[Cite as *State v. Williams*, 2011-Ohio-1864.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-G-2973**
- vs -	:	
MARK A. WILLIAMS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Chardon Municipal Court, Case No. 2008 CRB 00580.

Judgment: Affirmed.

Dennis M. Coyne, City of Chardon Prosecutor, 1428 Hamilton Avenue, Cleveland, OH 44114-1106 (For Plaintiff-Appellee).

Mark A. Williams, pro se, 1217 West River Road, North, #C-3, Elyria, OH 44035 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Mark A. Williams, appeals from the April 27, 2010 judgment entry of the Chardon Municipal Court denying his pro se request to vacate his guilty plea.

{¶2} In 2008, appellee, the state of Ohio, filed complaints against appellant charging him with menacing by stalking, a misdemeanor of the first degree, in violation of R.C. 2903.211; assault, a misdemeanor of the first degree, in violation of R.C. 2903.13(A); aggravated menacing, a misdemeanor of the first degree, in violation of

R.C. 2903.21(A)(1); and menacing, a misdemeanor of the fourth degree, in violation of R.C. 2903.22(A). Appellant pled guilty to assault. The remaining charges were dismissed pursuant to a plea agreement.

{¶3} Pursuant to its April 16, 2009 judgment entry, the trial court sentenced appellant to 180 days in jail, with 150 days suspended, and 5 years probation. The trial court also ordered appellant to pay a $500 fine. On April 23, 2009, the trial court granted appellant work release.

{¶4} On April 2, 2010, appellant filed a pro se request to vacate his guilty plea. The state filed a brief in opposition on April 23, 2010.

{¶5} Pursuant to its April 27, 2010 judgment entry, the trial court denied appellant's pro se request to vacate his guilty plea. It is from that judgment that appellant filed a timely pro se appeal, asserting the following assignments of error for our review:

{¶6} "[1.] The trial court erred in neither granting the requested relief nor holding a hearing on defendants [sic] request when informed with the April 2nd 2010 letter (t.d. 58, note to court, numbered docket statement has no dates attached, making it very hard to determine what is the proper docket number) requesting the vacating of his conviction because credible evidence had been recently uncovered showing that a breach of trust had occurred and that in fact the defendant was lied to by his counselor regarding the existence of an agreement with the prosecutor for the defendant to avoid jail time (see defendants' [sic] recorded evidence) in return for pleading guilty to an assault that did not occur and he was not accused in the original complaint of committing. In addition defendant has recently discovered evidence in existing Appeals

Court [sic] rulings that his counselor, Brandon Henderson, was not only dishonest but also incompetent in that the charges against defendant should clearly have been fought on the grounds of those court rulings and not bargained to.

{¶7} "[2.] The trial court erred in it's [sic] sentencing hearing by violating defendants [sic] constitutional rights when it failed to ask him if he understood the charges and consequences of his guilty plea as required under the stated rules of court and the Ohio Criminal Rule 11(E).

{¶8} "Further upon defendants [sic] first hearing from the magistrate that he would be sentenced to jail time right after pleading guilty, court dismissed defendants' [sic] subsequent denial of an assault and protest of being sentenced to jail by telling him 'your time to speak is over'. Therefore the court was aware at the time that defendant was duped into believing an agreement existed.

{¶9} "In addition when repeatedly requested the trial court did not and still has not produced the video transcript of the sentencing to review the proceedings and verify that this violation of defendants [sic] rights in court did indeed occur. The burden is on the court to show they followed the law and maintained defendants [sic] rights.

{¶10} "[3.] When initially faced with two charges, one of trespassing and another of menacing by stalking, defendant was brought before the Judge to hear the charges and enter his not guilty plea. Months later, to put more pressure on the defendant, new charges were added. The defendant was never properly informed of exactly what those charges were and was in fact misinformed by his counselor as to the exact nature of those charges.

{¶11} "Nor did defendant have an opportunity to go before the court before the actual trial to hear the new charges and enter his plea to them. This lack of knowledge of all the charges along with his anxiety facilitated his being pressured into pleading to something he should not have even been charged with and by denying him awareness of all his options if he was to settle.

{¶12} "[4.] The trial court showed it's [sic] prejudice in taking a plea (under protest) of guilty to an assault and instead producing a document (t.d. 45 or 52) to the effect that defendant had plead guilty to the charge of menacing by stalking.

{¶13} "Without the existence of a record or transcript of the hearing the court is virtually free to claim whatever suits them happened and was plead to at the hearing, in effect a phantasy [sic] court.

{¶14} "[5.] Having heard defendants [sic] disagreement and objection to being sentenced to jail time the trial court erred [in] not informing defendant of his right to appeal no matter the cost of such appeal.

{¶15} "Upon leaving the courtroom after sentencing defendant had a short and tense conversation with his counselor and complained of his counselors [sic] failure to make sure the magistrate was a party to the purported plea agreement and reminding counselor Henderson of the arguing and reluctance defendant had to pleading to something he did not do, how betrayed defendant felt and expressing how he never should have been badgered into pleading to something he was not even accused of doing and asking why his counselor had failed to object to the magistrates [sic] decision. Defendant's counselor blamed the outcome on the magistrate and stated that he could

not have foreseen the magistrate doing something so extraordinary having known the defendant had not assaulted anyone.

{¶16} "When inquiring about appealing this injustice defendants [sic] counselor told him that appeals cost 8000.00 dollars (knowing that defendant can not [sic] afford that) and quickly assured defendant that a motion to mitigate would be filed because he should not have to serve the sentence and also work release would be requested just in case relief from serving the jail time was not granted. Shortly after that the defendants [sic] counselor excused himself because he said he had to leave for another appointment and that defendant would be updated by phone. This statement by the counselor Brandon Henderson, telling defendant that in lieu of an appeal he would file a motion to have the sentence terminated and the purported regret of the prosecutor of defendants [sic] jail sentence is reprised and available to the court in transcript form or an audio copy of the actual recorded message left by attorney Henderson on defendants [sic] answering machine along with another recording in which the existence of the supposed agreement is stated.

{¶17} "After talking him into a guilty plea for something he did not do defendants' [sic] lawyer went on to dissuade him from filing an appeal. Had the trial court, having heard defendants [sic] objection to the sentence imposed, advised him of his right to appeal no matter the cost, defendant would not have fallen prey to being misinformed by his counselor. In addition defendant should have been properly informed about the actual likely hood [sic] of getting the sentence terminated with a motion to mitigate."

{¶18} Preliminarily, we note that Crim.R. 32.1 governs the withdrawal of a guilty plea and 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."

{¶19} Motions to withdraw a plea post-sentencing are governed by Crim.R. 32.1, not R.C. 2953.21 and 2953.23. *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, syllabus. As stated above, a motion to withdraw a guilty plea, filed after sentence has been imposed, should be granted only to correct a manifest injustice.

{¶20} In the case at bar, as previously indicated, appellant pled guilty to assault on April 16, 2009, and was sentenced by the trial court that same date. However, the trial court's April 16, 2009 judgment entry did not include appellant's plea or the trial court's finding of guilty to the charge of assault.

{¶21} On April 2, 2010, appellant filed a pro se request to vacate his guilty plea, which was denied by the trial court on April 27, 2010. On May 26, 2010, appellant filed a notice of appeal from the trial court's April 27, 2010 judgment entry.

{¶22} On July 2, 2010, this court filed a judgment entry indicating that the April 16, 2009 sentencing entry does not include appellant's plea or the trial court's finding of guilty to the charge of assault. Therefore, this court sua sponte remanded this case for the sole purpose of entering a new judgment that complies with the criteria for a final, appealable criminal judgment entry.

{¶23} On July 15, 2010, the trial court complied with this court's remand and issued a nunc pro tunc judgment entry which included appellant's plea and the trial court's finding of guilty to the charge of assault.

{¶24} On August 9, 2010, this court filed a judgment entry indicating that pursuant to the trial court's July 15, 2010 nunc pro tunc entry upon remand, correcting its previous entry of April 16, 2009, this court's jurisdictional concerns have been resolved and the appeal shall proceed according to the Ohio Rules of Appellate Procedure.

{¶25} While the entry imposing the sentence on appellant was technically deficient, we note that appellant filed his pro se request to vacate his guilty plea almost one year after the trial court's original April 16, 2009 sentencing entry. In fact, at the time of filing the request to vacate his plea, appellant's entire sentence had been served. As previously stated, Crim.R. 32.1 does not allow for a post-sentence withdrawal of a guilty plea except "to correct manifest injustice." The purpose of not allowing the post-sentence request is clear. The rule properly draws the line for those who have been informed as to their sentence but are simply unhappy with the result. Such is the case here. Therefore, appellant's request to vacate his plea is clearly a post-sentence motion and will be treated accordingly.

{¶26} Appellant never filed an appeal from the original sentencing order. A year later, when asking the trial court to vacate his plea, appellant did not supply the trial court with sufficient information to clearly establish the need to correct a manifest injustice. There is no transcript of the plea and sentencing hearing. There is no evidentiary material except for appellant's self-serving commentary regarding his displeasure with his trial counsel. There is no material corroborating any of appellant's allegations. While appellant attempted to get additional material before this court, it is

well-settled that if it was not before the trial court for consideration, it will not be considered for the first time on appeal. *State v. Byrd* (1987), 32 Ohio St.3d 79, 87.

{¶27} As a result, we cannot say the trial court abused its discretion in failing to hold a hearing or in failing to grant appellant's request.

{¶28} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Chardon Municipal Court is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.