[Cite as *State v. Maye*, 2015-Ohio-1680.]

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

State of Ohio — Court of Appeals No. H-14-005

Appellee — Trial Court No. CRI-2013-0749

v.

Jason E. Maye — **DECISION AND JUDGMENT**

Appellant — Decided: May 1, 2015

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, and
Patrick M. Hakos, Jr., Assistant Prosecuting Attorney, for appellee.

David J. Longo, Huron County Public Defender, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Jason Maye, appeals the denial by the Huron County Court of Common Pleas of his motion to withdraw a guilty plea. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On December 23, 2013, defendant-appellant, Jason Maye, pled guilty to burglary, a second degree felony, in violation of R.C. 2911.12. In exchange for his plea, the state agreed to recommend at the sentencing hearing a community control program and treatment in a community-based correctional facility ("C.B.C.F.") in lieu of a prison sentence. After appellant was advised of his rights by the court, the court gave appellant a lengthy explanation of the state's recommendation and made it clear that the court was not bound by the recommendation but could still impose a harsher sentence if the court saw fit. The court also noted that with appellant's lengthy criminal record it was likely that the court would not agree with the sentencing recommendation. Knowing this, appellant stated that he still wished to plead guilty. The court then found that appellant made a knowing, intelligent and voluntary waiver of his constitutional rights, with an understanding of the charge, the maximum penalty and the effects of entering the plea. The court accepted appellant's guilty plea, found him guilty and ordered a presentence investigation.

{¶ 3} At the sentencing hearing on February 5, 2014, the prosecution, consistent with the plea agreement, recommended that appellant be placed in a C.B.C.F. for drug treatment, and that the prison time be suspended. The court did not agree with the state's recommendation and sentenced appellant to a term of seven years in prison. In imposing the more severe sentence, the court cited appellant's numerous recidivism factors. The court noted that appellant committed this offense shortly after being released from prison and while on postrelease control, that appellant had a lengthy juvenile and adult criminal

record, that he had served multiple prison sentences in the past and that he had not responded favorably to previously imposed sanctions. These factors taken together convinced the court that appellant was not amenable to a community control sanction.

{¶ 4} After the sentence was pronounced, but prior to the end of the hearing and issuance of the court's journal entry, appellant asked to speak to his attorney. Shortly thereafter, defense counsel moved to withdraw appellant's guilty plea. A short hearing was held, both parties' arguments were heard, and the court denied the motion to withdraw the guilty plea.

{¶ 5} Appellant now appeals and asserts the following assignment of error:

> The trial court erred to the prejudice of the defendant-appellant when it overruled his motion to withdraw his plea of guilty, and proceeded to sentence him to a near-maximum term.

{¶ 6} Crim.R. 32.1 states that "[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." The distinction between a presentence and postsentence motion to withdraw a plea is significant, as different standards apply as to both ruling on the motion and whether or not a hearing is required on the motion. A presentence motion to withdraw a plea is to be liberally granted, and requires a hearing on the matter to determine "'whether there is a reasonable and legitimate basis for the withdrawal of the plea.'" *State v. Matthews*, 6th Dist. Wood No. WD-10-025,

2011-Ohio-1265, ¶ 19, quoting *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992), paragraph one of the syllabus. However, a postsentence motion to withdraw a guilty plea is subject to a much higher burden, and the plea will only be set aside to prevent a manifest injustice. Crim.R. 32.1. Further, a postsentence motion only requires a hearing if the defendant alleges facts that, if taken as true, would require the court to permit withdrawal of the plea. *Matthews, supra*, at ¶ 30.

{¶ 7} Appellant argues that his motion to withdraw his plea constituted a presentence motion because the sentencing hearing had not been completed and the court had not yet filed a judgment entry of sentence when appellant made his motion. As a presentence motion, appellant contends it should have been freely granted. The state counters that the trial court properly treated appellant's motion as a postsentence motion and, because appellant did not establish a manifest injustice, the lower court properly denied it.

{¶ 8} This issue is not one of first impression in this court. In *Matthews, supra*, at ¶ 26, we ruled that "[w]here a Crim.R. 32.1 motion is made after the trial court pronounced sentence at the sentencing hearing but before a sentencing judgment is filed, the motion is to be treated as a postsentence motion under the rule." We reasoned that under that situation, treating a defendant's "motion as a presentence motion would effectively eliminate trial court discretion on whether to impose a recommended sentence." *Id*. at ¶ 26. In *Matthews,* the defendant entered a plea of no contest after being advised by counsel that a suspended sentence in prison along with a suspension of

defendant's driver's license was likely. At the sentencing hearing, however, the judge sentenced the defendant to a longer prison term than the defendant expected. The defendant then moved to withdraw his plea before the end of the sentencing hearing. The motion was denied by the trial court and treated as a postsentence motion. In affirming the judgment, this court reasoned that since the motion was made after learning of the imminent sentence, it was correctly considered by the court to be filed after sentencing. *Id*. at ¶ 27.

{¶ 9} Reviewing the record before us, we find that appellant agreed to a plea bargain in which the state offered to recommend a community control sanction. Just as in *Matthews,* however, the sentencing court decided against community control and sentenced appellant to prison. Consistent with our reasoning in *Matthews*, we find that appellant's motion to withdraw his guilty plea was a postsentence motion. "A defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice." *State v. Smith,* 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. A manifest injustice is defined as a "clear or openly unjust act." *State ex rel. Schneider v. Kreiner,* 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998). "Manifest injustice is an extremely high standard, and a defendant may only withdraw his guilty plea in extraordinary cases." *State v. Harmon,* 6th Dist. Lucas No. L-10-1195, 2011-Ohio-5035, ¶ 12.

{¶ 10} The record clearly reflects that the only reason appellant sought to withdraw his guilty plea was his dissatisfaction with the sentence he had just received.

"A manifest injustice generally does not result when a defendant holds (as he discovers) a mistaken belief that his sentence would be significantly lighter than the one actually imposed." *State v. McComb*, 2d Dist. Montgomery Nos. 22570 and 22571, 2008-Ohio-295, ¶ 9. Accordingly, the lower court did not err in denying appellant's motion to withdraw his guilty plea, and the sole assignment of error is not well-taken.

{¶ 11} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE