

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

THE CITY OF CONNEAUT,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2008-A-0072
PATRICK T. DONOFRIO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Conneaut Municipal Court, Case No. 08 CRB 466.

Judgment: Affirmed.

Lori B. Lamer, Conneaut Law Director, and *Luke P. Gallagher*, Assistant Law Director, City Hall Building, 294 Main Street, Conneaut, OH 44030 (For Plaintiff-Appellee).

Brett R. Joseph, Joseph Law Services, Co., L.P.A., 293 Main Street, Conneaut, OH 44030 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Patrick T. Donofrio, appeals the judgment of the Conneaut Municipal Court, denying his Motion to Set Aside Conviction and Withdraw No Contest Plea Based on Newly Discovered Evidence or in the Alternative for Post-Conviction Relief. For the following reasons, we affirm the decision of the court below.

{¶2} On August 25, 2008, a Complaint was filed against Donofrio, alleging that “Donofrio, on or about the 20th day of August, 2008, in the City of Conneaut, did own,

keep, possess, harbor, maintain, or had the care, custody, or control of a dog, that bit or otherwise caused physical harm to any person, domestic animal or feline while said dog was off the premises of the owner, namely: a dog, in violation of Section 505.14(c)(4) of the Codified Ordinances of the City of Conneaut, Ohio.” In a separate Complaint, Donofrio was charged with violating Section 505.14(c)(2), for failing to confine a vicious and dangerous dog.

{¶3} On October 7, 2008, Donofrio entered a negotiated plea of no contest to violating Section 505.14(c)(4), a first degree misdemeanor. The municipal court sentenced Donofrio to thirty days in the Conneaut City Jail, but suspended the sentence provided he successfully complete five years of unsupervised Community Control; pay all fines and costs, including \$297 in restitution to the victim; and his dog be destroyed.

{¶4} On October 15, 2008, Donofrio filed, pursuant to Crim.R. 32.1, a Motion to Set Aside Conviction and Withdraw No Contest Plea Based on Newly Discovered Evidence or in the Alternative for Post-Conviction Relief. As the basis for the Motion, Donofrio claimed to have “newly discovered eyewitness evidence,” which “could not with reasonable diligence have [been] discovered and produced at the time of the trial scheduled for October 7, 2008.” In the alternative, Donofrio requested the municipal court to “deem this motion a petition for post-conviction relief in accordance with Crim.R. 35 and Section 2953.21 of the Ohio Revised Code.”

{¶5} Attached to Donofrio’s motion was the affidavit of Keith Drennen. Drennen swore that, on the night in question, he was driving his vehicle northbound on Harbor Street in Conneaut. As he approached the intersection with Poplar Street, he saw Donofrio walking his dog on a leash “on or very near the sidewalk.” Drennen then

saw another dog come running across a grassy yard and jump onto Donofrio's dog. Drennen did not know whether the dogs were playing or fighting. Drennen only witnessed the encounter for a period of "three or four seconds." Drennen did not claim to know Donofrio personally, but recognized him from a local bar both men frequented.

{¶6} On October 21, 2008, a hearing was held on Donofrio's Motion. At the hearing, Donofrio's counsel conceded that Donofrio was not on his property at the time of the incident in which his dog inflicted physical injuries on the victim's dog.

{¶7} On October 22, 2008, the municipal court denied Donofrio's Motion. The court noted that Donofrio disputed the City's claims that his dog was unleashed and that the victim's dog was chained at its owner's residence. The court concluded that, even accepting Drennen's testimony, all the essential elements for a violation of Section 505.14(c)(4) existed: "1. That the defendant was the owner of the dog that is the subject matter of this case. 2. That on August 20, 2008, the Defendant and his dog were not on their premises and were out for a walk. 3. That while on the walk on August 20, 2008, the Defendant's dog bit and otherwise caused physical harm to another dog, and that the other dog suffered such severe injuries that it was euthanized. 4. That the events occurred within the City of Conneaut, Ohio."

{¶8} On November 14, 2008, Donofrio filed his Notice of Appeal and raises the following assignments of error:

{¶9} "[1.] The trial court erred to the prejudice of defendant-appellant in overruling his motion to set aside conviction and withdraw 'no contest' plea based on newly discovered evidence."

{¶10} “[2.] The trial court erred to the prejudice of defendant-appellant in overruling his motion for post-conviction relief.”

{¶11} “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.” Crim.R. 32.1. The phrase “manifest injustice” has been “variously defined,” however, “it is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases.” *State v. Smith* (1977), 49 Ohio St.2d 261, 264 (citation omitted); *State v. Goist*, 11th Dist. No. 2003-T-0135, 2004-Ohio-3926, at ¶15 (citation omitted).

{¶12} “A defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice.” *Smith*, 49 Ohio St.2d 261, at paragraph one of the syllabus. “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 paragraph two of the syllabus.

{¶13} Donofrio argues that the municipal court failed to give “full and fair consideration” of the affidavit submitted in support of his Motion to Withdraw No Contest Plea and the possibility of affirmative defenses to the charge.

{¶14} Section 505.14(c)(4) of the Conneaut Codified Ordinances provides: “Any person owning, keeping, possessing, harboring, maintaining or having the case, custody or control of a dog shall be strictly liable if such dog is found to *** [b]ite or otherwise cause physical harm to any person, domestic animal or feline, while the dog

is off the premises of the owner, or while on premises which are not exclusively controlled by the owner.”

{¶15} “It shall be an affirmative defense to a violation of Section 505.14(c) that the dog was: A. Securely confined in an automobile or case which was adequately ventilated. B. Being used for lawful hunting purposes. C. Being exhibited at a public dog show, zoo, museum, or public institution. D. Engaged in any activity approved by the laws of the State.” Section 505.14(d)(1) of the Conneaut Codified Ordinances.

{¶16} According to Donofrio, the fact that his dog bit another dog does not mean “per se” that he “failed to control his dog,” since the “possibility [exists] that a dog under control via a leash, while walking, could be attacked by another dog not under control of its owner.” We disagree.

{¶17} The Conneaut Ordinance states that a dog owner is “strictly liable” if his dog bites another dog off the owner’s premises.¹ Donofrio admitted to committing all the essential elements of the crime, as correctly noted by the municipal court. The substance of Drennen’s affidavit does not contradict the basic facts established by the lower court. Cf. *Akron v. Ross*, 9th Dist. No. 20338, 2001 Ohio App. LEXIS 3083, at *30-*31 (“Ms. Ross stipulated that she was the owner of the dog and that it was not on her property. Hence, the only remaining element is whether the dog bit Mr. Allen. Mr. Allen testified that the dog bit him repeatedly.”).

{¶18} Moreover, an offender is typically not allowed to withdraw a guilty plea, postsentence, based on a claim of innocence or, as here, mitigating circumstances where there is no that claim that the plea was defective for not being knowingly, intelligently or involuntarily made. *State v. Zimmer*, 8th Dist. No. 90846, 2008-Ohio-

1. The constitutionality or propriety of the ordinance was not questioned and is not before this court.

6953, at ¶23, citing *State v. Stumpf* (1987), 32 Ohio St.3d 95, 104-105 (“[the appellant] cannot now claim his innocence, because ‘a counseled plea of guilty to a charge removes the issue of factual guilt from the case’”); *State v. Dudas*, 11th Dist. Nos. 2008-L-081 and 2008-L-082, 2008-Ohio-7043, at ¶39.

{¶19} In the present case, Donofrio claims he has “new” evidence that his dog was leashed while the victim’s dog was unleashed and attacked his dog. This claim, however, was known to Donofrio when he entered his no contest plea because Donofrio was walking the dog at the time. Where the essential elements of the charge have been admitted and no viable affirmative defense is demonstrated, an offender has failed to establish the existence of a manifest injustice to support the withdrawal of a no contest plea. The municipal court did not abuse its discretion by denying Donofrio’s Motion.

{¶20} The first assignment of error is without merit.

{¶21} Under the second assignment of error, Donofrio asserts the municipal court erred by failing “to separately entertain the motion for post-sentencing relief as an alternative to the relief sought under Rule 32.1.” Again, we disagree.

{¶22} Donofrio did not establish an independent basis for the request for postconviction relief but, rather, relied on the affidavit and arguments raised relative to the withdrawal of his plea. These arguments do not establish that Donofrio has suffered “a denial or infringement of the [his] rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States” any more than they demonstrated a manifest injustice. R.C. 2953.21(A)(1)(a); *State v. Bush*, 96 Ohio St.3d

235, 2002-Ohio-3993, at ¶14 (“[p]ostsentence motions to withdraw guilty or no contest pleas and postconviction relief petitions exist independently”).

{¶23} The second assignment of error is without merit.

{¶24} For the foregoing reasons, the judgment of the Conneaut Municipal Court, denying Donofrio’s Motion to Set Aside Conviction and Withdraw No Contest Plea Based on Newly Discovered Evidence or in the Alternative for Post-Conviction Relief, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.