[Cite as *State v. DeJesus*, 2023-Ohio-2485.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	Nos. 112043 and 112193
MIGUEL DEJESUS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED AND REMANDED
RELEASED AND JOURNALIZED: July 20, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-662745-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Gregory J. Ochocki, Assistant Prosecuting Attorney, *for appellee*.

Flowers & Grube, Melissa A. Ghrist and Louis E. Grube, *for appellant*.

ANITA LASTER MAYS, A.J.:

{¶ 1} In this consolidated appeal, defendant-appellant Miguel DeJesus ("DeJesus") appeals the trial court's summary denial of DeJesus's postsentence motion to withdraw his guilty pleas without a hearing. DeJesus does not challenge

the entirety of the ruling but advances that allegations a defendant did not understand the nature of his pleas due to a language barrier establishes a potential manifest injustice requiring a hearing. DeJesus also challenges the imposition of the Reagan Tokes Law and an error in the sentencing judgment entry.

{¶ 2} We affirm the trial court's judgment, overrule the Reagan Tokes Law challenge, and remand for a nunc pro tunc correction to the sentencing entry.

I. Facts and Procedural History

{¶ 3} On August 27, 2021, DeJesus was indicted on four counts.

> Count 1, rape, a first-degree felony in violation of R.C. 2907.02(A)(1)(b), with a furthermore clause that DeJesus purposefully compelled the victim who was under the age of ten to submit by force or threat of force;
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> Count 2, aggravated burglary, a first-degree felony in violation of R.C. 2911.11(A)(1);
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> Count 3, endangering children, a second-degree felony in violation of R.C. 2919.22(B)(1), with a furthermore clause that the violation resulted in serious physical harm to the victim; and
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> Count 4, endangering children, a fourth-degree felony in violation of R.C. 2919.22(B)(1), with a furthermore clause that DeJesus was previously convicted of endangering children in 2003.

{¶ 4} The single alleged victim of all offenses was a four-year-old relative. DeJesus, whose native language is Spanish, was in his mid-70s at the time of the indictments, plea, and convictions. All proceedings were conducted in English. On February 2, 2022, DeJesus entered into a plea agreement. DeJesus pleaded guilty to an amended Count 1, sexual battery, R.C. 2907.03(A)(5), and to Count 3, as indicted. Counts 2 and 4 were dismissed at the state's request.

{¶ 5} On February 24, 2022, the sentencing hearing was conducted where it was revealed that DeJesus suffers from alcohol use disorder and has had issues with alcohol and the law since the 1980s. DeJesus was sentenced to an indefinite term of six-to-nine years on amended Count 1, and six years on Count 3 to run concurrently.[1] DeJesus was also designated a Tier III sex offender registrant.

{¶ 6} On August 25, 2022, DeJesus filed a pro se motion to withdraw his guilty plea pursuant to Crim.R. 32.1 for ineffective assistance of counsel and requested a hearing. DeJesus argued his plea was not knowingly, intelligently, and voluntarily made due to counsel's (1) failure to provide an interpreter as requested of counsel, (2) failure to investigate DeJesus's case or contact key witnesses, and (3) false promise of a two-to-four-year sentence to induce DeJesus's guilty plea. DeJesus and his adult daughter submitted supporting affidavits that confirmed DeJesus's native language is Spanish, his ability to speak and read English is limited, and that counsel said he would "look into" securing an interpreter.

{¶ 7} The state responded to the motion on August 30, 2022, but did not address the issue of an interpreter. The trial court summarily denied the motion on September 19, 2022, without holding an evidentiary hearing.

{¶ 8} DeJesus appealed the withdrawal denial on October 14, 2022, in 8th Dist. Cuyahoga No. 112043. This court granted DeJesus's motions for a transcript

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[1] The sentencing entry erroneously reflects that the sentences were imposed on amended Count 1 and dismissed Count 2, an issue addressed in the second assignment of error.

of proceedings at the state's expense and for appointment of counsel that were filed on October 14, 2022, and October 26, 2022, respectively. On December 5, 2022, appointed appellate counsel moved for leave to file a delayed appeal from the sentencing entry, and to consolidate the delayed appeal with 8th Dist. Cuyahoga No. 112043 filed by DeJesus. On December 6, 2022, appellate counsel moved to appoint an interpreter. This court appointed an English-Spanish translator to assist counsel's communications with DeJesus and consolidated Appeals Nos. 112043 and 112193.

II. Assignments of error

{¶ 9} DeJesus assigns the following errors:

I. The trial court erred by denying DeJesus's motion to withdraw his guilty plea without an evidentiary hearing despite supporting affidavits demonstrating that he needed an interpreter.

II. The trial court erred by sentencing DeJesus on a count to which he did not enter a guilty plea.

III. The trial court erred by sentencing DeJesus pursuant to the unconstitutional Reagan Tokes Law.

III. Discussion

A. Failure to hold a hearing

{¶ 10} A defendant's plea in a criminal case "must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). DeJesus claims that the alleged language barrier rendered his plea legally invalid,

and the affidavits submitted with the motion to withdraw demonstrate that he is entitled to an evidentiary hearing.

{¶ 11} A motion to withdraw a guilty plea is governed by Crim.R. 32.1 that states: "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." *Id.* "A trial court is not required to hold a hearing on every postsentence motion to withdraw a guilty plea." *State v. Simmons*, 8th Dist. Cuyahoga No. 109786, 2021-Ohio-1656, ¶ 16, 20, citing *State v. Norman*, 8th Dist. Cuyahoga No. 105218, 2018-Ohio-2929, ¶ 16; *State v. Vihtelic*, 8th Dist. Cuyahoga No. 105381, 2017-Ohio-5818, ¶ 11.

{¶ 12} "'A hearing is required * * * if the facts alleged by the defendant, accepted as true, would require that the defendant be allowed to withdraw the plea.'" *Simmons* at ¶ 20, quoting *Norman* at ¶ 16, quoting *Vihtelic* at ¶ 11. "'A defendant must establish a reasonable likelihood that a withdrawal of his plea is necessary to correct a manifest injustice before a court must hold an evidentiary hearing.'" *Id.*, quoting *State v. Tringelof*, 12th Dist. Clermont Nos. CA2017-03-015 and CA2017-03-016, 2017-Ohio-7657, ¶ 11, quoting *State v. Williams*, 12th Dist. Warren No. CA2009-03-032, 2009-Ohio-6240, ¶ 14.

{¶ 13} "Manifest injustice must be demonstrated by specific facts in the record or supporting affidavits submitted with the motion." *State v. D-Bey*, 8th Dist. Cuyahoga No. 109000, 2021-Ohio-60, ¶ 56, citing *State v. Geraci*, 8th Dist.

Cuyahoga Nos. 101946 and 101947, 2015-Ohio-2699, ¶ 10. "The burden is on the defendant." *Id.* at ¶ 55, citing *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus; Crim.R. 32.1.

{¶ 14} "'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. Stovall*, 8th Dist. Cuyahoga No. 104787, 2017-Ohio-2661, ¶ 17, quoting *State v. Williams*, 10th Dist. Franklin No. 03AP-1214, 2004-Ohio-6123, ¶ 5.

{¶ 15} "'[T]he good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court.'" *State v. Roberts*, 8th Dist. Cuyahoga Nos. 93439 and 93440, 2010-Ohio-1436, ¶ 8, quoting *Smith* at paragraph two of the syllabus. Consequently, this court reviews "a trial court's decision whether to hold a hearing on a postsentence motion to withdraw a guilty plea for an abuse of discretion." *Simmons*, 8th Dist. Cuyahoga No. 109786, 2021-Ohio-1656, at ¶ 20, citing *State v. Grant*, 8th Dist. Cuyahoga No. 107499, 2019-Ohio-796, ¶ 13. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 16} A criminal "defendant is entitled to hear the proceedings in a language he can understand." *State v. Pina*, 49 Ohio App.2d 394, 399, 361 N.E.2d 262 (2d Dist.1975). R.C. 2311.14 and Sup.R. 88 delineate the circumstances

mandating the appointment of a foreign language interpreter. A party may request an interpreter and a trial court has broad discretion to determine whether the services are necessary to allow meaningful participation by the party. *State v. Preciado*, 8th Dist. Cuyahoga No. 101257, 2015-Ohio-19, ¶ 9, citing *State v. Saah*, 67 Ohio App.3d 86, 95, 585 N.E.2d 999 (8th Dist.1990).

{¶ 17} As asserted in his withdrawal affidavit, DeJesus states that his native language is Spanish, he can speak and read English only to a certain degree, and needed an interpreter to explain the proceedings and the details of his case. Also, DeJesus asserts that he asked defense counsel for an interpreter who said he would inquire. DeJesus's daughter swore that she informed the attorney that English was not DeJesus's native language and, due to the legal terminology and nature of the case, an interpreter would be in her father's best interest.

{¶ 18} The state argues that the claims are supported only by self-serving affidavits by DeJesus and his daughter that are not supported by the record. According to the state, there is nothing in the transcript that reflects the need for an interpreter. The state also argues that the record establishes that DeJesus's reading and writing skills were not significantly below normal and that DeJesus did not indicate problems understanding English.

{¶ 19} DeJesus counters that all affidavits are inherently self-serving, and "[t]he fact that evidence or testimony is 'self-serving' is not a basis under any of the Ohio Rules of Evidence for excluding or ignoring evidence." *Bay v. Brentlinger Ents.*, 10th Dist. Franklin No. 15AP-1156, 2016-Ohio-5115, ¶ 28 (acknowledging that

"any affidavit by a party that is beneficial to that party is likely to be intrinsically self-serving."). Appellant's reply brief, p. 1-2.

{¶ 20} The state adds that the same judge that presided over the plea and sentencing denied the motion to withdraw and did so pursuant to the trial court's discretion to determine the credibility of the affidavits. *State v. Davis*, 8th Dist. Cuyahoga No. 110301, 2021-Ohio-4015, ¶ 17 ("When reviewing affidavits attached to the motion, the trial court may, in the exercise of its discretion, judge credibility when deciding whether to accept the affidavits as true statements of fact."). DeJesus rejoins that the trial court issued a summary denial despite the state's failure to respond to the language issue in its brief in opposition to the motion to withdraw; thus it cannot be assumed that the trial court recalled DeJesus's language proficiency five months after the proceedings.

{¶ 21} As to the state's argument that the record indicated DeJesus was proficient in English, DeJesus counters it also indicates that he was born in Puerto Rico in 1947, was raised there until moving to Cleveland in the 1940s, attended high school in Puerto Rico, and attended trade schools in the United States and Puerto Rico. He studied "auto mechanics, building maintenance, plumbing, electrical, and heavy equipment operations" which, DeJesus indicates, are not language focused. Finally, DeJesus emphasizes that the indication in the record that DeJesus did not have problems reading and writing did not specify in which language he was proficient.

{¶ 22} DeJesus suggests that this court has already determined that allegations a defendant was prevented from understanding the plea proceedings due to the lack of a translator "establishes the possibility of manifest injustice." *State v. Kiss*, 8th Dist. Cuyahoga Nos. 91353, 91354, 2009-Ohio-739, ¶ 18. In 1960, Kiss pleaded guilty to several crimes in two cases and was sentenced to concurrent terms.[2] In January 2008, Kiss moved to withdraw his guilty plea and "averred that at the time of his pleas, he barely spoke English, he did not have a translator and he did not understand the proceedings." *Id.* at ¶ 12. Kiss, a Hungarian native who had entered the country for political asylum, stated that he was having problems applying for citizenship and immigration issues after he served his prison term. The motion was denied prior to the state's response without a hearing or explanation.

{¶ 23} The focus in *Kiss* was the weight to be given the 48-year filing delay as a factor in considering a motion to withdraw. The court looked to *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, for guidance. Francis, a native of Jamaica who pleaded guilty and was sentenced in 1993, moved to withdraw her plea in 2002 on the ground that the trial court did not fully state the R.C. 2943.031(A) advisement and Francis did not understand that she would be unable to obtain United States citizenship because of the conviction. (Under R.C. 2943.03, the trial court must advise a defendant of "possible deportation, exclusion or denial of naturalization upon guilty or no contest pleas.")

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[2] The opinion does not state what offenses were involved and how long Kiss was incarcerated.

{¶ 24} The court held that (1) a trial court is required to give the warning in R.C. 2943.031(A) verbatim before accepting a guilty or no contest plea from a non-United States citizen, and (2) where the statute was not recited verbatim, an appellate court is required to exercise its discretion to determine whether the trial court taking the plea substantially complied with the statute. *Francis* at paragraphs one and two of the syllabus.

{¶ 25} However, *Kiss* concentrated on *Francis's* determination regarding the timeliness of the motion. The appellate court in *Francis* had determined that the undue delay in filing the motion "in and of itself justified the trial court's denial" of the motion. *Francis* at ¶ 37. The Ohio Supreme Court rejected that finding and stated, the "[t]imeliness of the motion is just one of many factors the trial court should take into account when exercising its discretion in considering whether to grant the motion." *Id.* at ¶ 40. Due to the "strong policy expressed within R.C. 2943.031(D)" the court determined timeliness was not a significant factor in the case. *Id.* at ¶ 41.

{¶ 26} The court stated that "Kiss's affidavit establishes the *possibility* of a manifest injustice" and "because there was no hearing* * * the record is silent as to the reason for the 'extreme delay.'" (Emphasis added.) *Kiss*, 8th Dist. Cuyahoga Nos. 91353 and 91354, 2009-Ohio-739, ¶ 18.[3]

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[3] R.C. 2943.031 was not an issue in *Kiss* because the statute was not effective until October 2, 1989, 29 years after his sentence, which may have been a factor in the court's decision to remand the case for a hearing.

{¶ 27} We do not find that *Kiss* stands for the premise that "when a post-sentence motion to withdraw a plea has been filed, allegations that a defendant did not understand the nature of his plea due to a language barrier establishes the possibility of manifest injustice requiring a hearing." Appellant's brief, p. 6. However, this court does agree with *Kiss's* observation that "[a] motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility, and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *Id*. at ¶ 10, quoting *Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph two of the syllabus.

{¶ 28} The original trial judge ruled on the motion to withdraw approximately five months after the plea and sentence. DeJesus's exchange with the trial court at those hearings indicates that DeJesus understood the proceedings. The trial court advised DeJesus at the beginning of the plea hearing that if he had any questions during the proceedings, "let me know and I'll clear it up for you. Likewise, if you would like to speak with your lawyers about something in private, just let me know and I'll make sure that happens as well. Does that sound like a plan?" DeJesus responded, "Yes, Your Honor." (Tr. 6.)

{¶ 29} Prior to DeJesus entering his plea of guilty in response to the trial court's statement that DeJesus could receive up to 16 years in prison, DeJesus responded, "So I'm 74 years old. And this thing, it's a life sentence." (Tr. 7.) The trial court explained that it was required to advise him of the "worst case scenario. Okay?" to which DeJesus responded, "Okay." (Tr. 8.) DeJesus answered, "Yes, Your

Honor" to the trial court's query as to whether he understood "what is happening here today." (Tr. 9.) DeJesus also said that it was "my decision" to change his plea and that he was satisfied with legal counsel. (Tr. 10.)

{¶ 30} Also discussed on the record:

Court: How far did you go in school?

DeJesus: I got trade, trade college.

Court: You spent some time in college?

DeJesus: Like doing mechanic, got a license.

Court: Let me ask you this; do you have a high school diploma?

DeJesus: Yes.

Court: So I can also assume that you have the ability to read and write okay?

DeJesus: Yes, Your Honor.

* * *

Court: Are you a U.S. citizen?

DeJesus: Yes, Your Honor.

(Tr. 8, 10.)

{¶ 31} The trial court explained the sentencing ranges for the charges and the impact of the Reagan Tokes Law on a given sentence, replete with hypotheticals. After each example, DeJesus confirmed that the trial court's mathematical calculation was correct. DeJesus was also advised of the Tier III registration requirement and possibility of a fine. DeJesus stated he understood, had no questions for the trial court, and did not need to speak privately with defense counsel

before continuing. At no point during the plea or sentencing did DeJesus indicate he did not understand or ask for an interpreter.

{¶ 32} As noted by the state, this court previously acknowledged that, in its review of the affidavits, "the trial court may, in the exercise of its discretion, judge credibility when deciding whether to accept the affidavits as true statements of fact." *Davis*, 8th Dist. Cuyahoga No. 110301, 2021-Ohio-4015, at ¶ 17. This court does not find that the trial court's denial of the motion was an abuse of discretion in this case.

{¶ 33} The first assigned error is overruled.

B. Sentencing Entry

{¶ 34} The parties agree that DeJesus was sentenced on Counts 1 and 3 but the sentencing entry reflects that he was sentenced on Counts 1 and 2. "'The function of a nunc pro tunc entry is not to change, modify, or correct erroneous judgments, but merely to have the record speak the truth.'" *State v. Kimmie*, 8th Dist. Cuyahoga No. 98979, 2013-Ohio-2906, ¶ 20, quoting *Ruby v. Wolf*, 39 Ohio App. 144, 147, 177 N.E. 240 (8th Dist.1931). A nunc pro tunc entry is properly used to reflect "what the court actually decided." *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19. The case is remanded for correction of the error by a nunc pro tunc entry.

{¶ 35} The second assignment of error is sustained.

C. Reagan Tokes

{¶ 36} DeJesus argues in the third assignment of error that the indefinite sentence imposed upon him under the Reagan Tokes Law is unconstitutional

because it violates the state and federal constitutional rights to a jury trial, due process guarantees, and the separation-of-powers doctrine. DeJesus acknowledges that, based on the authority established by this district's en banc holding in *State v. Delvallie*, 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.), the challenges DeJesus advances against the constitutional validity of the Reagan Tokes Law have been overruled. *See id.* at ¶ 17-54. DeJesus advises that the arguments have been advanced to preserve DeJesus's claims for further review.

{¶ 37} The third assignment of error is overruled.

IV. Conclusion

{¶ 38} The trial court's judgment is affirmed. The case is remanded for the limited purpose of entering a nunc pro tunc order to correct the sentencing judgment entry pursuant to this opinion.

It is ordered that 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. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for issuance of a nunc pro tunc entry and execution of sentence.

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, ADMINISTRATIVE JUDGE

KATHLEEN ANN KEOUGH, J., and
LISA B. FORBES, J., CONCUR

N.B. Administrative Judge Anita Laster Mays is constrained to apply *Delvallie's* en banc decision. For a full explanation of her analysis, *see State v. Delvallie*, 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.) (Laster Mays, J., concurring in part and dissenting in part).

Judge Lisa B. Forbes is constrained to apply *Delvallie*. For a full explanation, *see State v. Delvallie*, 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.) (Forbes, J., dissenting).