

NO.

**07-2373**

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 88292, 88293

STATE OF OHIO,

Plaintiff-Appellant

-vs-

PARRIS BOSWELL,

Defendant-Appellee

**MEMORANDUM IN SUPPORT OF JURISDICTION**

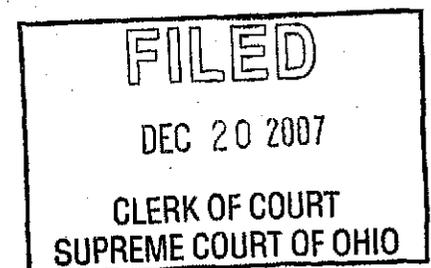
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*State v. Boswell*, Cuyahoga App. Nos. 88292, 88294, 2007-Ohio-5718

**WHY THIS APPEAL INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION  
OR ISSUE OF GREAT PUBLIC INTEREST**

This felony case involves the following question of public and great general interest. In this case, the defendant was charged with crimes whereby he was facing thirty years in prison. Defendant resolved these charges by pleading guilty and being sentenced to 16 years in prison. This plea took place in 2000. At the plea hearing, the trial judge mentioned post-release control but did not explain the specific amount of years of post-release control. Over five years after the original plea, defendant moved to vacate his plea because the trial judge did not indicate the number of years of post-release control. The trial court vacated the plea and the Eighth District affirmed. *State v. Boswell*, Cuyahoga App. Nos. 88292, 88294, 2007-Ohio-5718.

The State's opposition to decision of the Eighth District is more than just error correction. Rather, in affirming the trial court, the Eighth District ignored clear precedent from this Court and specifically held that a defendant seeking to vacate his plea need not establish prejudice. The State asserts that the Eighth District's reasoning in *Boswell* is flawed and that the conclusion establishes improper precedent. As explained below, both this Court and the United States Supreme Court have indicated that a criminal defendant, seeking to vacate a plea regarding a non-constitutional advisement, must establish prejudice. Indeed, as detailed infra, the defendant in this case cannot establish prejudice. Thus, the State of Ohio respectfully asks that this Court accept jurisdiction over this case.

**STATEMENT OF THE CASE**

In 2000, in Case No. 387210, defendant, Parris Boswell, (hereinafter referred to as "defendant") was indicted aggravated burglary (possible 3 to 10 years incarceration)

and misdemeanor assault (up to six months in prison). In Case No. 388072, defendant was charged with aggravated robbery (possible 3 to 10 years incarceration) plus firearm specification in addition to felony assault (possible 2 to 8 years incarceration) plus firearm specifications. Thus defendant was facing over thirty years in prison.

Faced with these possible penalties, defendant resolved the charges by pleading guilty in both cases as part of a package deal. In 387210 defendant plead guilty to aggravated burglary and assault and was sentenced to 6 years incarceration total. In 388072 defendant plead guilty aggravated robbery and felonious assault with specifications and was sentenced to 10 years incarceration total. These two sentences were ordered to be served consecutively for a total of 16 years incarceration.

Of note for purposes of this appeal, the transcript from the plea reveals that defendant was advised of the total possible charges he was facing. See Tr. 5/15/2000 at pages 3 to 5. Importantly, at the plea hearing, defendant was also advised that after he completed his jail term, the "may be subject to post-release control." (Tr. 5/15/2000 at 18-19.)

Defendant failed to timely appeal from this plea and sentence.

On September 9, 2004, defendant filed a motion for delayed appeal with the Eighth District Court of Appeals. The appellate court denied this motion. Thereafter defendant filed a motion for reconsideration with the appellate court which was also denied.

On June 6, 2005, defendant filed a motion to vacate his plea over five years after the fact. The State filed a brief in opposition. On May 11, 2006, the trial court granted the motion to withdraw the plea.

Thereafter the State filed a motion for leave to appeal which was granted by the Eighth District. The Eighth District affirmed the judgment of trial court. *State v. Boswell*, Cuyahoga App. Nos. 88292, 88294, 2007-Ohio-5718. In doing so, the appellate court held that defendant did not have to prove prejudice in seeking to invalidate a plea.

### **LAW AND ARGUMENT**

#### **PROPOSITION OF LAW I: BY ELIMINATING THE PREJUDICE REQUIREMENT, THE EIGHTH DISTRICT CHANGED THE LAW REGARDING POST-SENTENCE MOTIONS TO WITHDRAW GUILTY PLEAS.**

In the case at bar, defendant, who was facing over thirty years incarceration and resolved these charges with a plea agreement that resulted in a sixteen year sentence. This guilty plea occurred in 2000. Over five years later, defendant filed a motion to vacate his guilty, because the trial court did not inform him of the mandatory amount of post-release control. The State submits that the trial court erred in granting the motion to vacate and the Eighth District erred in affirming this judgment and its opinion changed the law for similar cases.

In reviewing this case it is important for this Court to be aware of two important facts.

First, the record reveals that the trial court did actually inform this defendant about post-release control at the plea hearing. See Tr. 5/15/2000 at 18, 19. The only failure on the part of the trial court is that it did not inform defendant of the years of post-release control and the mandatory nature of the post-release control.

Second, the State indicated to the appellate court in its brief and oral argument that the State has not, and will not take any steps to add post-release control this sentence. In order to add post-release control to this case, the State would either have

to file a motion for re-sentencing under *State v. Bezak* (2007), 114 Ohio St.3d 94, 2007-Ohio-3250, or file for a re-sentencing under R.C.2929.191. In an effort to preserve the original plea, the State has decided to forego attempting to add post-release control for this defendant. Thus, the State submits that this defendant got exactly what he bargained for at the plea, a sentence that does not include post-release control.

Because this was a post-sentence motion to withdraw guilty plea, defendant had the burden to establish a "manifest injustice." Crim.R. 32.1. Herein the State submits that, because this defendant got exactly what he bargained for, (a sixteen year jail sentence with no post release control) his motion to withdraw made over five years after his original plea did not establish a manifest injustice.

In determining whether it is necessary to vacate this plea in order to prevent a manifest injustice, the underlying issue is whether defendant's original plea was invalid. In resolving whether a criminal defendant knowingly, intelligently, and voluntarily entered a plea, the question is whether the trial court adequately guarded constitutional or non-constitutional rights promised by Crim.R. 11(C). *State v. Nero* (1990), 56 Ohio St.3d 106. The applicable standard of review depends upon which right or rights the defendant raises. Strict compliance is the standard if the defendant argues a violation of a constitutional right delineated in Crim.R. 11(C)(2)(c); alternatively, if the defendant raises a violation of a non-constitutional right found in Crim.R. 11(C)(2)(b), the standard of review is substantial compliance. *Nero, supra*.

Herein, because the requirement to inform a defendant of post-release control entails a non-constitutional right, the substantial compliance standard applies. "Substantial compliance means that under the totality of the circumstances the

defendant subjectively understands the implications of his plea and the rights he is waiving. Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made *must show a prejudicial effect*. The test is whether the plea would have been made otherwise.” *Id.*

The most glaring error by the Eighth District is the appellate court’s rejection of this Court’s long-standing requirement that a defendant seeking to vacate his plea, post-sentence, must establish prejudice. The court below completely rejected the principle that substantial compliance requires prejudice. The Court below stated, “We further find that Boswell was not required to demonstrate prejudice by the trial court’s error.” *Boswell, supra.* at ¶ 10}. This striking statement by the Eighth District ignores oft-repeated holding from this Court that “there must be some showing of prejudicial effect before a guilty plea may be vacated.” *State v. Jones*, \_\_\_ N.E.2d \_\_\_, 2007-Ohio-6093 at ¶ 56} quoting *State v. Stewart* (1997), 51 Ohio St.2d 86, 93, 5 O.O.3d 52, 364 N.E.2d 1163. See, also, *United States v. Vonn* (2002), 535 U.S. 55, 122 S.Ct. 1043, 152 L.Ed.2d 90 (A federal defendant must establish prejudice before vacating a plea.)

In *Stewart, supra*, this Court considered a case in which a trial court failed to advise a defendant prior to his guilty plea that he was not eligible for probation. This Court applied a substantial compliance review of the trial record and upheld the plea. *Id.* at 93. The Court noted,

although it can validly be argued that the trial court should adhere scrupulously to the provisions of Crim. R. 11(C)(2) \* \* \* **there must be some showing of prejudicial effect before a guilty plea may be vacated.** \* \* \* This court is not of the opinion that the appellant has not demonstrated that he was in any way prejudiced by the oversight of the trial court. \* \* \* the test is whether the plea would otherwise have been made. \* \* \* In the instant case, the factual circumstances indicated a guilty plea to a lesser offense was the wiser course to follow, and the

absence of a ritualistic incantation of an admonishment which is not constitutionally guaranteed does not establish grounds for vacating the plea.

*Id.* (emphasis added) Thus, the decision by the Eighth District has effectively attempted to overrule this Court and has changed the law in this district by no longer requiring a criminal defendant to prove prejudice.

Had the court below followed the precedent from this Court, it is clear that defendant could not establish prejudice. Given the fact that defendant was facing over 30 years incarceration and chose to enter into a plea that resulted in 16 incarceration, it cannot be said that the failure to inform this defendant of the mandatory nature of post-release control had any prejudicial effect on his decision to plead guilty. Defendant was clearly informed of the possibility of post-release control and still chose plead guilty. Importantly, nowhere in the record is there any indication from defendant that he would not have plead guilty had he known about the mandatory nature of post-release control.

More importantly, as it stands right now, defendant's sentence does not include post release control. The State is on record that, in an effort to preserve the plea, the State will not take any steps to add post-release control to this sentence. Thus, defendant cannot establish prejudice because he got exactly he plead to: a sixteen year sentence with no post release control.

At the least, the State submits that this Court should accept jurisdiction over this case in light of another case currently pending before this Court. *State v. Sarkozy*, Case No. 2006-Ohio-1973. In *State v. Sarkozy*, Cuyahoga App. No. 86952, 2006-Ohio-3977 the Eighth District refused to vacate a plea merely because there was a deficiency in the post-release control advisement.

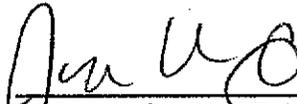
**CONCLUSION**

Accordingly, the State of Ohio respectfully asks this Court to accept jurisdiction over this case.

Respectfully submitted,

WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR

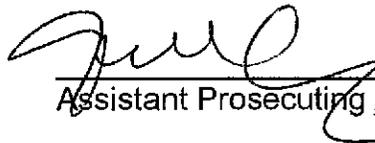
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**SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction has been mailed this 19<sup>th</sup> day of December 2007, to Richard Agopian, 1415 West 9<sup>th</sup> Street, Cleveland, Ohio 44113.



Assistant Prosecuting Attorney

NOV 5 - 2007

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
Nos. 88292, 88293

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**STATE OF OHIO**

PLAINTIFF-APPELLANT

vs.

**PARRIS BOSWELL**

DEFENDANT-APPELLEE

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case Nos. CR-388072 and CR-387210

**BEFORE:** Kilbane, J., Rocco, P.J., and Boyle, J.

**RELEASED:** October 25, 2007

**JOURNALIZED:** NOV 5 - 2007

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**FILED AND JOURNALIZED  
PER APP. R. 22(E)**

**NOV 5 - 2007**

**GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.**

**ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED**

**OCT 25 2007**

**GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

**NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED**

MARY EILEEN KILBANE, J.:

The State of Ohio ("State") appeals from the trial court's decision to vacate Parris Boswell's ("Boswell") plea. The State argues that the trial court did inform Boswell that he might be subjected to postrelease control, and therefore it substantially complied with Ohio law. For the following reasons, we affirm the decision of the trial court.

On February 15, 2000, a Cuyahoga County Grand Jury returned an indictment charging Boswell with aggravated burglary, a first degree felony, and assault, a first degree misdemeanor. On March 6, 2000, a Cuyahoga County Grand Jury returned an indictment charging Boswell with aggravated robbery with firearm specifications, a first degree felony; felonious assault with firearm specifications, a second degree felony; and having a weapon while under disability, a fourth degree felony.

On May 15, 2000, the trial court conducted a plea hearing with Boswell. During the hearing, the trial court told Boswell that he "may be subject to post-release control."<sup>1</sup> Boswell told the court that he understood, and then pleaded guilty to all five crimes as charged in the two separate indictments. On June 5, 2000, the trial court sentenced Boswell to a total prison term of sixteen years.

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<sup>1</sup>Transcript of hearing dated May 15, 2000, attached to Parris Boswell's addendum to motion to vacate plea.

On September 9, 2004 and on April 4, 2005, Boswell filed motions for a delayed appeal with this court. This court dismissed both appeals. On June 8, 2005, Boswell filed a motion with the trial court, seeking to vacate his May 15, 2000 plea agreement. In his motion, Boswell argued that the trial court failed to accurately and adequately inform him of the mandatory term of postrelease control that applied to his charges. Boswell further argued that the trial court did not advise him of any penalties for violating postrelease control. Accordingly, Boswell claimed that his guilty pleas must be vacated. The State opposed this motion; more than a year later, on May 9, 2006, the trial court vacated the guilty pleas entered on May 15, 2000. The State appeals, raising a single assignment of error.<sup>2</sup>

**“The trial court erred in granting Boswell’s motion to withdraw guilty plea six years after the plea. Journal entry dated 5/11/2006.”**

Pursuant to Crim.R. 32.1, a postsentence motion to withdraw a guilty plea should only be granted to correct manifest injustice. *State v. Woods*, Cuyahoga App. No. 84993, 2005-Ohio-3425. In reviewing the trial court’s decision to deny or grant a defendant’s motion to withdraw his guilty plea, this court’s standard of review is limited to a determination of whether the trial

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<sup>2</sup>The State’s two separate appeals have been consolidated.

court abused its discretion. *Id.* An abuse of discretion constitutes more than just an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

Here, the State argues that manifest injustice did not occur because the trial court substantially complied with the requirements of Crim.R. 11(C) when informing Boswell of the postrelease control requirements. We disagree with this argument.

Crim.R. 11 requires that, before the court may accept a plea of guilty in a felony case, the court must address the defendant personally and determine that he is making the plea voluntarily and "with understanding of \*\*\* the maximum penalty involved." *State v. Morgan*, Cuyahoga App. No. 87578, 2007-Ohio-71; *State v. Brusiter*, Cuyahoga App. No. 87819, 2006-Ohio-6444. "Post-release control constitutes a portion of the maximum penalty involved in an offense for which a prison term is imposed." *Morgan*, at paragraph 12. The Ohio Supreme Court has previously held that the trial court's failure to notify the defendant of postrelease control sanctions before accepting a guilty plea may form the basis to vacate the plea. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085; *Morgan*, *supra*.

Additionally, "R.C. 2943.032(E) requires that, prior to accepting a guilty plea for which a term of imprisonment will be imposed, the trial court must inform the defendant regarding postrelease control sanctions in a reasonably thorough manner." *Brusiter*, supra; See, also, *Morgan*, supra. "Without an adequate explanation of post-release control from the trial court, the defendant could not fully understand the consequences of his plea as required by Crim.R. 11(C). *Id.*

The State argues that the trial court substantially complied with the requirements of Crim.R. 11(C) when informing Boswell of the postrelease control requirements. However, prior to taking Boswell's guilty pleas to first and second degree felonies, the trial court failed to inform him that he would be subjected to mandatory postrelease control for five years and the consequences that would result if he violated the terms and conditions of his postrelease control. Instead, the trial court told Boswell that he "may be subject to post-release control."

In the present case, the record is clear that the trial court failed to advise Boswell that he was subject to a mandatory five-year term of postrelease control following his prison sentence. This court has repeatedly held that, where the trial court failed to personally address a defendant and inform him of the

maximum length of postrelease control before accepting his guilty plea, the court fails to substantially comply with Crim.R. 11(C)(2)(a) and R.C. 2943.032. *Brusiter*, supra; *Morgan*, supra; *State v. Cortez*, Cuyahoga App. No. 87871, 2007-Ohio-261. *State v. McCollins*, Cuyahoga App. No. 87182, 2006-Ohio-4886; *State v. Crosswhite*, Cuyahoga App. No. 86345, 2006-Ohio-1081; *State v. Pendleton*, Cuyahoga App. No. 84514, 2005-Ohio-3126.

We further find that Boswell was not required to demonstrate prejudice by the trial court's error. In *State v. Delventhal*, Cuyahoga App. No. 81034, 2003-Ohio-1503, this court determined that the prejudice requirement is applied as part of the substantial compliance rule. "Where the judge is required to inform the defendant personally and entirely fails to do so there is no further need to determine whether prejudice occurred, and this rule is not limited only to warnings that are constitutionally required." *Cortez*, supra.

Additionally, we overrule any argument that because Boswell was not subjected to a term of postrelease control, no manifest injustice occurred. This argument ignores the fact that at the time Boswell entered his plea, he was not fully informed of the maximum penalty involved. The fact that the trial court did not subject Boswell to a term of postrelease control is irrelevant; at the time

he entered his plea, he did not know the maximum penalty involved. Therefore, the trial court did not comply with Crim.R. 11 and R.C. 2943.032(E).

Because the trial court failed to advise Boswell of the maximum length of postrelease control before entering his guilty plea, the trial court did not substantially comply with the requirements of Crim.R. 11(C)(2)(a) and R.C. 2943.032. Therefore, we affirm the trial court's decision to vacate Boswell's plea.

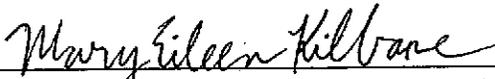
The State also raises the argument that the merits of Boswell's motion to vacate his plea are barred by the doctrine of res judicata. However, in putting forth this argument, the State has failed to separately argue it in its brief, in violation of App.R. 16(A). Accordingly, we may disregard this portion of the State's appeal. App.R. 12(A)(2).

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

  
MARY EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, J., and  
MARY J. BOYLE, J., DISSENTS (SEE SEPARATE DISSENTING OPINION)

MARY JANE BOYLE, J., DISSENTING:

I respectfully dissent. For the following reasons, I would reverse and remand the trial court's plea vacation.

First, I disagree with the majority's statement that claiming the state failed to separately address its claim, as required by App.R. 16(A), that Boswell's motion to withdraw his plea was barred by *res judicata*. App.R. 16(A)(7) provides that an appellant's brief must contain an argument "with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." Under App.R. 12(A)(2), this court may then disregard *an assignment of error*, if the party raising it "fails to argue the assignment separately in the brief, as required under App.R. 16(A)."

In its appellate brief, the state presented *a single assignment of error*, as the majority sets forth. Under the assignment of error, i.e., that the trial court

erred when it granted Boswell's motion to withdraw his plea, the state presents several arguments, *only one* of which is the res judicata argument. If Boswell's Crim.R. 32.1 motion is barred by res judicata, then the trial court erred when it granted it. Thus, the res judicata argument fully falls within Boswell's *single assignment of error*.

Furthermore, within its res judicata argument, the state sets forth a thorough argument and analysis, supported by extensive case law, including cases from this district, as well as eight other appellate districts. If this court concluded that res judicata barred Boswell's motion to vacate his plea, then we would have to conclude that the trial court erred in granting the motion for that reason. If we concluded that it did not bar it, then we would get to the issue that is the crux of this appeal; i.e., whether a trial court's notice to a defendant at his plea hearing that he *may* receive postrelease control, when it was actually *mandatory* postrelease control, meets the extraordinarily high standard of "manifest injustice" within a post-sentence Crim.R. 32.1 motion. Thus, it is this author's view that the issue of res judicata must first be addressed.

Most appellate courts, including this court, have applied res judicata to Crim.R. 32.1 motions at one time; but not consistently, and often times, the issue of res judicata is completely ignored. See *State v. Reynolds*, 3d Dist. No. 12-01-11, 2002-Ohio-2823 (for a list of cases from each district representing the

procedural “quagmire” and “turmoil” this issue presents). Nevertheless, it is my view that we are bound by this court’s decision in *State v. Gaston*, 8th Dist. No. 82628, 2003-Ohio-5825, which held that res judicata barred Gaston’s post-judgment Crim.R. 32.1 motion.

Gaston had entered a plea of guilty in April 2001. He directly appealed his sentence and conviction, but did not challenge his plea. We affirmed in February 2002. See *State v. Gaston*, 8th Dist. No. 79626, 2002-Ohio-506. Gaston filed a Crim.R. 32.1 motion to withdraw his plea seven months later, in September 2002.

This court disagreed with the state that Gaston’s motion was barred on jurisdictional grounds, since Gaston did not question his plea in his direct appeal. *Id.* at ¶4-5. Nevertheless, this court held that his motion was barred by res judicata. *Id.* at ¶8.

In *Gaston*, we discussed the Supreme Court’s decision in *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993 (where the Supreme Court held that R.C. 2953.21 and R.C. 2953.23 (postconviction relief statutes) do not govern a Crim.R. 32.1 post-sentence motion to withdraw a guilty plea). *Id.* We concluded that the holding in *Bush* only distinguished Crim.R. 32.1 motions from postconviction relief petitions, but did not address the issue of res judicata. *Id.*

We further reasoned in *Gaston* that just because the Supreme Court made it clear that a Crim.R. 32.1 motion is not a collateral attack, and is filed in the original action, did not mean that res judicata did not apply. *Id.* We relied on *State v. Szefcyk* (1996), 77 Ohio St.3d 93, for the proposition that: "Res judicata applies to 'any proceeding' initiated after a final judgment of conviction and direct appeal." *Id.* Therefore, in *Gaston*, this court concluded that a Crim.R. 32.1 motion would be included within "any proceeding," and as such, "res judicata bars any part of the motion that could have been raised on direct appeal." *Id.* See, also, *State v. Daily*, 8th Dist. No.84123, 2004-Ohio-5391; *Reynolds*, supra; *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266 (Tenth District). But, see, *State v. Spencer*, 2d Dist. No. 2006 CA42, 2007-Ohio-2140.

The same analysis applies to the case sub judice. Boswell contends that his plea was not voluntary because the trial court misinformed him at his plea hearing that he may receive, rather than he would receive, postrelease control. However, Boswell could have raised that issue on direct appeal. Thus, his motion is barred by res judicata.

Boswell further asserts that res judicata should not apply, since his trial counsel was ineffective when he did not recognize the trial court's error regarding postrelease control, and did not object. However, Boswell even states that, "the record of the plea hearing demonstrates" this alleged error. Since the

alleged ineffective assistance of counsel appeared on the face of the record, he could have directly appealed it.

Moreover, if an alleged ineffective assistance of counsel claim *does not appear on the face of the record*, a defendant can file a petition for postconviction relief within the time frame under R.C. 2953.21. “Matters outside the record that allegedly corrupted the defendant’s choice to enter a plea of guilty or no contest so as to render the plea less than knowing and voluntary are proper grounds for an R.C. 2953.21 petition for post-conviction relief. \*\*\* (T)he availability of R.C. 2953.21 relief on those same grounds removes them from the form of extraordinary circumstances demonstrating a manifest injustice which is required for Crim.R. 32.1 relief.” (Ellipses in original.) *State v. Cochran*, 2d Dist. No. 2006CA87, 2007-Ohio-4545, at ¶71, quoting *State v. Hartzell* (Aug. 20, 1999), 2d Dist. No. 17499, 1999 Ohio App. LEXIS 3812.

Therefore, it is my view that res judicata bars Boswell’s Crim.R. 32.1 motion and, as such, the trial court abused its discretion when it granted it.

Even if this court held that res judicata did not bar Boswell’s motion, this author would still conclude that the trial court abused its discretion when it granted Boswell’s Crim.R. 32.1 motion, nearly six years after he pled guilty, as it did not rise to the extraordinarily high standard of “manifest injustice.”

Crim.R. 32.1 provides as follows: "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." This rule imposes a strict standard for deciding a post-sentence motion to withdraw a plea. *State v. Griffin* (2001), 141 Ohio App.3d 551, 553. A defendant may only be allowed to withdraw a plea after sentencing in "extraordinary cases." *State v. Smith* (1977), 49 Ohio St.2d 261, 264. The defendant bears the burden of showing a manifest injustice warranting the withdrawal of a plea. *Id.* at paragraph one of the syllabus. "The logic behind this precept is to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdrawing the plea if the sentence was unexpectedly severe." *State v. Wynn* (1998), 131 Ohio App.3d 725, 728, citing *State v. Caraballo* (1985), 17 Ohio St.3d 66.

In *State v. Wolford* (Sept. 17, 1999), 2d Dist. No. 99CA10, 1999 Ohio App. LEXIS 4282, the Second District explained:

"The term *injustice* is defined as 'the withholding or denial of justice. In law, the term is almost invariably applied to the act, fault, or omission of a court, as distinguished from that of an individual.' Black's Law Dictionary, 5th Ed. A 'manifest injustice' comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the

resulting prejudice through another form of application reasonably available to him or her.

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“Failure to comply with the requirements of Crim.R. 11(C) when taking a plea is a defect that may be the subject of a merit appeal which supports reversal of a defendant’s conviction when prejudice results. *State v. Ballard* (1981), 66 Ohio St. 2d 473. Even when a timely appeal is not taken, a delayed appeal is available pursuant to App.R. 5(A), upon a proper showing. Therefore, a court’s failure to comply with the requirements of Crim.R 11(C) is not an extraordinary circumstance demonstrating a form of manifest injustice required for Crim.R. 32.1 relief.” (Emphasis in original and parallel citations omitted.) *Id.* at 4-5.

It is this writer’s view that Boswell has not demonstrated an “extraordinary circumstance” which would rise to the high standard of “manifest injustice,” such that his plea should have been vacated post-sentence, post-judgment, and nearly six years after he entered into his plea. His lack of proper notification appeared on the face of the record, and thus, he should have directly appealed the trial court’s postrelease control notification. He also could have filed a delayed appeal within a reasonable amount of time after discovering the error, rather than nearly six years later.

Thus, Boswell could have sought redress from the resulting prejudice through three different avenues that were reasonably available to him: (1) a timely direct appeal; (2) a more timely delayed appeal; or (3) a timely petition for post-conviction relief. He failed to take advantage of any of them. Boswell has not presented an extraordinary circumstance demonstrating a manifest injustice, which is required by a post-sentence Crim.R. 32.1 motion. Thus, it is this writer's view that the trial court abused its discretion when it granted Boswell's motion.

In addition, I disagree with the majority that it was "irrelevant" that Boswell did not *actually* receive postrelease control as part of his sentence. Regardless of whether he will be sentenced *in the future* to postrelease control pursuant to R.C. 2929.191, that is not the issue before us in the instant case. At this point, he is not subject to postrelease control, and as such, was not prejudiced by the trial court misinforming him of the mandatory nature of postrelease control. See *State v. Ballard* (1981), 66 Ohio St. 2d 473.

The majority cites six cases for the proposition that, "[t]his court has repeatedly held that, where the trial court failed to personally address a defendant and inform him of the maximum length of postrelease control before accepting his guilty plea, the court fails to substantially comply with Crim.R.

11(C)(2)(a) and R.C. 2943.032.” I agree that all six cases stand for that proposition.<sup>3</sup>

In none of the cases cited by the majority, however, did the appellants file a Crim.R. 32.1 motion to withdraw their plea, let alone one that was filed nearly five years after they pled guilty. In each of the six cases, it was the appellant’s direct appeal, where he claimed that the trial court erred when it accepted his guilty plea – because it was not knowingly, voluntarily, and intelligently made.

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<sup>3</sup>As the state correctly points out, this court has also held that a trial court substantially complies with Crim.R. 11 when it misinforms defendants at their plea hearing that they may, rather than they will, receive postrelease control. See *State v. Fleming*, 8th Dist. No. 87773, 2006-Ohio-6773; *State v. Shorter*, 8th Dist. No. 86826, 2006-Ohio-2882; and *State v. Rankin*, 8th Dist. No. 86706, 2006-Ohio-2571 (informed defendant that postrelease control was mandatory, but improperly told him he could receive “anywhere from three to five years”).

It is significant to note that on January 24, 2007, the Supreme Court granted discretionary review of a case from this district, where we affirmed the trial court’s denial of a defendant’s Crim.R. 32.1 motion and held that the trial court substantially complied with Crim.R. 11, despite the fact that the trial court made *no mention of postrelease control* at the plea hearing (Sweeney, J., dissented, concluding that he would have vacated the plea). See *State v. Sarkozy*, 8th Dist. No. 96952, 2006-Ohio-3977, accepted for review by *State v. Sarkozy*, 112 Ohio St.3d 1441, 2007-Ohio-3977. The proposition of law accepted by the Supreme Court was: “The failure during a plea colloquy to correctly advise a defendant of the length of postrelease control that will be part of the sentence of imprisonment causes the plea to be invalid. (Courts must exercise discretion in determining whether substantial compliance exists in relation to the alleged failure to advise of postrelease control.)” Oral argument in this case was held on October 16, 2007.

In all six cases, this court vacated the appellant's plea and remanded the case. Thus, it is my view that these cases, which do not have the same procedural issue as the one presented here, do not apply to the case at bar.

Even if the six cases could be relied on in this case, for the following reasons, I still would not agree that Boswell's plea should have been vacated.

"R.C. 2943.032(E) requires that, prior to accepting a guilty plea for which a term of imprisonment will be imposed, the trial court must inform a defendant regarding post release control sanctions in a reasonably thorough manner." *Rankin*, supra, at ¶29, citing *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171.

In *Fleming*, supra, at ¶3-4, this court stated:

"In resolving whether a criminal defendant knowingly, intelligently, and voluntarily entered a plea, our query is whether the trial court adequately guarded constitutional or non-constitutional rights promised by Crim.R. 11(C). The applicable standard of review depends upon which right or rights the appellant raises on appeal. We require strict compliance if the appellant raises a violation of a constitutional right delineated in Crim.R. 11(C)(2)(c); alternatively, if the appellant raises a violation of a non-constitutional right found in Crim.R. 11(C)(2)(b), we look for substantial compliance.' *State v. Moviell*, [8 th Dist. No.] 86244, 2006 Ohio 697, ¶10, citations omitted.

"As outlined by the Ohio Supreme Court:

“Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. Furthermore, a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect. The test is whether the plea would have been made otherwise. *State v. Nero* (1990), 56 Ohio St.3d 106, 108.”

Boswell argues here that he has raised a constitutional error, and thus strict compliance with Crim.R. 11 is required. However, the rights implicated (informing a defendant of the maximum penalty he could receive) are not of constitutional dimension and fall, instead, within the parameters of Crim.R. 11(C)(2)(b). Thus, only substantial compliance is necessary. *Fleming* at ¶5.

One of the cases cited by the majority, *Crosswhite*, supra, bears further discussion regarding what is required by “substantial compliance.” In *Crosswhite*, the trial court informed the appellant at his plea hearing that upon his release from prison, he “might be released on what is called postrelease control[.]” But the appellant’s postrelease control was mandatory, “by operation of law.” *Id.* at ¶9. We held that under the totality of the circumstances, the trial court did not substantially comply with the requirements of Crim.R. 11 when it accepted the appellant’s guilty plea. *Id.* at ¶12.

Two months later, in *State v. Holloway*, 8th Dist. Nos. 86426 and 86247, 2006-Ohio-2591 (“*Holloway I*”), we stated, “[t]his court recently addressed an identical situation in [*Crosswhite*].” *Id.* at ¶17. Relying on *Crosswhite*, we concluded that, by informing the appellant that he *may* get five years of postrelease control, rather than he *would* get it – because it was mandatory – that the appellant’s plea was not knowingly, intelligently, and voluntarily entered. *Id.* at ¶18. We vacated the appellant’s plea. *Id.*

Notably, however, on December 6, 2006, *Holloway I* was reversed by the Supreme Court of Ohio, in a one sentence opinion. See *State v. Holloway*, 111 Ohio St.3d 496, 2006-Ohio-6114. It stated, “The judgment of the court of appeals is reversed on the authority of *Watkins v. Collins* (2006), 111 Ohio St.3d 425[.]” On February 28, 2007, the Supreme Court, upon a motion for reconsideration, remanded *Holloway* to this court for consideration of the remaining assignments of error (since we vacated the appellant’s plea, we did not address the remaining assignments). See *State v. Holloway*, 112 Ohio St.3d 1495.

Upon remand, this court explained that, in *Watkins*, the Supreme Court held, “the failure of the trial court to inform the defendant that postrelease control was mandatory did not result in an invalid plea or sentence.” *State v. Holloway*, 8th Dist. Nos. 86426 and 86427, 2007-Ohio-2221, at ¶11 (“*Holloway II*”). We then concluded that the appellant’s assignment of error, claiming that

he was denied due process of law because he was not informed that he would be subjected to mandatory postrelease control at his plea hearing, was without merit. *Id.*

*Watkins* was an action for writ of habeas corpus to compel the release of twelve petitioners who were in prison for violating the terms of their postrelease control. *Id.* at ¶2. Each petitioner claimed that he was informed at his *sentencing hearing* that he *may* be subjected to postrelease control, but was not properly informed of the mandatory nature of the postrelease control.

In *Watkins*, the Supreme Court stated, “[h]ere, while not specifying the post[-]release control as mandatory, the trial courts did at least notify the petitioners that they could be subject to post[-]release control at their sentencing hearings.” *Id.* at ¶46. The Supreme Court further reasoned, “[w]hile these entries erroneously refer to discretionary instead of mandatory post[-]release control, they contain significantly more information than any of the sentencing entries held insufficient in [*Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126] (no reference to postrelease control) and [*Gensley v. Eberlin*, 110 Ohio St.3d 1474, 2006-Ohio-126] (vague reference about petitioner’s understanding the possibilities penalties).” *Id.* at ¶51. Thus, the Supreme Court concluded, “the sentencing entries are sufficient to afford notice to a reasonable person that the courts were authorizing post[-]release control as part of each petitioner’s

sentence. A reasonable person in the position of any of the petitioners would have had sufficient notice that post[-]release control could be imposed following the expiration of the person's sentence. \*\*\*" Id.

*Holloway I* only addressed appellant's argument that his *plea was invalid* because he was not informed of the mandatory nature of his postrelease control *at his plea hearing*. Despite the fact that *Watkins* was a habeas corpus action dealing with *postrelease control notification at sentencing*, the Supreme Court still reversed our decision in *Holloway I* based on the authority of *Watkins*.

Recently, the First District Court of Appeals was faced with the same issue as in *Holloway I* and *Crosswhite*; i.e., the appellant was misinformed at his plea hearing that he *may* receive postrelease control, when it was actually mandatory. See *State v. Fuller*, 1st Dist. No. C-040318, 2007-Ohio-1020. Because of this, the appellant in *Fuller* claimed that his plea was not voluntary, knowing, and intelligent, and therefore, the trial court violated Crim.R. 11(C)(2)(a) –as Boswell claims in the case sub judice. Id. at ¶1.

The First District discussed *Holloway I* and its reversal by the Supreme Court on the authority of *Watkins*. Id. at ¶7-9. It concluded that although the Supreme Court did not elaborate on its decision to reverse, the decision could “only be read to renounce the rule, applied by the Eighth District in its decision, that a trial court violates its duty under Crim.R. 11(C)(2)(a) when it misinforms

a defendant that a mandatory period of postrelease control is discretionary.” Id. at ¶9.

In light of the Supreme Court’s reversal of *Holloway I*, this writer agrees the high Court has made it clear that if a trial court misinforms a defendant at a plea hearing that he or she *may* receive postrelease control, when it was actually mandatory, the trial court has substantially complied with Crim.R. 11. As such, appellate courts err if they vacate a plea under these circumstances. The same reasoning would equally apply – and even more so – to a trial court’s plea vacation in the context of the “manifest injustice” standard under a Crim.R. 32.1 post-sentence motion to withdraw the plea.

Thus, it is my view that the trial court abused its discretion when it vacated Boswell’s motion to withdraw his plea, filed nearly six years after he entered into it. I would reverse and remand, and instruct the trial court to reinstate Boswell’s guilty plea.