[Cite as *State v. Gordon*, 2011-Ohio-1045.]

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

STATE OF OHIO	C. A. No. 25317
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RODZINSKI GORDON	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 07 2419

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

MOORE, Judge.

{¶1} Appellant, Rodzinski Gordon, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On November 10, 2009, Gordon entered guilty pleas to one count of aggravated possession of drugs and one count of violating the terms and conditions of his community control in two separate, unrelated criminal cases. The trial court then ordered a pre-sentence investigation, a screening for a community based corrections facility, and scheduled a sentencing hearing for December 15, 2009.

{¶3} At the sentencing hearing, the trial court sentenced Gordon to two years of incarceration. After the sentence was pronounced, Gordon requested to withdraw his guilty plea because he felt that his attorney had a conflict of interest and was not representing him fully. The trial court scheduled a hearing on Gordon's oral motion and allowed his trial counsel to

withdraw as Gordon's attorney. The trial court then revoked Gordon's bond and had him taken into custody to serve the sentence imposed by the court. A journal entry to this effect, dated December 15, 2009, was filed with the clerk of courts on February 12, 2010.

{¶4} A second attorney was appointed as Gordon's counsel and, on December 21, 2009, the court held a hearing on the motion to withdraw the guilty plea. At the hearing, Gordon's new counsel argued that the trial court should review the motion to withdraw under the pre-sentence standard while the State argued that it should be reviewed under the post-sentence standard. The court determined that Gordon's motion should be treated as a post-sentence motion and concluded that Gordon failed to demonstrate the existence of manifest injustice. As a result, the motion to withdraw his plea was overruled.

{¶5} Gordon timely filed a notice of appeal. He raises two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING [GORDON'S] MOTION TO WITHDRAW HIS GUILTY PLEA BY INCORRECTLY USING THE POST[-]SENTENCE STANDARD PROVIDED BY CRIMINAL RULE 32.1 VERSUS USING THE PRE-SENTENCE STANDARD."

{¶6} Gordon argues that the trial court abused its discretion when it denied his motion to withdraw his guilty plea by applying the post-sentence standard as opposed to the pre-sentence standard provided by Crim.R. 32.1. We do not agree.

{¶7} Crim.R. 32.1 provides:

> "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."

{¶8} The decision to grant or deny a motion to withdraw a guilty plea "is within the sound discretion of the trial court. * * * Thus, unless it is shown that the trial court acted unjustly or unfairly, there is no abuse of discretion." (Citations omitted.) *State v. Xie* (1992), 62 Ohio St.3d 521, 526. Under this standard, we must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd*. (1993), 66 Ohio St.3d 619, 621.

{¶9} In *State v. Neeley*, 12th Dist. No. CA2008-08-034, 2009-Ohio-2337, the Twelfth District held that

> "[a]ppellant's request to withdraw his plea came after pronouncement of sentence, that is, after a sentencing hearing was held and appellant learned what the sentence would be, and, therefore, the appropriate standard is withdrawal only to correct a manifest injustice. *State v. Surface*, Stark App. No.2008 CA 00184, 2009-Ohio-950; *State v. Hall*, Franklin App. No. 03AP-433, 2003-Ohio-6939; see *State v. McComb*, Montgomery App. Nos. 22579, 22571, 2008-Ohio-295; see *State v. Boswell*, Slip Opinion No.2009-Ohio-1577 (manifest injustice standard for postsentence motion under Crim.R. 32.1 is designed to discourage defendant from testing sentence and asking to withdraw plea if sentence is unexpectedly severe)." Id. at ¶6.

{¶10} The Second District further concluded "[w]hile technically occurring before sentence, a motion made after learning of the imminent sentence is considered to be filed after sentencing." *McComb* at ¶7.

{¶11} Gordon contends that this Court should review the ineffective assistance of counsel argument before assessing whether to apply the pre-sentence or post-sentence standard provided by Crim.R. 32.1. He claims that, but for the ineffective assistance of counsel, the motion to withdraw the guilty plea would have been made prior to sentencing and the court would have used the more lenient pre-sentence standard. He cites no authority for this proposition. See App. R. 16(A)(7). This Court, therefore, is permitted to disregard the argument

in its entirety. Loc.R. 7(B)(7). A review of prior cases demonstrates that the courts have first assessed the appropriate standard to apply to the ineffective assistance of counsel argument. See, e.g., *Neeley* at ¶5-10; *McComb* at ¶6-10; *Surface* at ¶4-14.

{¶12} Gordon further contends that the trial court failed to apprise Gordon of his appeal rights and thereby never imposed sentence as required by Crim.R. 32. The journal entry filed February 23, 2010 shows that the trial judge reviewed the language of Crim.R. 32 and concluded that the post-sentencing standard should be used because the sentence had been imposed. Crim.R. 32(A) states that "[a]t the time of imposing sentence, the court shall" afford counsel the opportunity to speak, address the defendant directly to see if he wants to make a statement, afford prosecution the opportunity to speak. The trial judge complied with these requirements in pronouncing sentence, and thus reasoned that this language requires that the motion to withdraw the guilty plea must be made before the sentence is announced in open court.

{¶13} Gordon also argues that sentence was never imposed because the trial judge failed to advise him of his appeal rights, as required by Crim.R. 32(B). Again, he cites no authority for this proposition. App.R. 16(A)(7). Crim.R. 32(B)(2) provides: "**[a]fter** imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed." (Emphasis added). The plain language of the rule provides that advisement of appeal rights is required after the imposition of sentencing. It does not provide that advisement is a pre-requisite to imposition of sentencing. Thus, the post-sentencing standard was proper in this case.

{¶14} In addition, any error in the trial court's failure to advise Gordon of the right to appeal was harmless. "Regardless of whether the common pleas court committed error with regard to Crim.R. 32(B)(2) and (3), [Gordon] has failed to show prejudice. Appellant was

appointed counsel and filed an appeal within the requisite time period. Accordingly, there was no reversible error in this case. See *State v. Duncan*, Henry App. No. 7-02-10, 2003-Ohio-3879, at ¶12." *State v. Middleton*, 12th Dist. No. CA2004-01-003, 2005-Ohio-681, at ¶25. Gordon's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "IF THE APPELLATE COURT BELIEVES THE CORRECT STANDARD IS IN FACT THE MORE RESTRICTIVE STANDARD OF POST[-]CONVICTION, THEN THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT [GORDON] DID NOT MEET HIS BURDEN OF THE EXISTENCE OF MANIFEST INJUSTICE."

{¶15} Gordon argues that the court abused its discretion in finding that he did not establish the existence of manifest injustice. We do not agree.

{¶16} A request to withdraw a guilty plea that is made after pronouncement of the sentence is reviewed under the post-sentence standard of "withdrawal only to correct a manifest injustice." *Neeley* at ¶6. "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." *State v. Ruby*, 9th Dist. No. 23219, 2007-Ohio-244, at ¶11. "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. A post-sentence motion to withdraw a plea should be granted only in extraordinary cases. *State v. Smith* (1977), 49 Ohio St.2d 261, 264. The burden is on the individual seeking withdrawal of his plea to establish the existence of manifest injustice. Id. at paragraph one of the syllabus.

{¶17} In addition, the decision to deny a post-sentence motion to withdraw a guilty plea is within the trial court's discretion and therefore cannot be reversed absent demonstration that it was unreasonable, arbitrary or unconscionable. *Xie*, 62 Ohio St.3d at 526.

{¶18} In his motion, Gordon alleged that his prior trial counsel was ineffective because counsel never informed him that the prosecutor was going to recommend a prison sentence and because there was a break down in the attorney-client relationship. In order to show ineffective assistance of counsel, Gordon must demonstrate that counsel's actions fell below an objective standard of reasonableness and that he was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 669. By entering a guilty plea, Gordon waived the right to claim that he was prejudiced by the ineffective assistance of counsel, "except to the extent that the alleged defects caused the plea to be less than knowing and voluntary." *Neeley* at ¶33.

{¶19} During the plea hearing, Gordon averred that he was never informed that the prosecutor was going to recommend incarceration. Gordon alleged that his prior trial counsel told him that the court would impose treatment at a community based corrections facility. Gordon told his counsel that he did not wish to submit to a PSI, but counsel said that he should comply with the pre-sentence investigation. The prior counsel also allegedly told Gordon to tell the court that there had been no promises made with regard to his entering a guilty plea. Gordon did not present any evidence to support these arguments other than his own testimony. No other witnesses testified.

{¶20} The transcript of the plea hearing indicates that as a part of the negotiated plea, Gordon would enter a plea of guilty to two community control violations and a guilty plea to the first count of the indictment in the new case. The State would move to dismiss the second and third counts of the indictment in the new case. The judge taking the plea informed Gordon that if he entered a guilty plea the court could re-impose a previously suspended eighteen-month sentence and it could impose a six to twelve-month sentence for the current charge of aggravated possession of drugs. The trial judge also informed Gordon that these sentences would run

consecutively, and thus, the maximum possible sentence included two and a half years of incarceration. Gordon responded that he was not previously aware of this, but that he now understood. Gordon stated that no one had pressured him into entering the guilty plea, and that he was satisfied with the representation he had received from his counsel. Gordon then entered guilty pleas and the court ordered a pre-sentence investigation.

{¶21} The fact that a pre-sentence investigation was ordered demonstrates that Gordon was aware that no agreement had been reached with regard to a sentencing recommendation. The transcript of the sentencing hearing establishes that the judge informed Gordon that there was a recommendation of incarceration in the confidential portion of the pre-sentence report. In addition, the prosecutor made a verbal recommendation of incarceration during the sentencing hearing. Gordon addressed the court and explained the adverse effect incarceration would have on his life. Thus, he acknowledged that incarceration was a possibility.

{¶22} After the court imposed a sentence of two years of incarceration, Gordon attempted to withdraw his guilty plea alleging for the first time a conflict of interest with his trial counsel. The trial court appointed new counsel, conducted a hearing, and advised Gordon that he could make additional written submissions in support of his motion. After hearing Gordon's arguments and reviewing the plea transcript, the trial court determined that Gordon failed to show that his counsel's representation fell below the applicable standard of care or that, but for his counsel's performance, he would not have entered his guilty plea. Thus, the trial court determined that Gordon failed to show a manifest injustice had occurred that would warrant granting his motion to withdraw his guilty plea. We find no abuse of discretion with that decision. *McComb* at ¶9.

{¶23} In addition, Gordon has failed to demonstrate that, but for his counsel's performance, he would not have entered his guilty plea. Instead he argued that, but for his counsel's performance, he would have entered the guilty plea but would have moved the court to withdraw the guilty plea prior to sentencing. Thus, Gordon's second assignment of error is overruled.

III.

{¶24} Gordon's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, 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.

CARLA MOORE
FOR THE COURT

CARR, J.
CONCURS IN JUDGMENT ONLY

DICKINSON, P. J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

NANCY MERCURIO-MORRISON, Attornrey at Law, for Appellant.

SHEILA KAY HINES, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.