[Cite as *State v. Buckwald*, 2010-Ohio-3543.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO	C.A. No. 09CA009695
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE ELYRIA MUNICIPAL COURT COUNTY OF LORAIN, OHIO
RALPH D. BUCKWALD	
Appellant	CASE Nos. 2000TRC00892 1994TRC05152

DECISION AND JOURNAL ENTRY

Dated: August 2, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Ralph Buckwald, appeals from the judgment of the Elyria Municipal Court, denying his motion to withdraw his plea. This Court affirms.

I

{¶2} In August 1994, Buckwald pleaded no contest to the charge of driving under the influence. He received a jail sentence and a fine. In January 2000, Buckwald pleaded no contest to the charge of driving while intoxicated. Again, he received a jail sentence and a fine. The Elyria Municipal Court handled both cases. See Elyria Municipal Court, Case Nos. 94TR05152 & 00TR00892. On September 16, 2009, Buckwald filed a motion to withdraw his plea in Case No. 00TR00892. On September 22, 2009, Buckwald filed another motion to withdraw his plea in Case No. 00TR00892, this time attaching different exhibits and specifying that he was seeking to withdraw his plea because it was uncounseled and taken in violation of Traf.R. 10, et al. and Crim.R. 11.

{¶3} On September 24, 2009, the trial court denied Buckwald's motion. Inexplicably, on September 29, 2009, the trial court issued another order denying Buckwald's motion in Case No. 94TR05152. Both orders noted that they were based upon Buckwald's motion to withdraw his plea and both were denied based on his failure to demonstrate manifest injustice. Subsequently, Buckwald filed a notice of appeal. Buckwald's notice of appeal listed both Case Nos. 94TR05152 and 00TR00892 and indicated that Buckwald sought to appeal from both of the court's September 24, 2009 and September 29, 2009 orders.

{¶4} Buckwald's appeal is now before this Court and raises two assignments of error for our review. We consolidate the assignments of error.

II

Assignment of Error Number One

"THE TRIAL COURT COMMITED HARMFUL REVERSABLE ERROR IN DENYING THE DEFENDANT-APPEALLANT HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTENCE OF COUNSEL; MANIFEST INJUSTICE WHEN THE TRIAL COURT SENTENCED DEFENDANT TO JAIL WHEN THE RECORD FAILS TO DEMONSTRATYE THAT THE DEFENDANT-APPEALLLANT EITHER APPEARD WITH COUNSEL OR EXECUTED A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHT TO COUNSEL[.]" (Sic.)

"DEFENDANT-APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISENCE OF COUNSEL GUARNTEED BY ARTICLE I, SECTION 10 OF THE OHIO CONSTITUION AND THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION[.]" (Sic.)

"THE TRIAL COURT ABUSED ITS DESCRETION AND PREJUDICED THE DEFENDANT-APPELLANT BY ALLOWING THE UNCOUNSELED PLEA AT INITIAL COURT APPEARANCE[.]" (Sic.)

Assignment of Error Number Two

"THE TRIAL COURT FAILED IN ALL RESPECTS TO COMPLY WITH TRAFFIC RULE 10(B)(1) IN AMY WAY SHAPE OR FORM; FAILING TO ORALLY OR WRITTINLY ADVISE DEFENDANT-APPPELLANT OF HIS OHIO CONSTITUTIONAL AND UNITED STATES CONSTITUTIONAL RIGHTS UNDER A NO-CONTEST PLEA; THE TRIAL FAILED TO INFORM

> DEFENDANT-APPELLANT OF THE EFFECTS OF HIS NO CONTESTY PLEA AS REQUIORED BY TRAFFIC RULE 10(B)(1), THE LANGUAGE OF WHICH IS SET FORTH IN TRAFFIC RULE 10(B)(2), IN BOTH CASE NO. 2000TRC00892 AND 1994TRC05152; BOTH CASES." (Sic.)

{¶5} In both of his assignments of error, Buckwald argues that the trial court erred by refusing to allow him to withdraw his 1994 and 2000 pleas on the basis that they were obtained in the absence of a valid waiver of his rights, including the right to counsel.

> "Pursuant to Crim.R. 32.1, '[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.' In a post-sentence motion, 'the burden of establishing the existence of a manifest injustice is upon the individual seeking to withdraw the plea.' *State v. Ruby*, 9th Dist. No. 23219, 2007-Ohio-244, at ¶10, citing [*State v. Smith* (1977), 49 Ohio St.2d 261,] paragraph one of the syllabus. A manifest injustice has been defined as a 'clear or openly unjust act.' *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, 208. Under the manifest injustice standard, a post-sentence 'withdrawal motion is allowable only in extraordinary cases.' *Smith*, 49 Ohio St.2d at 264." *State v. Brown*, 9th Dist. No. 24831, 2010-Ohio-2328, at ¶9.

This Court reviews a trial court's determination that a defendant failed to demonstrate a manifest injustice for an abuse of discretion. Id. at ¶8.

{¶6} As to Buckwald's 1994 plea, we note that Buckwald never filed a motion to withdraw that plea. Both of Buckwald's motions, filed September 16, 2009 and September 22, 2009, respectively, were filed in and captioned with Case No. 00TR00892. It would appear that the court treated one of the motions as if Buckwald had filed it in Case No. 94TR05152 and addressed it on the merits. Buckwald now seeks to appeal from the court's order, refusing to withdraw Buckwald's plea in Case No. 94TR05152. The trial court, however, could not deny a motion that was never filed. Buckwald never invoked the trial court's jurisdiction in Case No. 94TR05152 by filing a motion to withdraw pursuant to Crim.R. 32.1. Because the trial court did not have a motion before it in Case No. 94TR05152, its September 29, 2009 order denying the

same is a nullity from which Buckwald cannot appeal. See *State v. Keith*, 9th Dist. No. 08CA009362, 2009-Ohio-76, at ¶8 (treating court's order as a nullity where court did not have a properly filed motion before it). See, also, *Ohio Receivables, LLC v. Landaw*, 9th Dist. No. 09CA0053, 2010-Ohio-1804, at ¶6 ("When neither party has petitioned a court for modification of a judgment entry, the court may not effectively vacate a prior order by entering a new one sua sponte.").

{¶7} Moreover, the record reflects that Buckwald never filed a transcript or affidavit in support of his motions to withdraw his plea from 2000. "If [a] movant fails to submit evidentiary documents sufficient to demonstrate manifest injustice he is not entitled to withdraw his guilty plea." *Brown* at ¶12. Accord *State v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314, at ¶7 (concluding that defendant failed to satisfy his prima facie burden where he "did not submit evidence, whether testimony, affidavits, or transcripts, to bolster his argument that his waiver of counsel was constitutionally infirm"). Buckwald argues that the no contest plea he entered in 2000 is defective because the court did not fully inform him of his rights, orally and in open court, before accepting his plea. The record from Buckwald's 2000 case contains a written waiver, signed by Buckwald, the trial court, and the prosecutor, in which Buckwald acknowledges receiving his rights and waiving them. See *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, at ¶47 (concluding there was evidence to support a finding that defendant had waived right to counsel where record contained written waiver signed by the defendant and the court). Interestingly, Buckwald's written waiver is also signed by an attorney. Without evidentiary documentation, it is impossible to determine whether the court properly informed Buckwald of his rights and whether he was, in fact, represented by counsel at the time he entered his plea. There is no evidence that a manifest injustice occurred. See *Brown* at ¶12. Therefore,

the trial court did not abuse its discretion by denying Buckwald's motion to withdraw his plea in Case No. 00TR00892. Buckwald's assignments of error lack merit.

III

{¶8} Buckwald's assignments of error are overruled. The judgment of the Elyria Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Elyria Municipal Court, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

RALPH D. BUCKWALD, pro se, Appellant.

SCOTT STRAIT, Prosecutor, City of Elyria, for Appellee.