

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

State of Ohio

Court of Appeals No. L-12-1273

Appellee

Trial Court No. CR0199701957

v.

Richard Sheehy

DECISION AND JUDGMENT

Appellant

Decided: April 19, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Richard Sheehy, pro se.

* * * * *

JENSEN, J.

{¶ 1} Defendant-appellant, Richard Sheehy, pro se, is serving a sentence of 15 years to life after entering a plea of no contest to one count of murder in connection with the shooting death of John Barnhart on April 4, 1997. He timely appeals the May 1, 2012 judgment of the Lucas County Court of Common Pleas denying his “Motion to Correct

Void Judgment/Enforce Plea Agreement.” Appellant has assigned the following error and issue for our review:

FIRST ASSIGNMENT OF ERROR: Defendant was deprived of due process of law under the Fourteenth Amendment to the United States Constitution where he was misled during plea negotiations as to when he would be paroled.

FIRST ISSUE FOR REVIEW: Where a defendant pleads no contest to a charge based upon misinformation, and he is prejudiced as a result, should a trial court vacate the conviction.

{¶ 2} For the reasons that follow, we affirm the trial court’s decision.

I. BACKGROUND

{¶ 3} On May 19, 1997, appellant was indicted by the Lucas County Grand Jury on one count of murder with a firearm specification and one count of attempted murder, also with a firearm specification. He was represented by attorneys Martin Mohler and Marc Jacobs. On December 8, 1997, after reaching an agreement with the state, appellant entered a no contest plea to one count of murder in exchange for dismissal of the remaining charges. The court accepted the plea and made a finding of guilt. That same day appellant was sentenced to a prison term of 15 years to life.

{¶ 4} At the sentencing hearing, the court and the defendant engaged in the following colloquy:

The Court: The maximum penalty provided by law is a period of incarceration for an indeterminate term of fifteen years to life. And fifteen years of that sentence are mandatory; that is to say, that if I accept your plea I have no discretion. I must impose a sentence of fifteen years to life and you will serve fifteen years as a minimum in prison. Do you understand that?

The Defendant: Yes, sir.

The Court: All right. In addition, the law provides that there is a fine of up to \$15,000. Do you understand that?

The Defendant: Yes, sir.

The Court: Do you also understand that any prison terms stated will be served without good time credit. Do you understand that?

The Defendant: Yes, sir.

The Court: And do you understand what good time credit is?

The Defendant: Yes, sir.

The Court: That means that you won't have any part of your sentence automatically reduced because you're not getting in trouble or being good while you're in prison. Do you understand that?

The Defendant: Yes, sir.

The Court: All right. Do you understand that if you commit a crime while you're in prison, the parole board could increase your prison

time up to fifty percent of the original sentence in 15, 30, 60 or 90 day increments. Do you understand that?

The Defendant: Yes, sir.

The Court: All right. Do you also understand that if or after you're released from prison, you will have a period of five years of post-release control under conditions determined by the parole board. Do you understand that?

The Defendant: Yes, sir.

The Court: And post-release control is like parole. Do you understand that?

The Defendant: Yes, sir.

The Court: All right. Do you understand that if you violate the conditions of supervision while under post-release control, the parole board could return you to prison for up to nine months for each violation for a total of fifty percent of the original sentence. Do you understand that?

The Defendant: Yes, sir.

The Court: And if the violation of post-release control is for a new felony, you could receive the greater of one year or the time remaining on post-release control, plus a prison term for the new crime. Do you understand that?

The Defendant: Yes, sir.

The Court: So do you understand all the possible penalties that can be imposed should I accept your plea of no contest?

The Defendant: Yes, sir.

{¶ 5} The court proceeded to sentencing, which was memorialized in a judgment entry dated December 15, 1997. Appellant did not appeal this sentence.

{¶ 6} After serving almost 15 years, appellant went before the Ohio Parole Board for the first time on February 2, 2012. He was denied parole and the parole board informed him that he will not be considered for parole again until February 1, 2019. Appellant now claims that in accepting his plea and in explaining his sentence, the trial court misled him into believing that if he committed no offenses while in prison, he would be paroled after serving 15 years. Because appellant committed no crimes while incarcerated, he claims that he should have been paroled. He, therefore, filed with the trial court a May 1, 2012 “Motion to Correct Void Judgment/Enforce Plea Agreement.”

{¶ 7} In his motion, appellant argued that the trial court improperly imposed five years of postrelease supervision as part of his sentence despite the fact that the postrelease control statute was inapplicable to unclassified felonies such as murder. He also argued that he should be permitted under Crim.R. 32.1 to withdraw his plea because the trial court incorrectly informed him that after serving 15 years in prison, his sentence would be lengthened beyond 15 years by the parole board in increments of 30, 60, or 90 days *only if* appellant committed offenses while incarcerated. Appellant requested that the trial court issue a special mandate to the Ohio Parole Authority to hear appellant’s

case to reevaluate the circumstances under which the plea agreement was reached on December 8, 1997. Alternatively, he asked for permission to withdraw his plea and for the court to vacate his murder conviction.

{¶ 8} The state agreed with appellant that the instruction concerning postrelease control was unnecessary because murder is an unclassified felony not subject to the postrelease supervision statute, but pointed out that postrelease supervision did not become part of the sentence because that provision was not contained in the trial court's December 15, 1997 judgment entry. The state responded that appellant had not demonstrated that he would suffer manifest injustice if his request to withdraw his plea was denied. And it argued that defendant's petition for postconviction relief was barred by the doctrine of res judicata because he had not raised his claims on direct appeal.

{¶ 9} The trial court denied appellant's motion holding: (1) that appellant's "Motion to Correct Void Judgment/Enforce Plea Agreement" was really a petition for postconviction relief governed by the Ohio Rules of Civil Procedure, was time-barred under R.C. 2953.21(A)(2), and was barred by the doctrine of res judicata because the claims were not raised on direct appeal; (2) appellant was not sentenced to postrelease control because that term does not appear in the trial court's December 15, 1997 judgment entry; and (3) appellant's misunderstanding of his sentence did not rise to the level of manifest injustice under Crim.R. 32.1 sufficient to warrant allowing appellant to withdraw his murder plea. Appellant appealed to this court.

II. LAW AND ANALYSIS

{¶ 10} Appellant termed his motion in the trial court a “Motion to Correct Void Judgment/Enforce Plea Agreement.” This motion would fall into the category of motions that the Ohio Supreme Court in *State v. Bush* referred to as “irregular ‘no-name’ motions [which] must be categorized by a court in order for the court to know the criteria by which the motion should be judged.” *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, ¶ 10. In this context, it must be determined whether appellant’s motion is one for postconviction relief or for relief under Crim.R. 32.1. *See, e.g., State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997) (analyzing motion styled “Motion to Correct or Vacate Sentence”).

{¶ 11} In *Reynolds*, the court concluded that “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 post-conviction relief as defined in R.C. 2953.21.” In the present case, appellant’s first assignment of error alleges that he was deprived of due process of law under the Fourteenth Amendment to the United States Constitution in that he was allegedly misled during plea negotiations. His motion may, therefore, be categorized as a petition for postconviction relief and must be analyzed under R.C. 2953.21.

{¶ 12} R.C. 2953.21(A)(1)(a) provides, in pertinent part, that:

Any person who has been convicted of a criminal offense * * * who
claims that there was such a denial or infringement of the person’s rights as

to render the judgment void or voidable under the Ohio Constitution or the constitution of the United States * * * may file a petition in the court that imposed the sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief.

{¶ 13} Under R.C. 2953.21(2):

A petition under division (A)(1) of this section shall be filed no later than 180 days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication * * *. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than 180 days after the expiration of the time for filing the appeal.

{¶ 14} “In the interest of providing finality to judgments of conviction, courts construe the post-conviction relief allowed under R.C. 2953.21(A)(1) narrowly.” *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 868 N.E.2d 77, ¶ 47. “A post-conviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment.” *Id.*, citing *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). The standard of review is one of abuse of discretion. *Id.* at ¶ 58.

{¶ 15} In this case, the trial court correctly observed that appellant did not file a direct appeal of the judgment of conviction. The time for filing the petition for postconviction relief, therefore, expired 180 days after the expiration of the time for filing

the appeal. The court's sentence was journalized on December 15, 1997, thus the deadline for filing a notice of appeal was in early 1998. As appellant failed to file this motion until May 1, 2012, the motion is time-barred. Moreover, appellant's challenges to his sentence could have been addressed by direct appeal. Because they were not, they are also barred by the doctrine of res judicata. The trial court did not abuse its discretion in denying appellant's motion under R.C. 2953.21.

{¶ 16} Despite the fact that appellant's first assignment of error alleges a constitutional violation, the Ohio Supreme Court recognized in *Bush* that Crim.R. 32.1 provides an alternative remedy that exists independently from an R.C. 2953.21 petition. *Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, at ¶ 14. So to the extent that appellant seeks to withdraw his plea, we will also analyze his assignment of error under Crim.R. 32.1.

{¶ 17} Crim.R. 32.1 provides that "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." A defendant seeking to withdraw a plea of guilty after sentence has the burden of establishing the existence of manifest injustice. *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977), citing *United States v. Mainer*, 383 F.2d 444 (3rd Cir.1967). A manifest injustice has been defined as a "clear or openly unjust act" and as "an extraordinary and fundamental flaw in the plea proceedings." *State v. Reznickcheck*, 6th Dist. Nos. L-04-1029, L-04-1030, 2004-Ohio-4801, ¶ 11, citing

State ex rel. Schneider v. Kreiner, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998); *State v. Lintner*, 7th Dist. No. 732, 2001 WL 1126654 (Sept. 21, 2001). Under this standard, a postsentence withdrawal of a plea is permitted only in extraordinary cases. *Id.*, citing *Smith, supra*. See also *Reznickcheck*, 2004-Ohio-4801.

{¶ 18} An appellate court reviews a trial court’s decision on a motion to withdraw a plea under an abuse of discretion standard. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355 ¶ 32. An abuse of discretion connotes more than an error of law or judgment; it implies that the action of the trial court was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 19} In the present case, we agree that during the plea colloquy, the trial court mistakenly referred to postrelease supervision despite its inapplicability to the unclassified felony to which appellant was entering his plea. However, postrelease supervision was not included in the court’s judgment entry and, therefore, did not become part of his sentence. See, e.g., *State ex rel. Geauga Cty. Board of Commrs. v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, 800 N.E.2d 361, ¶ 20 (“A court of record speaks only through its journal entries.”). There was no abuse of discretion and no manifest injustice in this regard.

{¶ 20} Moreover, there is nothing in the record to support appellant’s claim that he was misinformed as to the length of his prison sentence. Appellant was represented by counsel in the lower court and has not alleged that counsel failed to effectively advise

him as to his potential sentence. The trial court complied with Crim.R. 11(C) and informed appellant of the consequences of entering his plea, including the potential length of his prison term. During the plea colloquy, other than the mistaken reference to postrelease supervision (which was not ultimately included as part of the December 15, 1997 judgment entry), the trial court provided an accurate recitation of appellant's sentence as the law existed at the time. And appellant signed a waiver that made clear that his sentence was 15 years to life and in no way indicated that he would be paroled after 15 years if he committed no further offenses while incarcerated. We find no manifest injustice and no abuse of discretion by the trial court in denying appellant's motion to withdraw his plea.

III. CONCLUSION

{¶ 21} The court finds appellant's assignment of error and issue for review not well-taken. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

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.

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

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