IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	
	:	
Appellee	:	Case No. 2022-1462
	:	
vs.	:	On Appeal from the Montgomery County
	:	Court of Appeals, Second Appellate
	:	District
	:	
ZAREN WIESENBORN	:	Court of Appeals
	:	Case No. 29388
Appellant	:	
	:	

MEMORANDUM IN RESPONSE TO JURISDICTION OF APPELLEE- STATE OF OHIO

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THIS COURT SHOULD DECLINE JURISDICTION

While this case involves a felony conviction, this Court should decline to hear Zaren Wiesenborn's appeal because this case does not involve a substantial constitutional question, nor does it raise a matter of public or great general interest. *See* Ohio Constitution, Article IV, Section 2(B)(2)(a)(ii) and (e); S.Ct.Prac.R. 5.02(A). The issues presented for this Court's review are well-settled: a trial court may take judicial notice of its own docket and a trial court does not have jurisdiction to modify a defendant's sentence once that sentence has been affirmed on direct appeal. Thus, the propositions of law Wiesenborn sets forth for consideration are well-settled issues of law and of interest only to Wiesenborn.

In affirming his sentence, the court of appeals did not misapply or misinterpret the law, it did not create new law, nor did it change existing law. Rather, the Second District Court of Appeals relied upon the well-settled principles of res judicata and the law of the case. Consequently, further review of this case is not warranted.

STATEMENT OF THE CASE AND FACTS

In March 2018, officers were dispatched to Wiesenborn's home for a welfare check stemming from an emergency phone call from A.W.'s friend. The friend told authorities that he was talking to A.W. via online video call and observed Wiesenborn touch A.W. inappropriately, pull her out of camera view, and then A.W. began screaming. When police arrived, A.W. stated that Wiesenborn had grabbed her breast. Wiesenborn told police that he just was attempting to get a rise out of A.W. by messing with her computer and heaphones and wrestling with her. Wiesenborn admitted that he pinned A.W.'s legs down with his knees, held her arms down, and fondled her breast. Wiesenborn was then arrested for gross sexual imposition.

A.W. has cerebral palsy and ataxia. During an interview at CARE House, A.W., who is smaller, younger, and frailer than Wiesenborn, disclosed that Wiesenborn had snapped his belt like he was going to hit her, pinned her down, pulled her bra down and touched her skin to skin. She pushed Wiesenborn off, but he told her that she was his girlfriend, that she "wanted it," and started touching her vagina outside of her clothes.

A.W. further disclosed ongoing sexual abuse that began when she was 12 or 13. Wiesenborn made her watch pornography and then he try to perform what was portrayed in the video with A.W. A.W. explained that she tried to get away but was overpowered. Wiesenborn would remove her clothing, put her breast in his mouth, or force his penis in her mouth. A.W. stated that Wiesenborn tried to put his penis in her vagina but he was unable to penetrate her due to her small size. A.W. feared that if she told anyone, the abuse would get worse. A.W. previously told their adoptive parents and they talked to Wiesenborn. The abuse stopped for a period of time, only to begin again a short while later. A.W. explained that if their parents heard anything, Wiesenborn would cover her mouth and lie about what they were doing. Wiesenborn also either hid or took her phone away so A.W. was unable to contact anyone. A.W. also advised that her adoptive parents wanted her to drop the charges against Wiesenborn. They told her that Wiesenborn had enough punishment in jail already and if she loved them, she would drop the charges.

Wiesenborn admitted to police that he and A.W. were not close and that he had a grudge against her because she blamed him for getting ataxia when he pushed her down the steps, damaging her nerves. Wiesenborn stated that he was introduced to pornography at 15, and A.W. started watching of her own volition around 13. Wiesenborn's statements to police

both acknowledged that he knew A.W. was not consenting to the sexual conduct and contact, and at the same time, tried to paint the encounters as consensual. Wiesenborn admitted that he pinned A.W. down and that digitally penetrated A.W. while he masturbated into tissues. Wiesenborn advised that while their parents told him what he did was wrong and could put him in jail, he got excited when he felt superiority or power over A.W. The fact that A.W. was aware of his power of her also excited him. Wiesenborn stated that once when he was mad at A.W., he pushed his penis against her vagina because he knew it would hurt her and would teach a lesson. Wiesenborn admitted that he knew what he was doing was morally and legally wrong, but it was the only way to get A.W. to comply with his wishes.

During Wiesenborn's PSI interview, he adivsed that he was introduced to step-sibling pornography at 12 or 13. Wiesenborn stated that he never got along with A.W. While Wiesenborn claimed that sometimes A.W. would initiate sexual activity, he also stated that he would have to persuade her. Wiesenborn stated that after fighting or wrestling, they would make up by performing oral sex on each other. Wiesenborn claimed that A.W.'s accusations were part of a revenge plot she had to punish him and their parents. Wiesenborn expressed that he believed the prosecutors and the media had portrayed him worse than he really was and had only told the police what he believed they want to hear.

Wiesenborn pleaded no contest as charged to an A indictment for acts occurring after he turned 18 years old, which included: six counts of rape (by force or threat of force), all violations of R.C. 2907.02(A)(2) and felonies of the first degree; four counts of gross sexual imposition (GSI) (by force), all violations of R.C. 2907.05(A)(1) and felonies of the fourth degree; and three counts of kidnapping (sexual activity), all violations of R.C. 2905.01(A) and felonies of the first

degree; after bindover, he also pleaded no contest as charged to a B indictment for acts occurring prior to him turning 18, but after he turned 14,which included: four counts of kidnapping (sexual activity), all violations of R.C. 2905.01(A) and felonies of the first degree; nine counts of GSI (by force), all violations of R.C. 2907.05(A)(1) and felonies of the fourth degree; and seven counts of rape (by force or threat of force), all violations of R.C. 2907.02(A)(2) and felonies of the first degree. The trial court found Wiesenborn guilty as charged. Wiesenborn was sentenced as follows:

Indictment A (After turning 18)			**Indictment B (Before turning 18)**		
Count	Crime Charged	Sentence	Count	Crime	Sentence
I	Rape	5 years	I	Kidnapping	4 years
II	Rape	5 years	II	Kidnapping	4 years
III	Rape	5 years	III	GSI	No sentence imposed/merged
IV	Rape	5 years	IV	GSI	No sentence imposed/merged
V	Rape	5 years	V	GSI	6 months
VI	Rape	5 years	VI	GSI	6 months
VII	GSI	12 months	VII	GSI	6 months
VIII	GSI	12 months	VIII	GSI	6 months
IX	GSI	12 months	IX	GSI	6 months
X	GSI	No sentence imposed/merged	X	GSI	6 months
XI	Kidnapping	No sentence imposed/merged	XI	GSI	6 months
XII	Kidnapping	6 years	XII	Kidnapping	No sentence imposed/merged
XIII	Kidnapping	No sentence imposed/merged	XIII	Kidnapping	No sentence imposed/merged
			XIV	Rape	4 years
			XV	Rape	4 years
			XVI	Rape	4 years
			XVII	Rape	4 years
			XVIII	Rape	4 years
			XIX	Rape	4 years
			XX	Rape	4 years

Total Sentence		39 years	Total Sentence		39.5 years

After sentencing, Wiesenborn filed a motion to withdraw his plea, arguing that his sentence was excessive and amounted to cruel and unusual punishment, and because his counsel did not believe that he would receive such a sentence. Prior to the trial court ruling on that motion, Wiesenborn also filed a notice of appeal, divesting the trial court of jurisdiction on the motion to withdraw.

On direct appeal, Wiesenborn alleged that the imposition of consecutive sentences was not supported by the record, and that his sentence was unconstitutional under U.S. Const. amend. VIII and pursuant to *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127. *Wiesenborn* at ¶¶ 14, 24. The Court of Appeals held that Wiesenborn would be eligible for release at age 52 for the offenses committed as a juvenile, and thus, *Moore* did not apply. *Id*. at ¶ 50. Wiesenborn also challenged the knowing, intelligent and voluntary nature of his plea. The Second District reviewed the record of the plea and found that the trial court properly informed Wiesenborn of required information prior to accepting his pleas and imposing sentence. *Id*. at ¶¶ 59, 60. Wiesenborn appealed to this Court, which declined to accept jurisdiction. *State v. Wiesenborn*, 158 Ohio St.3d 1430, 2020-Ohio-748, 141 N.E.3d 237. Wiesenborn also requested that this Court reconsider its denial, which request was also denied. *State v. Wiesenborn*, 158 Ohio St.3d 1507, 2020-Ohio-2819, 144 N.E.3d 447.

After the direct appeal was decided, Wiesenborn supplemented his pending motion to withdraw his pleas, or in the alternative, requested a new sentencing hearing.[1] Wiesenborn argued that the trial court was required to consider his age in imposing sentence pursuant to *State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952. The trial court denied the motions and held that the motion to withdraw was now barred by the doctrines of res judicata the law of the case, and that Wiesenborn failed to establish that his pleas resulted in a manifest injustice. The trial court also found that the record demonstrates that the sentencing judge considered Wiesenborn's youth in accordance with *Patrick*. Wiesenborn again appealed.

On appeal, the Second District again affirmed Weisenborn's convictions and sentences, finding that the trial court properly applied res judicata and the law of the case to all matter previously decided on direct appeal, and then considered the new material submitted on its merits. *State v. Wiesenborn*, 2d Dist. Montgomery No. 29388, 2022-Ohio-3762, ¶¶ 14-15 (*Weisenborn II*). The Court of Appeals also held that a manifest injustice is not established simply because a reviewing judge might have imposed a different sentence, and that while Wiesenborn's sentence was unexpected and counsel predicted a lower sentence, the trial court correctly found that his plea was not induced by a promise of a lower sentence than actually imposed. *Id*. at ¶¶ 17, 20. As to his claim that a resentencing is required by this Court's decision in *Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, the Second District noted that Wiesenborn's sentence was final in May 2020 and *Patrick* was not decided until December 2020. Accordingly, the appellate court concluded that Wiesenborn has no legal right to the

[1] Due to a change resulting from an election, a different judge heard Wiesenborn's motions in the trial court.

application of Patrick to his case, and the trial court had no authority simply to vacate Wiesenborn's sentence, which was final, and hold a new sentencing hearing. *Id*. at ¶ 26, citing *State v. Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671.

ARGUMENT

IV. IN OHIO, COURTS MAY TAKE JUDICIAL NOTICE OF THEIR OWN DOCKETS.

In affirming the decision of the trial court, the Court of Appeals reviewed the affidavit filed by Wiesenborn's trial counsel, and noted an inconsistency between an assertion in the affidavit and the appellate court's own records involving counsel. *Wiesenborn II* at fn. 1. Notably, this footnote was not the basis for the appellate court's decision as the issue of the veracity of the affidavits was not before the Court of Appeals. By definition, a footnote is an ancillary piece of information placed at the bottom of a page. Oxford Languages via www.google.com. Wiesenborn has not cited to any provision in the Supreme Court Rules of Practice that provide that this Court accepts appellate review of ancillary comments made by appellate courts.

Further, the trial court's decision denying the motion was reviewed for an abuse of discretion standard. The trial court's decision essentially accepted the affidavits as true, but found that the affidavits failed to meet the legal standard to establish that Wiesenborn's pleas were not knowingly entered. *Id*. at ¶¶ 20, 21. The trial court found that there was no evidence presented that indicated that counsel promised Wiesenborn what his sentence would be and thereafter resulted in a higher sentence. The trial court reasoned that while counsel advised Wiesenborn about his speculation on a sentence, and was mistaken; this equated to a prediction,

not a promise. Accordingly, the Wiesenborn failed to establish a manifest injustice required by Crim.R. 32.1, because the affidavits he filed did not establish that his plea was unintelligently or unknowingly induced because he was promised a particular sentence. The Court of Appeals simply held that, "in light of the deferential abuse-of-discretion standard that we must apply, we cannot say the trial court acted unreasonably in finding no manifest injustice warranting withdrawal of Wiesenborn's no-contest plea." *Id*. at ¶ 21.

Moreover, this Court has long held that it is axiomatic that courts can take judicial notice of their own docket. *Industrial Risk Insurers v. Lorenz Equip. Co*., 69 Ohio St. 3d 576, 635 N.E.2d 14 (1994). Courts cannot be expected to disregard facts contrary to assertions before it, when the facts are a matter of public record. To hold otherwise would induce and encourage gamesmanship. Even if it were improper for the appellate court to take notice of the information in the footnoote, Wiesenborn cannot establish that the Court of Appeals relied on this information in forming its opinion. Wiesenborn's first proposition of law is without merit and is not properly before this Court.

II. A TRIAL COURT DOES NOT ABUSE ITS DISCRETION IN DENYING A POST-SENTENCE MOTION TO WITHDRAW PLEAS OF NO CONTEST WHERE THE RECORD ESTABLISHES THE PLEAS WERE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE AND FAILS TO ESTABLISH A MANIFEST INJUSTICE.

Wiesenborn argues that trial counsel's statements created a manifest injustice sufficient to withdraw his plea. The record supports the trial court's decision finding that Wiesenborn failed to establish he suffered a manifest injustice.

Crim.R. 32.1 provides that a trial court may grant a defendant's post-sentence motion to withdraw his pleas only to correct a manifest injustice. Accordingly, a defendant who moves to

withdraw a plea bears the burden of establishing a manifest injustice. *State v. Ogletree*, 2d Dist. Clark No. 2014-CA-16, 2014-Ohio-3431, ¶ 45. This Court has defined a manifest injustice as a "clear or openly unjust act," that relates to a fundamental flaw in the plea proceedings resulting in a miscarriage of justice. *State v. Straley*, 159 Ohio St.3d 82, 2019-Ohio-5206, 147 N.E.3d 623, ¶ 14, quoting *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998) and citing *State v. Tekulve,* 188 Ohio App.3d 792, 2010-Ohio-3604, 936 N.E.2d 1030, ¶ 7 (1st Dist.). Under this standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). In this case, Wiesenborn has failed to establish that a manifest injustice has occurred in the plea proceedings and that the withdrawal of his plea is necessary to correct that manifest injustice.

Wiesenborn argues that he did not understand that he faced an effective sentence to life without parole based upon his attorney's belief that he had a good chance of receiving a 15-20 year prison sentence. Upon careful review, the trial court correctly concluded that Wiesenborn failed to establish a manifest injustice. The trial court relied on precedent from the Second District, which reads:

> A change of heart after becoming aware of an imminent, unexpectedly harsh sentence does not entitle a defendant to withdraw his guilty plea. *State v. Long*, 2d Dist. Montgomery No. 13285 (May 13, 1993). A manifest injustice generally does not result when a defendant holds (as he discovers) a mistaken belief that his sentence would be significantly lighter than the one actually imposed. See *State v. Lambros*, 44 Ohio App.3d 102, 541 N.E.2d 632 (8th Dist. 1988). The reason for the belief is key. If defense counsel caused the belief, what counsel exactly said must be examined. A manifest injustice does not necessarily arise merely because counsel is wrong about the sentence that is actually imposed. Only if counsel promised the defendant that a guilty plea will result in a lower sentence than is actually imposed would a manifest injustice potentially result. See *State v. Blatnik*, 17 Ohio App. 3d 201, 478 N.E.2d 1016 (6th Dist. 1984). If counsel simply made a prediction, there would be no manifest injustice. *Id*. In other words, counsel's erroneous advice and incorrect speculation regarding the sentence that is likely to be

> imposed potentially results in a manifest injustice only if counsel said that a guilty plea *will* result in a particular sentence, but not if counsel said that it *probably* will result.

State v. McComb, 2d Dist. Montgomery No. 22570, 2009-Ohio-295, ¶ 9.

In applying this standard, the trial court found that there was no evidence presented that indicated that counsel promised Wiesenborn what his sentence would be and thereafter resulted in a higher sentence. Wiesenborn's arguments to the contrary are unavailing and belied by the record. The Court of Appeals did not hold that any "magic words" were required, rather it looked at the record to see if it supported the trial court's conclusion. There is simply nothing in the record to establish that counsel promised or guaranteed Wiesenborn that he would receive a certain outcome. Because Wiesenborn failed to establish that his plea was unintelligently or unknowingly induced because he was promised a particular sentence, he has failed to establish a manifest injustice.

The record of the plea also supports the trial court's conclusion. Wiesenborn knew his full exposure to the possible prison sentence that could be imposed: 60 to 120 years if imposed concurrently and 245 years if maximum, consecutive sentences were imposed. Wiesenborn further acknowledged that he was never promised a particular sentence prior to entering the plea. The parties also put on the record that they were unable to come to an agreement on plea negotiations, and Wiesenborn understood that he was making his pleas without any agreement as to sentence.

The record clearly establishes that the trial court strictly complied with Crim.R. 11 by informing him of his rights, potential sentences, and ramifications of his plea; verifying the voluntary nature of his plea; and determining that he was not improperly induced into making

his plea. While Wiesenborn is young and his sentence is lengthy, his victim has suffered alienation from her family and will live with the emotional ramifications of repeated, violent sexual abuse that occurred throughout her entire adolescence for the rest of her life. Therefore, there is no manifest injustice established and no need for this Court to accept review in this case.

III. THE TRIAL COURT LACKED THE AUTHORITY TO MODIFY WIESENBORN'S SENTENCE AFTER IT WAS AFFIRMED ON APPEAL.

It is well-settled that trial courts have no inherent authority to suspend, cancel, modify or reconsider their own valid final judgments in criminal cases. *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 338, 686 N.E.2d 267 (1997). This rule is only subject to two exceptions: to correct a void sentence and to correct clerical errors. *State v. Garretson*, 140 Ohio App.3d 554, 559, 748 N.E.2d 560 (12th Dist. 2000). Neither of those exceptions are argued to be present here. In considering a case where a criminal defendant moved a trial court to reconsider and modify his sentence after exhausting all of his appeals, the Ohio Supreme Court held that a trial court had no authority to modify a final criminal sentence. *State v. Carlisle*, 131 Ohio St.3d 127, 2011-Ohio-6553, 961 N.E.2d 671, ¶ 16. Therefore, the trial court did not have the authority to modify Wiesenborn's sentence, especially after it was affirmed on appeal.

Despite this prohibition against modification of a sentence affirmed on appeal, Wiesenborn argues that the trial court is now required to reconsider his sentence in light of the Ohio Supreme Court's decision in *Patrick*, but Wiesenborn's reliance on *Patrick* is misplaced. First, *Patrick* was never applicable to Wiesenborn as *Patrick* was decided in December 2020; Wiesenborn's appeal was final in May 2020, and there is no indication that the Court intended

for its holding to be applied retroactively. *Cf. State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011, ¶ 24. Also, unlike *Patrick*, Wiesenborn was not sentenced to a life sentence pursuant to R.C. 2929.03(A)(1), but to a definite, aggregate prison sentence. Most importantly, the holding in *Patrick* has been overturned by the United States Supreme Court. *Jones v. Mississippi*, __ U.S. __, 141 S. Ct. 1307, 209 L.Ed. 390, (2021).

In *Patrick*, this Court held that trial courts must consider a juvenile offender's age before imposing a life sentence under R.C. 2929.03. *Patrick* at ¶ 2, relying on *Miller v. Alabama*, 567 U.S. 460, 477-478, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)(holding that youth and its attendant characteristics must be considered when a court imposes life without parole upon a juvenile). This Court then reasoned that youth is also a necessary consideration when a sentencing court determines at what point parole eligibility should be available during a life sentence. *Patrick* at ¶ 32. In *Jones,* the United States Supreme Court clarified its holding in *Miller* and held that the Eighth Amendment to the United States Constitution does not require that sentencing courts expressly consider an offender's age in imposing sentence; it is enough to hold a sentencing hearing where age can be considered. *Jones* at 1317. Therefore, there is no constitutional requirement for a trial court to articulate on the record whether, and how, the trial court considered an offender's youth before imposing a life sentence.

Even if this Court were to find that the holding in *Patrick* was not overruled and applies to this case, the fact remains that the trial court considered Wiesenborn's youth in imposing his sentence. *Wiesenborn* at ¶ 51. The trial court imposed lower sentences for the offenses Wiesenborn committed as a juvenile compared to the sentences it imposed for the offenses he committed as an adult. This consideration is all that is required by *Patrick* and *Jones*, so there is

no constitutional violation. While an offender's youthfulness is a necessary consideration of the crimes committed as a juvenile, it is likewise significant that Wiesenborn continued to commit the same crimes once he became an adult. This Court properly determined that the appropriate procedure, when a defendant is sentenced for crimes committed both as a juvenile and as an adult, is to separate the sentences and look at only the sentence imposed for the juvenile offenses exceeds the defendant's life expectancy. *Wisenborn*. at ¶ 50.

CONCLUSION

For the reasons set forth above, the State of Ohio, Appellee herein, respectfully requests that this Court find Wiesenborn's propositions of law meritless and deny him jurisdiction to appeal.

Respectfully submitted,

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By */s/ Elizabeth A. Ellis*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum in Response* was sent via email on the _30_th day of December, 2022, to counsel for Defendant-Appellant: Charlyn Bohland, 250 E. Broad Street, Suite 1400, Columbus, OH 43215; charlyn.bohland@opd.ohio.gov .

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