[Cite as *State v. Johnson*, 2009-Ohio-4398.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Sheila G. Farmer, P.J.
Plaintiff-Appellant	:	W. Scott Gwin, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. CT2009-0015
JEREMY L. JOHNSON	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal From Muskingum County Court Of Common Pleas Case No. CR2007-0089
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 26, 2009
APPEARANCES:	
For Plaintiff-Appellant	For Defendant-Appellee
ROBERT L. SMITH Assistant Prosecuting Attorney 27 North Fifth Street Zanesville, Ohio 43701	GREGORY E. CARTER 21 East Church Street Newark, Ohio 43055

Edwards, J.

{¶1} Plaintiff-appellant, State of Ohio, appeals from the February 13, 2009, Journal Entry of the Muskingum County Court of Common Pleas granting the Motion to Withdraw Guilty Plea filed by defendant-appellee Jeremy Johnson.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 28, 2007, the Muskingum County Grand Jury indicted appellee on one count of trafficking in drugs (crack) in violation of R.C. 2925.03(A)(1), a felony of the fifth degree, one count of trafficking in drugs (crack) with a forfeiture specification in violation of R.C. 2925.03(A)(1),a felony of the fifth degree, one count of possession of drugs (crack) in violation of R.C. 2925.11(A), a felony of the first degree, and one count of possession of drugs (cocaine) in violation of R.C. 2925.11(A), a felony of the second degree. Appellee also was indicted on one count of receiving stolen property in violation of R.C. 2913.51(A), a felony of the fourth degree, one count of having a weapon while under a disability in violation of R.C. 2923.13(A), a felony of the third degree, one count of possession of anabolic steroids in violation of R.C. 2925.11(A), a misdemeanor of the third degree, one count of possession of drug abuse instruments in violation of R.C. 2925.12(A), a misdemeanor of the second degree, and one count of possession of drugs (ecstasy) in violation of R.C. 2925.11(A), a felony of the third degree. The indictment alleged that the crimes occurred on March 15, 2007, March 18, 2007, and March 19, 2007. At his arraignment on April 4, 2007, appellee entered a plea of not guilty to the charges.

{¶3} On May 21, 2007, appellant filed a Motion to Suppress Evidence, seeking the suppression of physical evidence seized as a result of the warrantless search of his

residence. Following a hearing held on June 18, 2007, at which Patrolman Sean Beck was the sole witness to testify, the trial court denied such motion.

{¶4} Thereafter, on July 24, 2007, appellee withdrew his former not guilty plea and entered a plea of guilty to all of the charges in the indictment with the exception of the charge of possession of drugs (ecstasy) in violation of R.C. 2925.11(A). As memorialized in an Entry filed on September 5, 2007, appellee was sentenced to an aggregate prison sentence of six years. The State of Ohio entered a Nolle Prosequi as to the remaining count. Appellant did not file an appeal.

{¶5} On November 9, 2007, appellee filed a Motion to Withdraw Guilty Plea and "correct the manifest injustice that has occurred." Appellee, in his motion, alleged that, after his sentencing, he discovered that a key witness against him "was under an ongoing [federal] investigation related to dishonesty and abuse of his office as a police officer." Appellant, in his motion, alleged that "[t]he credibility of government witness was key to the prosecution of this matter and their veracity was at the very core of the resolution of the suppression issues raised below." Appellant further alleged that had he known that an officer involved in his prosecution "was lying and abusing his office for his own gain," he would not have entered a plea.

{¶6} A hearing on appellee's motion was held on January 28, 2008. During the hearing, facts were developed that suggested that possibly, as early as June, 2007, a federal undercover investigation commenced into the activities of two (2) Zanesville Police Officers, (Beck and Fusner), and that civilian informants as well as Muskingum County Sheriffs Deputies were being employed in an undercover investigation. Appellee alleged that this investigation would have been ongoing at the time of the

suppression hearing in this case, which took place on June 18, 2007. The officers involved in this case, who were the subject of the federal investigation, were subsequently indicted in Federal Court on or about October 25, 2007, for crimes which were alleged to have occurred between August 16, 2007, and September 25, 2007, over two (2) months after the suppression hearing took place.

{¶7} The trial court directed the parties to brief the following question:

{¶8} "Whether the fact of an investigation into criminal activity of one or more of the State's witnesses, although unknown to the prosecutor at the time of the suppression hearing, by federal authorities with the cooperation and assistance of the Muskingum County Sheriffs Department, is imputable to the State of Ohio, for purposes of Ohio Rule of Criminal Procedure 16, and/or the *Brady v. Maryland* doctrine, and, if so, is the failure to provide such information to Defendant-Appellee prior to the suppression or change of plea a basis for this Court to permit Defendant-Appellee to withdraw his plea of "guilty."

Thereafter, the parties submitted written memoranda and supplements thereto.

{¶9} Pursuant to a Journal Entry filed on February 13, 2009, the trial court granted appellee's Motion to Withdraw Guilty Plea.

{¶10} On February 19, 2009, appellant filed a request for written findings of fact and conclusions of law. The trial court denied such motion.

{¶11} Appellant now raises the following assignment of error on appeal:

{¶12} "THE TRIAL COURT ERRED WHEN IT PERMITTED THE DEFENDANT TO WITHDRAW HIS GUILTY PLEAS."[1]

[1] Pursuant to a Judgment Entry filed on April 28, 2009, this Court granted appellant's Motion for Leave to Appeal.

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{¶13} Appellant, in its sole assignment of error, argues that the trial court erred in granting appellee's Motion to Withdraw his guilty plea.

{¶14} 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 manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." Thus, a defendant seeking to withdraw a guilty plea after sentence has been imposed, as appellee did in the instant case, has the burden of demonstrating a "manifest injustice." *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus. A "manifest injustice" has previously been defined as a "clear or openly unjust act." Citing *State ex rel. Schneider v. Kriener*, 83 Ohio St.3d 203, 208, 1998-Ohio-271, 699 N.E.2d 83. *State v. Walling,* 3d Dist. No. 17-04-12, 2005-Ohio-428, ¶ 6. Notably, a post-sentence withdrawal of a guilty plea is only available in "extraordinary cases." *Smith,* 49 Ohio St.2d at 264.

{¶15} Furthermore, a trial court maintains discretion in determining whether a defendant established a "manifest injustice." *Id.,* at paragraph two of the syllabus. As such, this Court will not reverse a trial court's decision absent an abuse of discretion. *State v. Nathan* (1995), 99 Ohio App.3d 722, 725, 651 N.E.2d 1044. An abuse of discretion suggests a decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. After a review of the record, we find that the trial court did not abuse its discretion when it granted appellee's motion to withdraw his guilty pleas.

{¶16} In the case sub judice, the trial court held an oral hearing on appellee's motion to withdraw and further allowed both sides to submit supplemental post-hearing briefs.

{¶17} The trial court, in granting appellee's motion to withdraw his guilty pleas, did not set forth its reasons for the same. However, it is well settled that Crim.R. 32.1 does not require the trial court to issue findings of fact and conclusions of law when ruling on a motion to withdraw a plea. *State ex rel. Chavis v. Griffin* (2001), 91 Ohio St.3d 50, 51, 2001-Ohio-241, 741 N.E.2d 130.

{¶18} In the absence of findings of fact and conclusions of law, a reviewing court will presume regularity in the trial below and assume the trial court followed the proper application of the rules of evidence and procedure in arriving at the decision. See *Cox v. Cox* (1929), 34 Ohio App. 192, 170 N.E. 592; *Pettet v. Pettet* (1988), 55 Ohio App.3d 128, 562 N.E.2d 929

{¶19} Ultimately, it is within the sound discretion of the trial court to evaluate the credibility and weight of the movant's assertions. *State v. Smith* (1977), 49 Ohio St.2d at 264, 361 N.E .2d 1324. The trial court had before it all of the information presented both at the oral hearing and through the written brief submitted post-hearing and apparently gave great weight to the arguments of appellee. We will not second-guess the trial court's credibility and weight determinations.

{¶20} Furthermore, a review of the record indicates that appellant filed a transcript of the January 28, 2008, hearing on his Motion to Withdraw Guilty Plea but did so untimely and without leave of court. The record indicates transmission of the transcript in the case sub judice was due on April 2, 2009. However, the transcript was

not transmitted to this Court by the trial court clerk until June 24, 2009. Accordingly, we may not review such transcript. When portions of the transcripts 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 that the validity of the lower court's proceeding and affirm." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384.

{¶21} We find no evidence of an abuse of discretion in the trial court's granting of appellee's motion to withdraw his guilty pleas.

{¶22} Appellant's sole assignment of error is, therefore, overruled.

{¶23} Accordingly, the judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Edwards, J.

Farmer, P.J. and

Gwin, J. concur

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JUDGES

JAE/d0604

[Cite as *State v. Johnson*, 2009-Ohio-4398.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
JEREMY L. JOHNSON	:	
Defendant-Appellee	:	CASE NO. CT2009-0015

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES