

[Cite as *State v. Ferguson*, 2015-Ohio-1463.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-140368
	:	TRIAL NO. B-1306593
Plaintiff-Appellee,	:	
vs.	:	<i>OPINION.</i>
GERALD W. FERGUSON,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: April 17, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Paula E. Adams*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Office of the Hamilton County Public Defender and *Marguerite Slagle*, Assistant
Public Defender, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Presiding Judge.

{¶1} Defendant-appellant Gerald W. Ferguson has appealed the judgment of the common pleas court, overruling his motion to withdraw his guilty plea. We hold that the trial court erred in overruling Ferguson's motion without first affording him a hearing. Therefore, we reverse the trial court's judgment and remand the cause for the trial court to hold a hearing on Ferguson's motion.

Facts and Procedure

{¶2} In California in 1983, Ferguson was convicted of lewd or lascivious acts with a child under age 14. He moved to Ohio in 1995, prior to Ohio's enactment of former R.C. Chapter 2950, "Megan's Law." See Am.Sub.H.B. No. 180, 146 Ohio Laws, Part II, 2560, enacted in 1996, amended in 2003 by Am.Sub.S.B. No. 5, 150 Ohio Laws, Part IV, 6556. According to Ferguson, when he moved to Ohio, he was advised that he did not have a duty to register as a sex offender here. Ohio's Megan's Law became effective July 1, 1997.

{¶3} In 2005, Ferguson's brother, who lived in Arizona, became ill. Ferguson went to Arizona for about a year to operate his brother's automobile repair shop while his brother recovered. After his brother recovered, Ferguson returned to Ohio in September of 2006. He did not register as a sex offender.

{¶4} In October 2013, police received an anonymous tip that Ferguson had child pornography on his computer. A search revealed nothing, but Ferguson was arrested and charged with failing to register as a sex offender. After pleading guilty, Ferguson was placed on community control for two years and ordered to register as a sex offender.

{¶5} On May 21, 2014, Ferguson filed a postsentence Crim.R. 32.1 motion to withdraw his guilty plea on the grounds that his plea had been involuntary and his

counsel had been ineffective. Ferguson argued that he had no duty to register in Ohio as a sex offender. He further argued that if he had a duty to register in Ohio, he had had no notice of that duty, and therefore, his conviction violated his due-process rights. The trial court overruled Ferguson's motion, and he appealed.

Analysis

{¶6} Ferguson's sole assignment of error alleges that the trial court erred in overruling his motion to withdraw his guilty plea. He argues that his counsel's ineffectiveness in incorrectly advising him that he had a duty to register as a sex offender in Ohio, when he did not, and in failing to assert his due-process rights rendered his plea involuntary.

I. Crim.R. 32.1 Standard

{¶7} In *State v. Shirley*, 1st Dist. Hamilton No. C-130121, 2013-Ohio-5216, ¶ 8, we stated,

Crim.R. 32.1 provides that a trial court may permit a defendant to withdraw a guilty plea after sentence "to correct manifest injustice." Crim.R. 32.1; *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus; *State v. Akemon*, 173 Ohio App.3d 709, 2007-Ohio-6217, 880 N.E.2d 143, ¶ 8 (1st Dist.). "A manifest injustice has been defined as a 'clear or openly unjust act,' evidenced by an extraordinary and fundamental flaw in a plea proceeding." *State v. Tekulve*, 188 Ohio App.3d 792, 2010-Ohio-3604, 936 N.E.2d 1030, ¶ 7 (1st Dist.), citing *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998), and *Smith* at 264. While Crim.R. 32.1 does not require a hearing on a postsentence motion to withdraw a guilty plea, "this court has effectively adopted a rule that requires a hearing if the facts alleged in the motion, and

accepted as true by the trial court, would require that the plea be withdrawn.” *State v. Dye*, 1st Dist. Hamilton No. C-120483, 2013-Ohio-1626, ¶ 6, citing *State v. Brown*, 1st Dist. Hamilton No. C-010755, 2002-Ohio-5813. A trial court abuses its discretion when it denies a defendant’s motion to withdraw his plea without first holding an evidentiary hearing where the motion “includes evidence sufficient to demonstrate a manifest injustice.” *State v. Beasley*, 8th Dist. Cuyahoga No. 96806, 2011-Ohio-6650, ¶ 8, citing *State v. Russ*, 8th Dist. Cuyahoga No. 81580, 2003-Ohio-1001, ¶ 12.

II. Ferguson is Entitled to a Hearing

{¶8} Ferguson argues that the trial court erred in overruling his motion to withdraw his plea, because he does not have a duty to register as a sex offender in Ohio. Ferguson moved to Ohio in 1995, prior to the enactment of Megan’s Law. At that time, Ferguson was advised that he did not have a duty to register as a sex offender in Ohio.

{¶9} In 1997, Megan’s Law became effective. The Megan’s Law version of R.C. 2950.04 required an offender to register as a sex offender if the offender was sentenced for a sexually-oriented offense after July 1, 1997, was released from prison on or after July 1, 1997, after serving a sentence for a sexually-oriented offense, or was a habitual sexual who was required to register immediately prior to July 1, 1997. Former R.C. 2950.04(A)(3)(a) provided as follows:

Regardless of when the sexually oriented offense was committed, a person who is convicted, pleads guilty, or [is] adjudicated a delinquent child in a court in another state * * * for committing a sexually oriented offense that is not a registration-exempt sexually oriented offense, if, on or after July 1, 1997, * * * the offender * * * moves to and

resides in this state or temporarily is domiciled in this state for more than five days * * * and, if at the time the offender * * * moves to and resides in this state or temporarily is domiciled in this state for more than five days, * * * the offender * * * has a duty to register as a sex offender or child-victim offender under the law of that other jurisdiction as a result of the conviction, guilty plea, or adjudication.

{¶10} The record shows that when Ferguson moved to Ohio in 1995, he was advised that he did not have a duty to register. He lived in Ohio for ten years before his brother in Arizona became ill, and he left the state to operate his brother's business until he recovered. He returned to Ohio in 2006, because, as Ferguson told the trial court, "[T]hat's where I lived."

{¶11} If Ferguson maintained his Ohio residency, then he did not "move to and reside" in Ohio, or become "temporarily domiciled" in this state after July 1, 1997, because he had been a resident of and living in this state since 1995. Therefore, he would have no duty to register as a sex offender under Megan's Law upon his return from Arizona.

{¶12} There is simply not enough evidence in the record to determine whether Ferguson retained his Ohio residency while he was in Arizona. For example, there is no evidence as to whether Ferguson maintained his Ohio's driver's license, or whether he changed his residence for voting purposes while he was in Arizona. Therefore, this cause must be remanded for a hearing to determine whether Ferguson retained his Ohio residency while he was in Arizona.

{¶13} We hold that Ferguson's motion "include[d] evidence sufficient to demonstrate a manifest injustice." *See Shirley*, 1st Dist. Hamilton No. C-130212, 2013-Ohio-5216, at ¶ 8, quoting *Beasley*, 8th Dist. Cuyahoga No. 96806, 2011-Ohio-6650, at ¶ 8, citing *Russ*, 8th Dist. Cuyahoga No. 81580, 2003-Ohio-1001, at ¶ 12. In

fact, Ferguson's assertions, if taken as true, established that his conviction may have been invalid as a matter of law, because he had no duty to register as a sex offender. Therefore, the trial court erred in overruling the motion without holding a hearing.

{¶14} We hold that Ferguson is entitled to a hearing on his motion to withdraw his plea. Accordingly, we remand this cause for a hearing on the motion, at which the trial court may inquire into the residence/domicile issue, the alleged ineffective assistance of counsel, and any other issue that might rise to the level of manifest injustice.

Conclusion

{¶15} We sustain the assignment of error. The judgment of the trial court overruling Ferguson's motion to withdraw his guilty plea is reversed, and this cause is remanded for the trial court to hold a hearing on the motion and for further proceedings consistent with law and this opinion.

Judgment reversed and cause remanded.

MOCK and HILDEBRANDT, JJ., concur.

LEE H. HILDEBRANDT, JR., retired, from the First Appellate District, sitting by assignment.

Please note:

The court has recorded its own entry this date.