

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 Plaintiff-Appellee, :  
 -vs- : Case No. **07-0200**  
 STEVEN SAVAGE, : 11th Dist. No. 2005-G-2663  
 Defendant-Appellant. :

MEMORANDUM IN SUPPORT OF JURISDICTION

FOR APPELLANT:

Steven Savage, #423-361  
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 P.O.B. 56  
 Lebanon, Ohio 45036-0056

Appellant, in pro se

FOR APPELLEE:

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## JURISDICTIONAL STATEMENT

this case presents substantial constitutional questions stemming from the imposition of an unlawful sentence which is violative of the Sixth and Fourteenth Amendments as determined by **Blakely v. Washington** (2004) 542 U.S. 296 and **State v. Foster** (2006) 109 Ohio St.3d 1. See also **In re: Ohio Criminal Sentencing Statutes Cases** (2006) 109 Ohio St.3d 313.

One of the questions relates to due process and equal protection in petitioning the court for redress of grievances by the use of a direct attack upon an void and unlawful sentence.

The Court of Appeals erroneously determined that the use of a Motion under Criminal Rule 32.1 was not a proper remedy to repair the void and unlawful sentence. Appellant submits that a review of the law set forth herein demonstrates that the trial court and court of appeals' decisions were clearly erroneous.

Next there is the question as to whether an issue founded under the decision in **Blakely v. Washington** (2004) 542 U.S. 296 may be presented in a collateral attack.

Finally the question of whether a void sentence; where the trial court lacked subject matter jurisdiction creates such a manifest injustice that should be able to be raised in any court at any time.

This Court should accept jurisdiction to regulate the proper interpretation of the application of Crim. R. 32.1 in the context of a guilty plea resulting in the imposition of an void and unlawful sentence and the efficacy thereof as a remedy for the correction of such an unlawful sentence, and permit full briefing on these issues.

### STATEMENT OF THE CASE

Appellant was indicted in a shotgun indictment on various charges and, on the erroneous advise of counsel, entered a plea of guilty to five counts of rape and was sentenced to serve a total stated prison term of fifteen years, adjudicated a sexual predator and subjected to post-release control. All other charges were properly dismissed.

The trial court failed to advise appellant of his appeal rights pursuant to Crim. R. 32, and appellant's trial counsel failed to file a timely appeal on defendant's behalf. Appellant filed for leave to file a delayed appeal and consequently the Eleventh District Court of Appeals refused to grant him leave to file the appeal, and the Ohio Supreme Court declined jurisdiction.

On June 22, 2005, Appellant filed a Petition for Post-Conviction Relief and on July 8, 2005 Appellant filed a Motion to Correct Sentence pursuant to Criminal R. 32.1. the trial court dismissed the petition and motion on July 21, 2005. timely appeal was taken and on December 26, 2006 the Eleventh District Court of Appeals affirmed. This timely appeal follows.

### STATEMENT OF THE FACTS

Appellant's indictment did not provide notice or allege any facts which serve to enhance the statutory maximum sentence of three years. None of these facts were admitted by Appellant, proven beyond a reasonable doubt, or waived.

The "range" of sentences available as set forth in the plea documents was legally and factually incorrect by failing to note that the statutory maximum sentence, absent additional facts being proven beyond a reasonable doubt, is three years.

Appellant was sentenced to serve fifteen years, five times the statutory maximum sentence allowed.

Trial counsel made no objection to the trial court exceeding the statutory maximum sentence in the absence of fact allegation or proof beyond a reasonable doubt thereof, and failed to object to the erroneous representation of a sentencing "range" that is contrary to law.

PROPOSITION OF LAW NO. I:

WHERE A SENTENCE IMPOSED IN A CRIMINAL CASE IS NOT  
AUTHORIZED BY LAW IT IS VOID AB INITIO AND IS SUB-  
JECT TO REVIEW AT ANY STAGE OF THE PROCEEDINGS.

LAW AND ARGUMENT

It is well settled that a sentence imposed contrary to or not in accordance with the law is illegal and void ab initio. See, e.g. **In re: Shelton** (1957) 103 Ohio App. 436; **State v. Beasley** (1984) 14 Ohio St.3d 74. As such, a trial court or any court is vested with jurisdiction to correct an unlawful sentence. **Foglio v. Alvis** (1957) 143 N.E.2d 641; **State v. Parks** (1941) 67 Ohio App. 96; **State v. Vaughn** (1983) 10 Ohio App.3d 314; **Beasley**, supra.

The statutory maximum sentence for a felony of the first degree in Ohio is three years, in the absence of proper additional fact allegation and proof thereof beyond a reasonable doubt by a jury. **Apprendi v. New Jersey** (2000) 530 U.S. 466; **Blakely v. Washington** (2004) 542 U.S. 296; see also **McMillian v. Pennsylvania** (1986) 477 U.S. 79. In **State v. Foster** (2006) 109 Ohio St.3d 1, this Court applied this doctrine of law to Ohio's sentencing statutes and determined that the provisions of the statutes that purported to permit judicial fact finding by a standard less than beyond a reasonable doubt were, in fact, unconstitutional and any sentence rendered thereunder is void and must be vacated. See also **In re: Ohio Criminal Sentencing Statutes Cases** (2006) 109 Ohio St.3d 313.

In **Foster**, supra, this Court held that the decision would apply to those cases on direct review, but did not explicitly state that it would not apply otherwise.

A void sentence deprives the State of subject matter jurisdiction to confine a citizen and may be raised at any stage of the proceedings

and, further can never be waived. See e.g. *U.S. v. Adesida* (CA 6, 1997) 129 F.3d 846; *Bunker Ramos Corp. v. U.S. Bus. Forms, Inc.* (CA 7, 1983) 713 F.2d 1272; *State v. Jones* (1997) 123 Ohio App.3d 144; *State v. Shrum* (1982) 7 Ohio App.3d 244. See also *U.S. v. Cotton* (2000) 535 U.S. 625.

As such, the illegal sentence in this case is, in fact, subject to review in a direct attack (i.e. Criminal Rule 32.1), post-conviction or other collateral proceedings and the decision of the lower court must be reversed.

**PROPOSITION OF LAW NO II:**

THE IMPOSITION OF AN UNLAWFUL SENTENCE CONSTITUTES SUFFICIENT MANIFEST INJUSTICE TO BE COGNIZABLE FOR REVIEW AND RELIEF IN A DIRECT ATTACK VIA A MOTION PRESENTED PURSUANT TO CRIMINAL RULE 32.1.

**LAW AND ARGUMENT**

Ohio Criminal Rule 32.1 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 *State v. Sherritt* (1998) Ohio App. LEXIS 361, (Feb 6, 1998), the court held that a post-sentence Crim. R. 32.1 motion typically treats defects in pleas, but the rule "comfortably applies to correct manifest injustice in sentence only". (id)

The *Sherritt* case is in direct conflict with the ruling in the instant case by both the trial court and the court of appeals and warrants the attention of this Court, especially in the wake of the virtual avalanche of litigation by prisoner's who are being subjected to incarceration based upon unconstitutional sentences pursuant to

the application of **Blakely v. Washington** (2004) 542 U.S. 296 in **State v. Faster** (2006) 109 Ohio St.3d 1, which, pursuant to the decision by this Court in **Foster**, is applicable only to those cases mounting a direct attack thereupon.

In **State v. Bush** (2002) 96 Ohio St.3d 235, this Court held not only that a 32.1 motion unarguably constitutes a direct attack, but also that no lower court has the ability to "convert" such an action into a collateral attack. Simply put, a 32.1 motion is a direct attack no matter whether the trial courts like it.

Further authorities lend credence to the viability of a 32.1 style motion to correct an unlawful sentence. In **U.S. v. Barnes** (CA 6, 2002) 278 F.3d 644, the court noted that a breach is presented under the aegis of a motion to withdraw the plea, quoting **Santobello v. New York** (1971) 404 U.S. 257.

The power to repair an illegal, invalid or void sentence is inherent and such authority is vested in all Ohio courts. See Article IV, Section 4 Ohio Constitution: (Original Jurisdiction vested in Common Pleas Courts to determine all justiceable controversies") see also **Lincoln Tavern, Inc. v. Snader** (1956) 165 Ohio St. 61; **State v. Beasley** (1984) 14 Ohio St.3d 74; **State v. Vaughn** (1983) 10 Ohio App.3d 314; **State v. Parks** (1941) 67 Ohio App. 96; **Foglio v. Alvis** (1957) 143 N.E.2d 641.

The Eleventh District Court of Appeals held in **State v. Glavic** (2001) 143 Ohio App.3d 583, that the decision to grant or deny a Crim. R. 32.1 motion is within the sound discretion of the trial court. **Glavic**, supra. "What constitutes an abuse of discretion with respect to denying a motion to withdraw a guilty plea necessarily is viable with the facts and circumstances involved." **State v. Grigsby**

(1992) 609 N.E.2d 183; **State v. Walton** (1981) 2 Ohio App.3d 117,119.

This Court has defined "abuse of discretion" as an attitude that is unreasonable, arbitrary or unconscionable. **Huffman v. Hair Surgeon, Inc.** (1985) 19 Ohio St.3d 83,87. "It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary. A decision is unreasonable if there is no sound reasoning process that would support the decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning process that would support a contrary result." **Office of Disciplinary Counsel v. Michaels** (1990) 50 Ohio St.3d 607; **Proctor & Gamble Company v. Stoneham** (2000) 140 Ohio App.3d 260.

"Abuse of discretion" may also mean the failure to apply the principle of law applicable to a situation, if thereby prejudice results to a litigant. **State v. Shafer** (1942) 71 Ohio App. 1; **State v. Virgi** (1948) 84 Ohio App. 15.

In this case, the Court of Appeals parades its seemingly mindless adherence to the "abuse of discretion" doctrine to refuse to grant any relief, no matter how much it is warranted, by erroneously stating: "Savage alleges no facts indicating he is the victim of "manifest injustice." He alleges no facts at all." (Opinion at ¶27).

"Fact" is defined as follows:

"A thing done; an action performed or an incident transpiring; an event or circumstance; an actual occurrence. An actual happening in time or space or an event mental or physical. That which has taken place, not what might or might not have taken place." (Black's Law Dictionary)

"A deed; and act; that which exists; that which

is real; that which is true." (Ballentine's Law Dictionary)

"Facts" is defined as follows:

"Actualities; that took place, not what might or might not have happened; things that in very truth have occurred." (Ballentine's Law Dictionary, 1954 Supplement).

**City of South Euclid v. Clapacs** (1966) 6 Ohio Misc. 101.

In this case, Savage presented operative facts (material and judicial) in both his trial court motions (post-conviction and 32.1) and the appellant's brief to the Eleventh District Court of Appeals, claiming that the State of Ohio failed to provide him with the notice and opportunity requirements of the U.S. Constitution to defend against the additional elements added to the charges after the grand jury indictment, a fact corroborated by the indictment filed in this case and the recent case law of **Blakely v. Washington** (2004) 542 U.S. 296 and its progeny.

Savage further presented the fact that the trial court and the State added insult to injury by convicting him of these additional elements without a jury determination and then by lowering the prosecutions burden of proof of beyond a reasonable doubt, to some undetermined, non-constitutional standard, to which, Savage's counsel failed to object at any point in the proceedings. All of these facts were corroborated by the transcripts of proceedings, the sentencing judgment entry of the court and the recent case law of **Blakely** and its progeny and Ohio Revised Code §2929.14.

In this case, the sentence imposed, which is contrary to law is illegal and void. **In re: Shelton** (1957) 103 Ohio App. 436; **State v. Foster**, supra, **Blakely**, supra. A void judgment has no force or effect under the law. See generally **State v. Swiger** (1998) 125 Ohio App.3d 456; **Patton v. Deimer** (1988) 35 Ohio St.3d 68. Such a judgment

may be challenged in any way, at any step in the proceedings, **Patton**, supra, **Swiger**, supra, cannot be ratified, and cannot be made valid by anything the defendant might do or fail to do. **Slaven v. Slaven** 22 Ohio Op. 230, 8 Ohio Supp. 70 [C.P., 1941]. And therefore, the fact that Savage was statutorily entitled to a maximum three year, concurrent sentence provided by the mandatory presumptive requirements of Ohio Revised Code 2929.14(B), created a manifest injustice that was prejudicial to his constitutional entitlements.

This Court has held that a defendant who seeks a post-sentence 32.1 motion bears the burden of establishing existence of manifest injustice. **State v. Smith** (1977) 361 N.E.2d 1324. Appellant could not have presented a more clear cut example of manifest injustice, and to permit a conviction to stand, based upon elements used to enhance Appellant's sentence beyond the statutory maximum of three years, that were neither indicted by a grand jury, tried by a jury or found to be true beyond a reasonable doubt would be a manifest miscarriage of justice, **U.S. v. Ward** (1994) 37 F.3d 243, and has been equated with plain error review. **U.S. v. Matinez** (11th Cir., 1996) 83 F.3d 371; Citing **U.S. v. Newsome**, 998 F.2d 1571, 1579 (11th Cir., 1993).

Furthermore, the Appeals Court implies that there is no resolution available to this Appellant for the unconstitutional, illegal and void sentence that was imposed upon him. However, the refusal to consider these arguments by the reviewing court results in an independent miscarriage of justice by refusing to permit the opportunity to argue to the trial court that the suggested severance, clearly unconstitutionally overbroad, set forth in **Foster**, which has been rejected by the General Assembly as evidence by the decision

not to adopt the severance by re-writing the statutes, which merely exacerbates and compounds the initial miscarriage of justice and vitiates the protections of the Ex Post Facto Clause of the United States Constitution, *Calder v. Bull* (1798) 3 U.S. 386,390 in being sentenced to serve more than the permissible maximum sentence.

Appellant submits that the decision of the lower court's argument that appellant failed to present facts that established the existence of a manifest injustice in this case (note that the court tacitly agreed that Savage's sentence was unlawful) is incorrect as a matter of law and this Court should accept jurisdiction under its appellate and supervisory capacity to correct the error in this case as well as clarify the law for the remainder of Ohio Courts.

**PROPOSITION OF LAW NO. III:**

WHERE A SENTENCE IN A CRIMINAL CASE IS ENHANCED BEYOND THE STATUTORY MAXIMUM BASED UPON FACTS NOT ALLEGED IN THE INDICTMENT OR PROVEN BEYOND A REASONABLE DOUBT, IT IS TANTAMOUNT TO AN ACQUITTAL ON THE SENTENCE ENHANCEMENT FACTS, RENDERING O.R.C. §2953.23(A)(1)(b) APPLICABLE TO A DELAYED POST CONVICTION PETITION.

**LAW AND ARGUMENT**

As noted above, the maximum sentence of imprisonment in a criminal case for a felony of the first degree is three years, absent additional fact allegation and finding, beyond a reasonable doubt by jury or waiver. *Apprendi*, supra, *Blakely*, supra, *McMillan*, supra, and *Foster*, supra. It is irrefragable that the state obtained a conviction for indicted rape charges at a change of plea hearing, and then during the sentencing hearing, the state obtained another conviction for the elements enhancing Appellant's sentence beyond the three year maximum, therefore for the state to claim that Appellant cannot meet the second prong of the test, set out in O.R.C. §2953.23

(A)(1)(b) simply fails to hold water.

"While in deciding whether a new constitutional rule is to be applied retroactively, it is proper to consider the state's reliance on the old rule and the impact of the new rule on the administration of justice if the degree to which the new rule enhances the integrity of the fact finding process is sufficiently small "where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially its truth finding function, and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule [is] given complete retroactive effect". **Hankerson v. North Carolina** (1977) 432 U.S. 233.

The core of due process guaranteed by the Fourteenth Amendment is notice and opportunity to respond. See e.g. **LaChance v Erickson** (1998) 522 U.S. 262. The failure of the government to warn a defendant prior to sentencing and give him the opportunity to respond, defend, or otherwise rebut the judicial fact findings upon which the possibility of an enhanced sentence relies, mandates that the state and by extension, the court, is divested of in persona jurisdiction to render sentence accordingly. See, e.g. **Lewis v. Reed** (1927) 117 Ohio St. 525; **Lucas v. O'dea** (6th Cir., 1999) 179 F.3d 412. "No man by express consent, can confer jurisdiction upon the court to try him for a crime", **Doyle v. State** (1848) 17 Ohio St. 222,225 jurisdictional defect cannot be waived or procedurally defaulted and requires reversal. **U.S. v. Griffin** ( ) 303 U.S. 226.

A defendant may appeal his sentence even when sentence imposed falls within range advocated by defendant, as long as defendant can identify specific legal error, **U.S. v. Hayes** (6th Cir., 1995) 49 F.3d 178; O.R.C.§2953.08(A)(4), and defendant who received maximum

sentence for offense is entitled to de novo review of sentence by Court of Appeals. **State v. Kershaw** (1999) 132 Ohio App.3d 243. A defendant cannot by stipulation give status contrary to law, **Walsh v. Bollas** (1992) 82 Ohio App.3d 588, the stipulation must be voluntary knowing and informed, **State v. Small** (2005) 162 Ohio App.3d 375, and cannot be a waiver of a right not plainly intended to be relinquished. **Beyer v. Miller** (1951) 90 Ohio App. 66.

where the fact allegations necessary to find Appellant guilty of the additional facts necessary to enhance his sentence beyond the statutory maximum of three years were not properly included in the indictment, or proven beyond a reasonable doubt, it is axiomatic that no rational fact finder could have found Appellant guilty of the facts, because they were never alleged. See, e.g. **U.S. v. O'Hagan** (CA 8, 1998) 139 F.3d 641; **U.S. v. Huntsman** (CA 8, 1992) 959 F.2d 1429; **State v. Washington** (1978) 56 Ohio App.2d 129.

As no rational fact finder can find a person guilty of elements of which the defendant is not accused, the requirements of O.R.C. §2953.23(A)(1)(b) are, in fact, fulfilled in this case requiring merit consideration of a so-called "untimely" post-conviction petition and the lower courts must be reversed.

#### **PROPOSITION OF LAW NO IV:**

WHERE TRIAL COUNSEL ADVOCATES A GUILTY PLEA BASED UPON LEGALLY INCORRECT ADVICE AS TO THE POSSIBLE PENALTY, AND AN UNLAWFULLY ENHANCED PENALTY IS IMPOSED BASED UPON SUCH ADVICE, THE DEFENDANT HAS BEEN DENIED EFFECTIVE COUNSEL AND MANIFEST INJUSTICE, SUFFICIENT TO WARRANT RELIEF, HAS BEEN DEMONSTRATED.

#### **LAW AND ARGUMENT**

The maximum statutory penalty for a first degree felony in Ohio, absent additional fact finding above and beyond the elements of the

offense is three years. In this case, trial counsel advocated acquiescence to the imposition of a sentence five times the maximum penalty. Further, trial counsel advocated the execution of a written plea document that erroneously stated the law in terms of potential penalties wherein the document insidiously stipulated to consecutive sentences to circumvent appellant's constitutional rights, allowing the state to exceed the bounds of the law and enhance the maximum presumptive term of three years, absent allegations by indictment, **Apprendi v. New Jersey** (2000) 530 U.S. 466, see also **McMillan v. Pennsylvania** (1986) 477 U.S. 79, submission to a jury or proven beyond a reasonable doubt as required by the Constitution. **Blakely v. Washington** (2004) 542 U.S. 296, see also **State v. Foster** (2006) 109 Ohio St.3d 1.

The advocacy of counsel to acquiesce to an agreement that clearly reflected an erroneous statement of the law relevant to the actual, lawful penalty is clearly ineffective.

A lawyer is required to arm himself with the pertinent law and facts of the case. See e.g. **State v. Cutcher** (1969) 17 Ohio App.2d 107 citing **Poe v. U.S.** (D.C. Cir., 1964) 233 F. Supp. 173, wherein the Court held that counsel is effective "because of the unawareness on the part of defense counsel of a rule of law basic to the case." (id. at 178, citing **People v. Ibarra** (1963) 34 Cal. Rptr. 863.

The lower courts in this case argue that, since **Blakely** was decided subsequently to the sentencing in this case, then counsel could not "possess oracular powers", the development of the law so as to render the failure to read, understand and properly advise Appellant of the law, is ineffectiveness. As Appellant disagrees, noting that **Apprendi** and **McMillan** both predate the sentencing in

this case and, while **Blakely** is unarguably a watershed rule of law, **Booker v U.S.** (2005) 125 S.Ct. 738, the doctrine of law upon which it relies was well published, well established and readily identifiable by a licensed attorney of ordinary training, skill and competence. **State v. Lytle** (1976) 48 Ohio St.2d 391; **State v. Bradley** (1989) 42 Ohio St.3d 136.

In this case, it is unarguable that counsel failed to properly arm himself with the relevant law regarding sentencing. Had the appellant been properly advised, the resulting punishment would of been one fifth of that imposed by the trial court.

The decision of the lower court that counsel was not ineffective is clearly erroneous.

**CONCLUSION**

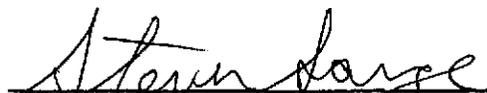
For the foregoing reasons, this Court should accept jurisdiction over this case, permit full briefing and, ultimately, reverse the lower Courts, and Appellant so prays.

Respectfully submitted,

  
Steven Savage #423-361  
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Appellant, in pro se

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was sent via regular U.S. Mail to the office of the Geauga County Prosecutor, 231 Main St., Chardon, Ohio 44024, on this 29 day of January, 2007.

  
Steven Savage  
Appellant, in pro se



THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
GEAUGA COUNTY, OHIO

**FILED**  
IN COURT OF APPEALS  
DEC 26 2006  
DENISE M. KAMINSKI  
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STATE OF OHIO, : OPINION  
 :  
 Plaintiff-Appellee, :  
 : CASE NO. 2005-G-2663  
 - vs - :  
 :  
 STEVEN K. SAVAGE, :  
 :  
 Defendant-Appellant. :

Civil Appeal from the Court of Common Pleas, Case No. 01 C 000060.

Judgment: Affirmed.

*David P. Joyce*, Geauga County Prosecutor, and *J. A. Miedema*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

*Erik M. Jones*, Mentzer, Vuillemin and Mygrant, LTD., One Cascade Plaza, #2000, Akron, OH 44308 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Steven K. Savage appeals the judgment of the Geauga County Court of Common Pleas denying his motions for post-conviction relief. We affirm.

{¶2} July 20, 2001, Savage was indicted by the Geauga County grand jury on fifteen counts of rape, one count of attempted rape, and six counts of sexual battery for conduct involving his minor step daughter. Nine of the rape counts carried mandatory life sentences upon conviction or a plea of guilty. Savage pled not guilty to all charges

at his arraignment on July 23, 2001. At about this same time, Savage was under indictment in Lake County, Ohio, for charges stemming from the same or similar conduct with the child.

{¶3} December 10, 2001, a plea agreement was filed. The parties agreed to amend three of the rape charges, deleting language specifying Savage had compelled his step daughter into sex through force or threat of force. This removed from him the shadow of (multiple) mandatory life sentences for his crimes. Savage agreed to plead guilty to the three amended charges, as well as two further charges of rape as indicted. He and the state agreed to a prison term of fifteen years. Savage stipulated to the findings then required under R.C. 2929.14(E) for imposition of consecutive sentences. He and the state jointly recommended to the trial court that he be deemed a sexual predator.

{¶4} February 20, 2002, the trial court sentenced Savage to ten year terms of imprisonment for each of the amended rape charges. These sentences were to run concurrently, and concurrent with his sentence for rape out of Lake County. Savage was sentenced to concurrent terms of five years on the two other rape charges, these five year sentences to be served consecutive to his other sentences, for a total of fifteen years, the other charges being nolle.

{¶5} June 22, 2005, Savage petitioned the trial court to vacate or set aside his conviction or sentence, pursuant to R.C. 2953.21(A)(1). July 8, 2005, he moved that court to withdraw his former guilty plea pursuant to Crim.R. 32.1. The state responded. By decision and judgment entry filed July 21, 2005, the trial court denied Savage relief. Savage timely noticed this appeal August 19, 2005, making six assignments of error:

{¶6} "[1.] In summarily dismissing the petition for post-conviction relief without ordering an evidentiary hearing, the trial court deprived petitioner of his absolute right to due process of law Article 1 Section 16 Ohio Constitution and 14th Amendment of the United States Constitution.

{¶7} "[2.] The trial court abused it's [sic] discretion and committed prejudicial error when it denied the post-conviction petition and failed to proceed to an evidentiary hearing on the issues and merits of the claim.

{¶8} "[3.] The trial court abused it's [sic] discretion and committed prejudicial error in holding that the U.S. Supreme Court's decision in *Apprendi v. New Jersey* and *Blakely v. Washington* do not apply to Ohio's sentencing scheme.

{¶9} "[4.] Ineffective assistance of trial counsel.

{¶10} "[5.] In summarily dismissing defendant's post-sentence Criminal Rule 32.1 motion to correct sentence without ordering an evidentiary hearing, the trial court deprived defendant of his absolute right to due process of law Article 1 Section 16 Ohio Constitution and 14th Amendment of the United States Constitution.

{¶11} "[6.] The trial court abused it's [sic] discretion and committed prejudicial error when it denied appellant's post-sentence Criminal Rule 32.1 motion to correct sentence and failed to proceed to an evidentiary hearing on the issues and merits of the claims."

{¶12} Under his first assignment of error, Savage alleges his due process rights were infringed when the trial court denied his petition to vacate sentence without holding an evidentiary hearing.

{¶13} A criminal defendant challenging his conviction through a petition for post-conviction relief is not automatically entitled to a hearing. *State v. Schlee* (Sept. 22, 2000), 11th Dist. No. 99-L-112, 2000 Ohio App. LEXIS 4354, at \*6. Whether to hold a hearing is discretionary with the trial court. *Id.* at \*7. First, the trial court must determine if there are substantive grounds for relief, R.C. 2953.21(C), i.e., whether “there was such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States \*\*\* [.]” R.C. 2953.21(A)(1). The court makes this determination by reviewing the petition for relief, supporting affidavits and documents, and the entire record in the case. R.C. 2953.21(C). However, if that review indicates the petitioner is not entitled to relief, then no hearing is required.

{¶14} Savage argues that he was entitled to a hearing due to the alleged unconstitutionality of his sentencing, wherein the trial court relied on judicial factfinding, formerly mandated by R.C. 2929.14(B), in imposing more than minimum sentences. Of course, R.C. 2929.14(B) was declared unconstitutional by the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph one of the syllabus.<sup>1</sup>

{¶15} The *Foster* Court relied on the rule in *Apprendi v. New Jersey* (2000), 530 U.S. 466, as applied by *Blakely v. Washington* (2004), 542 U.S. 296, in determining that sentences based on judicial factfinding, rather than a jury verdict or admission of the defendant, are prohibited constitutionally. *Foster* at paragraph one of the syllabus. Savage pled guilty to five counts of rape, and stipulated to the length of his incarceration. His sentences are based on his admissions.

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1. *Foster* was decided after Savage filed his assignments of error and brief in this case, and he does not argue it. Rather, he relies directly on *Apprendi* and *Blakely*.

{¶16} The first assignment of error is without merit.

{¶17} Under his second assignment of error, Savage argues that his petition for post-conviction relief was timely (even though filed more than three years after his sentencing), pursuant to R.C. 2953.23(A)(1), and that he was entitled, therefore, to a hearing. The statute provides that a petition is timely filed if two criteria are met: (1) it is based on a new federal or state right recognized by the United States Supreme Court, which right applies retroactively; and (2) the petitioner shows by clear and convincing evidence that no reasonable factfinder would have convicted him, absent the complained-of constitutional error. R.C. 2953.23(A)(1)(a) and (b).

{¶18} This assignment of error fails. Savage points to no constitutional error attending his sentencing in 2002, or the trial court's rejection of his petition to vacate in 2005. His sentences were based on his admissions, and he stipulated to the length of those sentences. Per *Foster*, *Blakely* has no retrospective application. Further, he simply cannot meet the second prong of the test, set out at R.C. 2953.23(A)(1)(b), as the alleged constitutional error relates not to his admitted guilt, but simply to his sentencing.

{¶19} The second assignment of error is without merit.

{¶20} Under his third assignment of error, Savage again argues that the trial court erred in determining that *Apprendi* and *Blakely* were inapplicable to his sentencing. The analysis applied to the first and second assignments of error is dispositive.

{¶21} The third assignment of error is without merit.

{¶22} Under his fourth assignment of error, Savage argues he received ineffective assistance of counsel, due to failure of his counsel to divine, in the winter of 2001-2002, the decision of the United States Supreme Court in *Blakely* in 2004. Savage admits his counsel was a properly licensed attorney in this state, and thus, presumed to be competent. *Schlee* at \*9. The burden of proving ineffective assistance of counsel falls on the defendant. *Id.* Savage cites no authority requiring counsel to possess oracular powers.

{¶23} The fourth assignment of error is without merit.

{¶24} Under his fifth assignment of error, Savage argues he was deprived of his due process rights as a result of the failure of the trial court to hold an evidentiary hearing on his Crim.R. 32.1 motion to withdraw his guilty plea. Crim.R. 32.1 provides:

{¶25} "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."

{¶26} The decision to grant or deny a Crim.R. 32.1 motion is within the sound discretion of the trial court. *State v. Zinn*, 4th Dist. No. 04CA1, 2005-Ohio-525, at ¶14. It is reviewed for abuse of discretion. *Id.* "Abuse of discretion" is not mere error of judgment. *Id.* Rather, the term "connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary." *Id.* A trial court is not required to hold an evidentiary hearing on a Crim.R. 32.1 motion, unless it appears from the facts alleged by the defendant that manifest injustice would occur if the plea stands. *Id.* at ¶16.

{¶27} In this case, Savage alleges no facts indicating he is the victim of "manifest injustice." He alleges no facts at all. He infers he would not have entered the plea agreement in 2001-2002, if he had been aware of the potential constitutional infirmities of the Ohio sentencing statutes, under *Apprendi* and *Blakely*. He argues that abolition of judicial factfinding under R.C. 2929.14(B) entitles him to minimal three-year sentences for the first degree felonies to which he pled. He asserts, yet again, ineffective assistance of counsel for failing to argue this.

{¶28} It is defendant's burden to establish "manifest injustice" for purposes of Crim.R. 32.1. *Zinn* at ¶15. Savage's assumptions and allegations fail to do so. Indeed, for his instruction, we point out that under the rule of *Apprendi* and *Blakely*, as applied in Ohio, a successful resolution to this appeal would allow the trial court to resentence him to five consecutive ten-year terms of incarceration, at the least. *Foster*, at paragraph seven of the syllabus. As a matter of common sense, Savage has suffered no injustice of any kind.

{¶29} The fifth assignment of error is without merit.

{¶30} Under his sixth assignment of error, Savage reiterates and elaborates on the theme that he is entitled to resentencing under *Apprendi* and *Blakely*. Essentially, he argues that the trial court abused its discretion in failing to hold a Crim.R. 32.1 hearing, vacating or modifying his sentences, since those sentences were "void" or "voidable." He premises this argument on the trial court's discretion to refuse a plea agreement, combined with *Blakely's* alleged mandate that he receive minimal sentences. As the law stood at the time of his sentencing, and as it stands now, the trial

court could have sentenced Savage to far longer terms of imprisonment. The reasoning applicable to the previous assignments of error, especially the fifth, applies again.

{¶31} The sixth assignment of error is without merit.

{¶32} The judgment of the Geauga County Court of Common Pleas is affirmed.

DONALD R. FORD, P.J.,

DIANE V. GRENDALL, J.,

concur.