[Cite as *State v. Bryukhanova*, 2010-Ohio-5504.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio — Court of Appeals No. F-10-002

Appellee — Trial Court No. 06CR000114

v.

Dina Bryukhanova — **DECISION AND JUDGMENT**

Appellant — Decided: November 12, 2010

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney, and
Jon H. Whitmore, Assistant Prosecuting Attorney, for appellee.

Jeffrey P. Nunnari for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the order of the Fulton County Court of Common Pleas, denying her postsentencing motion to withdraw her no contest plea. For the reasons that follow, we affirm.

{¶ 2} On August 15, 2006, appellant, Dina Bryukhanova, was operating a Freightliner semi-tractor-trailer rig northbound on Fulton County Road 22, when she

disregarded a stop sign at U.S. Route 20-A. Appellant's truck entered the intersection, colliding with a minivan driven by Steven Westmeyer. Phyllis and Sydney Westmeyer were passengers in the minivan. Steven and Phyllis Westmeyer died in the collision.

{¶ 3} Appellant was charged with two counts of aggravated vehicular homicide, third degree felonies. Appellant entered an initial plea of not guilty, but, following plea negotiations, agreed to plead no contest to an amended charge of two counts of vehicular homicide, first degree misdemeanors.

{¶ 4} Following a plea hearing, the court accepted appellant's plea, found her guilty of the amended charges and sentenced her to two concurrent five month terms of local incarceration. No appeal was taken. At no time did appellant seek postconviction relief. After appellant had served 75 days, the court released appellant and placed her on probation.

{¶ 5} On October 14, 2009, appellant moved to withdraw her no contest plea. The trial court scheduled a hearing, following which the court denied the motion. From this order, appellant now brings this appeal. Appellant sets forth the following single assignment of error:

{¶ 6} "The trial court erred as a matter of law and abused its discretion to the prejudice of appellant when it refused to allow her to withdraw her previously tendered pleas of no contest."

{¶ 7} "A post-sentence motion to withdraw a guilty plea will only be granted if the defendant can establish a manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d

261, paragraph one of the syllabus; and Crim.R. 32.1. The burden of establishing the existence of such injustice is upon the defendant. Id. We review the trial court's denial of appellant's motion under an abuse of discretion standard, i.e., whether the trial court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157." *State v. Floro*, 6th Dist. No. L-09-1065, 2010-Ohio-2254, ¶ 7.

{¶ 8} Appellant puts forth three reasons that she believes the prior proceedings were unjust. First, she insists that, because her native language is Russian, she was unable to fully understand the plea colloquy. Next, she maintains that the trial court did not fully inform her of the effect of her no contest plea in violation of Crim.R. 11(E). Finally, she insists, she was denied effective assistance of counsel by her retained counsel.

{¶ 9} The state responds that the relief appellant seeks is barred by the doctrine of res judicata. Alternatively, the state argues, appellant failed to demonstrate manifest injustice.

{¶ 10} "Under the doctrine of res judicata, a final judgment of conviction 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 was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Szefcyk* (1996), 77 Ohio St.3d 93, syllabus.

{¶ 11} Citing *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, the trial court rejected the state's res judicata argument. *Bush* holds motions to withdraw guilty or no contest pleas under Crim.R. 32.1 "exist independently" from R.C. 2953.21, the statute governing petitions for postconviction relief. Id at ¶ 14. The Crim.R. 32.1 motion is not a collateral challenge to the validity of a conviction or a sentence in a criminal proceeding, but a direct attack on a plea, filed in the underlying criminal case. Id. at ¶ 13.

{¶ 12} *Bush* dealt not with res judicata, but the application of the R.C. 2953.23 timelines to Crim.R. 32.1. Courts before and after *Bush* have repeatedly applied the doctrine of res judicata to Crim.R. 32.1 motions. *State v. Vernon*, 11th Dist. No. 2006-L-146, 2007-Ohio-3376, ¶ 19; *State v. Lankford*, 7th Dist. No. 07 BE 3, 2007-Ohio-3330, ¶ 7; *State v. Herbert*, 3d Dist. No. 16-06-12, 2007-Ohio-4496, ¶ 16; *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266, ¶ 10, *State v. Davie*, 9th Dist. No. 21707, 2004-Ohio-1068, ¶ 11; *State v. Miller*, 9th Dist. No. 03CA008259, 2003-Ohio-6580, ¶ 9; *State v. Wooden*, 10th Dist. No. 02AP-473, 2002-Ohio-7363, ¶ 20. All of the grounds appellant cites in support of her motion to withdraw her plea could have been raised in a direct appeal had appellant sought such an appeal. Thus, these claims are barred by the doctrine of res judicata.

{¶ 13} Even if the doctrine did not apply, in its judgment entry the trial court fully articulates the reasons it found appellant's argument concerning her purported language deficiency unpersuasive. Not the least of these reasons was the trial court's own observation of appellant's communication skills during the plea colloquy.

{¶ 14} Although the court did not use the exact language of Crim.R. 11(B)(2), its statements to appellant during the plea colloquy were sufficient to impart the effect of a no contest plea to her. There is nothing in the record to suggest that trial counsel provided deficient representation or in any manner acted to appellant's prejudice. See *Strickland v. Washington* (1984), 466 U.S. 668, 687. Given this, we cannot say that appellant met her burden to prove manifest injustice. Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 15} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFRIMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE