[Cite as *State v. Druktenis*, 2011-Ohio-4020.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-A-0049**
- vs -	:	8-12-11
BRIAN O. DRUKTENIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 11303.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelly M. Pratt*, Assistant Prosecutor, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Michael A. Hiener, P.O. Box 1, Jefferson, OH 44047 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Brian O. Druktenis, appeals from his conviction and sentence for murder with a gun specification in the Ashtabula County Court of Common Pleas. Mr. Druktenis raises two assignments of error related to the validity of his sentence and his ability to withdraw a guilty plea. For the reasons stated below, we do not find Mr. Druktenis' claims compelling, and we affirm the decision of the trial court.

{¶2} **Statement of the Facts and Procedural History**

{¶3} In June of 1985, a then 20-year-old Mr. Druktenis was indicted on one count of aggravated murder with specifications in violation of R.C. 2903.01(A). He eventually pled guilty to the reduced charge of murder with a firearm specification (R.C. 2903.02). On October 28, 1985, Mr. Druktenis was sentenced to three years of incarceration for the firearm specification and 15 years to life on the murder charge, to be served consecutively. The trial court's sentencing entry indicated that Mr. Druktenis was to serve his sentence at the Ohio State Reformatory in Mansfield ("Mansfield"). Within 90 days of his arrival at Mansfield, Mr. Druktenis was notified that he was not, in fact, eligible to serve his sentence at a reformatory and was transferred to a penitentiary. Over the last 25 years, Mr. Druktenis has come before the parole board a number of times. Despite what appears to be an exemplary inmate history and maintenance of a minimum security status and a high honor status for the past 15 years, he has received unfavorable determinations from the parole board each time.

{¶4} On February 10, 2010, almost 25 years after his initial incarceration, Mr. Druktenis filed motions to vacate what he believed was a void sentence and to withdraw his previous plea of guilty pursuant to Crim.R. 32.1. The trial court held a hearing at which Mr. Druktenis presented testimonial evidence from his original trial counsel, Robert Rugerri, and Mr. Druktenis' sister, Denise Kidner. Mr. Druktenis, himself, also testified. The state presented testimonial evidence from Michael Franklin, who assisted then Ashtabula County Prosecutor Greg Brown on Mr. Druktenis' case. Mr. Druktenis' original trial judge was the late Judge Mahoney.

{¶5} After the hearing and consideration of written closing arguments, the trial court denied Mr. Druktenis' motions on September 27, 2010. It is from this denial that Mr. Druktenis filed a timely notice of appeal.

{¶6} Mr. Druktenis raises two assignments of error in his appeal:

{¶7} "[1.] The trial court committed reversible error by not vacating appellant's sentence.

{¶8} "[2.] The trial court committed reversible error by applying the wrong standard under Crim.R. 32.1 to Appellant's Motion to Withdraw His Plea of Guilty."

{¶9} **The Sentence - Reformatories vs. Penitentiaries**

{¶10} Mr. Druktenis, in his first assignment of error, argues that his sentence was void and that the trial court erred in denying the motion to vacate his sentence. Citing the former version of R.C. 5143.03, he asserts that because an individual convicted of murder was prohibited from being sentenced or transferred to a reformatory, his sentence was contrary to law and thus void. We disagree, and conclude that Mr. Druktenis' first assignment of error is, in fact, moot.

{¶11} At the time of Mr. Druktenis' conviction and sentence, in 1985, the Ohio Revised Code distinguished between "reformatories," governed by R.C. 5143, and "penitentiaries," governed by R.C. 5145. The distinction at the time was that reformatories provided an environment better suited to young and first time offenders, placing greater emphasis on rehabilitation. See *State ex rel. McKee v. Cooper* (1974), 40 Ohio St.2d 65. Reformatories also provided a shortened minimum sentence for parole eligibility. Id. However, not all young, first time offenders were eligible to serve their time in a reformatory. The former version of R.C. 5143.03 clearly stated that "[n]o

male person convicted of aggravated murder or murder shall be sentenced or transferred to the reformatory."

{¶12} Mr. Druktenis, based on his plea agreement, was convicted of murder. Despite the prohibition against placing individuals convicted of murder in reformatories, the trial court sentenced Mr. Druktenis to serve his time at Mansfield. The error was identified quite promptly, and Mr. Druktenis was transferred to a penitentiary within 90 days of his arrival at Mansfield.

{¶13} Mr. Druktenis spent close to 90 days at Mansfield in contravention of R.C. 5143.03. During that time, he could have filed a motion to vacate his sentence based on the fact that his placement in a reformatory was prohibited by law. However, he may not have been aware of the prohibition against his placement in a reformatory until the time of his transfer. Upon his transfer to the penitentiary, Mr. Druktenis would have been made aware of the problem associated with serving his sentence in the reformatory. At that time, he had the option of either filing a motion to withdraw his plea with the trial court, pursuant to Crim.R. 32.1, or, filing a motion for delayed appeal pursuant to App.R. 5(A). He did neither.

{¶14} **Crim. R. 32.1 Motion-Sentencing Errors**

{¶15} Twenty-five years after being sentenced, Mr. Druktenis filed a motion with the trial court to vacate his sentence and withdraw his plea, pursuant to Crim.R. 32.1. The trial court held a hearing on the motion and declined to vacate his sentence. Further, the trial court refused to withdraw the plea agreement, applying the post-sentence "manifest injustice" standard of review.

{¶16} The trial court did not err in failing to find his sentence void as Mr. Druktenis suggests. Rather than being void, his sentence was plagued by a mere sentencing error. Generally, "a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act." *State v. Simpkins,* 117 Ohio St.3d 420, 2008-Ohio-1197, ¶12, citing *State v. Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, ¶27. However, "a court's failure to impose a sentence as required by law" will also render the sentence void. Id. at ¶13. More recently, the *Simpkin*s holding has been narrowed, whereby sentences that do not contain statutorily mandated terms, such as the imposition of post-release control, are now only partially void. See *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238.

{¶17} Mr. Druktenis does not fall into the line of void or partially void sentence cases culminating in *Fischer*. The trial court that sentenced Mr. Druktenis did not fail to impose a statutorily mandated term. Instead, the trial court directed Mr. Druktenis to serve a legally appropriate and statutorily complete sentence at an impermissible penal institution. The prohibition against Mr. Druktenis serving his sentence at a reformatory originates, not in the sentencing portion of the revised code, but in Title 51 – the public welfare section. His sentencing entry, therefore, contained what amounts to an administrative or clerical error but does not constitute a failure to follow sentencing mandates under Chapter 2947 of the Revised Code.

{¶18} At the time of Mr. Druktenis' transfer to the penitentiary, in late 1985 or early 1986, any error in sentencing Mr. Druktenis to a reformatory was cured. See *State v. Reynolds* (Aug. 6, 1987), 8th Dist. No. 52461, 1987 Ohio App. LEXIS 8175 (holding that the trial court's error in sentencing defendant to a reformatory in

contravention of R.C. 5143.03 was moot due to his transfer to a penitentiary prior to appeal). This correction was made substantially prior to the initiation of Mr. Druktenis' Crim.R. 32.1 motion, which he filed almost 25 years after his sentence was imposed. At the time of this appeal, no sentencing error exists for this court to remedy. Any previous error was corrected at the time of Mr. Druktenis' transfer to the penitentiary. Therefore, any complaint Mr. Druktenis had regarding the impropriety of his sentence to a reformatory is moot.

{¶19} Furthermore, the distinction between reformatories and penitentiaries was abolished in 1987 via an amendment to R.C. 5120.03. In 1987, had he still been serving time at Mansfield, Mr. Druktenis would have begun serving penitentiary time along with all other inmates housed in reformatories, regardless of what his sentencing entry stated. Therefore, this amendment to the revised code further cures any error present in Mr. Druktenis' original sentencing entry.

{¶20} The first assignment of error is without merit.

{¶21} **Motion to Withdraw Plea**

{¶22} In his second assignment of error, Mr. Druktenis asserts that the trial court erred when it evaluated his motion to withdraw his plea under a post-conviction standard of review rather than a pre-sentence standard. Mr. Druktenis relies on the argument that his sentence was void to support his contention in this assignment of error that his motion to withdraw his plea was, in fact, brought prior to sentencing and should have been liberally granted under the pre-sentence standard. However, Mr. Druktenis' sentence was not void, and the error was cured quite promptly after it was imposed. His sentence thus stands. The trial court, in reviewing Mr. Druktenis' Crim.R.

32.1 motion to vacate his plea, was therefore obliged to apply a post-sentence standard of review and find manifest injustice before granting relief.

{¶23} **Post-Sentence Standard of Review-Manifest Injustice**

{¶24} 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."

{¶25} "Pursuant to Crim.R. 32.1, to withdraw a guilty plea after the imposition of sentence, a defendant bears the burden of demonstrating that such a withdrawal is necessary to correct a manifest injustice." *State v. Madeline* (Mar. 22, 2002), 11th Dist. No. 2000-T-0156, 2002 Ohio App. LEXIS 1348, *7, citing *State v. Kerns* (July 14, 2000), 11th Dist. No. 99-T-0106, 2000 Ohio App. LEXIS 3202. "A post-sentence Crim.R. 32.1 motion to withdraw a guilty plea is granted only in extraordinary cases to correct a manifest injustice." *Madeline* at *7-8, citing *State v. Smith* (1977), 49 Ohio St.2d 261, 264. A manifest injustice is a "clear or openly unjust act." *State v. Walling*, 3d Dist. No. 17-04-12, 2005-Ohio-428, ¶6.

{¶26} An appellate court reviews the trial court's decision on a motion to withdraw a plea under an abuse of discretion standard. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶32. A Crim.R. 32.1 motion is addressed to the sound discretion of a trial court. *Madeline* at *8, citing *State v. Xie* (1992), 62 Ohio St.3d 521, paragraph two of the syllabus. "The good faith, credibility, and weight of a defendant's assertions in support of his motion are to be resolved by a trial court." Id., citing *State v. Gibbs* (June 9, 2000), 11th Dist. No. 98-T-0190, 2000 Ohio App. LEXIS 2526, *6.

{¶27} An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev. 2004) 11.

{¶28} The trial court applied the post-conviction standard of review to Mr. Druktenis' motion to withdraw his plea. This standard of review, requiring that a trial court find manifest injustice in order to withdraw a post-conviction plea, was appropriate under the circumstances. Mr. Druktenis was convicted and sentenced in 1985 and had served almost 25 years of his sentence by the time he brought the motion to withdraw. During that time, any error in his sentence was cured, and the trial court correctly determined that this sentence remained valid and was not void as Mr. Druktenis contended. Therefore, the trial court did not err in requiring a showing of manifest injustice before granting Mr. Druktenis relief.

{¶29} Furthermore, a review of the record and transcript from the motion hearing fails to demonstrate any abuse of discretion by the trial court in finding no manifest injustice had occurred. Although Mr. Druktenis took the stand to allege that the late Judge Mahoney promised him reformatory time in exchange for his plea, no other evidence was presented to concretely support this assertion. In fact, the evidence submitted strongly supports the conclusion that no promises were made, and that reformatory time was merely discussed as a likely possibility given his age and lack of criminal record.

{¶30} While Mr. Druktenis' willingness to accept the plea deal may have been partially founded on a hope of receiving reformatory time, other significant incentives to plead to the lesser murder charge existed, including the eventual possibility of parole.

Mr. Druktenis presents no compelling evidence that he was induced to take the plea based solely on a promise of reformatory time. No promise appears to have existed at all.

{¶31} Under Crim.R. 11(F), "the underlying agreement upon which the plea is based shall be stated on the record in open court." We must note that Mr. Druktenis did not present for review by the trial court the transcript of the plea colloquy from 1985, which could have illuminated the facts and circumstances surrounding his plea. The burden rested on Mr. Druktenis to demonstrate that a manifest injustice has occurred, and the trial court did not abuse its discretion in finding otherwise in the face of the evidence presented. The second assignment of error is without merit.

{¶32} The judgment of the Ashtabula County Court of Common Pleas is hereby affirmed.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.