[Cite as *State v. Meade*, 2018-Ohio-3544.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO, :

Plaintiff-Appellee, : Case No. 17CA3816

vs. :

ELDER R. MEADE, : DECISION AND JUDGMENT ENTRY

Defendant-Appellant. :

APPEARANCES:

Matthew F. Loesch, Portsmouth, Ohio, for appellant.

Shane Tieman, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 8-23-18
ABELE, J.

{¶ 1} This is an appeal from Scioto County Common Pleas Court judgments that imposed a restitution order and denied a motion to withdraw a guilty plea. Elder Meade, defendant below and appellant herein, assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT IMPROPERLY FAILED TO ORDER A RESTITUTION HEARING AFTER THE APPELLANT QUESTIONED THE AMOUNT OF RESTITUTION ORDERED."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ABUSED ITS DISCRETION BY NOT

PROPERLY CONSIDERING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA."

{¶ 2} On July 6, 2017, a Scioto County Grand Jury returned an indictment that charged appellant with one count of burglary in violation of R.C. 2911.12(A)(2) and 2911.12(D), a second-degree felony.

{¶ 3} On October 12, 2017, appellant (1) waived a reading of the indictment, (2) indicated that he understood his constitutional rights (3) signed a document and acknowledged that the maximum penalty for a second-degree felony is eight years in prison and a $15,000 fine, and (4) entered a guilty plea. The document also stated "Court costs, restitution and other financial sanctions including probation fees may be imposed." Appellant also signed and acknowledged that the trial court judge fully explained the information to him in open court and on the record, that he understood the potential penalty, and that he explicitly acknowledged that his plea was knowing, voluntary, and intelligent. At the hearing, the trial court again informed appellant of the eight year maximum sentence, but the court opted to sentence appellant to serve four years in prison with three years of post-release control. Although the court did not fine appellant, the court ordered him (1) to pay $2,845 in restitution to the victims, jointly and severally with his co-defendant, and (2) to pay the costs of prosecution. After the court quoted the restitution amount, and once again asked appellant if he had any questions, appellant said "Yes, why is their restitution to them when they got their stuff back? That doesn't make no sense," to which the prosecutor stated "We had listed there were some items not recovered." Appellant stated "I mean it's on- they got it on paper uh - took pictures of it, they got their stuff

back." The court then stated: "Well, we can't go forward if you are disputing the restitution figures today, it's up to you?" Appellant replied: "Never mind." At that point the court ordered appellant to pay $2,845 in restitution.

{¶ 4} On November 20, 2017 appellant filed a post-sentence motion to withdraw his guilty plea. The trial court denied the motion, but filed the entry with an incorrect case number. The court subsequently issued a nunc pro tunc entry to correct the error. Although appellant filed his notice of appeal outside the time limit for an appeal, this court accepted the appeal as a delayed appeal and the matter is properly before us.

I.

{¶ 5} In his first assignment of error, appellant asserts that he "clearly disputed the restitution amount" at the end of the change of plea and sentencing hearing and the trial court improperly failed to conduct a hearing after appellant questioned the amount of restitution. The state, however, argues that (1) appellant's sentence is an agreed sentence and, thus, is not reviewable under R.C. 2953.08(D)(1), and (2) after appellant inquired about and initially disputed the restitution amount, he informed the court that he wished to proceed with the plea agreement and, thus, voluntarily opted to go forward with the plea agreement. Therefore, the state reasons, the trial court had no reason to hold a restitution hearing.

{¶ 6} "'When a defendant enters a plea in a criminal case, the plea 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. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 7, quoting *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). In determining whether a guilty or no

contest plea is knowing, intelligent, and voluntary, an appellate court must examine the totality of the circumstances through a de novo review of the record to ensure that the trial court complied with constitutional and procedural safeguards. *State v. Billiter,* 4th Dist. Scioto No. 15CA3720, 2018-Ohio-733, ¶ 15, citing *State v. Cooper*, 4th Dist. Athens No. 11CA15, 2011-Ohio 6890, ¶ 35.

{¶ 7} Crim.R. 11 governs the process that a trial court must use before accepting a felony plea of guilty or no contest." *Veney*, *supra*, 120 Ohio St.3d 176 at ¶ 8. Before accepting a guilty plea in a felony case, a trial court must address the defendant personally and determine that "the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing." Crim.R. 11(C)(2)(a). The court must both inform and determine that the defendant understands that he "is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendants favor, and to require the state to prove the defendant's guilty beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself." Crim.R. 11(C)(2)©. In addition to the various rights that would be waived, the court must determine that the defendant "understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence." Crim.R. 11(C)(2)(b).

{¶ 8} In the case sub judice, at the beginning of appellant's change of plea hearing the trial court recited and explained the offense. The court also (1) explained that appellant could have time added to his sentence for post-release control for up to three years, (2) explained the

maximum prison term and the concept of community control, but indicated that appellant would not be placed on community control, and (3) asked appellant if he understood that he would be waiving his rights to a jury trial, confrontation of witnesses against him, compulsory process for obtaining witnesses in his favor, the requirement that the state prove at trial his guilt beyond a reasonable doubt and his right to not to be compelled to testify against himself. Appellant acknowledged to the court that he understood all of this information. After our review of the totality of the circumstances, we believe that the trial court complied with Crim.R.11(C)and the various applicable constitutional and procedural safeguards and that appellant entered a knowing, intelligent, and voluntary plea.

{¶ 9} Appellant contends that because he questioned, during the sentencing hearing, the appropriate amount of restitution his guilty plea should now be deemed to be invalid. We disagree. R.C. 2929.18(A)(1) allows a court to order, as a financial sanction, an amount of restitution to be paid by an offender to his victim “based on the victim’s economic loss. * * * If a court imposes restitution, the court may base the amount of restitution on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts that indicate the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. *State v. Lalain*, 136 Ohio St.3d 248, 2013-Ohio-3093, 994 N.E.2d 423, syllabus paragraph one. If a court imposes restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.

{¶ 10} In the case sub judice, the trial court followed up appellant’s question about the

appropriate amount of restitution by asking if he actually wanted to dispute the amount because, if so, the court could not, at that point, accept appellant's guilty plea. In response to the court's question, appellant stated "never mind." Also, neither the co-defendant, her attorney, nor appellant's attorney challenged the amount of restitution. We recognize that appellant initially raised his concern about the amount of the restitution order, but, after the court's inquiry, he elected to withdraw his objection and to proceed with the plea agreement. Here, the trial court acted appropriately and we find no error with the court's action.

{¶ 11} Appellant cites case authority to support his argument concerning the appropriate amount of restitution. In *Lalain,* a corporation sought to recover the cost of an expert report on the value of its loss in addition to the time that employees expended in attempting to identify and value the items taken - all of which were returned. The company sought over $63,000 as restitution for expenses that, the Supreme Court of Ohio concluded, were not incurred as a direct and proximate result of the commission of the offense. The court further noted that at sentencing, although the defendant's counsel disputed the amount of restitution, the court failed to hold a hearing. *Id*. at ¶ 4. While we have no quarrel with the proposition of law in *Lalain*, we believe that appellant's statement and actions at the hearing must result in the conclusion that appellant voluntarily agreed to the terms of his plea agreement, including the amount of restitution.

{¶ 12} The state also argues that appellant's negotiated plea and agreed sentence is not reviewable. "A felony sentence is not reviewable under R.C. 2953.08(D)(1) 'if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.'" *State v. Ross*, 4th Dist. Scioto No. 16CA3771,

2017-Ohio-9400, ¶ 60. "[A] sentence is 'authorized by law' and is not appealable within the meaning of R.C. 2953.08(D)(1) only if it comports with all the mandatory sentencing provisions." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 21. Thus, "a sentence that is 'contrary to law' is appealable by a defendant; however, an agreed-upon sentence may not be if (1) both the defendant and the state agree to the sentence, (2) the trial court imposes the agreed sentence, and (3) the sentence is authorized by law. R.C. 2953.08(D)(1). If all three conditions are met, the defendant may not appeal the sentence." *Underwood* at ¶ 16.

{¶ 13} In the instant case, the sentencing entry under "aggregate sentence" indicates: "This sentence, pursuant to O.R.C. 2953.08(D) is/is not an agreed sentence for a total net sentence of ____ years." Although the trial court filled in the blank for the length of the sentence with the numeral "4", the court did not designate either "is" or "is not" for an agreed sentence. However, a review of the sentencing transcript reveals that the parties arrived at an agreed sentence. Moreover, neither appellant, appellant's attorney, his codefendant, nor his codefendant's attorney expressed any disagreement, contrary views or challenged the amount of restitution. Because both the appellant and the state openly agreed to the sentence, and the trial court imposed the agreed upon sentence, the sentence is authorized by law and is not reviewable. See R.C. 2953.08(D)(1).

{¶ 14} Accordingly, based upon the foregoing reasons we overrule appellant's first assignment of error.

II.

{¶ 15} In his second assignment of error, appellant asserts the trial court abused its

discretion by not properly considering appellant's motion to withdraw his guilty plea.

{¶ 16} Crim.R. 32.1 provides that "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." Here, because appellant filed his motion to withdraw his guilty plea after his sentence, his judgment of conviction could only be set aside, and his plea withdrawn, to correct manifest injustice.

{¶ 17} Generally, the standard of review for a post-sentence Crim.R. 32.1 motion is far more deferential than a pre-sentence motion: "[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." *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. The Supreme Court of Ohio has defined "manifest injustice" 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), quoting *Webster's Third New International Dictionary* 1164, 1375 (1986). The court has also stressed that post-sentence withdrawal "is allowable only in extraordinary cases." *Smith* at 264, (Citation omitted). Furthermore, "[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. *State v. Baker*, 2d Dist. Montgomery No. 27593, 2018-Ohio-669, ¶ 11; *State v. Berry*, 2d Dist. Green No. 2013-CA-34, 2014-Ohio-132, ¶¶ 26-28. Generally, an appellate court will not disturb a trial court's ruling on a motion to withdraw a guilty plea absent an abuse of discretion. *State v. Barnett*, 73 Ohio St.3d 244, 596 N.E.2d 1101 (1991). Thus, a

defendant has a heavy burden to show that extraordinary circumstances exist that amount to a manifest injustice. *Smith*, *supra*.

{¶ 18} In the case sub judice, appellant pled guilty and was sentenced on October 12, 2017. On November 20, 2017, appellant filed his notice of appeal and his motion to withdraw guilty plea.[1] Appellant contends that two cases stand for the proposition that the trial court must conduct a hearing on the motion to withdraw his guilty plea. See *State v. Kidd*, 168 Ohio App.3d 382, 2006-Ohio-4008, 860 N.E.2d 138, and *State v. Norris*, 2d Dist. Champaign C.A. No. 2003-CA-25, 2004-Ohio-1483. We believe, however, that both cases are distinguishable from the case sub judice.

{¶ 19} In *Kidd*, the defendant pled guilty to two counts of trafficking in cocaine in exchange for the dismissal of the remaining counts. After a hearing, the trial court sentenced

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[1]The trial court's denial of that motion on November 22, 2017 states: "This court finds that an appeal has been made to the Fourth District Court of Appeals and this Court is without jurisdiction to rule in this matter. The Court further finds Defendant has provided no information to this Court, through affidavit, as to why he should be permitted to withdraw his plea. The Court finds it is without jurisdiction to rule on the Motion. If the Court had jurisdiction, it would overrule the Motion as written." A magistrate's order on December 8, 2017 indicates that appellant had failed to comply with the local rules of court to perfect his appeal and this court ordered that his appeal be dismissed within 10 days of the filing of the magistrate's order unless appellant perfected the appeal. The file reflects that appellant's appeal was perfected on December 19, 2017. Assuming arguendo that the trial court was incorrect in its assumption that it did not have jurisdiction, we find that to be harmless error because the trial court also addressed the merits of the motion and concluded that it would overrule the motion as written. Crim.R. 52(A) defines harmless error in the context of criminal cases and provides: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." During a harmless-error inquiry, the state has the burden to prove that the error did not affect the substantial rights of the defendant. *State v. Morris,* 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 23, citing *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 15. If there is "a '[d]eviation from a legal rule,' " courts undertake a " 'harmless error' inquiry—to determine whether the error 'affect[ed] substantial rights' of the criminal defendant." *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 7, quoting *United States v. Olano*, 507 U.S. 725, 732–733, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). The term "substantial rights" has been interpreted to require that " 'the error must have been prejudicial.' (Emphasis added.)" *Id*., quoting *Olan*o at 734, 113 S.Ct. 1770. If a court determines that the error did not affect the defendant's substantial rights, then the error is harmless and " 'shall be discarded.' " *Id*., quoting Crim.R. 52(A); *State v. Morris, supra.* Here, the trial court's statement did not affect the appellant's substantial rights.

Kidd in accordance with the parties' agreed sentence. The *Kidd* court concluded that the record supported the view that a sufficient chance existed that Kidd's claims of ineffective assistance were plausible and to conduct an evidentiary hearing. *Id.* at ¶ 14. In the instant case, however, the "evidence" involved the following exchange: Appellant: "Yes, why is their restitution to them when they got their stuff back? That doesn't make no sense." Prosecutor: "We had listed there were some items not recovered." Appellant: "I mean it's on -they got it on paper uh-took pictures of it, they got their stuff back." Court: "[W]e can't go forward if you are disputing the restitution figures today, It's up to you?" Appellant: "Never mind." We do not believe that the facts present in *Kidd* has any applicability to the case at bar.

{¶ 20} *In Norris,* the defendant argued that because she did not understand what the letters OMVI meant when she pled guilty, her plea was not voluntary. The *Norris* court concluded that the denial of Norris's motion without a hearing constituted an abuse of discretion. The court pointed out that although *Norris* entered a plea (1) the court did not explain the charge to her before she entered her plea, (2) the uniform traffic ticket did not provide sufficient information, and (3) the officer did not check the box "under the influence of alcohol, drug of abuse" nor the box "prohibited blood alcohol concentration." In the case sub judice, however, the trial court fully apprised appellant of the charge, the consequences of his plea, and the various rights he would be waiving by entering a guilty plea. Thus, we believe that the facts and circumstances present in this case, including the trial court's decision to overrule appellant's motion without conducting a hearing, was proper and did not prejudice appellant.

{¶ 21} In the case at bar it appears that appellant may have later decided, after more reflection, to withdraw his plea based on his displeasure with the restitution order. However, "a

change of heart or mistaken belief about the plea is not a reasonable basis requiring a trial court to permit the defendant to withdraw the plea." *State v. Fry*, 4th Dist. Scioto No. 14CA3604, 2014-Ohio-5016, ¶ 14, citing *State v. Lambros*, 44 Ohio App.3d 102, 103, 541 N.E.2d 632 (8th Dist.1988); *Ross*, *supra,* at ¶ 45. Once again, an evidentiary hearing is not required on every post-sentence motion to withdraw a plea. *See Baker*, *supra,* 2018-Ohio-669, ¶ 13, citing *State v. Humphrey*, 2d Dist. Montgomery No. 19243, 2002-Ohio-6525.

{¶ 22} Accordingly, we overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Scioto County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, J.: Concurs in Judgment & Opinion
Harsha, J.: Concurs in Judgment Only

For the Court

BY:______________________
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.