

[Cite as *Rocky River v. Holcomb*, 2016-Ohio-396.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102982

CITY OF ROCKY RIVER

PLAINTIFF-APPELLEE

vs.

CLELL HOLCOMB

DEFENDANT-APPELLANT

JUDGMENT:

CONVICTIONS AFFIRMED; SENTENCE REVERSED
AND REMANDED FOR RESENTENCING

Criminal Appeal from the
Rocky River Municipal Court
Case Nos. 14CRB2396 and 14CRB2406

BEFORE: Kilbane, P.J., McCormack, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: February 4, 2016

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Clell Holcomb (“Holcomb”), appeals from his convictions for misdemeanor assault and misdemeanor attempted assault. Having reviewed the record and the controlling case law, we affirm the convictions, however, we conclude, and Rocky River concedes, that the trial court erred when it imposed ten years of community control sanctions. Therefore, we reverse Holcomb’s sentence and remand for resentencing.

{¶2} In Rocky River M.C. No. 14CRB2406, Holcomb was charged with assault, following an alleged attack upon one of his neighbors on November 30, 2014. Holcomb was also charged in Rocky River M.C. No. 14CRB2396 with domestic violence and unlawful restraint of his wife, following an alleged assault on December 4, 2014. The trial court also imposed a temporary protection order barring him from contacting his wife and the children residing in the household.

{¶3} Holcomb, who was represented by counsel, entered into plea agreements in both matters on March 19, 2015. In Case No. 14CRB2406, the prosecutor amended the charge to attempted assault, and Holcomb pled no contest. In Case No. 14CRB2396, Holcomb pled no contest to one charge of assault and the charge of unlawful restraint was dismissed. The trial court found Holcomb guilty of both charges. The trial court noted that Holcomb was incarcerated on unrelated felony drug charges and ordered that he serve the maximum community control sanctions upon completion of his sentences in the felony drug case. The court then ordered Holcomb to serve two consecutive five-year terms of community control sanctions. At that point, Holcomb informed the court that he was withdrawing his plea. The trial court further informed Holcomb that he was to have no contact with his wife and the

children, and that if he violated the terms of the community control sanction, he would serve 90 days of incarceration in each case.

{¶4} Holcomb now appeals, assigning the following two errors for our review:

Assignment of Error One

The trial court committed reversible error when it imposed ten years of community control sanctions in violation of R.C. 2929.25 five year maximum.

Assignment of Error Two

The trial court abused its discretion when it refused to honor the defendant's withdrawal of his guilty pleas.

Community Control

{¶5} Within the first assignment of error, Holcomb argues that the trial court exceeded the five-year limit set forth in R.C. 2929.25 when it imposed two consecutive five-year terms of community control sanctions. Rocky River concedes this error.

{¶6} We note that R.C. 2929.25(A)(2) sets forth a maximum five-year term of community control sanctions for misdemeanors and provides, "[t]he duration of all community control sanctions imposed upon an offender and in effect for an offender at any time shall not exceed five years." *See also State v. Cowen*, 167 Ohio App.3d 233, 238, 2006-Ohio-3191, 854 N.E.2d 579 (2d Dist.); *Strongsville v. Starek*, 8th Dist. Cuyahoga No. 92603, 2009-Ohio-4568, ¶ 24. *Accord State v. LaSalla*, 8th Dist. Cuyahoga No. 101316, 2015-Ohio-106, ¶ 24 (noting the five-year limit on community controls sanctions for felony offenses).

{¶7} Therefore, the trial court's imposition of consecutive five-year terms of community control sanctions exceeds R.C. 2929.25(A)(2). The matter must be remanded for resentencing.

{¶8} The first assignment of error is well taken.

Withdrawal of No Contest Plea

{¶9} Holcomb next asserts that the trial court erred in denying his motion to withdraw his no contest plea.

{¶10} Crim.R. 32.1 states:

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.

{¶11} The general rule is that motions to withdraw guilty or no contest pleas that are made before sentencing are to be freely and liberally allowed. *State v. Peterseim*, 68 Ohio App.2d 211, 214, 428 N.E.2d 863 (8th Dist.1980). However, a defendant does not have an absolute right to withdraw a guilty plea prior to sentencing. *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992). In ruling on a presentence motion to withdraw a plea, the court must conduct a hearing and decide whether there is a reasonable and legitimate basis for withdrawal of the plea. *Id.* at 527. The decision to grant or deny such a motion is within the sound discretion of the trial court. *Id.*

{¶12} In contrast, a motion to vacate a plea of guilty or no contest that is made after the trial court has imposed sentence is permitted only “to correct a manifest injustice.” *State v. Bell*, 8th Dist. Cuyahoga No. 87727, 2007-Ohio-3276, citing *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). The defendant bears the burden of establishing the existence of a “manifest injustice.” *Id.* at paragraph one of syllabus. A manifest injustice is a “clear or openly unjust act,” a “fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application

reasonably available to him or her.” (Citations omitted.) *State v. Smith*, 8th Dist. Cuyahoga No. 94063, 2010-Ohio-3512, ¶ 15. It is an extremely high standard that permits the court to allow a plea withdrawal only in “extraordinary cases.” *State v. Malone*, 8th Dist. Cuyahoga No. 91439, 2009-Ohio-1364, ¶ 8. Crim.R. 32.1 requires this standard in order “to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe.” *State v. Caraballo*, 17 Ohio St.3d 66, 67, 477 N.E.2d 627 (1985), citing *Peterseim* at 213.

{¶13} A postsentence motion to vacate a guilty plea is also left to the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Blatnik*, 17 Ohio App.3d 201, 202, 478 N.E.2d 1016 (6th Dist.1984).

{¶14} In this matter, Holcomb orally attempted to withdraw his guilty plea after the trial court announced that it was imposing the maximum term of community control sanctions. As such, Holcomb bears the burden of establishing the existence of a “manifest injustice.” From the face of the record, it clearly appears that Holcomb found the sentence, though thoughtfully crafted and at the lower range of possible sentences, to be unexpectedly severe. We find no manifest injustice in this matter, however, as the record does not disclose any “clear or openly unjust act,” or “fundamental flaw” in connection with the acceptance of the no contest plea. Therefore, we find no abuse of discretion.

{¶15} The second assignment of error is without merit.

{¶16} Convictions affirmed, sentence reversed, and the matter is remanded for resentencing.

It is ordered that appellee and appellant share the 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 Rocky River Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

TIM McCORMACK, J., and
SEAN C. GALLAGHER, J., CONCUR