

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 104241**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**SAMUEL HURTH II**

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-15-597978-A

**BEFORE:** Laster Mays, J., Keough, P.J., and Blackmon, J.

**RELEASED AND JOURNALIZED:** December 8, 2016

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**ATTORNEYS FOR APPELLEE**

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant, Samuel Hurth II (“Hurth”), appeals his guilty plea and sentence, asking this court to withdraw his guilty plea, reverse his sentence, and order the trial court to conduct a trial. We affirm.

{¶2} After pleading guilty to one count of domestic violence, a third-degree felony, in violation of R.C. 2919.25(A), Hurth was sentenced to 36 months in prison. After receiving his sentence, Hurth filed a motion to vacate his guilty plea pursuant to Crim.R. 32. The trial court denied his motion.

## **I. Facts**

{¶3} On April 1, 2015, Hurth played a video game with his 11 year-old son, J.P. J.P. became agitated and upset because he was losing. According to Hurth, J.P. was disrespectful and argumentative. Hurth grabbed J.P. by his shirt and shoved him into a wall. Hurth then threw J.P. on the bed and began hitting J.P. on his back while J.P. lay on his stomach. After which, Hurth rolled J.P. onto his back, put his hands around his neck, and began choking him for a few seconds. Once Hurth left the room, J.P. called his mother. When Hurth realized this, he grabbed the phone, injuring J.P.’s thumb. J.P. was treated for his injuries, which included a red mark on his left wrist, redness on the back of and around his neck, a scratch on the right side of his chest, and two 4-inch scratches on the lower side of his back.

{¶4} Hurth was indicted on August 11, 2015, pleaded guilty on February 8, 2016, and was sentenced on February 29, 2016. The court sentenced Hurth to the maximum sentence he could received, 36 months. The court justified giving Hurth the maximum because Hurth had ten prior convictions for violence. Hurth admitted that he had a past history of domestic violence against the mother of his children, but had never been convicted for committing violence against one of his children.

{¶5} Hurth claimed that he only pleaded guilty because he thought he would received community control sanctions, not actual incarceration time. The trial court stated that it was not aware of Hurth's ten prior domestic violence convictions when Hurth's counsel and the state were discussing potential sentences. Hurth filed a motion to vacate the plea. The trial court denied this motion. As a result, Hurth has filed this timely appeal and assigns two errors for our review:

- I. The trial court erred by not granting appellant's motion to vacate plea.
- II. The trial court abused its discretion by imposing a prison sentence contrary to R.C. 2929.14 and the purposes and principles of the felony sentencing guidelines.

## **II. Vacating a Guilty Plea**

### **A. Standard of Review**

{¶6} “A postsentence motion to withdraw a guilty plea is governed by the ‘manifest injustice’ standard. *See* Crim.R. 32.1.” *State v. Kongkeo*, 8th Dist. Cuyahoga No. 96691, 2012-Ohio-356, ¶ 2. “A manifest injustice has been defined as a ‘clear or openly unjust act,’ meaning that a postsentence withdrawal motion to withdraw a guilty plea is allowable only in extraordinary cases.” (Citations omitted.) *Id.*

{¶7} “Whether a defendant has demonstrated a manifest injustice is addressed to the sound discretion of the trial court.” (Citation omitted.) *Cleveland v. Jaber*, 8th Dist. Cuyahoga Nos. 103194 and 103195, 2016-Ohio-1542, ¶ 17. “Manifest injustice relates to some fundamental flaw in the proceedings which results in a miscarriage of justice or is inconsistent with the demands of due process.” *Id.* at ¶ 18.

### **B. Law and Analysis**

{¶8} In Hurth’s first assignment of error he argues that the trial court erred by not granting appellant’s motion to vacate plea. Crim.R. 32.1 provides that “[a] motion to withdraw a plea of guilty \* \* \* 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. Crim.R. 32.1.” *Richmond Hts. v. McEllen*, 8th Dist. Cuyahoga No. 99281, 2013-Ohio-3151, ¶ 6.

{¶9} Thus,

pursuant to Crim.R. 32.1, a postsentence motion to withdraw a guilty plea, such as appellant’s, may be granted only to correct a manifest injustice. A

defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice.

A manifest injustice is a fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the requirements of due process.

*Id.* at ¶ 7. “This is so because a defendant should not be encouraged to plead to test the potential punishment and withdraw the plea if the sentence is unexpectedly severe.”

*Cleveland v. Jaber*, 8th Dist. Cuyahoga Nos. 103194 and 103195, 2016-Ohio-1542, ¶ 18.

{¶10} Hurth claimed that he did not expect to receive the maximum sentence but rather probation. Otherwise, he would not have pleaded guilty. Because he received an unexpected sentence, Hurth filed a postsentence motion to vacate his guilty plea. However, there was not a manifest injustice committed by the court. Hurth knowingly and voluntarily entered his guilty plea with full understanding of his constitutional rights.

(Tr. 11 and 12.) Therefore, Hurth’s first assignment of error is overruled.

### **III. Felony Sentencing**

#### **A. Standard of Review**

{¶11} “An appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence.” *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23.

Clear and convincing evidence is that measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

*Id.* at ¶ 22.

## **B. Law and Analysis**

{¶12} In Hurth’s second assignment of error, he argues that the trial court abused its discretion by imposing a prison sentence contrary to R.C. 2929.14 and the purposes and principles of the felony sentencing guidelines. There are two grounds upon which a criminal defendant may claim that a sentence is contrary to law. “First, a sentence is contrary to law if it falls outside the statutory range for the particular degree of offense.” (Citation omitted.) *State v. Bonds*, 8th Dist. Cuyahoga No. 100481, 2014-Ohio-2766, ¶ 5. The maximum amount of incarceration for a third-degree felony of domestic violence is 36 months. R.C. 2929.14(A)(3)(b). Hurth received 36 months, so his sentence was not contrary to law.

{¶13} “Second, a sentence is contrary to law if the trial court fails to consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12.” (Citation omitted.) *Id.* at ¶ 6.

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the

seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

R.C. 2929.11(A) and (B).

Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism, and the factors set forth in division (F) of this section pertaining to the offender's service in the armed forces of the United States and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

R.C. 2929.12(A).

{¶14} The record reflects in the journal entry that the trial court did consider the purposes and principles of felony sentencing set forth in R.C. 2929.11 at the sentencing hearing. The court stated that this is the “sentence of the court, this is domestic violence, a felony of the third degree. The sentence of the court is \$250 in costs, 36 months at the Lorain Correctional Institution.” (Tr. 22.) When the defense objected and questioned the court about the sentencing, the court stated, “this is his 11th conviction, he got the benefit of the plea.” (Tr. 23.)

{¶15} As a result, the appellant filed a motion to withdraw his guilty plea. At the motion hearing, the court denied the motion stating that “the court thinks that there was a need to protect the community. This involved a young kid.” (Tr. 4.) In addition the court stated, “the court was not aware of the fact that he had ten prior convictions for acts



of violence or acts which included domestic violence. Ten priors.” *Id.* Because the court considered the purposes and principles of felony sentencing in the journal entry and in the motion hearing, the sentence is not contrary to law. *See State v. Clayton*, 8th Dist. Cuyahoga No. 99700, 2014-Ohio-112, ¶ 9 (“the trial court’s journal entry indicates that the court considered ‘all required factors of the law’ \* \* \*. The trial court’s statement that it considered the required statutory factors, without more, is sufficient to fulfill its obligations under the sentencing statutes.”). Therefore, Hurth’s second assignment of error is overruled.

{¶16} Judgment is affirmed.

It is ordered that the 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.

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

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ANITA LASTER MAYS, JUDGE

KATHLEEN ANN KEOUGH, P.J., and  
PATRICIA ANN BLACKMON, J., CONCUR