

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24966

Appellee

v.

MICHAEL SIMONE

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 1999-01-0023

Appellant

DECISION AND JOURNAL ENTRY

Dated: April 28, 2010

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant Michael Simone appeals the ruling of the Summit County Court of Common Pleas which denied his motion to withdraw his guilty plea. For reasons set forth below, we affirm.

FACTS

{¶2} In 1999, Simone pled guilty to one count of driving while under the influence of alcohol or drugs, in violation of R.C. 4511.19(A), a felony of the fourth degree due to Simone’s three prior similar convictions in the six years prior, and one count of resisting arrest in violation of R.C. 2921.33(A), a misdemeanor of the second degree. Simone was sentenced to a total of nine months in prison. Simone was granted judicial release in July 1999, but subsequently violated community control twice. Ultimately, Simone completed his sentence.

{¶3} On April 3, 2009, ten years after his guilty plea, Simone filed a motion to withdraw his plea contending that his conviction was constitutionally infirm as at least one of his

prior DUI convictions used to enhance the 1999 conviction was uncounseled. The trial court held a hearing on his motion. On August 10, 2009, the trial court denied Simone's motion and concluded that Simone's motion was untimely and that Simone failed to show that there had been a manifest injustice.

{¶4} Simone has timely appealed, raising one assignment of error for our review.

LIMBO

{¶5} We begin with a discussion of Simone's 1999 sentencing entry. Simone's sentencing entry provides that "[A]fter release from prison, [Simone] is ordered subject to post-release control to the extent the parole board may determine as provided by law." Pursuant to R.C. 2967.28(C), Simone was actually subject to up to three years of post-release control. This Court has previously held that the language used above by the trial court is insufficient to notify an offender of his post-release control obligations, thereby rendering the sentence void. See *State v. Harmon*, 9th Dist. No. 24495, 2009-Ohio-4512, at ¶¶2, 8.

{¶6} In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, the Supreme Court of Ohio held that, "[i]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which post[-]release control is required but not properly included in the sentence, the sentence is void * * * ." *Id.* at syllabus. "The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment." *Id.* at ¶19, quoting *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶12, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268. Generally when we are confronted with an appeal from a void sentence, we have vacated the sentence and remanded the case to the trial court for

resentencing, without addressing the merits of the appeal. See, e.g., *State v. Bedford*, 9th Dist. No. 24431, 2009-Ohio-3972, at ¶¶14-15.

{¶7} However, the Supreme Court has also made it abundantly clear that once a defendant completes a sentence with a post-release control error, the defendant cannot be resentenced. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, at ¶35 (“There is no dispute that the trial court should have imposed mandatory post-release control on Harrison at his original sentencing. But the trial court's authority to repair that omission ended when Harrison completed his original one-year incarceration. This court's recent jurisprudence is unmistakable on that point.”). The Supreme Court has not however clarified whether a completed void sentence remains void or somehow is transformed into a non-void entry. Here we are faced with a defendant who seeks to withdraw his plea after completing his void sentence.

{¶8} Thus, we are faced with two questions that seem to have no clear answer under the current state of the law: (1) is an appeal from a motion to withdraw a guilty plea by a defendant who has completed a void sentence interlocutory or final; and (2) should the trial court reviewing that motion treat it as a pre- or post-sentence motion.

{¶9} The Supreme Court of Ohio has held that “in a criminal case, where there has been no pronouncement of sentence, an order of the trial court overruling defendant's motion for leave to withdraw his plea of guilty is interlocutory in nature, does not amount to a disposition of the case and is not a final appealable order.” *State v. Chamberlain* (1964), 177 Ohio St. 104, 107. If Simone’s sentence is void then “there has been no pronouncement of sentence” in his case and the order denying his motion to withdraw his guilty plea is interlocutory and he cannot appeal from it. *Id.* Of course, the inherent problem then becomes that Simone could *never* appeal from the denial of his motion to withdraw his guilty plea as the trial court cannot

resentence him and thus cannot create a non-void sentencing entry. See *Harrison* at ¶35. Thus, attempts to logically extend or apply the post-release control precedent of the Supreme Court would put Simone in a perpetual state of limbo. However, in light of its precedent we do not believe that the Supreme Court would sanction the deprivation of a person's right to appeal.

{¶10} Instead, we focus on a factually unrelated Supreme Court case that concluded that “the right to appeal must include a reasonable opportunity to file a timely appeal.” *Rothman v. Rothman*, 124 Ohio St.3d 109, 2009-Ohio-6410, at ¶6. Therefore, despite the fact that it appears Simone's 1999 sentence was void, we conclude that Simone's appeal is nonetheless not interlocutory.

{¶11} This brings us to our next question, namely whether the trial court should have treated Simone's motion as a pre- or post-sentence motion to withdraw his guilty plea. Under *Boswell*, if Simone's sentence was void, as we have determined it was, the trial court should have considered his motion as a pre-sentence motion. *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at syllabus. (“A motion to withdraw a plea of guilty or no contest made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1.”). However, this necessarily means that the motion to withdraw a guilty plea made by a defendant who has completed a void sentence would always be considered as a pre-sentence motion, as the void sentence would no longer be correctable. *Harrison* at ¶35. That conclusion also makes little sense to this Court.

{¶12} Apparently that conclusion also does not sit well with the Supreme Court. In *Harrison*, the Supreme Court in dicta commented about the analysis that a trial court should apply when it is faced with a motion to withdraw a guilty plea from a defendant who has completed a void sentence. *Id.* at ¶37. *Harrison*, like Simone, had completed a void sentence.

See *id.* at ¶¶34-35. However, unlike Simone, Harrison did not voluntarily file a motion to withdraw his guilty plea; instead the trial court gave Harrison the option of moving to withdraw his guilty plea or being resentenced. *Id.* at ¶10. The Supreme Court of Ohio noted that “[i]n a vacuum, the trial court could have accepted the withdrawal of Harrison's plea even after he had completed his sentence, had he shown the ‘manifest injustice’ required by Crim.R. 32.1. But Crim.R. 32.1 applies in instances where defendants seek a plea withdrawal of their own volition.” *Id.* at ¶37. The Court did not apply this reasoning to Harrison’s case as Harrison’s plea was not of his own volition. *Id.* Simone however falls squarely within the dicta of *Harrison*. Therefore, the trial court correctly considered Simone’s motion as a post-sentence motion. We acknowledge that given the post-release control precedent in effect today there is no logical legal analysis that allows us to conclude that Simone’s appeal is interlocutory or that his motion should be treated as a pre-sentence motion. Notwithstanding our inability to develop a clear path to reach such a conclusion, it is reasonable to conclude that Simone deserves the right to appeal, *Rothman* at ¶6, and that his motion is a post-sentence motion. *Harrison* at ¶37. We find it untenable to conclude that Simone’s appeal is interlocutory by virtue of his void sentence given that Simone would remain perpetually in limbo unable to ever perfect an appeal. Therefore, we proceed to analyze the merits of Simone’s appeal.

MOTION TO WITHDRAW GUILTY PLEA

{¶13} On appeal, Simone argues that the trial court erred in concluding that his motion for withdrawing his guilty plea was untimely. Essentially Simone alleges that the trial court improperly denied his motion solely based upon it being untimely. We disagree.

{¶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.”

It is the defendant’s burden to prove that a manifest injustice exists. *State v. Smith* (1977), 49 Ohio St.2d 261, 264. The trial court should grant the motion only in extraordinary cases. *Id.* A trial court’s decision to grant or deny a motion to withdraw a guilty plea will not be reversed on appeal absent an abuse of discretion. *State v. Brown*, 9th Dist. No. 23455, 2007-Ohio-2885, at ¶9, quoting *State v. Atkinson*, 9th Dist. No. 05CA0079-M, 2006-Ohio-5806, at ¶10, citing *Smith*, 49 Ohio St.2d at 264. An abuse of discretion “implies that the court’s attitude is unreasonable, arbitrary, or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶15} We have stated that:

“A trial court does not abuse its discretion in denying a motion to withdraw a plea where three elements are met. First, the defendant must have been represented by competent counsel; second the court must provide the defendant a full hearing prior to accepting the original guilty plea; and, finally, the court must provide a full hearing to the defendant, considering all the arguments in favor of withdrawal of his plea, before rendering a decision on the motion.” (Internal citations and quotations omitted). *Brown* at ¶10.

Simone concedes in his appellate brief that “it is undisputed that [Simone] was represented by competent counsel at the time he entered his original plea and that the Trial Court provided a full hearing prior to accepting the plea.” Instead Simone argues that the trial court did not comply with the third element listed above in that the trial court failed to consider all of Simone’s arguments and denied his motion solely on the basis of it being untimely.

{¶16} Simone’s main argument is that at least one of the prior convictions upon which his 1999 felony DUI conviction was based was uncounseled and thus under *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, the uncounseled conviction could not be used to enhance the 1999 charge to a felony. He alleges that since *Brooke* was recently decided, it was not unreasonable for him to make this argument in 2009.

{¶17} We begin our analysis by noting that the trial court did not base its decision entirely on the timing of Simone’s motion. The trial court stated that Simone’s motion was untimely *and* that he had not shown the existence of a manifest injustice. The trial court stated it based its decision on the totality of the circumstances. The trial noted that Simone did not appeal from the conviction or plea at issue, nor did he file a motion to suppress or a motion to dismiss the 1999 felony charge.

{¶18} Nonetheless, it is clear that the timing of Simone’s motion was an important factor in the trial court’s decision. The Supreme Court of Ohio has stated that “it has been held that an undue delay between the occurrence of the alleged cause for withdrawal and the filing of the motion is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.” *Smith*, 49 Ohio St.2d at 264.

{¶19} Here, Simone waited ten years before filing his motion to withdraw his guilty plea. Despite his assertion that the argument he now makes was unavailable to him at the time of his original plea in 1999, that is not the case. For example, the argument Simone makes was discussed in 1989 when the Supreme Court of Ohio decided *State v. Brandon* (1989), 45 Ohio St.3d 85, 87, wherein the Court stated that “[c]learly, if it is established that appellee's prior convictions were uncounseled, then it would have been inappropriate for the trial court to use these convictions for the purpose of enhancement of sentence.” See, also, *Nichols v. United States* (1994), 511 U.S. 738, 746-747.

{¶20} Thus, in 1999 when Simone originally pled, his trial counsel should have been aware of this argument. Moreover, Simone was represented by several different attorneys on several subsequent occasions, any of whom could have made the argument that Simone has waited ten years to make; in 1999, counsel appeared for Simone to seek his judicial release, to

continue a shock probation hearing date, and to represent him on a charge of violating community control; in 2000 counsel moved the court to grant Simone occupational driving privileges and represented Simone on a community control violation; in 2003 counsel moved to have Simone's license suspension terminated and moved the court to grant Simone occupational driving privileges.

{¶21} Moreover, the trial court had the opportunity to hear Simone testify at the hearing on his motion to withdraw his guilty plea. Simone testified that both his 1993 and 1995 DUI convictions were uncounseled. Yet, Simone's counsel later discovered evidence, which he presented to the trial court, indicating that Simone's 1995 conviction was in fact counseled. It is unclear from the trial court's entry what role that testimony played in the trial court's decision; however, the conflict certainly put Simone's credibility at issue. It is well settled that "the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *Smith*, 49 Ohio St.2d at 264.

{¶22} Based upon the evidence presented to the trial court, we cannot conclude the trial court abused its discretion in denying Simone's motion to withdraw his guilty plea. This is not the extraordinary case in which there is a manifest injustice. *Id.*

CONCLUSION

{¶23} In light of the foregoing, we affirm the judgment of the Summit County Court of Common Pleas.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, J.
CONCURS, SAYING:

{¶24} I concur in the majority's judgment, but write separately to express my concern with the potential problems created by permitting an offender to withdraw his plea after the completion of his sentence. The Supreme Court of Ohio has noted that Crim.R. 32.1 itself does not set forth a time limitation as to when a motion to withdraw a plea can be filed. *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, at ¶14. The majority correctly noted that the Supreme Court has recently stated, in dicta, that a trial court may accept the plea withdrawal of a defendant after the completion of a sentence if the offender can show manifest injustice. *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, at ¶37. However, unlike the circumstances in *Harrison* and *Bush*, this case involves an offender who, by his own volition, moved the trial

court to withdraw his plea years after he completed his sentence. Allowing an offender to withdraw his plea subsequent to the completion of his sentence threatens to undermine the societal interests in finality, comity, and the conservation of scarce judicial resources. Furthermore, the victims of traumatic crimes have a unique interest in obtaining closure.

{¶25} The need for finality of a guilty plea is recognized in Rule 11(e) of the Federal Rules of Criminal Procedure, which states “[a]fter the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.” Other states have also recognized the need to limit the ability of a defendant to withdraw his plea after the imposition of a sentence. For example, the Supreme Court of Connecticut recently held that once a sentence has been executed, a trial court lacks jurisdiction to entertain any claims regarding the validity of a plea in the absence of a specific exception set forth in a statute or rule of practice. *State v. Das* (2009), 291 Conn. 356, 368. The Supreme Court of Georgia has held that when the term has expired in which a defendant was sentenced pursuant to a guilty plea, the trial court lacks jurisdiction to allow the withdrawal of a plea. *Rubiani v. State* (2005), 279 Ga. 299. The aforementioned examples speak to the recognition of certain sovereigns that the ability of a defendant to withdraw his plea must be limited once a sentence is imposed. The instant case presents a more extreme set of facts in that Simone moved the trial court to withdraw his plea not only after his sentence was imposed, but after he had completed his sentence. The Supreme Court of Nebraska has held that the state’s statutory scheme does not grant a trial court jurisdiction to consider a motion to withdraw a plea after the defendant has served the sentence on the underlying offenses. *State v. Rodriguez-Torres* (2008), 275 Neb. 363, 367. From a practical perspective, the life of a criminal case in which a defendant has admitted guilt ought to be subject to some temporal limit.

APPEARANCES:

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