[Cite as *State v. Walton*, 2023-Ohio-2879.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 112235
v.	:	
KAREEM WALTON,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: August 17, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-16-607989-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anthony T. Miranda, Assistant Prosecuting Attorney, *for appellee*.

Patituce & Associates, LLC, Joseph C. Patituce, and Megan M. Pattituce, *for appellant*.

ON SUA SPONTE RECONSIDERATION[1]

MICHAEL JOHN RYAN, J.:

{¶ 1} Upon review, this court sua sponte reconsiders its decision in this case. After reconsideration, the opinion as announced by this court on July 6, 2023, *State v. Walton*, 8th Dist. Cuyahoga No. 112235, 2023-Ohio-2307, is hereby vacated and substituted with this opinion.[2]

Procedural and Factual History

{¶ 2} Defendant-appellant Kareem Walton appeals from the trial court's November 21, 2022 judgment denying his motion to withdraw his plea. After a thorough review of the record and pertinent law, we reverse and remand.

{¶ 3} This case arose from an early morning July 2016 incident during which Walton, who was 20 years old at the time, crashed his vehicle into a tree. Five teen-aged passengers were in the vehicle with him at the time. All five victims were injured and three of them died from the injuries they sustained.

{¶ 4} Walton was charged with three counts of aggravated vehicular homicide, second-degree felonies in violation of R.C. 2903.06(A)(1)(a); three counts

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[1] The original decision in this appeal, *State v. Walton*, 8th Dist. Cuyahoga No. 112235, 2023-Ohio-2037, released on July 6, 2021, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. *See* App.R. 22(C); *see also* S.Ct.Prac.R. 7.01.

[2] "[B]y virtue of the jurisdiction conferred by Section 3(B), Article IV, Ohio Constitution, courts of appeals also have inherent authority in the furtherance of justice, to reconsider their judgments sua sponte." *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 594 N.E.2d 616 (1992), citing *Tuck v. Chapple*, 114 Ohio St. 155, 151 N.E. 48 (1926).

of aggravated vehicular homicide, third-degree felonies in violation of R.C. 2903.06(A)(2)(a); two counts of aggravated vehicular assault, third-degree felonies in violation of R.C. 2903.08(A)(1)(a); two counts of aggravated vehicular assault, fourth-degree felonies in violation of R.C. 2903.08(A)(2)(b); and driving under the influence of alcohol or drugs, a first-degree misdemeanor in violation of R.C. 4511.19(A)(1)(a).

{¶ 5} The record demonstrates that Walton was transported from the scene of the accident to a hospital, where blood-alcohol tests were administered. During discovery, the state provided defense counsel with Walton's medical records, which demonstrated that Walton had a blood-alcohol content of .031. Counsel filed a motion to suppress the results of the tests contained in those records.

{¶ 6} A suppression hearing was held in June 2017. The parties stipulated that (1) blood draws were taken from Walton after being admitted to the hospital for his injuries sustained in the incident; (2) the blood was properly maintained for purposes of analysis; (3) the state did not need to call the person who drew the blood; (4) there was no chain of custody issue with any documented substance analysis result based on those blood draws; and (5) the blood work results were "authentic and admissible." Walton's contention at the hearing was that the blood results were unreliable and that the test could have yielded a "false positive." More specifically, Walton argued that the results were incorrect because severe trauma could release chemicals in the blood that would lead to a false positive or elevated test result for the presence of alcohol in the bloodstream.

{¶ 7} The state presented the expert witness testimony of Dr. Christine Schmotzer. Dr. Schmotzer testified as to how the test used by the hospital's lab measured a byproduct of enzymatic reaction and how that result is reduced by a variance factor and then converted to blood-alcohol content. She opined that, in this case, Walton's blood-alcohol content was at least 0.028 mg/dl, which was greater than the 0.02 mg/dl legal limit for drivers between the age of 18 and 21 years old.

{¶ 8} Dr. Schmotzer addressed Walton's contention that lactic acid and other byproducts released in the body as a result of trauma would elevate the results of the test used by the lab. According to Dr. Schmotzer, the test she used was less susceptible to that interaction, but she could not quantify the level of interference. Dr. Schmotzer testified that some studies demonstrated the generation of chemicals as the result of trauma that interfere with the test, while other studies did not. Dr. Schmotzer opined that, within a reasonable degree of scientific certainty, the results demonstrated that Walton's blood-alcohol level was above 0.02 mg/dl for whole blood as prohibited under R.C. 4511.19.

{¶ 9} Walton presented an expert, Dr. Fred Staubus. Dr. Staubus disagreed with Dr. Schmotzer's analysis and opined that Walton's results were actually under the legal limit. According to Dr. Staubus, the test results were so close to the legal limit that the results were within the bounds of susceptibility of interference from trauma. Thus, Dr. Staubus opined the tests could not show beyond a reasonable doubt that Walton was above the legal limit set forth in R.C. 4511.19.

{¶ 10} The trial court held that the issue of interference was a weight-of-the-evidence determination for a jury and denied Walton's motion to suppress. Trial was set for the following day. The parties appeared, and the state put its plea offer on the record: plead guilty to the indictment with a merger of some counts and a joint recommendation of an aggregate sentence not in excess of 25 years. Walton expressed his desire to go forward with a trial. However, after a brief recess during which Walton consulted with his mother, he accepted the state's plea offer. The trial court engaged in a plea colloquy with Walton and thereafter accepted his plea as knowingly, voluntarily, and intelligently made.

{¶ 11} At sentencing, the trial court imposed an aggregate prison term of 25 years, which included consecutive sentences.

{¶ 12} Walton, pro se, filed a direct appeal and sought appointment of appellate counsel. *State v. Walton*, 8th Dist. Cuyahoga No. 106103, 2018-Ohio-1963 ("*Walton I*"). This court granted Walton's motion and appointed counsel. Appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and a motion for leave to withdraw as counsel. In the *Anders* brief, appointed counsel identified two potential issues to raise on appeal: (1) whether appellant knowingly, intelligently, and voluntarily pled guilty; and (2) did the trial court abuse its discretion in imposing consecutive sentences. This court held counsel's motion to withdraw in abeyance pending an independent review of the record and subsequently ordered Walton to file a pro se brief. Walton complied, and in his brief, he raised two assignments of error. In his first

assignment of error, Walton contended that the state breached the terms of the plea agreement by seeking maximum, consecutive terms. In his second assignment of error, Walton contended that the trial court erred by considering his juvenile record in determining his sentence.

{¶ 13} This court reviewed assigned counsel's potential assignments of error, as well as Walton's assignments of error, and found them to be without merit. *Walton I* at ¶ 13, 19, 26. Accordingly, this court granted appointed counsel's motion to withdraw and affirmed Walton's conviction and sentence. *Id.* at ¶ 27-28.

{¶ 14} Walton filed an App.R. 26(B) application to reopen his appeal. *State v. Walton*, 8th Dist. Cuyahoga No. 106103, 2018-Ohio-4021 ("*Walton II*"). Walton proposed a single assignment of error alleging that his appellate counsel was ineffective for "failing to raise abuse of discretion by the lower court when it denied appellant's motion to suppress." *Id.* at ¶ 3. Walton contended that appellate counsel, instead of filing an *Anders* brief, should have challenged the trial court's finding that the suppression issues went to the weight of the evidence. This court disagreed and denied Walton's application:

> There is no indication that the trial court erred in determining that the arguments raised were an attack on the credibility of the evidence, not its admissibility. Both expert witnesses testified that the test used in the hospital laboratory could generally determine the presence of alcohol in a blood sample, but they disagreed on the meaning of the results and whether the results indicated, within a reasonable degree of scientific certainty, what Walton's blood alcohol content was at the time the sample was analyzed. This goes to the weight of the evidence. Walton's expert disagreed with the findings of the state's witness and indicated that a further reduction in the result should have been

> factored in as a result of chemicals that the body produces during trauma that could elevate the results.
>
> Again, this goes to the credibility of the evidence and the weight that the finder of fact should give it. Walton did not demonstrate that the test was sufficiently unreliable that the results should be excluded. Therefore, Walton has not demonstrated a colorable claim of ineffective assistance of appellate counsel.

Walton II at ¶ 13-14.

{¶ 15} In March 2022, Walton filed a motion to withdraw his plea, which the state opposed. The trial court held a hearing on the motion, at which Walton called his trial counsel as a witness. The trial court allowed the parties to file post-hearing briefs and thereafter issued a decision denying Walton's motion. As ground for the denial, the trial court stated that it was without jurisdiction and cited *State v. Simmons*, 8th Dist. Cuyahoga No. 109786, 2021-Ohio-1656. Walton now appeals, raising the following two assignments of error for our review:

> I. The trial court abused its discretion in denying Mr. Walton's Motion to Withdraw Plea pursuant to Crim.R. 32.1 based on the finding that the trial court lacked jurisdiction pursuant to *State v. Simmons*, 8th Dist. Cuyahoga No. 109786, 2021-Ohio-1656, and *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 378 N.E.2d 162 (1978).
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> II. The trial court abused its discretion by denying Mr. Walton's Motion to Withdraw Plea based on the ineffective assistance of counsel supported by newly discovered evidence.

Law and Analysis

{¶ 16} Crim.R. 32.1, which governs withdrawals of guilty pleas, 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." On a motion to withdraw a plea after sentencing, the defendant has the burden of showing the existence of a manifest injustice. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. Manifest injustice has been described as a "clear or openly unjust act," *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998), that is evidenced by "an extraordinary and fundamental flaw in the plea proceeding." *State v. Hamilton*, 8th Dist. Cuyahoga No. 90141, 2008-Ohio-455, ¶ 8; *see also State v. Vinson*, 2016-Ohio-7604, 73 N.E.3d 1025, ¶ 41 (8th Dist.). Thus, a postsentence withdrawal of a guilty plea is permitted "only in extraordinary cases." *State v. Rodriguez*, 8th Dist. Cuyahoga No. 103640, 2016-Ohio-5239, ¶ 22.

{¶ 17} We review a trial court's denial of a motion to withdraw a guilty plea for an abuse of discretion. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). An abuse of discretion occurs when a court exercises its judgment in an unwarranted way regarding a matter over which it has discretionary authority. *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 35.

{¶ 18} In *Special Prosecutors*, 55 Ohio St.2d 94, 378 N.E.2d 162, the Supreme Court of Ohio held that "Crim.R. 32.1 does not vest jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent to an appeal and an affirmance by the appellate court." *Id.* at 97-98. A trial court cannot "vacate a judgment which has been affirmed by the appellate court, for this action would affect the decision of the reviewing court, which is not within the power

of the trial court to do." *Id.* at 98. This court adopted the Supreme Court's holding, stating that "a trial court has no jurisdiction to consider a defendant's motion to withdraw his or her guilty pleas under Crim.R. 32.1 after a court of appeals has affirmed the defendant's convictions." *Simmons*, 8th Dist. Cuyahoga No. 109786, 2021-Ohio-1656, at ¶ 21; *see also State v. Lewis*, 8th Dist. Cuyahoga No. 110448, 2022-Ohio-70, ¶ 11.

{¶ 19} However, since *Special Prosecutors*, the Supreme Court of Ohio has reversed course. First, in *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, the court elaborated on *Special Prosecutors* as follows:

> We take this opportunity to specify that the holding in *Special Prosecutors* does not bar the trial court's jurisdiction over posttrial motions permitted by the Ohio Rules of Criminal Procedure [after an appeal and affirmance of conviction]. These motions provide a safety net for defendants who have reasonable grounds to challenge their convictions and sentences. The trial court acts as the gatekeeper for these motions and, using its discretion, can limit the litigation to viable claims only.

Davis at ¶ 37.

{¶ 20} Second, more recently in *State ex rel. Davis v. Janas*, 160 Ohio St.3d 187, 2020-Ohio-1462, 155 N.E.3d 822, the court stated that although "[g]enerally, a trial court loses jurisdiction to modify its judgment once that judgment has been affirmed on appeal[,] * * * [r]elief from final judgments in criminal cases is confined to the procedures authorized by statute or rule." *Id.* at ¶ 11, citing *Special Prosecutors* and *Davis*. The *Janas* Court specifically listed a Crim.R. 32.1

motion to withdraw a guilty plea as a vehicle for seeking relief from a final judgment. *See Janas* at *id.*, fn. 3.

{¶ 21} Here, the trial court denied Walton's motion to withdraw his plea, citing a lack of jurisdiction; therefore, it did not consider the merits of the motion. In light of *Davis* and *Janas*, the trial court did have jurisdiction to consider the merits of Walton's motion to withdraw his plea. We therefore reverse the trial court's judgment and remand the case for further proceedings.[3]

{¶ 22} Judgment reversed and remanded.

It is ordered that appellant recover from appellee 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.

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[3] Walton has filed a motion for en banc consideration of this case, contending it conflicts with the decision issued in *State v. Brown*, 8th Dist. Cuyahoga No. 112027, 2023-Ohio-2064. In opposition to Walton's en banc motion, the state requests that if we do find that the trial court had jurisdiction, we consider the merits of Walton's grounds for his motion to withdraw his plea and overrule them. Because the trial court denied Walton's motion solely on the jurisdictional ground, we remand for the trial court to first consider the merits of his motion to withdraw his plea. *See Roush v. Butera*, 8th Dist. Cuyahoga No. 97463, 2012-Ohio-2506, ¶ 27 ("As an appellate court, we do not consider arguments that the trial court did not address.").

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MICHAEL JOHN RYAN, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EMANUELLA D. GROVES, J., CONCUR