

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-787 (C.P.C. No. 09CR-09-5786)
Jonathan L. Stewart,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 28, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas that granted defendant-appellee's, Jonathan L. Stewart, motion to withdraw his guilty plea. Because the trial court did not abuse its discretion in granting Stewart's motion to withdraw his guilty plea, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} In August 2004, Stewart was convicted of one count of unlawful sexual conduct with a minor. The trial court classified Stewart as a sexually oriented offender under Ohio's then-existing sexual offender laws known as "Megan's Law." As an individual classified as a sexually oriented offender under Megan's Law, Stewart had to

register and annually verify his current address for 10 years. Former R.C. 2950.06(B)(2) and R.C. 2950.07(B)(3).

{¶ 3} Effective January 1, 2008, Megan's Law was repealed and replaced with a new version of those laws, commonly known as the Adam Walsh Act ("AWA"). Pursuant to that Act, Stewart was automatically reclassified as a Tier II sexual offender. That classification required him to verify his current address every 180 days for 25 years. R.C. 2950.06(B)(2) and R.C. 2950.07(B)(2). Stewart did not contest his reclassification under the AWA.

{¶ 4} In 2009, a Franklin County Grand Jury indicted Stewart with one count of failing to verify his current address in violation of R.C. 2950.06. The indictment alleged that between August 6 and September 18, 2009, Stewart failed to verify his current address pursuant to R.C. 2950.04 and 2950.041. Stewart initially entered a not guilty plea to the charge. On November 30, 2009, however, Stewart withdrew that plea and entered a guilty plea to one count of failing to verify his current address. The trial court accepted Stewart's plea, found him guilty, and sentenced him to the jointly-recommended mandatory minimum prison term of three years. R.C. 2950.99. Stewart did not appeal his conviction.

{¶ 5} After his guilty plea, however, the Supreme Court of Ohio declared that reclassifications of previously-convicted sexual offenders (such as Stewart) under the AWA were unconstitutional. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424.¹ In light of that ruling, Stewart filed a motion pursuant to Crim.R. 32.1 to withdraw his guilty plea. Stewart argued that he should be allowed to withdraw his guilty plea because he was unconstitutionally reclassified under the AWA and, therefore, could not commit a violation of that Act. Additionally, Stewart claimed that under Megan's Law, the trial court would not have been required to sentence him to a mandatory three years in prison, but could have sentenced him to community control and that he could have been eligible for judicial release. The State opposed Stewart's motion.

{¶ 6} The trial court held a hearing to listen to the parties' arguments. At the hearing, Stewart's counsel argued that his client entered his guilty plea under the belief

¹ In a subsequent case, the Supreme Court of Ohio also concluded that the AWA could not be applied to sex offenders who committed an offense prior to its enactment. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, ¶ 22.

that his Tier II classification under the AWA was constitutional. Because the classification was not constitutional, counsel argued that it would be a manifest injustice if the trial court did not allow him to withdraw that plea. The State presented a variety of arguments in opposition to Stewart's motion. Specifically, the State argued that (1) Stewart waived his constitutional challenges to his classification by entering a guilty plea and by not asserting this defense earlier, (2) the *Bodyke* case could not be applied retroactively to Stewart's case, (3) res judicata barred the motion, (4) Stewart would still have been guilty of the charge even under Megan's Law, and (5) Stewart would have received a mandatory three-year sentence regardless of whether the AWA applied.

{¶ 7} The trial court, after expressing its animosity at laws that attempt to predict the future behavior of sexual offenders, granted Stewart's motion to withdraw his guilty plea. In doing so, the trial court did not expressly address any of the State's arguments. It concluded, however, that it must grant the motion, at least in part, because "[h]e is serving a three-year mandatory sentence in prison that never would have happened under Megan's Law." (Tr. 24.)

{¶ 8} The State appeals and assigns the following errors:

[I]. The common pleas court erred and abused its discretion when it sustained the motion to withdraw [guilty] plea without ruling on the state's arguments that defendant's constitutional challenges were not applicable to his case and were barred by waiver, forfeiture, and res judicata.

[II]. The common pleas court erred and abused its discretion when it found "manifest injustice" based on affirmative considerations contrary to controlling precedent and based on refusal to make a decision on whether defendant's arguments presented viable defenses to the charge or sentence.

II. The State's Assignments of Error-The Grant of a Motion to Withdraw Guilty Plea

{¶ 9} Because the State's two assignments of error both address the trial court's decision to grant Stewart's motion to withdraw, we will consider them together. This case requires the court to determine whether a criminal defendant who enters a guilty plea to a violation of a statute that was unconstitutionally applied to him may be allowed to withdraw that guilty plea.

A. Standard of Review

{¶ 10} Crim.R. 32.1 permits a motion to withdraw a guilty plea "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." "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶ 5.

{¶ 11} A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court. *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph two of the syllabus. Therefore, this court's review of a trial court's denial of a post-sentence motion to withdraw a guilty plea is limited to a determination of whether the trial court abused its discretion. *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780, ¶ 16, citing *State v. Peterseim*, 68 Ohio App.2d 211, (8th Dist.1980). An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Widder*, 146 Ohio App.3d 445, 2001-Ohio-1521, ¶ 6 (9th Dist.2001). Absent an abuse of discretion on the part of the trial court, its decision concerning a post-sentence motion to withdraw guilty plea must be affirmed. *State v. Xie*, 62 Ohio St.3d 521, 527 (1992).

{¶ 12} The trial court granted Stewart's motion after concluding that it must do so to correct a manifest injustice. The State argues that this decision was an abuse of discretion for two reasons. First, the State complains that the trial court failed to address its procedural arguments that defeat Stewart's claims. Second, the State contends that the trial court abused its discretion in concluding that a manifest injustice occurred.

B. Manifest Injustice and the Unconstitutional Application of the AWA to Stewart

{¶ 13} In 2004, Stewart was classified as a sexually oriented offender under Megan's Law. However, after Ohio replaced Megan's Law with the AWA, Stewart was automatically reclassified as an offender under that Act. Both laws required offenders to register and verify their addresses although the specific requirements under each statutory scheme were different. After his reclassification, Stewart was indicted for failing to verify his address. Stewart entered his guilty plea and was found guilty of that charge before the Supreme Court of Ohio held that the reclassification provisions of the AWA

could not be applied to an offender, like Stewart, who had previously been adjudicated under Megan's Law. *Bodyke* at ¶ 66.

{¶ 14} The Supreme Court of Ohio faced similar facts in *State v. Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481. *Gingell* had been adjudicated under Megan's Law and then reclassified under the AWA. After that reclassification, but before *Bodyke*, *Gingell* was indicted for failure to verify his address and to provide notice of an address change. Also before *Bodyke*, *Gingell* pled guilty to and was convicted of one count of failure to verify his address. On appeal, the Supreme Court of Ohio concluded that because *Gingell* was indicted after his reclassification but before *Bodyke*, there could be no doubt that he was indicted under the AWA and pled guilty to a violation of that Act. *Id.* at ¶ 8. The court vacated *Gingell*'s conviction for a violation of the AWA because the application of the AWA was based upon an unlawful reclassification. *Id.* See also *State v. Adkins*, 5th Dist. No. 2011CA00052, 2011-Ohio-5308, ¶ 18-19 (reversing conviction under AWA for failure to verify address, based on *Gingell*, where defendant was originally classified under Megan's Law); *State v. Godfrey*, 9th Dist. No. 25187, 2010-Ohio-6454, ¶ 7 (reversing conviction under AWA for failure to register and verify address where defendant originally classified under Megan's Law).

{¶ 15} We note that in *Gingell*, the defendant presented his claims in a direct appeal from his conviction. Here, Stewart seeks the same relief but through a motion to withdraw his guilty plea. In similar situations, however, the Eighth District Court of Appeals has concluded that trial courts do not abuse their discretion when they grant a defendant's motion to withdraw a guilty plea. *E.g.*, *State v. Caldero*, 8th Dist. No. 96719, 2012-Ohio-11. In those cases, the court has noted the injustice in finding someone guilty of a violation of the AWA's requirements when the AWA had been unconstitutionally applied to that person. *State v. Beasley*, 8th Dist. No. 96806, 2011-Ohio-6650, ¶ 11. This court, relying on the Eight District Court of Appeals cases, recently held that a trial court abused its discretion by denying a defendant's motion to withdraw guilty plea to a count of failure to verify an address under the AWA because the defendant was unconstitutionally reclassified under the AWA. *State v. Smith*, 10th Dist. 11AP-6, 2012-Ohio-465, ¶ 18.

{¶ 16} The State also argues that *Gingell* is distinguishable because Stewart's offense was not based on an "unlawful reclassification" under the AWA, but was based on his continuing registration and verification requirements under Megan's law. We disagree. *Gingell* makes it clear that an indictment filed after an offender's reclassification under the AWA but before *Bodyke* charges a violation of the AWA, not Megan's Law. *Gingell* at ¶ 8; *Beasley* at ¶ 10 (noting that Megan's Law requirements did not exist after enactment of AWA but before *Bodyke*). The State argues further that if Megan's Law did apply, Stewart would still be guilty of failing to verify his address under that law. It is true that Stewart remained accountable for the requirements of Megan's Law. *Id.* Whether he complied with the requirements of that law, however, is not before us. That will be determined by the trial court. *Caldero* at ¶ 14; *Gingell* at ¶ 8.

{¶ 17} Simply put, Stewart entered a guilty plea and was found guilty of violating a statute that was later determined to have been unconstitutionally applied to him. It is not an abuse of discretion for a trial court to conclude that this constitutes a manifest injustice sufficient to warrant the withdrawal of his guilty plea.

{¶ 18} The State also argues that the doctrine of res judicata prohibited the trial court from granting Stewart's motion to withdraw his guilty plea. We disagree. We acknowledge that res judicata may, in some circumstances, apply to bar claims asserted in a post-sentence motion to withdraw guilty plea. *See State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶ 60 (concluding that res judicata was a valid basis for rejecting claims raised in a motion to withdraw plea that were or could have been asserted in previous appeal); *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266, ¶ 7 (10th Dist.). However, as the Supreme Court of Ohio has noted, res judicata is a rule of fundamental and substantial justice, *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 25, citing *State v. Szefcyk*, 77 Ohio St.3d 93, 95, (1996), that "'is to be applied in particular situations as fairness and justice require, and that * * * is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice.'" *Id.*, quoting *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 386-87 (1995) (Douglas, J., dissenting). Thus, a trial court has discretion not to apply res judicata when to do so would result in injustice. This rule is consistent with the language of Crim.R. 32, which allows the post-sentence withdraw of a guilty plea only "to correct manifest injustice."

{¶ 19} For example, in *State v. Tinney*, 5th Dist. No. 2011 CA 41, 2012-Ohio-72, the appeals court affirmed a decision which granted a motion to withdraw a guilty plea that was, at least in part, based on the defendant's mental competency. The court noted that the defendant had raised the competency issue in two previous motions to withdraw. *Id.* at ¶ 11-15. The state argued that res judicata should bar the competency issue from being raised in defendant's third motion. The appeals court rejected the state's argument, applying the rule in *Simpkins* because it concluded that "[t]he confluence in this case of lingering concerns by some police officials of appellee's actual guilt and the issue of appellee's mental competency has, in our minds, at least heightened the possibility of an injustice done to appellee nearly twenty years ago." *Id.* at ¶ 31. Compare *State v. Greenleaf*, 9th Dist. No. 25848, 2012-Ohio-686, ¶ 8-9 (refusing to apply the *Simpkins* injustice exception to res judicata because defendant waited six years to raise issue).

{¶ 20} Not long after the trial court accepted Stewart's guilty plea to violations of the AWA, the Supreme Court of Ohio held in a number of cases that reclassifications under the AWA and the retroactive application of the AWA to offenders such as Stewart were unconstitutional. *Bodyke; Williams; Gingell*. Because the AWA requirements could not be applied to Stewart, he could not have violated those requirements. *Gingell*. Essentially, Stewart pled guilty to an offense that he could not have committed. Given these circumstances, we cannot say that the trial court abused its discretion when it granted Stewart's motion to withdraw his guilty plea to correct manifest injustice.

{¶ 21} Waiver would also not bar Stewart's claims, because the underlying basis of his indictment has been found to be unconstitutional. *State v. Brunning*, 8th Dist. No. 95376, 2011-Ohio-1936, ¶ 12. Additionally, even though the failure to raise a constitutional challenge in the trial court is generally a waiver of that challenge, such waiver is discretionary, and in criminal cases, an appellate court may review such claims even if they were not brought to the attention of the trial court. *State v. Miller*, 12th Dist. No. CA2011-04-028, 2012-Ohio-995, ¶ 40, citing *In re M.D.*, 38 Ohio St.3d 149, 151 (1988) (court reserves the right to consider constitutional issues not raised in "specific cases of plain error or where the rights and interests involved may warrant it"); see also *State v. Rush*, 83 Ohio St.3d 53, 59 (1998). We also reject the State's argument that

Bodyke could not be retroactively applied to Stewart's case. *State v. Eads*, 2d Dist. No. 24696, 2011-Ohio-6307, ¶ 20.

{¶ 22} Finally, we agree with the State that the mandatory three-year prison sentence Stewart received was the proper sentence for his violation. *See State v. Freeman*, 1st Dist. No. C-100389, 2011-Ohio-4357, ¶ 18 (current penalty provisions for failure to verify address effective January 1, 2008 properly applied to defendant's conduct that occurred after that date, even though sex offense that formed the basis for the verification requirements occurred before that date); *State v. Topping*, 12th Dist. No. CA2011-07-067, 2012-Ohio-2259, ¶ 18 (same, although noting conflict amongst various courts of appeals in Ohio on this issue). However, this point is of limited consequence because Stewart's sentence was only a part of the trial court's reasoning in finding a manifest injustice. As the trial court noted, "this man serves a three-year mandatory incarceration under a statute that has since been held to be unconstitutional by the Supreme Court and the Tenth District Court of Appeals. And I don't understand how that does not equate to manifest injustice." (Tr. 13.) Thus, the trial court found manifest injustice because Stewart's conviction was based upon the unconstitutional application of the AWA to him. This conclusion is not unreasonable, arbitrary, or unconscionable.

III. Conclusion

{¶ 23} For these reasons, we conclude that the trial court's manifest injustice finding was not an abuse of discretion. Accordingly, we overrule the State's two assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶ 24} Because I cannot agree that Stewart's guilty plea was invalidated by the subsequent decisions in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, and *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, and because I believe that the trial

court's failure to decide this precise question constitutes an abuse of discretion, I respectfully dissent from the majority's decision.

{¶ 25} At the outset, I believe the doctrine of res judicata prohibited Stewart from attacking his already final conviction for failure to verify based on the subsequent decisions in *Bodyke* and *Williams*. "It is well-established that the application of res judicata is mandatory, even if there is a subsequent change in the law by judicial decision." *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, ¶ 16 (8th Dist.), citing *State v. Szefcyk*, 77 Ohio St.3d 93, 95 (1996). A final judgment does not lose its preclusive res judicata effect whenever the statute upon which it is based is later declared invalid or unconstitutional. See *State v. Caldwell*, 2d Dist. No. 24333, 2012-Ohio-1091, ¶ 5; *State v. Bolds*, 96 Ohio App.3d 483 (9th Dist.1994) (guilty plea to municipal ordinance had res judicata effect even though ordinance was declared unconstitutional six months later by the Supreme Court of Ohio); *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940) (holding that a judgment based on a statute later found to be unconstitutional had res judicata effect). "Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

{¶ 26} The Supreme Court of Ohio's holdings in *Szefcyk* and *State v. Reynolds*, 79 Ohio St.3d 158 (1997), are particularly instructive in this regard. In *Szefcyk*, the defendant was convicted of involuntary manslaughter predicated on a minor-misdemeanor. *Id.* at 93. When he appealed arguing that a conviction for involuntary manslaughter cannot be predicated upon a minor misdemeanor, the court of appeals affirmed his conviction, and the Supreme Court of Ohio declined jurisdiction. *Id.* at 94. Two years later, the Supreme Court of Ohio answered a certified conflict on the exact same question and held that a minor misdemeanor *cannot* serve as the predicate offense for involuntary manslaughter. *Id.* at 95, citing *State v. Collins*, 67 Ohio St.3d 115 (1993). When the defendant filed a petition for postconviction relief based on this new judicial ruling, the Supreme Court of Ohio held that his petition was barred by res judicata, finding "no merit to [his] claim that res judicata has no application where there is a change in the law due to a judicial decision of this court." *Id.*

{¶ 27} In *Reynolds*, the defendant was originally convicted of aggravated robbery with a firearm specification. *Id.* at 159. Within one year after his conviction was affirmed by the Sixth District, the Supreme Court of Ohio decided two cases holding that a firearm specification requires independent proof of operability. *Id.* at 160. Because no such proof was required at the time of his conviction, the defendant filed a postconviction petition based on the new rulings. *Id.* However, the Supreme Court of Ohio held that his petition was barred by res judicata, reasoning that "there was nothing that precluded Reynolds from directly appealing the issues of operability of the firearm and the proof required to show operability." *Id.* at 162.

{¶ 28} The Second District has applied res judicata to arguments identical to those raised by Stewart, recognizing that a "pre-*Bodyke*, pre-*Williams* conviction for violating the AWA's registration requirements is, at best, an erroneous exercise of jurisdiction, meaning a legal error, [and] may not be collaterally attacked." *Caldwell* at ¶ 14. Although *Caldwell* involved a postconviction petition, " '[t]he doctrine of res judicata applies to issues raised in a motion to withdraw a guilty plea in the same way that the doctrine applies to issues raised in a petition for post-conviction relief.' " *State v. Hazel*, 10th Dist. No. 08AP-1002, 2009-Ohio-2144, ¶ 10, quoting *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266, ¶ 7 (10th Dist.); see also *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶ 59 (res judicata bars "the assertion of claims in a motion to withdraw a guilty plea that were or could have been raised at trial or on appeal").

{¶ 29} The majority agrees that the trial court did not address the state's res judicata argument but affirms the trial court's non-ruling based on a discretionary "injustice" exception. While I find the application of such an exception problematic in the context of post-sentence plea withdrawal, I believe the circumstances of this case do not justify any exception to the doctrine of res judicata, especially when compared to the facts in *Szefcyk* and *Reynolds*. Unlike those cases, the conduct to which Stewart pleaded guilty remains a crime under Megan's Law and, as explained below, remains subject to the same three-year penalty under 2007 Am.Sub.S.B. No. 97 ("S.B. 97"). Moreover, nothing prevented Stewart from raising the same constitutional challenges as those raised and later decided in *Bodyke* and *Williams*. It must be remembered that the doctrine of res judicata protects finality and serves vital public interests beyond case-by-case

determinations of equity. *Szefcyk* at 95, quoting *Federated Dept. Stores* at 401. "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989).

{¶ 30} Additionally, I disagree with the majority's reliance on *State v. Eads*, 2d Dist. No. 24696, 2011-Ohio-6307, for the proposition that *Bodyke* retroactively applies to already final convictions for failure-to-verify under the then-valid AWA. In *Eads*, the defendant was convicted of failure to register *after* *Bodyke* had already been decided, and his conviction was still pending on direct appeal at the time of the decision in *Williams*. *Eads* at ¶ 11. The question in *Eads* was therefore not whether *Bodyke* and *Williams* retroactively applied to the defendant's *conviction* for failure to register, but whether those decisions retroactively applied the defendant's initial Tier *classification*. *Eads* at ¶ 14.

{¶ 31} Next, I believe that the trial court abused its discretion by finding a "manifest injustice" based on the incorrect belief that the statute authorizing Stewart's mandatory sentence, current R.C. 2950.99, was part of the AWA amendments found unconstitutional in *Bodyke*. Contrary to the trial court's belief, the enhanced penalties in current R.C. 2950.99 resulted from S.B. 97—not the AWA. While the Supreme Court of Ohio declared aspects of the *reclassification* scheme of the AWA unconstitutional in *Bodyke* and *Williams*, it did not address or invalidate the enhanced *penalty* provisions codified in R.C. 2950.99, as amended by S.B. 97. *State v. Freeman*, 1st Dist. No. C-100389, 2011-Ohio-4357, ¶ 21; *see also* *State v. Poling*, 5th Dist. No. 2009-CA-00264, 2011-Ohio-3201; *State v. Topping*, 12th Dist. No. CA2011-07-067, 2012-Ohio-2259. As the majority correctly recognizes, the penalty provisions in current R.C. 2950.99 validly apply to registration and verification offenses committed after the effective date of that statute, January 1, 2008, even if the sex offense underlying the duty to verify was committed before.

{¶ 32} The majority acknowledges the trial court's error in this regard but maintains that this point is "of limited consequence" because the trial court also found a manifest injustice on the grounds that Stewart's "conviction was based upon the unconstitutional application of the AWA to him." (Majority Opinion, ¶ 22.) In my view, however, the only aspect of Stewart's "conviction" found invalid by the trial court was

Stewart's "three-year mandatory sentence." (Tr. 24.) As evidenced by the transcript of the hearing, the trial court expressed concerns that the AWA "implements a new penalty" that was found unconstitutional. (Tr. 13.) After the state replied that the penalties in R.C. 2950.99 were amended by S.B. 97, not the AWA, and had not been found unconstitutional, the trial court nevertheless found a "manifest injustice" based on the need to further investigate Stewart's *sentence*. In announcing its decision, the trial court provided the following rationale:

So, I don't know where we are, but I am going to grant defendant's motion to withdraw his guilty plea. You can set the case for trial whenever you want and we will take up all of these other issues at that time and we will proceed accordingly.

I think that the status of this law is in serious question, based not only on the Supreme Court decisions, but the Court of Appeals decisions. Whether [the state] wants to admit it or not, this man is a human being. *He is serving a three-year mandatory sentence in prison that never would have happened under Megan's Law, and we have a debate as to whether or not it should apply now.* And I think his *mandatory sentence raises the bar to a manifest injustice* if it isn't investigated and resolved.

So, therefore, under 32.1, I find that there is a manifest injustice and I am going to allow him to set aside his guilty plea. That will be all.

(Emphasis added.) (Tr. 24.)

{¶ 33} These statements, in my opinion, confirm that that the trial court found a manifest injustice based on its incorrect concern that the statute authorizing Stewart's mandatory sentence was invalid, a concern that the majority agrees was erroneous. The trial court did not decide whether *Bodyke* rendered Stewart's guilty plea invalid. In fact, the majority acknowledges that the trial court did not address the state's arguments as to why *Bodyke* did not invalidate Stewart's guilty plea. Therefore, I believe that the trial court's incorrect sentencing rationale constituted an abuse of discretion. I also find an abuse of discretion based on the trial court's failure to decide the dispositive arguments and questions regarding the validity and finality of Stewart's plea. *See State v. Green*, 10th Dist. No. 09AP-972, 2010-Ohio-3838, ¶ 32 (the failure to exercise discretion

necessarily constitutes an abuse of discretion); *Kaur v. Bharmota*, 10th Dist. No. 05AP-1333, 2006-Ohio-5782, ¶ 13 (same).

{¶ 34} For the above reasons, I believe that the trial court abused its discretion by granting Stewart's motion to withdraw guilty plea, and I would sustain the state's first and second assignments of error. Accordingly, I respectfully dissent.
