STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 99 C.A. 107
VS.	)	
	)	O P I N I O N
EDWARD C. SABLE,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Mahoning County Court No. 4 Case No. 94TRD9173
JUDGMENT:	Affirmed
APPEARANCES:	
For Plaintiff-Appellee:	Paul J. Gains Prosecuting Attorney Dawn M. Durkin Assistant Prosecuting Attorney Mahoning County Courthouse 120 Market Street Youngstown, Ohio 44503
For Defendant-Appellant:	Atty. Louis R. Bertrand 409 South Prospect Street P.O. Box 268 Ravenna, Ohio 44266

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: May 4, 2001

DONOFRIO, J.

Defendant-appellant, Edward C. Sable, appeals from a decision of Mahoning County Court No. 4 denying his motion to vacate his no contest plea to the charge of operating a motor vehicle while under the influence of alcohol and/or drugs.

On November 25, 1994, appellant was arrested and charged with operating a motor vehicle while under the influence of alcohol and/or drugs, menacing, assault on a police officer, and disorderly conduct while intoxicated. Pursuant to a Rule 11 agreement, on February 7, 1995, appellant pled no contest to the charge of operating a motor vehicle while under the influence of alcohol and/or drugs. Appellant in his brief indicates that the other original charges were dismissed, however we have no record of those proceedings. The trial court convicted appellant of R.C. 4511.19(A)(1) and sentenced him to thirty days in jail with twenty-seven days suspended and placed him on twelve months good behavior probation. It also suspended his driver's license for one-hundred and eighty days.

The record does not reflect what occurred from the date appellant was sentenced until December 23, 1998, when appellant filed a Crim.R. 32.1 motion to vacate his no contest plea.

The trial court held a hearing on appellant's motion and overruled said motion on April 22, 1999. Appellant filed his notice of appeal on April 29, 1999.

Appellant raises only one assignment of error but addresses two issues. His assignment of error states:

> "THE TRIAL COURT, CONTRARY TO CRIMINAL RULE 32.1, COMMITTED PREJUDICIAL ERROR, ACTING WITH MANIFEST INJUSTICE AND UNFAIRLY, AND ABUSED ITS DISCRETION IN OVERRULING DEFENDANT-APPELLANT'S POST-SENTENCE MOTION TO VACATE HIS NO CONTEST PLEA TO A CHARGE OF OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS, A FIRST DEGREE MISDEMEANOR."

First, appellant argues that the trial court failed to inform him of his rights in accordance with Crim.R. 11(E) and failed to inform him of the effects of pleading no contest when it accepted his plea. Appellant contends that he did not become aware of the trial court's errors until he retained new counsel for another O.M.V.I. charge.

There is no transcript of the proceedings of February 7, 1995, at which appellant entered his plea and was convicted and sentenced.

App.R. 9 provides that appellant must submit a transcript to the appellate court. If no transcript is available, App.R. 9(C) and (D) provide alternatives for the appellant. App.R. 9(C) states:

> "If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App.R. 10, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal."

App.R. 9(D) provides that the parties may submit an agreed statement of the case as the record on appeal.

Appellant states that he requested a transcript but was informed that none was available. He claims that he then submitted a statement of facts of the proceedings to the trial court for approval. Appellant further claims that due to a lack of knowledge of the proceedings, the trial court would not approve his statement of facts. Appellant then filed the affidavits of himself and his counsel with this court which stated that the trial court never informed him of the consequences of his no contest plea. However, appellant failed to comply with any of the alternatives set out in App.R. 9.

The Ohio Supreme Court has stated:

> "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." Knapp v. Edwards Laboratory (1980), 61 Ohio St.2d 197, 199.

Accordingly, since we have no means of evaluating what transpired at the trial court on February 7, 1995, we have no choice but to presume the validity of the proceedings below.

Appellant alleges in his second issue for review, that the trial court abused its discretion in denying his motion to vacate his no contest plea. Appellant argues that he demonstrated manifest injustice by the fact that the trial court failed to advise him of the effects of his plea and because he has a defense to the O.M.V.I. violation.

As a defense he offers the affidavit of Rocco Flaviano, the service manager for Curtland Auto and Truck, Inc. Flaviano stated in his affidavit that he repaired appellant's Cadillac on or about November 25-27, 1994 and that it was inoperable when it was delivered from the Austintown impound lot. Appellant was arrested on November 25, 1994. He contends that since his vehicle was inoperable when he was arrested, he could not have been guilty of operating it while under the influence of alcohol and/or drugs. Therefore, appellant argues that Flaviano's

affidavit coupled with the trial court's failure to inform him of his rights, resulted in the trial court abusing its discretion in not vacating his plea.

Crim.R. 32.1 states, "[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."

Whether or not to grant a Crim.R. 32.1 motion is within the trial court's sound discretion. *State v. Smith* (1977), 49 Ohio St.2d 261, at paragraph two of the syllabus. The good faith, credibility, and weight of the movant's assertions in support of the motion should be resolved by the trial court. *Id.* A defendant who wishes to withdraw a no contest plea after a sentence has been imposed has the burden of showing manifest injustice. *Id.* at paragraph one of the syllabus; Crim.R. 32.1. An undue delay between the occurrence of the alleged cause for withdrawal of the plea and the filing of the motion to withdraw adversely affects the credibility of the movant and weighs against granting the motion. *Id.* at paragraph three of the syllabus.

In the present case appellant waited over three years after his sentence was imposed to file his Crim.R. 32.1 motion to

vacate his plea. It could not have taken him over three years to discover that his car was inoperable when it arrived at Curtland Auto and Truck, Inc. to be repaired. This fact weighs heavily against credibility. Furthermore, appellant's sentence had been completed long before he moved to withdraw his plea. On February 7, 1995, the trial court sentenced appellant to thirty days imprisonment with twenty-seven days suspended and credit for four days served, placed him on twelve months probation, and suspended his driver's license for one-hundred and eighty days. Appellant never filed a motion to suspend his sentence. Therefore, he should no longer be on probation and no longer be under license suspension. He would have completed his sentence one year after it was imposed and over two years before filing his motion to vacate his plea.

The Eleventh District, in affirming a decision to deny a motion to vacate a no contest plea, stated that the length of time that had passed (two years since sentencing) and the fact that the appellant had recently been discharged from probation weighed heavily against allowing appellant to vacate his plea. *State v. Ball* (1991), 72 Ohio App.3d 549.

Given the foregoing, the trial court did not abuse its discretion. Therefore, appellant's assignment of error lacks merit.

Accordingly, the decision of the trial court is hereby affirmed.

Vukovich, J., concurs
Waite, J., concurs