

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92089**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**CHARLES MCQUEEN**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-371528

**BEFORE:** Rocco, P.J., Blackmon, J., and Dyke, J.

**RELEASED:** May 21, 2009

**JOURNALIZED:  
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶1} Defendant-appellant Charles McQueen appeals from the trial court’s decisions rendered at a hearing held pursuant to *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197. The trial court denied his motion to withdraw his guilty plea to a charge of voluntary manslaughter with a firearm specification, and re-imposed the agreed sentence of thirteen years, but with the addition of a five-year period of postrelease control.

{¶2} McQueen presents three assignments of error. He argues the trial court abused its discretion in denying his motion to withdraw his guilty plea because he was not fully informed prior to entering his plea the maximum term included postrelease control. He further argues, on alternative grounds, the sentence imposed upon him offends his right to due process of law, i.e., either, in light of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio 856, he was “entitled to the statutory presumption of a minimum term” of only three years for the conviction; or, alternatively, the agreed thirteen-year sentence did not include postrelease control.

{¶3} This court cannot find error in the decisions the trial court made in this case. Consequently, the trial court’s order of sentence is affirmed.

{¶4} The record reflects McQueen’s conviction results from the December 11, 1998 shooting death of seventeen-year-old Juwan Hopper. On January 28,

1999, McQueen was indicted with two others on a single count of aggravated murder with a firearm specification.

{¶5} When the case was called for trial at the end of August, 1999, McQueen entered into a plea agreement. According to the court's journal entry, McQueen agreed to enter a guilty plea and to accept a sentence of three years prior to and consecutive to a term of ten years in exchange for the state's amendment of the indictment to a charge of voluntary manslaughter with a firearm specification.<sup>1</sup> The trial court, however, failed to include postrelease control in its journal entry.

{¶6} McQueen subsequently filed a delayed appeal, but his appeal was dismissed.<sup>2</sup>

{¶7} On May 15, 2008, in response to the state's motion, the trial court issued an order for McQueen's return from prison "for a hearing pursuant to *State v. Simpkins*," supra. The court eventually conducted the hearing on August 21, 2008.

{¶8} After the court announced that it had reviewed the pre-sentence report that had been prepared, McQueen made an oral motion to withdraw his

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<sup>1</sup>It can be gleaned from the record that each of McQueen's co-defendants entered into the same plea agreement.

<sup>2</sup>Pursuant to R.C. 2953.08(D)(1), a sentence "is not subject to review \*\*\* if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."

plea. The sole basis for his motion was his assertion that, “had [the court of appeals] allowed the delayed appeal, [it] would have set aside the plea for not advising concerning post release control as part of the sentence in this case.”

{¶9} The court noted that, although he had been afforded the opportunity, McQueen had neither prepared a written motion to withdraw his plea, nor provided any evidence to support his assertion. The court indicated it could not simply assume that the transcript of McQueen’s plea hearing demonstrated he was never informed of postrelease control; therefore, his motion was denied.

{¶10} Similarly, the trial court rejected McQueen’s argument that he “was presumptively entitled to a minimum sentence” under the law at the time of his original sentencing hearing. The court noted that McQueen’s plea secured him an agreed definite prison term of only thirteen years, when he had been facing significantly more time.

{¶11} The prosecutor then stated for the record that three witnesses saw McQueen and his two co-defendants as “[t]hey ambushed this victim \*\*\* this was a gang shootout and [McQueen] was there and he fired shots.” The court indicated the presentence report supported the prosecutor’s statement.

{¶12} Thus, the court decided that the agreed sentence totaling thirteen years remained appropriate. The court gave McQueen credit for time served.

The court further notified him that, upon his release, he would be subject to a mandatory five-year period of postrelease control.

{¶13} McQueen appeals from the trial court’s decisions with the following assignments of error.

**{¶14} “I. Defendant was denied due process of law when the court refused to vacate defendant’s plea as he was not advised concerning post-release control when he entered his plea.**

**{¶15} “II. Defendant was denied due process of law when the court overruled defendant’s motion to vacate his plea and imposed a maximum sentence in violation of defendant’s constitutional rights.**

**{¶16} “III. Defendant was denied due process of law when the court imposed a sentence in violation of the agreed plea.”**

{¶17} In his first assignment of error, McQueen argues the trial court abused its discretion in denying his motion to withdraw his guilty plea. He asserts he was not fully informed prior to entering his plea that the “maximum term” for his conviction of a first degree felony with a firearm specification included postrelease control. This court finds McQueen’s argument unpersuasive.

**{¶18}** The trial court ordered McQueen returned pursuant to *Simpkins*, supra, which “held that, because the journal entry on sentencing did not indicate

that Simpkins was subject to postrelease control, it did not conform to statutory mandates \*\*\* and was therefore a nullity and void.” *State v. Singleton*, Cuyahoga App. No. 90042, 2008-Ohio-2351, ¶43.<sup>3</sup>

{¶19} Since McQueen’s sentence was void, the trial court was required to treat his Crim.R. 32.1 motion as one made prior to sentencing. *State v. Boswell*, Slip Opinion No. 2009-Ohio-1577. With respect to a plea withdrawal motion made prior to sentencing, the standard of appellate review is limited to a determination of whether the trial court abused its discretion. *State v. Xie* (1992), 62 Ohio St.3d 521.

{¶20} In *State v. Peterseim* (1980), 68 Ohio App.2d 211, this court set forth the standard for determining whether the trial court has abused its discretion in denying a presentence motion to withdraw a plea. No abuse of discretion occurs in a case where: 1) the accused was afforded a full Crim.R. 11 plea hearing at which he was represented by highly competent counsel; 2) the accused was given a complete and impartial hearing on the motion; and, 3) the record reflects the court gave full and fair consideration to his request. *Id.*

{¶21} A review of the record in this case demonstrates that, inasmuch as it was able, the trial court complied with the foregoing criteria. Although

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<sup>3</sup>In citing this case, this court remains cognizant that it has been accepted by the supreme court for review. *State v. Singleton*, 120 Ohio St.3d 1415, 2008-Ohio-6166.

McQueen had not supported his motion in writing, the court nevertheless provided him with a full hearing.

{¶22} After McQueen made his argument, the court noted that McQueen had been represented by highly competent counsel at his original plea hearing, and that, faced with the overwhelming evidence against his client, counsel negotiated an advantageous plea agreement. The court further noted that McQueen failed to present a copy of the transcript of his plea hearing, although this document was crucial to his claim. Cf., *Singleton*, supra. Under these circumstances, the trial court presumed McQueen had been informed of the mandatory five years of postrelease control that attended every first-degree felony conviction.

{¶23} Nothing in the record contradicts the trial court's assumption. Absent a reasonable and legitimate basis for McQueen's request to withdraw his plea, therefore, the trial court did not abuse its discretion in denying his motion. *State v. Xie*, supra; *State v. Montgomery*, Cuyahoga App. No. 87246, 2006-Ohio-3850; cf., *State v. Kinkopf*, Cuyahoga App. No. 90773, 2008-Ohio-6950.

{¶24} McQueen's first assignment of error, accordingly, is overruled.

{¶25} In his second and third assignments of error, McQueen argues that the sentence ultimately imposed upon him offends his right to due process of law. He makes this argument in the alternative. He claims either that in light



of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio 856, he was “entitled to the statutory presumption of a minimum term” of only three years for his voluntary manslaughter conviction rather than the maximum term of ten years; or that the agreed thirteen-year sentence did not include postrelease control. Once again, this court remains unpersuaded.

{¶26} The latter alternative McQueen suggests must be rejected because nothing in the record supports a conclusion that the parties did not intend for him to be placed on the mandatory period of postrelease control. Without a copy of the transcript of his plea hearing, this court presumes regularity in the lower court proceedings, and such an agreement would have been in derogation of the law. R.C. 2929.19(B)(3)(c); cf., *State v. Barajas-Larios*, 178 Ohio App.3d 613, 2008-Ohio-5460.

{¶27} In *Foster*, the supreme court declared unconstitutional several sentencing provisions, and held that if a trial court relied upon those provisions in pronouncing sentence, the sentence imposed was contrary to law, and, consequently, must be vacated. Such cases were remanded to the trial court for a new sentencing hearing consistent with its holding.

{¶28} *Foster*, however, neither held that offenders were “entitled” to a minimum term for a first-degree felony conviction, nor held that defendants whose cases were not pending on appeal fell under its rubric, nor applied to a

jointly recommended sentence. *State v. Montgomery*, Cuyahoga App. No. 83914, 2008-Ohio-443, ¶¶7-11. For these reasons, McQueen's initial alternative theory also fails.

{¶29} Accordingly, McQueen's second and third assignments of error are overruled.

The trial court's decisions and order of sentence are affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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KENNETH A. ROCCO, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and  
ANN DYKE, J., CONCUR