

**IN THE SUPREME COURT OF OHIO**  
**Supreme Court Case Number 07-0413**

**STATE OF OHIO**

Appellee

v.

**SAMANTHA G. RUBY**

Appellant

On Appeal from the Summit  
County Court of Appeals,  
Ninth Appellate District  
Court of Appeals No. 23219

**MEMORANDUM IN OPPOSITION**  
**STATE OF OHIO**

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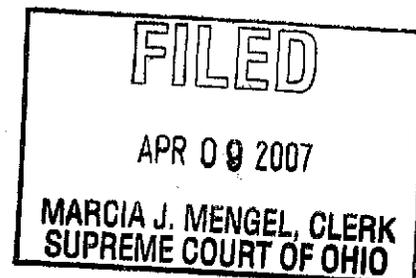
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## PROPOSITION OF LAW I

### **A DEFENDANT CANNOT USE A MOTION TO WITHDRAW A GUILTY PLEA AS A SUBSTITUTE FOR APPELLATE REVIEW OF HER VALID CRIMINAL SENTENCE.**

#### LAW AND ARGUMENT

On March 24, 2004 the trial court sentenced the defendant to seven years incarceration. The defendant did not appeal the severity of this sentence but subsequently filed a motion to withdraw her guilty plea eighteen months after her conviction. On April 10, 2006 the trial court granted this motion and reduced the defendant's sentence to four years incarceration. Can a defendant use a motion to withdraw a guilty plea as a substitute for appellate review of her valid criminal sentence?

1. **The doctrine of *res judicata* bars a defendant from litigating the severity of her sentence in a motion to withdraw his guilty plea.**

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." First, the State contends that this issue is barred under the doctrine of *res judicata* because the defendant could have challenged the severity of her sentence on direct appeal. "Where a judgment of conviction is rendered by a court having jurisdiction over the person of the defendant and jurisdiction of the subject matter, such judgment is not void, and the cause of action merged therein becomes *res judicata* as between the state and the defendant." *State v. Rodriguez* (1989), 65 Ohio App.3d 151, 153. (citations omitted).

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.”* Id. Where the defendant claims that her sentence is improper, this argument is *res judicata* because it could have been raised on direct appeal. Id.

The doctrine of *res judicata* prevents the defendant from vacating his conviction through a motion to withdraw a guilty plea where the issue raised by the defendant could have been raised on direct appeal. *State v. Rexroad*, 9<sup>th</sup> Dist. No. 22214, 2004-Ohio-621 at ¶ 9. Almost every appellate district in Ohio has similarly concluded that *res judicata* bars a defendant from litigating issues in a Motion to Withdraw a Guilty Verdict where it could have been raised on direct appeal of the defendant’s conviction:

However, the doctrine of *res judicata* serves as a bar to many of Reed's claims. This court, and several other courts, has previously held that a criminal defendant cannot raise any issue in a post-sentence motion to withdraw a guilty plea that was or could have been raised at trial or on direct appeal. *State v. Wright*, 7<sup>th</sup> Dist. No. 01 CA 80, 2002-Ohio-6096, ¶ 37; see also *State v. Reynolds*, 3<sup>rd</sup> Dist. No. 12-01-11, 2002-Ohio-2823; *State v. Reed* (Oct. 5, 2001), 2<sup>nd</sup> Dist. No. 01CA0028; *State v. Wyrick* (Aug. 31, 2001), 5<sup>th</sup> Dist. No. 01CA17; *State v. Unger* (May 23, 2001), 4<sup>th</sup> Dist. No. 00CA705; *State v. Clemens* (May 31, 2000), 9<sup>th</sup> Dist. No. 19770; *State v. Jackson* (Mar. 31, 2000), 11<sup>th</sup> Dist. No. 98-T-0182; *State v. Jefferies* (July 30, 1999), 6<sup>th</sup> Dist. No. L-98-1316.

*State v. Reed*, 7<sup>th</sup> Dist No. 04 Ma 236, 2005-Ohio-2927 at ¶ 11.

In *Reed* the Court barred the defendant’s claims in his motion to withdraw his guilty plea that his attorney was not certified to try second degree felonies because that issue that could have been raised on direct appeal after his conviction. Id at 14. “If a defendant believes that the trial court has committed an error, then he should raise that error at the first possible opportunity, not in a collateral attack.” Id at 13. Here, the defendant could have appealed the severity of her sentence immediately after her conviction by appealing that conviction to this court. The

defendant could have asserted that the trial court committed error by sentencing the defendant to seven years incarceration because she was a first time offender and other defendants had received lesser sentences. However, the defendant did not appeal her sentence. By failing to raise this issue at the appropriate time, this issue is now barred under the doctrine of *res judicata*.

**2. A seven year sentence for Aggravated Vehicular Homicide is not such a severe sentence as to constitute a manifest injustice.**

Further, even if the defendant's motion is not barred under the doctrine of *res judicata*, the State contends that the trial court abused its discretion when granting the defendant's motion to withdraw her guilty plea. Crim R. 32.1 indicates that a trial court can only withdraw a guilty plea after sentencing where the defendant has proven a manifest injustice. The "manifest injustice" standard is an extremely high standard, which permits the withdrawal of a guilty plea only in extraordinary cases. *State v. Smith* (1977), 49 Ohio St.2d 261, 264. A manifest injustice has been defined by the Ohio Supreme Court as a "clear or openly unjust act." *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, 208. A guilty plea is more difficult to withdraw after the imposition of a sentence in light of the possibility that a defendant may be encouraged to plead guilty in order to test the weight of potential punishment, and then withdraw the plea if the punishment is too severe. *State v. Peterseim* (1980), 68 Ohio App.2d 211, 213.

Here, the defendant has not set forth any grounds to prove that her sentence was a manifest injustice. The defendant was convicted of Aggravated Vehicular Homicide, and given a seven-year sentence. The defendant was aware of this possible sentence when she entered her guilty plea. This Court has indicated that where the defendant is aware of the severity of a sentence that the defendant fails to prove a manifest injustice. *State v. Wilson* (May 4, 1994), Summit No. 16544. The severity of a sentence is not a manifest injustice and does not constitute

grounds to vacate a guilty plea after sentencing. *State v. Youngblood* (May 17, 2001) Eighth Dist. No. 77997.

The circumstances surrounding the defendant's conviction do not indicate that the trial court committed a manifest injustice when sentencing the defendant to seven years incarceration. The defendant caused the death of the victim by crashing her car into the victim's car while driving at a high rate of speed in a residential area. (March 11, 2004 T.pp. 10-11). The defendant was driving without a license and ran a stop sign before the collision. (March 11, 2004 T.pp. 10-11). She then ran away after the collision leaving the victim to die. (March 11, 2004 T.pp. 10-11). The defendant has failed to prove a manifest injustice in this case. (March 11, 2004 T.pp. 10-11).

The defendant's motion for jurisdiction must be denied.

**WHY LEAVE TO APPEAL SHOULD BE DENIED**

Pursuant to the argument offered, the Appellee respectfully contends that leave to appeal should be denied, as Appellant has failed to present a substantial constitutional issue, or indicate this case is of great public or general interest.

Respectfully submitted,

**SHERRI BEVAN WALSH**  
Prosecuting Attorney

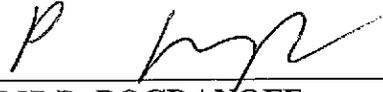


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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Opposition was sent by regular U.S. Mail to Attorney Joseph R. Spoonster, Fortney & Klingshim, 4040 Embassy Parkway, Suite 280, Akron, Ohio 44333, on this 6th day of April, 2007.



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