

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 00251
	:	
	:	
JOHN LEWIS HOFFNER	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Criminal Appeal from Stark County Court of Common Pleas Case No. 2003 CR 1026
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	June 28, 2010
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APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Stark County, Ohio

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Edwards, P.J.

{¶1} Appellant, John Lewis Hoffner, appeals a judgment of the Stark County Common Pleas Court overruling his motion to withdraw his guilty plea. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} In 2003, appellant was indicted by the Stark County Grand Jury with two counts of attempted murder (R.C. 2923.02(A), R.C. 2903.02(A)), one count of aggravated burglary (2911.11(A)(1), (2)), and two counts of felonious assault (R.C. 2903.11(A)(1)). On September 10, 2003, appellant pleaded guilty to all charges in exchange for a negotiated prison term of 12 years. He did not appeal.

{¶3} In 2007, appellant filed a motion to correct or vacate his sentence based on *Blakely v. Washington* (2004), 542 U.S. 296 and *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2005-Ohio-856. The motion was overruled.

{¶4} In 2008, appellant filed a pleading challenging the validity of the indictment, claiming it was a direct indictment. The same year, appellant filed a motion to vacate a void judgment, claiming his indictment was defective under *State v. Colon*, 118 Ohio St.3d 26, 885 N.E.2d 917, 2008-Ohio-1624. The court overruled both motions.

{¶5} On August 18, 2009, appellant filed a motion to withdraw his guilty plea. In his motion, appellant alleged that his sentence was void because the court did not advise him that he would be subject to a mandatory five year term of post-release control and could be fined \$20,000.00 as part of his sentence. The trial court overruled the motion, finding that appellant failed to provide the court with a transcript of his

sentencing hearing in support of his motion. However, the court noted that the change of plea form signed by appellant specifically addressed the period of post-release control and the judgment entry of conviction and sentence further recited that the court notified appellant of the mandatory maximum period of post-release control, as well as the consequences of violating post-release control. The court further found that the record did not demonstrate that the court failed to notify appellant of the maximum fine that could be imposed as part of his sentence, and further, appellant was not fined as part of his sentence.

{¶6} Appellant appeals, assigning four errors:

{¶7} “I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY FAILING TO MEET THE REQUIREMENTS OF CRIM. R. 11 WHEN IT ACCEPTED DEFENDANT-APPELLANT’S GUILTY PLEA.

{¶8} “II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT FAILED TO INFORM DEFENDANT OF HIS APPELLATE RIGHTS, U.S.C.A. CONST. AMENDS 5 & 14.

{¶9} “III. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT FAILED TO PROPERLY INSTRUCT DEFENDANT OF HIS RIGHT TO COMPULSORY PROCESS WHICH IS CONSTITUTIONALLY PROTECTED UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I, OF THE OHIO CONSTITUTION.

{¶10} “IV. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT WHEN IT ALLOWED THE DEFENDANT TO ENTER A

PLEA OF GUILTY TO A DEFECTIVE INDICTMENT THAT OMITTED THE REQUIRED MENS REA ELEMENT OF RECKLESSNESS, VIOLATING DUE PROCESS.”

I,II,III,IV

{¶11} Crim. R. 32.1 governs withdrawal of a guilty plea:

{¶12} “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.”

{¶13} The burden to establish the existence of manifest injustice is on the defendant. *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, syllabus 1. A motion made pursuant to Crim. R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant’s assertions in support of the motion are matters to be resolved by that court. *Id.* at syllabus 2.

{¶14} Appellant did not raise any of the arguments he raises on appeal in his motion to withdraw his plea in the trial court. In the trial court, appellant argued only that he should be entitled to withdraw his guilty plea because he was never advised of the mandated period of post-release control and the maximum fine for which he could be sentenced. He does not claim on appeal that the court erred in overruling his motion on either of these grounds, but instead raises four new claims related to his plea. It is axiomatic that the failure to raise an issue in the trial court waives the right to raise the issue on appeal. *State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364, paragraph one of the syllabus, *overruled on other grounds* (1988), 49 Ohio St.3d 226.

{¶15} As noted by the trial court, appellant failed to provide the court with a transcript of his sentencing hearing, and the judgment entry of conviction and sentence and change of plea form demonstrated that appellant was notified of post-release control. The court further found that in his plea form, appellant acknowledged that he understood that fines, restitution and other financial sanctions could be a part of his sentence, and in any event, appellant was not fined as part of his sentence in the instant case. The record does not demonstrate that the court abused its discretion in overruling appellant's motion to withdraw his plea.

{¶16} The first, second, third and fourth assignments of error are overruled.

{¶17} The judgment of the Stark County Common Pleas Court is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Delaney, J. concur

JUDGES

JAE/r0413

