[Cite as *State v. Aleshire*, 2010-Ohio-2566.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 09-CA-132
LONNY J. ALESHIRE, JR.	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Court of Common Pleas, Case No. 05CR60
JUDGMENT:	Affirmed in part, reversed in part & Remanded
DATE OF JUDGMENT ENTRY:	June 7, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH W. OSWALT Licking County Prosecutor 20 S. Second Street, 4th Floor Newark, OH 43055	LONNY J. ALESHIRE, JR. Chillicothe Correctional Institution 15802 SR 104, North Chillicothe, OH 45601

Gwin, P.J.

{¶1} Defendant-appellant Lonny J. Aleshire, Jr., appeals a judgment of the Court of Common Pleas of Licking County, Ohio, which overruled his motion for a new trial and motion to withdraw his guilty plea. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE[1]

{¶2} Appellant was indicted by the Licking County Grand Jury on one count of rape, six counts of unlawful sexual conduct with a minor, and three counts of sexual imposition. At the change of plea hearing appellant pled guilty to all counts, and the court found him guilty of the same. Upon acceptance of the plea, the court allowed the State to dismiss Case No. 05 CR 69, a second indictment filed against appellant that alleged sexual battery.

{¶3} During appellant's plea hearing, the following exchange occurred:

{¶4} "Q. You understand that a guilty plea is a complete admission of the charges filed against you?

{¶5} "A. Yes, Your Honor.

{¶6} "Q. And did your attorney explain that to you?

{¶7} "A. Yes, Your Honor.

{¶8} "Q. At this time, I am going to ask the assistant prosecutor to present the facts of the State's case against you. I want -- in Case Number 05 CR 60. If there is a disagreement, *I'm going to ask you whether you agree with the facts. If there is a disagreement regarding the facts, I want to clear that up on the record. Before you answer, please consult with your attorney.*

[1] A statement of the facts underlying appellant's original conviction is unnecessary to our disposition of this appeal. Any facts needed to clarify the issues addressed in Appellant's assignment of error shall be contained therein.

{¶9} "THE COURT: Miss Seeds.

{¶10} "MS. SEEDS: Thank you, Your Honor.

{¶11} "The defendant in this matter has been charged with one count of rape, in violation of Ohio Revised Code Section 2907.02(A) (2), which is a felony of the first degree, punishable by a term of incarceration of three to ten years and a maximum fine of $20,000.

{¶12} "He's also been charged with six counts of unlawful sexual conduct with a minor, in violation of Ohio Revised Code Section 2907.04(A) (B)(3), which are felonies of the third degree, each of which are punishable by a term of incarceration of one to five years and a maximum fine of $10,000.

{¶13} "Finally, he's been charged with three counts of sexual imposition, in violation of Ohio Revised Code Section 2907.06(A) (3) misdemeanors of the third degree, which are punishable by 60 days in jail and a maximum fine of $500.

{¶14} "The basis for these charges are as follows: The defendant was born on September 15th, 1970. He was residing at 503 East Main Street Hebron, Licking County, Ohio with his family. His father, Lonny Aleshire, Senior, is a pastor at the Licking Baptist Church located at 1609 Beaver Run Road, Hebron, Ohio, Licking County. The defendant worked part-time at the church with the choir and with the youth group. When his father was ill in the past, the defendant would fill in for him by giving the sermon. It was through the church that he met both the victims.

{¶15} "[S.C.] was born August 3rd, 1989, and had just turned 13 years of age in August of 2002 when the defendant began to make inappropriate advances toward her. He first started by holding her hand, telling her he loved her, and then this

progressed to kissing, and finally, in February of 2003, he digitally penetrated her. That continued on through the summer of 2003 when the defendant engaged in sexual intercourse and oral intercourse with [S.C.] This conduct continued through the summer of 2004. These incidents would take place when the defendant would arrange to be alone with the victim either at the church, in his car or at his house.

{¶16} "The defendant's second victim was [S.C.'s] sister, [J. C.] Her date of birth is January 2nd, 1988, and in June of 2004, the first weekend after school was out for the summer, [J.C.] being 16 years of age at the time, agreed to babysit for the defendant's children. After arriving home, the defendant was to drive her home but, instead, he detoured to the church. Once inside the church, the defendant began kissing her and telling her he loved her. He then forced her to the ground and engaged in sexual intercourse with her. He then performed oral sex on her and requested she do the same.

{¶17} "Q. *(By the Court) Mr. Aleshire, do you agree with the facts as presented?*

{¶18} "A. *Your Honor, I have no exception.*

{¶19} "Q. *And have you discussed these facts fully and completely with your attorney?*

{¶20} "A. *Yes, Your Honor.*

{¶21} "Q. *And has your attorney advised you of all possible defenses and all motions that could be filed in your behalf?*

{¶22} "A. *Yes, Your Honor.*

{¶23} "Q. And are you satisfied with your attorney?

{¶24} "A. Yes, Your Honor.

{¶25} "Q. *You understand that no one can force you to change your pleas today?*

{¶26} "A. *Yes, Your Honor.*

{¶27} "Q. *Are you doing this freely and voluntarily?*

{¶28} "A. *Yes, Your Honor.*

{¶29} "Q. Knowing what your rights are?

{¶30} "A. Yes, Your Honor.

{¶31} "Q. Knowing what the penalties are?

{¶32} "A. Yes, Your Honor

{¶33} "* * *

{¶34} "Q. *Do you want me to accept your pleas of guilty?*

{¶35} "A. *Yes, Your Honor.*

{¶36} "Q. *And are you pleading guilty because you are guilty?*

{¶37} "A. *Yes, Your Honor.*"

{¶38} The change of plea forms reflect that the parties jointly recommended that appellant receive six years on the rape count. Further, it was recommended that one-year terms be imposed for each count of unlawful sexual conduct and six month terms for each count of sexual imposition. The one-year and six month terms would run concurrent to each other for a total of one year. This one-year sentence would be run "consecutive to Case No. 05 CR 69," which was the case that the trial court allowed to be dismissed. The court departed from the recommendation as to the rape count and imposed a seven-year prison term for that count. The Court followed the one-year and

six month recommendations for the remaining counts and ran all of the sentences concurrently.

{¶39} The trial court proceeded to sentencing immediately after accepting appellant's negotiated guilty plea and entering its finding of guilt. During the sentencing portion of the proceedings, the trial court informed appellant as follows:

{¶40} "The Court would notify the defendant that upon your release from prison, you will be on post-release control, and that is mandatory and would be for a period of five years. And if you violate that post-release control, you could be returned to prison for up to nine months with the maximum for repeated violations equaling 50 percent of our stated prison term, and if the violation is a new felony, you may be returned to prison for the remaining post release control period or 12 months, whichever is greater, plus a prison term for the new crime.

{¶41} "The Court has exceeded the minimum term in this case by reason of the fact that it is a negotiated plea." (T. at 23-24).

{¶42} On November 1, 2006, appellant filed a pro se Motion to Withdraw Plea of Guilty, to which he attached his own affidavit, the change of plea forms, and a letter from his trial counsel regarding his sentence. The State opposed the motion, and appellant filed a reply to the State's memorandum. Through an entry filed December 1, 2006, without holding a hearing on the matters raised in the Motion to Withdraw Plea of Guilty, the trial court denied the motion.

{¶43} In *State v. Aleshire,* Licking App. No.2007-CA-1, 2007-Ohio-4446 ["*Aleshire I* "], we affirmed the trial court's denial of appellant's motion to withdraw his

negotiated guilty plea that appellant filed nearly one year after he began serving his prison sentence.

{¶44} The Supreme Court of Ohio then reviewed the matter. Initially the Supreme Court vacated the appellant's plea and remanded for a new hearing. *State v. Aleshire,* 117 Ohio St.3d 402, 884 N.E.2d 57, 2008-Ohio-1272. Upon motion of the State, the Supreme Court reconsidered and remanded to this Court for further review. *State v. Aleshire,* 118 Ohio St.3d 1213, 889 N.E.2d 136, 2008-Ohio-2700.

{¶45} Upon remand from the Supreme Court of Ohio, this Court was asked to consider whether this court's ruling on defendant-appellant's sole assignment of error, concerning the trial court's overruling of his post-sentence motion to withdraw his negotiated guilty plea, should be modified in light of *State v. Sarkozy,* 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224. See, *State v. Aleshire* (June 11, 2008), 2008-Ohio-2700, 118 Ohio St.3d 1213, 889 N.E.2d 136. On remand, this Court upheld appellant's conviction and sentence. See, *State v. Aleshire,* Licking App. 2007-CA-1, 2008-Ohio-5688 ["Aleshire II"].

{¶46} On September 29, 2009 appellant filed a "Motion for a New Trial" claiming newly discovered evidence. The state responded. On October 15, 2009 appellant filed a "Memorandum Contra and Alternative Motion to Withdraw Guilty Plea." On October 30, 2009, the trial court denied the motion for a new trial and appellant's second motion to withdraw his plea of guilty. The trial court found that it lacked jurisdiction citing this Court's decision in *State v. Fletcher*, Licking App. No. 2009-CA-0055, 2009-Ohio-5650.

{¶47} On December 29, 2009 appellant filed a motion for delayed appeal. See, *State v. Aleshire,* Licking App. No. 09-147. This Court denied appellant's request by Judgment Entry filed January 21, 2010.

{¶48} It is from the trial court's Judgment Entry filed October 30, 2009 that appellant has filed the instant appeal raising as his sole assignment of error:

{¶49} "I. THE TRIAL COURT ERRED IN FINDING IT LACKED JURISDICTION TO HEAR APPELLANT'S MOTION FOR A NEW TRIAL AND MOTION TO WITHDRAW GUILTY PLEA."

I.

{¶50} In his sole assignment of error, appellant argues that this Court has previously reviewed and affirmed that the trial court substantially complied with Criminal Rule 11. Since that ruling, however, the appellant claims he has obtained evidence of his actual innocence that he was previously prevented from discovering. Accordingly, he contends the trial court erred by overruling his motion for a new trial and motion to withdraw his plea of guilty.

{¶51} The entry of a plea of guilty is a grave decision by an accused to dispense with a trial and allow the state to obtain a conviction without following the otherwise difficult process of proving his guilt beyond a reasonable doubt. See *Machibroda v. United States* (1962), 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473.

{¶52} A plea of guilty constitutes a complete admission of guilt. Crim. R. 11 (B)(1). "By entering a plea of guilty, the accused is not simply stating that he did the discreet acts described in the indictment; he is admitting guilt of a substantive crime." *United v. Broce* (1989), 488 U.S. 563, 570, 109 S.Ct. 757, 762.

{¶53} We begin our analysis of the trial court's decision in the case at bar by noting a reviewing court is not authorized to reverse a correct judgment merely because it was reached for the wrong reason. *State v. Lozier* (2004), 101 Ohio St.3d 161, 166, 2004-Ohio-732 at ¶46, 803 N.E.2d 770, 775. [Citing State *ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn.* (1998), 81 Ohio St.3d 283, 290, 690 N.E.2d 1273]; *Helvering v. Gowranus* (1937), 302 U.S. 238, 245, 58 S.Ct. 154, 158.

{¶54} Pleas of guilty that are knowingly, voluntarily, and intelligently entered waive the defendant's right to trial on the criminal charge or charges involved. It necessarily follows, therefore, that "[a] plea of guilty in a criminal case precludes the defendant from thereafter making a motion for a new trial." *State v. Frohner* (1948), 150 Ohio St. 53, paragraph thirteen of the syllabus; *State, ex rel. Batten v. Reece,* 70 Ohio St.2d 246, 436 N.E.2d 1027; *State v. Franklin,* Greene App. No. 2002-CA-7, 2003-Ohio-3831 at ¶10.

{¶55} Moreover, allowing a defendant to file a motion for new trial instead of a motion to withdraw the plea permits the defendant to circumvent the more stringent standard set forth in seeking a withdrawal of a plea. *State v. Frohner,* supra. See, also *State v. Woodley,* Cuyahoga App. No. 83104 at n. 2. (Citing *State v. Burke* (Mar. 9, 2001), 2nd Dist. No. 17955; *State v. Vincent,* 4th Dist. No. 02CA2654, 2003-Ohio-473, at ¶ 20; *State v. Franklin,* 2nd Dist. No.2002 CA 77, 2003-Ohio-3831).

{¶56} Accordingly, because appellant entered guilty pleas to all the charges and waived his right to have a jury determine his guilt or innocence, the trial court correctly determined that it did not have jurisdiction to rule upon appellant's motion for a new trial. Therefore, we affirm the trial court's decision dismissing his motion for a new trial

and overrule the appellant's assignment of error related to his filing of a motion for a new trial.

{¶57} However, because appellant subsequently filed a "response/motion" which motion is in essence a motion to withdraw his plea, we will proceed to review the trial court's denial of his motion pursuant to the standard for a post-sentence withdrawal of a plea[2].

{¶58} In the case at bar, appellant is not arguing that he maintained his innocence during the change of plea hearing with the trial court[3]. *State v. Woodley* at ¶12. Thus, he made a conscious choice to enter into the plea. A guilty plea is a complete admission of the defendant's factual guilt. See, *Aleshire I*, supra at ¶ 8.

{¶59} Crim. R. 32.1 governs the withdrawal of a guilty or no contest plea and 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." Because appellant's request was made post-sentence, the standard by which the motion was to be considered was "to correct manifest injustice."

{¶60} The accused has the burden of showing a manifest injustice warranting the withdrawal of a guilty plea. *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus. A manifest injustice has been defined as a "clear or openly unjust act." *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, 208. "'Manifest injustice relates to some fundamental flaw in the proceedings which result[s]

[2] Crim.R.32.1 does not contain any express provision permitting withdrawal of a plea of guilty based on newly discovered evidence.

[3] See, e.g. *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162, fn. 10.

in a miscarriage of justice or is inconsistent with the demands of due process.'" *Ruby* at ¶ 11, quoting *State v. Williams,* 10th Dist. No. 03AP-1214, 2004-Ohio-6123, at ¶ 5. Accordingly, under the manifest injustice standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. *Smith,* 49 Ohio St.2d at 264.

{¶61} The Ohio Supreme Court in *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598, rejected a post-sentence motion to withdraw a plea even though the defendant presented evidence of his innocence. In that case, the defendant sought to withdraw his plea based on testimony made at a subsequent trial of another participant, which indicated the defendant who had pleaded guilty did not commit the shooting. The Court held:

{¶62} "A plea of guilty is a complete admission of guilt. By entering his guilty plea to the principal charge and to the specification under R.C. 2929.04(A)(3), appellant admitted that he murdered Mary Jane Stout for the purpose of avoiding detection, apprehension, trial or punishment for his crimes of attempted aggravated murder and aggravated robbery. Appellant makes no claim that his plea was not entered knowingly, intelligently, and voluntarily. The three-judge panel questioned appellant extensively prior to accepting his guilty plea. He indicated that he made an informed and knowledgeable plea, with full realization as to its effect. Based upon appellant's guilty plea and the evidence adduced at his sentencing hearing, we cannot say that the panel abused its discretion or that appellant met his burden of showing that manifest injustice had occurred. Thus, we uphold the panel's decision not to permit appellant to withdraw his plea." Id. at 104-105, 512 N.E.2d 598

{¶63} In the case at bar, as previously noted, the State indicated to the trial court that this was a negotiated plea[4]. (T. at 14). Appellant agreed. (Id.). After the State recited the underlying facts that led to appellant's indictment, the court inquired, "Mr. Aleshire, do you agree with the facts as presented?" (T. at 11). Appellant replied, "Your Honor, I have no exception."[5] (Id.). After being appraised of the ramifications of the guilty plea, appellant stated he understood the penalty. He also told the court that no promises were made to him to coerce him into entering the plea. Appellant further acknowledged that he was pleading guilty because he was guilty. (T. at 15).

{¶64} In the instant case, by pleading guilty, appellant admitted the allegations as set forth by the prosecutor. This Court has previously found that his plea was knowingly, intelligently, and voluntarily entered. To the extent that appellant raises issues in his Crim.R. 32.1 motion that were resolved in his previous appeal, the trial court was correct in finding that it lacked jurisdiction. *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 92, 97, 378 N.E.2d 162; *State v. Fletcher*, Licking App. No. 2009-CA-0055, 2009-Ohio-5650 at ¶ 10.

{¶65} Accordingly, the trial court correctly determined that it did not have jurisdiction to rule upon appellant's motion to withdraw his guilty plea. Therefore, we

[4] Appellant was originally indicted on six counts of Unlawful Sexual Conduct with a Minor, felonies of the third degree which carried a minimum sentence of one year to a maximum sentence of five years for each count; one count of Rape, a felony of the first degree, with a minimum sentence of three years and a maximum sentence of ten years; and one count of Sexual Battery, also a felony of the third degree. Thus, appellant was facing, if convicted, a maximum potential sentence of forty-five (45) years incarceration. In exchange for his plea of guilty, the State dismissed the Sexual Battery charge, and recommended a sentence of seven years. See, *Aleshire I* at ¶ 19.

[5] The evidence against appellant included not only the testimony of the two minor victims, but also inculpatory telephone conversations between appellant and one of the victims, and DNA evidence placing appellant's seamen on the carpet of the church in a location where one of the victims indicated that she and appellant had engaged in sexual activity. See, *Aleshire I* at ¶ 19.

affirm that part of the trial court's decision and overrule the corresponding part of appellant's assignment of error.

{¶66} However, the trial court based its decision upon this Court's decision in *State v. Fletcher*, Licking App. No. 2009-CA-0055, 2009-Ohio-5650. In *Fletcher* we noted, "We agree with the Eighth District's reasoning [in *State v. Dawson,* Cuyahoga App. No. 87102, 2006-Ohio-3505]. We find the trial court was correct in determining it lacked jurisdiction over the issues appellant attempted to raise in his motion to withdraw his plea. *The issues are the same as those appellant raised in his prior appeal before this court.* Id. at ¶ 14. (Emphasis added).

{¶67} Even without a remand, a trial court could regain jurisdiction to do an act that was "not inconsistent" with our prior exercise of jurisdiction, i.e., entertain a petition for post-conviction relief, or even entertain a Civ.R. 60(B) that was based upon an issue that was not argued or waived upon appeal.

{¶68} Under the doctrine of res judicata, a final judgment 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 the defendant raised or could have raised at trial or on appeal. *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 96, 671 N.E.2d 233, reaffirming *State v. Perry* (1967), 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104, paragraph nine of the syllabus. "More specifically, a criminal defendant cannot raise any issue in a post sentence motion to withdraw a guilty plea that was or could have been raised at trial or on direct appeal. *State v. Reed,* Mahoning App. No. 04 MA 236, 2005-Ohio-2925, 2005 WL 1385711; *State v. Zinn,* Jackson App. No. 04CA1, 2005-Ohio-525, 2005 WL

318690; *State v. Robinson,* Cuyahoga App. No. 85266, 2005-Ohio-4154, 2005 WL 1926043; *State v. Rexroad,* Summit App. No. 22214, 2004-Ohio-6271, 2004 WL 2674605; *State v. Reynolds,* Putnam App. No. 12-01-11, 2002-Ohio-2823, 2002 WL 1299990; *State v. Wyrick* (Aug. 31, 2001), Fairfield App. No. 01CA17, 2001 WL 1025811; *State v. Jackson* (Mar. 31, 2000), Trumbull App. No. 98-T-0182, 2000 WL 522440; *State v. Jeffries* (July 30, 1999), Wood App. No. L-98-1316, 1999 WL 550251." *State v. Brown,* supra 167 Ohio App.3d 242, 2006-Ohio-3266, at ¶ 7.

{¶69} In the case at bar, as a basis for his motion to withdraw his guilty plea, appellant claimed to have "newly discovered" evidence. The state responds that appellant's motion to withdraw his guilty plea was barred by the doctrine of res judicata since appellant has not shown that the issues raised in the motion could not have been raised in his earlier motions and in his earlier appeal. The state further asserts that our previous decisions affirming the trial court's denial of appellant's motion to withdraw his plea is the law of the case for these subsequent proceedings. The state asserts that appellant cannot show a manifest injustice, and that his request for withdrawal of his guilty plea was properly denied.

{¶70} However, the trial court did not address the merits of appellant's claim of "newly discovered" evidence in denying his motion. The trial court denied his motion, explaining that the court lacked jurisdiction ostensibly because appellant had raised no issues that he had not previously raised[6].

{¶71} The key to a trial court's procedural posture must be that a defendant received a "full and fair consideration" of the plea withdrawal request. *State v. Wooley*

[6] In our previous decisions, this Court held that appellant has failed to demonstrate that he was prejudiced by the trial court's failure to inform him prior to accepting his plea concerning mandatory post-release control.

(Dec. 13, 1985), Lucas App. No. L-85-105. "A trial court does not abuse its discretion in overruling a motion to withdraw: (1) where the accused is represented by highly competent counsel, (2) where the accused was afforded a full hearing, pursuant to Crim.R. 11, before he entered the plea, (3) when, after the motion to withdraw is filed, the accused is given a complete and impartial hearing on the motion, and (4) where the record reveals that the court gave full and fair consideration to the plea withdrawal request." *State v. Johnson,* Cuyahoga App. No. 83350, 2004-Ohio-2012, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863, at syllabus. Other considerations that may weigh in the court's analysis include: "(1) whether the motion was made within a reasonable time; (2) whether the motion set out specific reasons for the withdrawal; (3) whether the accused understood the nature of the charges and the possible penalties; and (4) whether the accused was perhaps not guilty or had a complete defense to the charges." *State v. McNeil* (2001), 146 Ohio App.3d 173, 176, 765 N.E.2d 884. (Citing citing *State v. Fish* (1995), 104 Ohio App.3d 236, 240, 661 N.E.2d 788). "A hearing on a post-sentence Crim. R. 32.1 motion is not required if the facts alleged by the defendant and accepted as true by the trial court would not require the court to permit a guilty plea to be withdrawn." *State v. Wynn* (1998), 131 Ohio App.3d 725, 728, 723 N.E.2d 627, 629; *State v. Blatnik* (1984), 17 Ohio App.3d 201, 204, 478 N.E.2d 1016, 1020; *Aleshire I*, supra at ¶13.

{¶72} Upon review, we find the trial court did not give full and fair consideration to appellant's motion to withdraw his guilty plea due to the trial court's belief that it lacked jurisdiction to consider the motion.

{¶73} Therefore, the judgment of the Licking County Court of Common Pleas is affirmed in part and reversed in part and the cause is remanded for proceedings in accordance with our opinion and the law[7].

By Gwin, P.J., and

Wise, J., concur;

Hoffman, J.,concurs

separately

_____

HON. W. SCOTT GWIN

_____

HON. WILLIAM B. HOFFMAN

_____

HON. JOHN W. WISE

WSG:clw 0518

[7] It should be noted however, that this Court is not stating that appellant's motion to withdraw his guilty plea has merit or should be granted. We are only stating that the lower court needs to provide appellant with a full and fair consideration in order to determine the merit of his application for relief.

Hoffman, J., concurring

{¶74} I concur generally in the majority's analysis and disposition of Appellant's assignment of error as concerning that portion of Appellant's motion to withdraw his guilty plea that falls outside the compass of this Court's previous judgment. My singular analytical disagreement with the majority relates to its conclusion the trial court did not have jurisdiction to rule upon Appellant's motion for a new trial (Majority Opinion at ¶56). While I agree with the majority's analysis as to why the trial court should have denied the motion, I believe such rational inherently involves the exercise of jurisdiction; not the lack of it.

{¶75} I also write to retreat from the decision I authored for this Court in *State v. Davis*, 2009-Ohio-5175. Although not cited in the majority opinion nor necessary to the majority's analysis in the case sub judice, Appellee relied, in part, on the *Davis* case in support of its contention the trial court lacked jurisdiction to entertain Appellant's motion for a new trial.

{¶76} *Davis* is significantly procedurally different from the case now under review. Upon revisiting *Davis*, I now believe my interpretation of *State ex rel. Special Prosecutors* (1978), 55 Ohio St.2d 94, was overly broad. The Ohio Supreme Court in *Special Prosecutors* found the trial court's granting of a motion to withdraw the guilty plea and the order to proceed with a new trial were inconsistent with the judgment of the Court of Appeals, which had affirmed the trial court's conviction premised upon that guilty plea. The Supreme Court concluded the trial court had no jurisdiction.

{¶77} Upon further consideration, I now believe the Supreme Court's reference to "new trial" merely pertained to the remedy ordered.[8] The mechanism through which to obtain that remedy was the motion to withdraw the guilty plea. It was this procedural mechanism which the Supreme Court found the trial court was without jurisdiction to entertain. Upon reconsideration, I believe this Court reached the wrong conclusion in *Davis*.

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HON. WILLIAM B. HOFFMAN

[8] I now believe I misconstrued the Supreme Court's reference to "new trial" in *Special Prosecutor's* as it is clear no trial had ever been held therein.

[Cite as *State v. Aleshire*, 2010-Ohio-2566.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
LONNY J. ALESHIRE, JR.	:	
Defendant-Appellant	:	CASE NO. 09-CA-132

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed in part and reversed in part and the cause is remanded for proceedings in accordance with our opinion and the law. Costs to be split equally between the parties.

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. JOHN W. WISE