[Cite as *State v. Coffelt*, 2012-Ohio-4900.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2012-CA-92
RONALD JAMES COFFELT	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Canton Municipal Court, Case No. 2009CRB00048
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 22, 2012
APPEARANCES:	
For Plaintiff-Appellant	For Defendant-Appellee
JOE MARTUCCIO LAW DIRECTOR TYRONE HAURITZ CITY PROSECUTOR ANTHONY FLEX 218 Cleveland Avenue S.W. Canton, OH 44701	RICHARD GIBBS 1001 South Main Street North Canton, OH 44720

Gwin, P.J.

{¶1} Plaintiff-appellant, the State of Ohio, appeals from a judgment of the Canton Municipal Court granting the motion to withdraw the plea of no contest of defendant-appellee, Ronald James Coffelt [“Coffelt”].

Facts and Procedural History

{¶2} On January 5, 2009, Coffelt was arrested and charged with Menacing by Stalking and two counts of Criminal Damaging or Endangering.

{¶3} On March 23, 2009, Coffelt appeared with his attorney and entered a "No Contest" plea to one count of Menacing by Stalking and one count of Criminal Damaging or Endangering. One count of Criminal Damaging or Endangering was dismissed by the State. Coffelt was found guilty and sentenced by the court on Count 2 to court costs, one hundred eighty days in jail with all but one day suspended on the condition of good behavior for two years and given credit for one day served, restitution, no contact with the victim (except for during civil proceedings), and a list of food items to bring to court. On Count 1 Coffelt was sentenced to court costs, ninety days in jail with all but one day suspended on the condition of good behavior for two years and credit for one day served on Count 2.

{¶4} On April 13, 2011, Coffelt, through different counsel, filed a motion to seal the record and index in this case. A hearing was set for June 7, 2011. This hearing was continued to June 21, 2011. This hearing was again continued until July 12, 2011.

{¶5} On July 25, 2011, Coffelt filed a motion to enforce plea agreement or, in the alternative, withdraw guilty plea to correct a manifest injustice pursuant to Criminal Rule 32.1. A hearing on this motion was set for September 13, 2011. On September 12,

2011, the State filed an objection to this motion. On September 15, 2011, Coffelt filed a motion to continue the September 13, 2011 hearing, which was granted. The hearing was rescheduled for until April 3, 2012.

{¶6} On April 16, 2012, a Judgment Entry was issued granting Coffelt's motion to withdraw his plea, and setting a pre-trial on April 24, 2012. At the pre-trial Coffelt set the case for a second pre-trial on May 29, 2012, and a jury trial on June 11, 2012.

{¶7} On May 4, 2012, the state filed a motion for reconsideration of the April 16, 2012, judgment entry. That motion was denied.

Assignments of Error

{¶8} The state assigns two errors,

{¶9} "I. THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING ON APPELLEE'S MOTION TO WITHDRAW PLEA.

{¶10} "II. THE TRIAL COURT'S GRANTING OF THE APPELLEE'S MOTION TO WITHDRAW HIS PLEA OF MARCH 23, 2009, WAS IMPROPERLY GRANTED, CONTRARY TO LAW, AND AN ABUSE OF DISCRETION."

Analysis

{¶11} Coffelt's first and second assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶12} At the outset, we note that the state's authority to pursue an appeal from the decision of the trial court granting the motion to withdraw the plea, is not by right under R.C. 2945.67, but rather may only be appealed by leave of court,

> The state or a municipality did not originally enjoy a right of appeal from an order or judgment in a criminal case. To balance this disparity

between the rights of the accused and the accuser, the General Assembly enacted R.C. 2945.67. *State v. Davidson* (1985), 17 Ohio St.3d 132, 17 OBR 277, 477 N.E.2d 1141. Because Section 3(B)(2), Article IV of the Ohio Constitution provides courts of appeal with only such jurisdiction as is 'provided by law,' the prosecutor may appeal in a criminal case only where there is express statutory authority. *State ex rel. Leis v. Kraft* (1984), 10 Ohio St.3d 34, 10 OBR 237, 460 N.E.2d 1372.

State v. Williams, 85 Ohio App.3d 542, 544, 620 N.E.2d 171(1993).

{¶13} As the Ohio Supreme Court has observed,

R.C. 2945.67(A) specifically governs appeals by the state in criminal and juvenile delinquency proceedings. It provides that the state may appeal as of right an order that (1) grants a motion to dismiss all or any part of an indictment, complaint, or information, (2) grants a motion to suppress evidence, (3) grants a motion for the return of seized property, and (4) grants post conviction relief. It further provides that with the exception of final verdicts, the state may appeal any other decision in a criminal or juvenile delinquency proceeding by leave of the appellate court.

This court has held that even when a trial court's order constitutes a final order pursuant to R.C. 2505.02 and 2505.03, the state may appeal from that order only by leave of the court of appeals unless it is one of the types of orders that R.C. 2945.67(A) permits the state to appeal as of right. *State v. Matthews* (1998), 81 Ohio St.3d 375, 378, 691 N.E. 2d

> 1041 (requiring the state to seek leave to appeal a trial court's order granting a new trial, even though such an order constitutes a final order pursuant to R.C. 2505.02(B)(3)).(Emphasis sic.)

In re A.J.S., 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 30. Under R.C. 2945.67, it is clear that the instant action does not fall under any of the categories giving the state an appeal by right. Accordingly, the state's only course was to file a motion for leave to appeal to this court, which it did not do. *See*, App. R. 5(C).

{¶14} In the interest of justice, we shall address the state's assignments of error in this case.

{¶15} 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." In the case at bar, because appellant's request was made post-sentence, the standard by which the motion was to be considered was "to correct manifest injustice."

{¶16} The accused has the burden of showing a manifest injustice warranting the withdrawal of a guilty plea. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324(1977), paragraph one of the syllabus). In *Smith,* supra, the Ohio Supreme Court, addressed the concept of "manifest injustice," stating that "[t]his term [manifest injustice] has been variously defined, but it is clear that under such standard, a post-sentence withdrawal motion is allowable only in extraordinary cases." *Id.* at 264.

{¶17} Furthermore, "[b]efore sentencing, the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the

public interest in protecting the right of the accused to trial by jury. But if a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe. * * *" *State v. Peterseim*, 68 Ohio App.2d 211, 213, 428 N.E.2d 863(1980), quoting *Kadwell v. United States*, 315 F.2d 667 9th Cir 1963).

{¶18} Importantly, "an undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *State v. Bush*, 96 Ohio St.3d 235, 773 N.E.2d 522 2002-Ohio-3393 at ¶14. (Quoting *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324(1977), paragraph three of the syllabus); See also *State v. Copeland-Jackson*, 5th Dist. No. 02COA018, 2003-Ohio-1043, ¶7 ("[t]he length of passage of time between the entry of a plea and a defendant's filing of a Crim.R. 32.1 motion is a valid factor in determining whether a 'manifest injustice' has occurred").

{¶19} A reviewing court will not disturb a trial court's decision whether to grant a motion to withdraw a plea absent an abuse of discretion. *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715(1992). In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140(1983).

{¶20} The trial court, in granting Coffelt's motion to withdraw his guilty pleas, did not set forth its reasons. 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*, 91 Ohio St.3d 50, 51, 741 N.E.2d 130, 2001-Ohio-241(2001); *State v. Dillon*, 5th Dist. No. CT2009-0016, 2009-Ohio-2971, ¶41.

{¶21} 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*, 34 Ohio App. 192, 170 N.E. 592(1929); *Pettet v. Pettet*, 55 Ohio App.3d 128, 562 N.E.2d 929(1988); *Dillon*, ¶42.

{¶22} Crim. R. 32.1 does not mandate an evidentiary hearing, and for this reason, a court must hold an evidentiary hearing only in cases where the facts, taken as true, would require the court to permit the plea to be withdrawn. *State v. Steward*, 5th Dist. No. 03-CA-69, 2004-Ohio-3054, ¶17, citing *State v. Hamad*, 63 Ohio App.3d 5, 577 N.E.2d 1111(1989).

{¶23} In the case at bar, however, the trial court granted the motion. The trial court accepted as true the allegation by Coffelt that he only entered his pleas because he was led to believe that the convictions would be expunged. Whether that belief was fostered by the state or by Coffelt's attorney, or both, the trial court chose to believe Coffelt. Coffelt is not exonerated by the trial court's decision; rather he risks conviction of the charges.

{¶24} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the fact finder lost its way.'" *State v. Pallai*, 7th Dist. No. 07 MA 198, 2008-Ohio-6635, ¶31,

quoting State v. Woullard, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964, ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. No. 99 CA 149, 2002-Ohio-1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(1999).

{¶25} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶26} The trial court had before it all of the information presented through the written motions and memorandum submitted and apparently gave great weight to the arguments of Coffelt. We will not second-guess the trial court's credibility and weight determinations.

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

{¶28} The state's first and second assignments of error are overruled in their entirety.

{¶29} The judgment of the Canton Municipal Court, Stark County, Ohio is affirmed.

By: Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE

WSG:clw 1009

[Cite as *State v. Coffelt*, 2012-Ohio-4900.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
RONALD JAMES COFFELT	:	
Defendant-Appellee	:	CASE NO. 2012-CA-92

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Canton Municipal Court, Stark County, Ohio is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE