[Cite as *State v. McCommons*, 2015-Ohio-1583.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26372
	:	
v.	:	T.C. NO. 14CRB471
	:	
ARTHUR LEE McCOMMONS	:	(Criminal appeal from
	:	Municipal Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 24th day of April, 2015.

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. . . . . .

DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Arthur Lee

McCommons, filed August 29, 2014. McCommons appeals from the Dayton Municipal Court's denial of his "Motion to Withdraw Plea," filed following his plea of guilty to one count of assault, in violation of R.C. 2903.13, a misdemeanor of the first degree. On April 1, 2015, the State filed a "Notice of Conceded Error," in which it acknowledged "that the trial court failed to inform the Appellant of the effect of his guilty plea," pursuant to Crim.R. 11(E).

{¶ 2} McCommons entered his guilty plea on April 29, 2014. The following exchange occurred at the plea hearing:

> THE STATE: The next case Your Honor is going to be the State vs. Arthur McCommons, 2014 CRB 471. It's my understanding that Mr. McCommons is going to go ahead and enter a plea as charged to the assault your Honor. * * *
>
> THE COURT: How does your client wish to plead?
>
> THE DEFENSE: Guilty your Honor.
>
> THE COURT: The court is going to accept that plea of guilty. * * * * * *
>
> THE COURT: Ok Sir I'm going to sentence you to a 180 days (sic) in the Montgomery County Jail. I'm going to suspend a hundred and seventy-nine and give you credit for one day served. I'm going to place you thereafter for a period of supervised probation not to exceed one year for the purpose of you doing the Stop the Violence program. Additionally, you are going to have no contact at all with the complaining witness. Don't talk to her. Don't call her. Don't email her. Don't send her letters. Don't

> have any of your friends or family contact her on your behalf. I will take into consideration your financial situation. I won't impose a fine but I will have you pay the court costs. * * *

{¶ 3} On May 5, 2014, McCommons filed his motion to withdraw his plea, pursuant to Crim.R. 32.1. He asserted therein as follows:

> * * * Here, the Defendant presents three main issues as to why he would like his plea withdrawn. First, he indicates he was not aware that he would be placed on probation while he completed the Stop the Violence program. Second, he indicates that he was not aware that the potential jail time of 180 (sic) would be suspended, with credit given for one day served. Last, he indicates that the no contact order is negatively affecting his family, specifically that his grandchildren would like to invite the Complaining Witness to their school play but are unable to do so due to the no contact order.
>
> * * *

The municipal court denied the motion on July 8, 2014, without a hearing, finding "said Motion Not Well Taken."

{¶ 4} McCommons' sole assignment of error is as follows:

> THE TRIAL COURT ERRED IN ACCEPTING APPELLANT'S GUILTY PLEA.

{¶ 5} McCommons asserts that the municipal court failed to comply with Crim.R. 11(E) and R.C. 2937.07. As noted above, the State agrees with McCommons that the municipal court failed to comply with Crim.R. 11(E).

{¶ 6} "We review a trial court's decision on a post-sentence motion to withdraw guilty plea and on a decision granting or denying a hearing on the motion for an abuse of discretion. * * *." *State v. Ogletree*, 2d Dist. Clark No. 2014-CA-16, 2014-Ohio-3431, ¶ 11. "The lynchpin of abuse-of-discretion review is the determination whether the trial court's decision is reasonable. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990)." *State v. Chase*, 2d Dist. Montgomery No. 26238, 2015-Ohio-545, ¶ 17.

{¶ 7} We initially note that R.C. 2929.24(A)(1) provides that a misdemeanor of the first degree is punishable by a term of imprisonment not to exceed six months. Crim.R. 2(C) defines a serious offense as "any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months." Crim.R. 2(D) provides that a " '[p]etty' offense means a misdemeanor other than a serious offense." Pursuant to Crim.R. 2(C) and (D), the offense of assault is classified as a petty offense. Crim.R. 11(E) provides: "In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty." " * * * [B]efore accepting a guilty plea to a misdemeanor for a petty offense, the court [is] required to inform [the defendant] that a plea of guilty is a complete admission of guilt." *State v. Jones,* 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, ¶ 25.

{¶ 8} Crim.R. 32.1 provides: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to

withdraw his or her plea." As this Court has previously noted:

> * * * The manifest injustice standard demands a showing of extraordinary circumstances. *State v. Smith* (1977), 49 Ohio St.2d 2261, 361 N.E.2d 1324. Further, the defendant has the burden to prove the existence of manifest injustice. *Id.*
>
> The term *injustice* is defined as "the withholding or denial of justice. In law, the term is almost invariably applied to the act, fault, or omission of a court, as distinguished from that of an individual." Black's Law Dictionary, 5th Ed. A "manifest injustice" comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her.
>
> Crim.R. 32.1 derives from the court's inherent power to vacate its own prior orders when justice so requires. In that regard, it is comparable to Civ.R. 60(B), which contemplates equitable relief from a final order subject to certain defects. In this context, it is noteworthy that Civ.R. 60(B) relief is not a substitute for appellate review of prejudicial error. *Doe v. Trumbull Cty. Children's Services Bd.* (1986), 28 Ohio St.3d 128, 502 N.E.2d 605. We believe that the same bar reasonably applies to Crim.R. 32.1.

State v. Hartzell, 2d Dist. Montgomery No. 17499, 1999 WL 957746, *2 (Aug. 20, 1999).

{¶ 9} In *Hartzell*, Hartzell filed a motion, pursuant to Crim.R. 32.1, asking the trial court to vacate his guilty pleas, entered four years earlier, in part due to the trial court's

failure to comply with the requirements of Crim.R. 11(C), which governs pleas of no contest and guilty in felony cases. *Id*., *1. This Court determined as follows:

> Failure to comply with the requirements of Crim.R. 11(C) when taking a plea is a defect that may be the subject of a merit appeal which supports reversal of a defendant's conviction when prejudice results. *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115. Even when a timely appeal is not taken, a delayed appeal is available pursuant to App.R. 5(A), upon a proper showing. Therefore, a court's failure to comply with the requirements of Crim.R. 11(C) is *not* an extraordinary circumstance demonstrating a form of manifest injustice required for Crim.R. 32.1 relief.
>
> * * *
>
> We find that the grounds for the motion which Hartzell filed fail to demonstrate a manifest injustice required for Crim.R. 32.1 relief. * * *

*Id., *2* (emphasis added).

{¶ 10} As in *Hartzell*, we conclude that the municipal's court's failure to comply with Crim.R. 11(E) does not demonstrate a manifest injustice pursuant to Crim.R. 32.1, since McCommons could have raised the issue on direct appeal. As noted above, however, McCommons asserted in his motion that he sought to withdraw his plea because (1) he was not aware that he would be placed on probation; (2) he was not aware that all but one day of the sentence imposed would be suspended; and (3) the no contact order is "negatively affecting his family," and the trial court overruled the motion without a hearing. As this Court has noted:

> " 'A hearing on a post-sentence motion to withdraw a guilty plea is

> not necessary if the facts alleged by the defendant, even if accepted as true, would not require the court to grant the motion to withdraw the guilty plea.' " *State v. Mogle*, 2d Dist. Darke Nos. 2013-CA-4, 2013-CA-5, 2013-Ohio-5342, ¶ 17, quoting *State v. Burkhart*, 2d Dist. Champaign No. 07-CA-26, 2008-Ohio-4387, ¶ 12. * * * In other words, "[t]o obtain a hearing, 'a movant must establish a reasonable likelihood that the withdrawal is necessary to correct a manifest injustice[.]' " *State v. Tunstall*, 2d Dist. Montgomery No. 23730, 2010-Ohio-4926, ¶ 9, quoting *State v. Whitmore*, 2d Dist. Clark No. 06-CA-50, 2008-Ohio-2226, ¶ 11. "[W]e have held that no hearing is required on a post-sentence motion to withdraw a plea where the motion is supported only by the movant's own self-serving affidavit, at least when the claim is not supported by the record." * * * *State v. Stewart*, 2d Dist. Greene No. 2003-CA-28, 2004-Ohio-3574, ¶ 6.

State v. Ogletree, 2d Dist. Clark No. 2014-CA-16, 2014-Ohio-3431, ¶ 13.

{¶ 11} Further, "[t]he Supreme Court has stated that a trial court *should* hold a hearing on a motion to withdraw a plea 'unless it is clear that denial of the motion is warranted.' * * *." *State v. Kemp*, 2d Dist. Clark No. 2014 CA 32, 2014-Ohio-4607, ¶ 7 (emphasis added). This Court further noted in *Kemp* that "[u]ndue delay in filing a Crim.R. 32.1 motion 'is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.' " *Id*., ¶ 8.

{¶ 12} We conclude that the municipal court abused its discretion in overruling McCommons' motion without a hearing. The municipal court did not afford defense counsel an opportunity to speak on behalf of McCommons and did not address

McCommons personally or ask him if he wanted to make a statement, pursuant to Crim.R. 32. Nor did the court "call for an explanation of the offense," pursuant to R.C. 2937.07, which governs court action on pleas in misdemeanor cases. The court merely asked defense counsel at the start of the hearing, "How does your client wish to plead?" Defense counsel immediately responded, "Guilty," and we further conclude that McCommons' motion suggests that he received ineffective assistance of counsel. Given the cursory nature of the plea hearing, it is evident that McCommons, as he asserted in his motion, may have been unaware of his rights and the potential penalty for his offense when his plea was entered for him by defense counsel. We conclude that the municipal court should have held a hearing on McCommons' motion to withdraw his plea, which we note was filed without undue delay. In other words, McCommons has shown a reasonable likelihood, based upon the record before us, that his plea should be withdrawn. Accordingly, McCommons' assigned error is sustained, the judgment of the municipal court is reversed, and the matter is remanded for a hearing on McCommons' motion to withdraw his plea.

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FAIN, J. and HALL, J., concur.

Copies mailed to:

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