[Cite as *State v. Brown*, 2019-Ohio-3773.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 108063

v. :

CARLOS M. BROWN, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 19, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-15-595537-A, CR-16-603601-A, and CR-16-609349-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anna Faraglia and Brandon Piteo, Assistant Prosecuting Attorneys, *for appellee*.

Eric Foster, *for appellant*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, Carlos Brown, appeals from the trial court's judgment, rendered after his guilty plea, sentencing him to consecutive sentences totaling thirteen and one-half years in prison. Brown contends that the trial court erred in denying his motion to withdraw his guilty plea without a hearing, and that

the consecutive sentences were not supported by the record. Finding no merit to the appeal, we affirm.

I. Background

{¶ 2} In Cuyahoga C.P. No. CR-16-609349, Brown was indicted in a 23-count indictment that charged the rape and kidnapping of multiple victims. Prior to trial, the state dismissed Counts 6-23 of the indictment, leaving Counts 1-5, which charged the rape and kidnapping of two victims. Brown rejected the state's plea offer, and the matter proceeded to a bench trial.

{¶ 3} After the victims testified, Brown accepted the state's plea offer. The court conducted a plea hearing at which Brown pleaded guilty in CR-16-609349 to one count of rape in violation of R.C. 2907.02, a first-degree felony; and one count of attempted sexual battery in violation of R.C. 2923.02 and 2907.03, a fourth-degree felony. The remaining counts were dismissed. In Cuyahoga C.P. No. CR-16-603601, Brown pleaded guilty to an amended count of attempted failure to verify current residence address in violation of R.C. 2923.02 and 2950.06(F), a fourth-degree felony; the remaining count was dismissed. Brown acknowledged at the plea hearing that he understood that his guilty pleas automatically constituted a probation violation in Cuyahoga C.P. No. CR-15-595537, in which Brown had pleaded guilty to failing to provide notice of a change of his address in violation of R.C. 2950.05(F), a requirement that resulted from Brown's 2012 conviction for sexual battery.

{¶ 4} On December 4, 2018, Brown appeared with counsel for a sentencing hearing. The trial court reviewed Brown's plea agreement and then heard from defense counsel, the prosecutor, and Brown. The trial court then sentenced Brown to 18 months in prison in CR-15-595537, and in CR-16-609349, to 10 years incarceration on Count 1, and one year on Count 4. As the court began to impose sentence in CR-16-603601, Brown kicked over the podium, and yelled to defense counsel, "You told me something different, man. You told me something different." (Tr. 751.) As the deputies escorted Brown from the courtroom, he yelled, "I'll be back. I ain't tripping on none of this." (Tr. 752.) After the deputies removed Brown from the courtroom, the trial court continued the sentencing hearing. The court sentenced Brown in CR-16-603601 to one year in prison, and further, ordered the sentences in the three cases to be served consecutively, for a total term of thirteen and one-half years incarceration.

{¶ 5} After the hearing, the trial court issued a journal entry of sentencing that set forth the sentences in the three cases and stated in part:

> After addressing the court and while the court was pronouncing its judgment, defendant attempted to leave the courtroom, knocked over the podium, began making uncontrollable outbursts which resulted in defendant being removed from the courtroom. The sentencing will resume on a future date so that defendant will be advised of his sentencing in its entirety.

{¶ 6} On December 10, 2018, Brown again appeared with counsel before the trial court. The judge reviewed the events leading to Brown's removal from the courtroom during the sentencing hearing on December 4, 2018, and then stated:

> I have brought Mr. Brown back because I want to complete the sentencing in his presence so I can advise him of all of his rights and I can advise him of this sentence that this court has given.
>
> When we left off last time the defendant had already spoken. The state of Ohio had spoken. The defense counsel had spoken as well. So all that is left to do today is just reiterate my sentence and to, as I indicated earlier, to advise the defendant of his rights.

(Tr. 758.)

{¶ 7} At this point, Brown interrupted the judge and told her that he wanted to withdraw his plea pursuant to Crim.R. 32.1. The court stated that it was denying the motion. Brown then said that the court was required to hold a hearing on his motion to determine if there was a basis for the motion. The trial court told Brown that "[w]hat we're going to do today, as I indicated, we are going to continue your sentencing." (Tr. 759.) The court then informed Brown that "regarding any withdrawal of plea, that would have had to have happened before sentencing. And since you have — you are asking to withdraw your plea after sentencing, then as I indicated to you, this court will deny that motion." *Id*.

{¶ 8} The trial court then informed Brown of the sentences it had imposed in each case, and reiterated the findings it had made on December 4, 2018, to impose consecutive sentences. It further advised Brown that he would be subject to mandatory five years of postrelease control upon his release from prison and of the penalties for violating postrelease control. The court also advised Brown of his appellate rights and that he would be assessed court costs. This appeal followed.

II. Law and Analysis

A. Motion to Withdraw Guilty Plea

{¶ 9} In his first assignment of error, Brown contends that the trial court erred in summarily denying his motion to withdraw his guilty plea without conducting a hearing regarding the basis for the motion.

{¶ 10} As an initial matter, we note that "[i]n Ohio, a criminal defendant has the right to representation by counsel or to proceed pro se with the assistance of standby counsel." *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, at paragraph one of the syllabus. The two rights are independent of each other, and may not be asserted simultaneously. *Id*. at ¶ 32. That is, although a defendant has the right either to appear pro se or with counsel, he has no right to act as co-counsel on his own behalf. *Id*. at ¶ 31.

{¶ 11} Brown was represented by appointed counsel throughout the proceedings, including at the hearing on December 10, 2018. Counsel did not request that Brown be allowed to withdraw his plea; Brown made that request on his own. Because he was represented by counsel, Brown had no right to make an oral motion to withdraw his guilty plea, and the trial court could have summarily denied the motion on that basis alone. The trial court denied the motion for another reason, however, and accordingly, we consider whether the trial court abused its discretion in denying Brown's motion to withdraw his plea without a hearing.

{¶ 12} Crim.R. 32.1 provides that "[a] motion to withdraw a plea of guilty * * * 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."

{¶ 13} A presentence motion to withdraw a guilty plea should be freely and liberally granted. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). Nevertheless, a defendant does not have an absolute right to withdraw a plea prior to sentencing, and accordingly, the trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea. *Id.*

{¶ 14} Postsentence motions to withdraw a plea are treated differently. Where the basis for denying the motion "is clearly warranted," the trial court is not obligated to hold a hearing. *State v. Congress*, 8th Dist. Cuyahoga No. 102867, 2015-Ohio-5264, ¶ 11, quoting *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 51. Thus, a trial court need not hold an evidentiary hearing on a postsentence motion to withdraw a guilty plea if the record indicates the movant is not entitled to relief, and the movant has failed to submit evidentiary documents sufficient to demonstrate a manifest injustice. *State v. Russ*, 8th Dist. Cuyahoga No. 81580, 2003-Ohio-1001, ¶ 12. Furthermore, a trial court's decision denying a postsentence motion to withdraw a plea without a hearing is granted deference, particularly when the court conducted the original plea hearing. *State v. Hunter*, 8th Dist. Cuyahoga No. 99472, 2013-Ohio-5022, ¶ 18.

{¶ 15} Accordingly, we must determine whether Brown's motion to withdraw his guilty plea was made prior to sentencing or after. If Brown's motion was a presentence motion, as he contends, the trial court erred in not conducting a

hearing on the motion to withdraw the plea. If, however, the motion was a postsentence motion, we review the trial court's decision denying the motion for an abuse of discretion, according deference to the court's decision to deny the motion without a hearing. *Id*. at ¶ 16-17.

{¶ 16} Brown asserts that his motion to withdraw his plea was a presentence motion because he was removed from the courtroom on December 4, 2018, before sentencing was completed, and the trial court's journal entry regarding that hearing stated that "the sentencing will resume on a future date so that defendant will be advised of his sentencing in its entirety." He argues further that the trial court's advisement at the December 10, 2018 sentencing hearing that Brown was brought back to court "to complete sentencing in his presence" (tr. 758) demonstrates that sentencing was not completed before he made his motion.

{¶ 17} Brown's argument is without merit. The record reflects that the court completed sentencing Brown after he was removed from the courtroom. (Tr. 752-756.) The court was within its authority to do so: Crim.R. 43(B) provides that "[w]here a defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with the defendant's continued physical presence, the hearing or trial may proceed in the defendant's absence * * * and judgment and sentence may be pronounced as if the defendant were present."

{¶ 18} Crim.R. 43(B) further provides that "[w]here the court determines that it may be essential to the preservation of the constitutional rights of the defendant, it may take such steps as are required for the communication of the

courtoom proceedings to the defendant." The trial court in this case took those steps: it set another hearing for December 10, 2018, to advise Brown of his sentence and his constitutional rights relative to that sentence.

{¶ 19} The trial court's sentencing entry of December 4, 2018, does not support Brown's argument that sentencing was not completed on December 4, 2018. The journal entry stated that sentencing would resume on a future date "so that defendant will be advised of his sentencing in its entirety." Despite Brown's argument otherwise, the journal entry did not state or imply that sentencing would be completed on a future date or that it would start over; it stated that Brown would be brought back to court so that he could be advised "in its entirety" of the sentence that was imposed on December 4, 2018, after he was removed from the courtroom due to his disruptive conduct.

{¶ 20} The trial court's advisement at the beginning of the hearing on December 10, 2018, also demonstrates that the court brought Brown back to court in order to advise him of the completed sentence that was imposed on December 4, 2018. The judge announced that she brought Brown back "so I can advise him of all of his rights and I can advise him of this sentence that this court has given." (Tr. 758.) The judge further explained that "all that is left to do today is just reiterate my sentence and to, as I indicated earlier, to advise the defendant of his rights." *Id*.

{¶ 21} It is apparent that Brown's sentencing was completed on December 4, 2018. Therefore, Brown's oral motion to withdraw his guilty plea, made on December 10, 2018, at a hearing held for the sole purpose of advising Brown of the

sentence that had been previously imposed and his rights regarding that sentence, was a postsentence motion.

{¶ 22} A defendant who seeks to withdraw a guilty plea 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. A manifest injustice is a fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the requirements of due process. *Hunter*, 8th Dist. Cuyahoga No. 99472, 2013-Ohio-5022 at ¶ 15. Under the manifest injustice standard, a postsentence motion to withdraw a plea is permitted '"only in extraordinary cases.'" *Congress*, 8th Dist. Cuyahoga No. 102867, 2015-Ohio-5264 at ¶ 10, quoting *State v. Montgomery*, 2013-Ohio-4193, 997 N.E.2d 579, ¶ 61 (8th Dist.). The heavy standard is meant to avoid the possibility of a defendant pleading guilty to test the weight of potential punishment, and later withdrawing the plea if the sentence was unexpectedly severe. *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, 884 N.E.2d 607, ¶ 4 (8th Dist.).

{¶ 23} This is not the extraordinary case that would warrant withdrawal of the plea. First, it is apparent that Brown's motion to withdraw his plea was due merely to a change of heart in light of the sentence imposed by the judge. Indeed, after hearing the sentence on December 4, 2018, Brown kicked over the podium and yelled that defense counsel "told [him] something different" and "I ain't tripping on none of this." (Tr. 751-752.) A mere change of heart regarding a guilty plea and the

possible sentence is insufficient justification for the withdrawal of a plea, however. *State v. Barrett*, 8th Dist. Cuyahoga No. 100047, 2014-Ohio-1234, ¶ 9.

{¶ 24} Furthermore, Brown offered no evidence whatsoever to demonstrate a manifest injustice sufficient to withdraw his plea. Although he argues that because this was an oral motion there was no basis from which the trial court could decide the motion, the record demonstrates that the trial court conducted the original plea hearing and was familiar with the facts of the case, and could decide the motion without a hearing. Furthermore, Brown's outburst at sentencing on December 4, 2018, established a record from which the trial court could conclude that his motion amounted to nothing more than a change of heart in light of his sentence.

{¶ 25} We recognize that the trial court told Brown his motion was denied because it should have been filed prior to sentencing, an incorrect statement of law. Nevertheless, because the record before the trial court demonstrated that Brown was not entitled to relief, and he failed to submit any evidence demonstrating the existence of a manifest injustice, we find that the trial court did not abuse its discretion in summarily denying Brown's motion to withdraw his guilty plea without a hearing. An appellate court shall affirm a trial court's judgment that is legally correct on other grounds; i.e., one that reaches the right result for the wrong reason, because such an error is not prejudicial. *Gunton Corp. v. Architectural Concepts*, 8th Dist. Cuyahoga No. 89725, 2007-Ohio-6805, ¶ 9, citing *Cook Family Invest. v. Billings*, 9th Dist. Lorain Nos. 05CA008689 and 05CA008691, 2006-Ohio-764, ¶ 19. The first assignment of error is therefore overruled.

B. Consecutive Sentences

{¶ 26} In his second assignment of error, Brown contends that the trial court erred in imposing consecutive sentences.

{¶ 27} R.C. 2929.14(C) allows the court to require an offender to serve consecutive multiple prison terms for convictions on multiple offenses. Consecutive sentences may be imposed if the trial court finds that (1) a consecutive sentence is necessary to protect the public from future crime or to punish the offender, (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and (3) one of the following applies — (a) the offender committed one or more of the multiple offenses while awaiting trial or sentencing, (b) at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct, or (c) the offender's history demonstrates consecutive sentences are necessary to protect the public. *Id.*

{¶ 28} There are two ways a defendant can challenge consecutive sentences on appeal. The defendant can argue that consecutive sentences are contrary to law because the court failed to make the necessary findings required by R.C. 2929.14(C). *State v. Williams*, 8th Dist. Cuyahoga No. 100488, 2014-Ohio-3138, ¶ 4. The defendant can also argue that the record does not support the findings made under R.C. 2929.14(C)(4). *Id.*

{¶ 29} In imposing consecutive sentences at the sentencing hearing on December 4, 2018, the trial court found that (1) consecutive sentences were necessary to protect the public from future crime or to punish Brown; (2) consecutive sentences were not disproportionate to the seriousness of Brown's conduct and the danger he poses to the public; and (3) Brown committed the offenses in CR-16-603601 and CR-16-609349 while on community control in CR-15-595537. (Tr. 752-754.)

{¶ 30} Brown does not dispute that the trial court made all the findings required by R.C. 2929.14(C). Rather, he contends that the consecutive sentences should be vacated because the trial court's findings were not supported by the record.

{¶ 31} Pursuant to R.C. 2953.08(G)(2)(a), a reviewing court may vacate or modify consecutive sentences if it finds by clear and convincing evidence that the record does not support the findings made under R.C. 2929.14(C)(4). *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 22.

> Clear and convincing evidence is that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.

Id., quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954) paragraph three of the syllabus.

{¶ 32} As this court has stated:

> It is important to understand that the "clear and convincing" standard applied in R.C. 2953.08(G)(2) is not discretionary. In fact, R.C. 2953.08(G)(2) makes it clear that "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." As a practical consideration, this means that courts are prohibited from substituting their judgment for that of the trial judge.
>
> It is also important to understand that the clear and convincing standard used by R.C. 2953.08(G)(2) is written in the negative. It does not say that the trial judge must have clear and convincing evidence to support its findings. Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings. In other words, the restriction is on the appellate court, not the trial judge. This is an extremely deferential standard of review.

State v. Perkins, 8th Dist. Cuyahoga Nos. 106877 and 107155, 2019-Ohio-88, ¶ 14, quoting *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 20-21 (8th Dist.).

{¶ 33} In this case, we have no basis for concluding that the record does not support the trial court's findings. The record reflects that the trial court considered Brown's offenses, weighed the need to protect the public and punish him, and evaluated the proportionality of the punishment to his conduct. Further, the court found that he committed the offenses while serving a term of community control sanctions.

{¶ 34} Brown argues, however, that the trial court improperly imposed consecutive sentences because it incorrectly found that his failure to report his address in CR-16-603601 was his "second offense." The trial court made this finding at the hearing on December 10, 2018, after defense counsel requested that the court reconsider its decision to impose consecutive sentences. (Tr. 765.) The trial court denied the motion, stating that Brown was "well aware of his reporting

requirements" and "[t]his is not his first offense in that area. This is his second offense." (Tr. 766.)

{¶ 35} Brown contends that the record does not support the trial court's finding that his failure to report his address to the sheriff in CR-16-603601 was his "second offense." (Tr. 766.) He asserts that he pleaded guilty in CR-15-595537 to failing to notify the sheriff of a change of address in violation of R.C. 2950.05(F), and in CR-16-603601 to attempted failure to verify a current residence address in violation of R.C. 2923.02 and 2950.06. Brown contends these are separate offenses that do not support the trial court's finding that his failure to verify in CR-16-603601 was his "second offense."

{¶ 36} But whether the record supports the trial court's statement on December 10 2018, regarding Brown's "second offense" is not dispositive of whether the trial court properly imposed consecutive sentences. The record reflects that at the sentencing hearing on December 4, 2018, the trial court made the requisite findings to impose consecutive sentences. There was no discussion regarding whether Brown's failure to report was his first or second offense; rather, the trial court found that consecutive sentences were necessary to protect the public or punish Brown; were not disproportionate to the seriousness of Brown's conduct and the danger he poses to the public; and Brown committed the offenses in two of the cases while on probation in a third case — a finding clearly supported by the record. Thus, whether the record supports the trial court's statement at the hearing on December 10 2018, that Brown's failure to report to the sheriff was his "second

offense" is irrelevant to whether the trial court properly imposed consecutive sentences on December 4, 2018, when the trial court sentenced Brown.

{¶ 37} Brown also challenges as unsupported by the record the trial court's finding that consecutive sentences are not disproportionate to the seriousness of his conduct and the danger he poses to the public. Brown asserts that in making this finding, the trial court merely recited the facts of the offenses as testified to at trial by the victims, but that the court's mere recitation of the facts was insufficient to support its finding.

{¶ 38} Brown relies on *State v. Johnson*, 8th Dist. Cuyahoga No. 102449, 2016-Ohio-1536, as support for his argument. In *Johnson*, this court found that the trial court's comments that the defendant's rape offenses against very young children were "heinous" and "terrible" did not support the court's finding that consecutive sentences were not disproportionate to the seriousness of the defendant's conduct because the heinous nature of the offenses was inherent in the offenses themselves and the tender age of the victims. *Id*. at ¶ 20. This court found that those facts were insufficient to support the trial court's finding because the facts said "nothing more" about whether consecutive sentences were not disproportionate to the seriousness of the defendant's conduct and to the danger he posed to the public. *Id*. Brown contends that his case is like *Johnson* because, although his offenses against the two victims were admittedly "heinous and terrible," the horrendous nature of his offenses alone is not a sufficient basis for imposing consecutive sentences.

{¶ 39} Brown's reliance on *Johnson* is misplaced. Unlike as in *Johnson*, the trial court in this case did not limit its assessment regarding whether consecutive sentences were disproportionate to Brown's conduct and the danger he poses to the public to merely a recitation of the offenses and a statement regarding the heinous nature of his actions. Rather, the trial court found that consecutive sentences were not disproportionate to the seriousness of Brown's conduct and the danger he poses to the public after it listened to Brown rationalize his behavior by asserting that the victims, neither of whom he knew, were his girlfriends and wanted to have sex with him, even though he threatened them to force them to have sex with him. (Tr. 748.) The court stated:

> If you believe that that is proper behavior, then society needs to be protected from you. * * * You have priors, and my fear is that this behavior in your mind is okay. That when you see someone on the street that's young, that you can sort of intimidate, that in your mind you can make them out to be your girlfriend and then another rape occurs.

(Tr. 748-749.)

{¶ 40} Further, the court found that Brown had essentially "destroyed" one of the victims, noting that the victim no longer allowed anyone to touch her and was in therapy. (Tr. 748-749.) In addition, unlike the defendant in *Johnson*, prior to his guilty pleas, Brown had already been determined to be a Tier III sex offender and had previously pleaded guilty to sexual battery. And unlike the defendant in *Johnson*, who apologized for his offenses, Brown offered no apologies and continued to rationalize his actions. (Tr. 749.)

{¶ 41} On the record before us, we cannot find by clear and convincing evidence that the trial court's findings under R.C. 2929.14(C)(4) were not supported by the record or were erroneous in any respect. The second assignment of error is therefore overruled.

{¶ 42} 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. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

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

KATHLEEN ANN KEOUGH, JUDGE

EILEEN T. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR