

[Cite as *State v. Smith*, 2010-Ohio-3512.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94063**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JADE SMITH**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-502283-B

**BEFORE:** Celebrezze, J., Rocco, P.J., and Stewart, J.

**RELEASED AND JOURNALIZED:** July 29, 2010

**FOR APPELLANT**

Jade Smith (pro se)  
Inmate No. A544-016  
Grafton Correctional Institution  
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**ATTORNEYS FOR APPELLEE**

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Cuyahoga County Prosecutor  
BY: Diane Smilanick  
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The Justice Center  
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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Jade Smith, appeals from the trial court's denial of his pro se motions to vacate his sentence and withdraw his guilty plea. He contends that his sentence is void because the trial court failed to inform him of his rights prior to accepting his plea. Appellant has failed to show that the trial court erred; therefore, we affirm the denial of his motions.

{¶ 2} Appellant was charged, along with a co-defendant, with attempted aggravated murder. On February 25, 2008, as part of a plea deal, appellant plead guilty to one count of felonious assault with forfeiture

specifications. On March 31, 2008, he was sentenced to six years of incarceration with three years of postrelease control. Appellant's sentence was affirmed by this court in *State v. Smith*, Cuyahoga App. No. 91375, 2008-Ohio-5753 ("*Smith I*").

{¶ 3} On July 26, 2009, after this court affirmed his sentence, appellant submitted motions to the trial court to vacate his sentence and to withdraw his guilty plea. Both motions were denied on August 18, 2009. Appellant brings this appeal challenging those denials arguing three assignments of error.

### **Law and Analysis**

{¶ 4} Appellant claims that "[t]he trial court denied his Constitutional right of due process of law as guaranteed by the United States and Ohio Constitutions from the impartial decision of the trial court in denying [his] motion to vacate void sentence pursuant to Crim.R. 11(C) [and] pursuant to Crim.R. 32.1 motion to withdraw guilty plea." Appellant's second and third assigned errors also relate to this assigned error<sup>1</sup>; therefore, they will be addressed together.

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<sup>1</sup>Appellant's other assigned errors state:

(2) "The trial court should have engaged in a dialogue with appellant pursuant to Crim.R. 11(C), hereby, the trial court abused its discretion in denying appellant the required explanation before accepting his guilty plea."

(3) "The trial court violated appellants' [sic] rights of due process for the

{¶ 5} All of appellant's claimed errors stem from an argument that the trial court did not properly engage him in a valid plea colloquy, failing to inform him of his constitutional rights and ensuring that his plea was made knowingly, voluntarily, and intelligently.

### **Vacation of Void Sentence**

{¶ 6} Crim.R. 11(C) provides that in order for a court to accept a plea of guilty or no contest to a felony charge, the court must address the defendant personally and do all of the following:

{¶ 7} “(a) Determin[e] 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.

{¶ 8} “(b) Inform[] the defendant of and determin[e] 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.

{¶ 9} “(c) Inform[] the defendant and determin[e] that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for

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strict compliance of Crim.R. 11(C), and appellant's non-constitutional rights.”

obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶ 10} Failure to comply with these mandates regarding constitutional rights renders a plea unenforceable. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶20. Appellant contends that the trial court failed to engage him in a plea colloquy advising him of his rights; the maximum sentence that could be imposed, including postrelease control; and did not strictly comply with Crim.R. 11. This would mean appellant's sentence is void. See *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. However, appellant has failed to provide this court with a transcript of the plea hearing.

{¶ 11} "An appellant has the responsibility of providing the reviewing court with a record of the facts, testimony, and evidentiary matters that are necessary to support the appellant's assignments of error. *Volodkevich v. Volodkevich* (1989), 48 Ohio App.3d 313, 314, 549 N.E.2d 1237, 1238-1239. In the absence of a complete record, an appellate court must presume regularity in the trial court's proceedings. *State v. Roberts* (1991), 66 Ohio App.3d 654, 657, 585 N.E.2d 934, 936-937." *State v. Tillman* (1997), 119 Ohio App.3d 449, 454, 695 N.E.2d 792.

{¶ 12} Appellant failed to provide a transcript of his plea hearing and supports his argument only with bald claims in his brief. Therefore, this court must presume that the trial judge engaged appellant in a valid plea colloquy and informed him of mandatory postrelease control and the rights he was waiving by pleading guilty.

### **Postsentence Withdrawal of Plea**

{¶ 13} Appellant argues that the trial court erred in denying his motion to withdraw his guilty plea because the trial court did not engage him in a valid plea colloquy, making his motion a presentence withdrawal of his plea. Crim.R. 32.1 allows one to withdraw a guilty plea “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.” See, also, *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715; *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus. Further, “[a] motion to withdraw a plea of guilty \* \* \* made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1.” *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, at the syllabus.

{¶ 14} Because appellant has failed to show that his sentence is void, we must treat this as a postsentence motion, requiring appellant to demonstrate

that a manifest injustice has occurred necessitating the withdrawal of his plea.

{¶ 15} “A manifest injustice has been defined as a ‘clear or openly unjust act.’” *State v. Simmons*, Cuyahoga App. No. 91062, 2009-Ohio-2028, ¶24, quoting *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 1998-Ohio-271, 699 N.E.2d 83. “Again, ‘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.” *State v. Sneed*, Cuyahoga App. No. 80902, 2002-Ohio-6502, ¶13, citing *State v. Wheeler*, Montgomery App. No. 18717, 2002-Ohio-284.

{¶ 16} Whether a defendant has shown a manifest injustice is within the sound discretion of the trial court. *Smith* at paragraph two of the syllabus. Accordingly, an appellate court will review a trial court’s denial of a postsentence motion to withdraw a guilty plea using an abuse of discretion standard. *State v. Nathan* (1995), 99 Ohio App.3d 722, 725, 651 N.E.2d 1044. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 17} Here, appellant has failed to show that a manifest injustice has occurred. He simply says he would have chosen to go to trial rather than plead guilty had he known what rights he was giving up or the possible sentence.

{¶ 18} Generally, “a mere change of heart” is insufficient justification. *State v. Drake* (1991), 73 Ohio App.3d 640, 645, 598 N.E.2d 115. Appellant has failed to demonstrate that a manifest injustice occurred because he has failed to support his allegations that the trial court did not conduct a valid plea colloquy. Appellant did not include the transcript from the plea hearing. Therefore, we must assume the trial court satisfied its duties to appellant. *Tillman*, supra.

### **Res Judicata**

{¶ 19} Appellant’s Crim.R. 32.1 motion is also barred by res judicata.<sup>2</sup> According to this doctrine, “a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the

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<sup>2</sup>A motion to vacate a void sentence may not be barred by res judicata if the sentence is, in fact, void “because, by definition, a void sentence means that no final judgment of conviction has been announced.” *State v. McGee*, Cuyahoga App. No. 91638, 2009-Ohio-3374, ¶8.



defendant at trial, which resulted in that judgment of conviction, or on an appeal from that judgment.’ Pursuant to res judicata, a defendant cannot raise an issue in a petition for postconviction relief if he or she could have raised the issue on a direct appeal; a petition for postconviction relief is not the proper vehicle to raise issues that were or could have been determined on a direct appeal.” (Internal citations and emphasis omitted.) *State v. Kenney*, Cuyahoga App. Nos. 81752 and 81879, 2003-Ohio-2046, ¶44.

{¶ 20} Here, appellant contends the trial court erred by not engaging him in a valid plea colloquy. That is an allegation that was known at the time of appellant’s first appeal in *Smith I* and which should have been raised then. Ohio courts have recognized an exception to res judicata when a party raises “new, competent, relevant and material evidence” outside of the record. *Kenney* at ¶45. Appellant does not rely on or present any evidence outside of the record; therefore, his motion to withdraw his guilty plea is barred by res judicata.

### **Conclusion**

{¶ 21} Appellant based his motion to vacate his sentence and Crim.R. 32.1 motion on the lack of a valid plea colloquy. However, he failed to include a transcript of his plea hearing, and therefore has not supported these assertions. There is also no compelling argument that a manifest injustice

has occurred in this case. Finally, appellant failed to raise these arguments in *Smith I*, meaning that his Crim.R. 32.1 motion is barred by res judicata.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR., JUDGE

KENNETH A. ROCCO, P.J., and  
MELODY J. STEWART, J., CONCUR