trial court error in sentencing: first, with respect to postrelease control and, second, with respect to claimed noncompliance with Crim.R. 32(C). Appellant filed motions in both cases seeking appointment of counsel with respect to the resentencing motion. The trial court

granted the request on June 9, 2010. Appellant, pro se, filed a motion to withdraw his guilty pleas in both cases on June 15, 2010.

{¶ 5} The trial court conducted a motion hearing on August 30, 2010. At the hearing the court provided appellant with notice of postrelease control in both cases. The court also filed a judgment on resentencing on August 31, 2010. In the judgment, the trial court resentenced appellant with respect to postrelease control.

{¶ 6} The trial court also considered appellant's motions to withdraw his guilty pleas at the hearing. In the August 31, 2010 judgment, the trial court denied the motions. Appellant appeals the August 31, 2010 judgments in both cases. We have consolidated the two appeals for proceedings in this court. This appeal is appellant's first appeal in either case.

{¶ 7} This is an *Anders* case. Counsel for appellant filed an appellate brief, but has also moved for leave to withdraw as counsel under *Anders v. California*, 386 U.S. 738 (1967). Counsel advises the court that he is unable to find a meritorious ground for appeal. Counsel has provided appellant with copies of both the appellate brief and the motion to withdraw. Included in the motion to withdraw is notice to appellant of his right to submit his own appellate brief in this appeal.

{¶ 8} Appellant filed a pro se appellant's brief in this appeal on September 15, 2010, entitled "Notice of Intended Assignments of Error for Appellate Review." At that time, the appeal had not been identified as an *Anders* case. We struck the document from the record because appellant was represented by counsel and could not simultaneously

also represent himself. See *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶ 31.

{¶ 9} With the filing of the *Anders* brief and counsel's motion to withdraw, appellant is entitled under *Anders* procedure to file a pro se brief. Accordingly we vacate the court's prior order striking the document from the record and consider it in this appeal.

{¶ 10} Appellant's counsel has asserted two potential assignments of error on appeal:

> First Assignment of Error. The defendant was re-sentenced by the trial court contrary to law.
>
> Second Assignment of Error. The defendant was denied his request to withdraw his prior guilty plea contrary to law.

{¶ 11} In the pro se brief appellant did not formally identify assignments of error but did set forth a series of legal arguments.

Resentencing for Postrelease Control

{¶ 12} Under the first potential assignment of error, appellate counsel asserts that the resentencing of appellant in both cases to correct sentencing errors as to postrelease control was contrary to law. In appellant's pro se motion for resentencing, he argued that the sentencing judgments in both cases were void due to sentencing errors as to postrelease control and should be vacated. Appellant argued that a de novo sentencing

hearing was required. The trial court did resentence appellant as to postrelease control, but did not conduct a de novo resentencing hearing.

{¶ 13} Under the first potential assignment of error, appellate counsel states that the question of whether a de novo resentencing hearing for postrelease control was required under *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961 was resolved in the Ohio Supreme Court's decision of *State v. Fisher*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332. We agree. In *Fischer*, the court modified *Bezak* and held that "the new sentencing hearing to which an offender is entitled in *Bezak* is limited to proper imposition of postrelease control." *Id*. at ¶ 29. Accordingly, we find the potential First Assignment of Error is not well-taken.

{¶ 14} Appellant also argues that the court was without jurisdiction to resentence him as to postrelease control in case No. 02CR553 because he had completed serving his sentence. Appellant argues he remains incarcerated to serve the sanction imposed in November 2006 for violation of community control, but that for purposes of postrelease control he has completed his original sentence.

{¶ 15} The record demonstrates otherwise. The sanction imposed upon violation of community control was a return to prison to serve the balance of appellant's original sentence less credit for time served. The April 30, 2004 judgment in case No. 02CR553 granting judicial release and placing appellant on community control specified terms and conditions of community control. After listing the terms and conditions of community control, the judgment states: "The Court advised the Defendant that should he violate the

terms of Community Control he could be returned to prison to serve the balance of the sentence previously imposed." In a November 8, 2006 judgment, issued after appellant violated community control, the trial court reinstated the original sentence with credit for time served. We conclude that appellant remained subject to resentencing as to postrelease control in case No. 02CR553.

{¶ 16} Appellant also argues in his own brief, that the trial court erred in permitting counsel for appellant to withdraw as counsel at the August 30, 2010 hearing and for appellant to represent himself at the hearing. We disagree. The record reflects that appellant's counsel at the hearing advised the trial court that appellant desired to have counsel withdraw from legal representation and for appellant to represent himself at the hearing. A disagreement existed between appellant and his attorney over the merits of legal arguments. The court indicated that it was reluctant to do so and proceeded with the hearing without permitting counsel to withdraw.

Claimed *Baker* Noncompliance with Crim.R. 32(C)

{¶ 17} Pro se, both in the trial court and on appeal, appellant has argued resentencing was required due to noncompliance with Crim.R. 32(C) in the January 16, 2004 (case No. 02CR553) and November 8, 2006 (case No. 05CR478) judgments under the analysis of *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163. Appellant claims the judgments are deficient in that they referred to the fact that appellant had pled guilty to the applicable offense but did not state whether the guilty pleas were accepted by the court or whether any verdict or finding of guilt was made.

{¶ 18} In *Baker*, the Ohio Supreme Court held that guilty pleas establish guilt, even without further action by the court:

> Unlike a plea of no contest, which requires a trial court to make a finding of guilt, *State v. Bird* (1998), 81 Ohio St.3d 582, 584, 692 N.E.2d 1013, a plea of guilty requires no finding or verdict. *Kercheval v. United States* (1927), 274 U.S. 220, 223, 47 S.Ct. 582, 71 L.Ed. 1009 ("A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence"). See also *State v. Bowen* (1977), 52 Ohio St.2d 27, 28, 6 O.O.3d 112, 368 N.E.2d 843. *Baker* at ¶ 15.

{¶ 19} *Baker* held that under Crim.R. 32(C) "a trial court is required to sign and journalize a document memorializing the sentence and the manner of the conviction: a guilty plea, a no contest plea upon which the court has made a finding of guilt, a finding of guilt based upon a bench trial, or a guilty verdict resulting from a jury trial." *Baker* at ¶ 14. Both the January 16, 2004 and November 8, 2006 judgments recited the fact that appellant pled guilty and the court imposed sentence. In our view, the judgments met the requirements identified in *Baker* as to memorializing the sentence and the manner of conviction. Although *Baker* was modified recently in the decision of *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, we do not view *Lester* as affecting the

validity of *Baker* compliant judgments. Accordingly, we find appellant's arguments as to invalidity of his convictions under Crim.R. 32(C) to be without merit.

Motions to Withdraw Guilty Pleas

{¶ 20} In the potential Second Assignment of Error, counsel raises the issue of trial court error in overruling appellant's motions to withdraw his guilty pleas. Pro se, appellant argues that the convictions based upon the pleas were void due to a failure to comply with statutory requirements for imposition of postrelease control and that under the Ohio Supreme Court decision in *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, his Crim.R. 32.1 motions are to be treated as presentence motions under the rule. Presentence motions to withdraw guilty pleas under Crim.R. 32.1 are to be "freely and liberally granted." *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). After sentence, however, such motions are granted only upon a showing of "manifest injustice." Crim.R. 32.1.

{¶ 21} In *Fischer*, *supra*, the Ohio Supreme Court held that "when a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and set aside." *Fischer* at ¶ 26. As the sentence otherwise remains valid, this court has held that motions to withdraw guilty pleas in judgments subject to attack for failure to comply with statutory requirements for imposition of postrelease control are to be treated as postsentence motions under Crim.R. 32.1. *State v. Gonzalez*, 193 Ohio App.3d 385, 2011-Ohio-1542, 952 N.E.2d 502, ¶ 34 (6th District); *accord, State v. Thomas*, 1st Dist. Nos. C-100411 and C-100412, 2011-Ohio-1331, ¶ 16;

State v. Christie, 3d Dist. No. 4-10-04, 2011-Ohio-520, ¶ 25; *State v. Bell*, 8th Dist. No. 95719, 2011-Ohio-1965, ¶ 22. We find appellant's argument that the trial court erred in treating his motions to withdraw his guilty pleas as postsentence motions under Crim.R. 32.1 is without merit.

{¶ 22} Appellant argues that the trial court erred in failing to allow an evidentiary hearing on the Crim.R. 32.1 motions and in overruling the motions. No hearing is required on postsentence motions under Crim.R. 32.1 unless the facts as alleged by the appellant, taken as true, would require the trial court to permit withdrawal of the plea. *State v. Blatnik*, 17 Ohio App.3d 201, 204, 478 N.E.2d 1016 (6th Dist. 1984); *State v. Burkhart*, 2d Dist. No. 07-CA-26, 2008-Ohio-4387, ¶ 12.

{¶ 23} A post-sentence motion to withdraw a guilty plea may only be granted to correct a "manifest injustice." Crim.R. 32.1. A defendant who seeks to withdraw a guilty plea after the imposition of sentence carries the burden of establishing the existence of manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. A manifest injustice is defined as a "clear or openly unjust act." *State v. Odoms*, 10th Dist. No. 04AP–708, 709, 2005–Ohio–4926, ¶ 9, citing *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, 208. Manifest injustice is an extremely high standard, and a defendant may only withdraw his guilty plea in extraordinary cases. *State v. Tabor*, 10th Dist. No. 08AP–1066, 2009–Ohio–2657, ¶ 6, citing *State v. Price*, 4th Dist. No. 07CA47, 2008–Ohio–3583, ¶ 11. *State v. Harmon*, 6th Dist. No. L-10-1195, 2011-Ohio-5035, ¶ 12.

{¶ 24} The decision to grant or deny a Crim.R. 32.1 motion to withdraw a guilty plea is reviewed on appeal under an abuse of discretion standard. *Harmon* at ¶ 11; *State v. Tunstall*, 2d Dist. No. 23730, 2010-Ohio-4926, ¶ 9. An appellate court will reverse a trial court's judgment on such a motion only upon a showing that it is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 25} At the August 30, 2010 hearing, the trial court asked appellant what evidence he intended to submit at the hearing to support a claim of manifest injustice to support his motions to withdraw the guilty pleas. Appellant replied:

> Mr. Beachum: Okay. On the '02 case my other counsel never questioned any witnesses, never told me why I was even pulled over. I didn't have a warrant and I didn't – wasn't in a traffic violation. I was never explained to why an off-duty officer was in my car before (Inaudible) gun was even found.
>
> The Court: Well, this is where you entered a plea of guilty and you're saying your attorney – who was your attorney, sir?
>
> Mr. Beachum: It was Denise Demmitt. And Ms. Demmitt told me, she said, "You're going to get an all white jury. They're going to find you guilty anyway. Just take the plea."

{¶ 26} Neither in his brief on the motions nor at the hearing, did appellant claim that a fuller investigation by trial counsel would have produced evidence helpful to the

defense in either criminal case such that with the additional facts his attorney likely would not have recommended he plead guilty and appellant would have chosen to take the cases to trial. Appellant did not identify any available defenses or claimed facts to demonstrate that a prediction, on the merits, of a probable unsuccessful outcome at trial was not warranted.

{¶ 27} In our view appellant did not allege facts, either in his motions or at the hearing, which if true would have required the trial court to grant the motions to withdraw his guilty pleas. Accordingly, we conclude appellant's claim of trial court error in failing to proceed with an evidentiary hearing is without merit.

{¶ 28} We also recognize that an undue delay between the occurrence of the claimed cause for withdrawal of a guilty plea and the filing of the motion to withdraw "is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." (Citation omitted.) *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). Appellant pled guilty to the having a weapon under disability charge on October 8, 2003, and pled guilty to the trafficking in cocaine charges on August 3, 2006. The motions to withdraw the guilty pleas were filed on June 15, 2010.

{¶ 29} We find no abuse of discretion in the trial court's determination that appellant failed to establish the existence of manifest injustice warranting withdrawal of his guilty pleas. We find the proposed Second Assignment of Error as well as appellant's pro se arguments concerning his motions to withdraw his guilty pleas are not well-taken.

{¶ 30} This court, as required under *Anders*, has undertaken its own examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we grant the motion of appellant's counsel to withdraw as counsel in this appeal. We affirm the judgment of the Sandusky County Court of Common Pleas. Appellant is ordered to pay costs of the appeal pursuant to App.R. 24. The clerk is ordered to serve all parties, including Cardell Beachum, with notice of this decision.

Judgment affirmed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE