

TABLE OF CONTENTS

| | Page: |
|------------------------------------------|-------|
| A. EXPLANATION OF BASIS FOR JURISDICTION | 1 |
| B. STATEMENT OF THE CASE AND FACTS | 2 |
| C. PROPOSITIONS OF LAW | 3 |
| D. CONCLUSION | 4 |
| APPENDICES | x |

A. EXPLANATION OF BASIS FOR JURISDICTION

This case involves the fairly common scenario of partial or complete recantations which would weaken the Criminal Rule 11 basis for a plea. With current review of “Adam Walsh Law” reclassifications underway in several Ohio appellate courts, the right to challenge such pleas under the protection of the Ohio and Federal Constitutions is important to litigants. This matter is therefore of wide public interest.

The case at bar involves a summary determination, made before there was a response filed by the State or a full hearing. Counsel’s initial research does not show an endorsement of summary determinations in jurisdictions outside of the Eighth Appellate District. The repetition of this precedent would propose a substantial constitutional issue.

In many of Ohio’s law enforcement agencies evidence is not kept for a long period of time and often recantations are the only basis for determining Rule 11 compliance. While not ideal, upholding decisions that recantations do not have prima facie evidentiary value would set a rigid precedent.

B. STATEMENT OF THE CASE & FACTS

The allegations of offense conduct stem from a dispute over visitation. The complaining witness, mother of two children with the Appellant, had said victimizing behavior began when they met to transmit gifts for the children. On November 5, 2002, Appellant was indicted for kidnapping with sexual motivation specifications, rape, aggravated robbery with sexual motivation specifications and felonious assault with sexual motivation specifications. On February 7, 2003, following an extensive plea colloquy reviewing possible consequences, Appellant pled guilty to sexual battery and theft under \$500. A three year prison sentence was imposed. Both a petition to vacate and an initial motion to withdraw guilty plea were filed in the summer of 2003 and overruled.

This appeal arises out of a motion filed in August 2007. The motion was overruled without a reply from the Prosecution or formal hearing on August 28, 2007. To enhance judicial economy and serve the Appellant, the accelerated docket was chosen, for appeal of this denial. The Eighth Appellate District affirmed the trial court decision and denied a subsequent motion for reconsideration.

C. PROPOSITIONS OF LAW

Proposition of Law No. 1.

Sworn documents calling into question the basis for a Plea should entitle the movant to an oral hearing when a Motion to vacate guilty plea is pending.

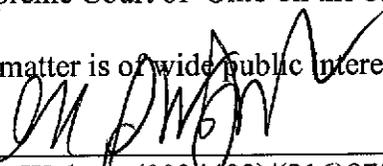
This Honorable Court allowed some latitude on the part of trial courts in determining what constitutes a manifest injustice in State v. Smith (1977) 49 Ohio St. 2d 261, 361 N.E.2d 1324. However, in the instant case, there was no physical evidence brought forward during the prosecution and negotiation of the case other than the alleged victim. The only basis for disregarding the affidavit would be to conclude that, even if true, the Defendant is not entitled to relief. State v. Boshko, (12th Dist 2000) 139 Ohio App.3d 827, 745 N.E.2d 1111. The new affidavit, coupled with material already in the file, pierced both the mens rea and active elements of the offense conduct charged.

Proposition of Law No. 2

Ruling on motions to withdraw guilty pleas should
Require the input of the state prior to decision

In the case at bar, the assistant prosecutor present during the original plea colloquy was notified of the presence of the motion. His input was essential in arriving at a viable decision. Particularly relevant was the weight of complaining witness testimony and the probative value of the affidavit. The Eighth District jumped to the conclusion that a post conviction motion must be satisfied to merit a hearing. State v. Hill, (1st Dist 1998) 129 Ohio App.3d 658, 718 N.E.2d 978.

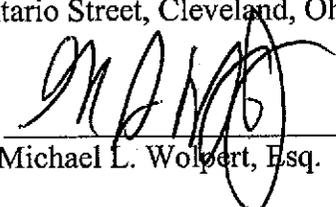
District docketed March 25, 2008 to the Supreme Court of Ohio on the basis that there are substnstial constitutional issues and the matter is of wide public interest.



Michael L. Wolpert (0034402)/(216)870-2638
18021 Marcella Road #102
Cleveland, Ohio 44119
Counsel for Defendant-Appellant

SERVICE

This case was sent via intercourt mail to Richard Bombeck, Assistant Prosecuting Attorney for Cuyahoga County, Ohio, at 1200 Ontario Street, Cleveland, Ohio this day of May 2008. 



Michael L. Wolpert, Esq.



47175759

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO
Plaintiff

WILLIAM CALDERO JR
Defendant

Case No: CR-02-429615-ZA

Judge: JANET R BURNSIDE

INDICT: 2905.01 KIDNAPPING W/SEX. MOTIVATION SPEC.
2907.03A1 SEXUAL BATTERY
2913.02 THEFT
ADDITIONAL COUNTS...

JOURNAL ENTRY

DEFENDANT'S POST-SENTENCE MOTION TO WITHDRAW GUILTY PLEA IS DENIED.
CLERK ORDERED TO SEND A COPY OF THIS ORDER TO:
MICHAEL L. WOLPERT, ESQ.; 18021 MARCELLA RD., #102, CLEVELAND OH 44119

08/23/2007
CPLMB 08/23/2007 14:54:18

Judge Signature

08/27/2007

HEAR
08/23/2007

RECEIVED FOR FILING
08/28/2007 07:51:26
By: CLSJO
GERALD E. FUERST, CLERK

APPENDIX II

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90470

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM CALDERO, JR.

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-429615

BEFORE: Kilbane, J., Sweeney, A.J., and Stewart, J.

RELEASED: February 28, 2008

JOURNALIZED: MAR 25 2008

CA07090470 50724601



0654 00491

MARY EILEEN KILBANE, J.:

Defendant-appellant William Caldero, ("appellant") appeals from the trial court's denial of his second postsentence motion to withdraw guilty plea without oral hearing, without any response from the State, by journal entry filed August 28, 2007.

In his second postsentence motion filed after appellant had served his sentence herein, the appellant raised the same grounds as his first postsentence motion to withdraw guilty plea. He reiterated the plea colloquy focused on prospects for probation. He argued that this colloquy, coupled with a new affidavit of Rosalyn Santiago of June 28, 2007 (a modified recantation from the her original affidavit attached to the first postsentence motion), attached in support of his second motion, warranted an oral hearing and consideration and finding on the issue of whether manifest injustice could be demonstrated, necessitating granting of the motion to withdraw his guilty plea.

Appellant was indicted on November 5, 2002, on one count of kidnapping in violation of R.C. 2905.01, with a sexual motivation specification; one count of rape in violation of R.C. 2907.02; one count of aggravated robbery in violation of R.C. 2911.11, with a sexual motivation specification; and one count of felonious assault in violation of R.C. 2903.11,

with a sexual motivation specification. The indictment was based on the complaints of Rosalyn Santiago, the mother of two of the appellant's children. Santiago had alleged that appellant stole her purse, dragged her into a bedroom, struck her in the head with hair clippers, and forced her to engage in sexual conduct with him.

On February 7, 2003, appellant pleaded guilty to sexual battery in violation of R.C. 2907.03(A), a felony of the third degree, and to misdemeanor theft, a misdemeanor of the first degree. The trial court accepted the plea agreement, and nolle the remaining two counts of the indictment. Appellant was sentenced on March 18, 2003, to a three-year prison term for the sexual battery conviction and a six-month jail term for the theft conviction, sentences to run concurrent.

On August 28, 2003, appellant filed a petition to vacate and set aside sentence, pursuant to R.C. 2953.21, with an affidavit of partial recantation by Rosalyn Santiago dated June 18, 2003, in support.

On September 8, 2003, appellant filed a motion to withdraw guilty plea. The state responded with a motion to dismiss these two motions, which the trial court granted. The trial court also specifically denied them and also denied defendant's motion for judicial release.

On November 3, 2005, the appellant filed a notice of appeal of the trial court's three orders docketed October 6, October 7, and October 8 of 2003, overruling his motion for postconviction relief, motion for judicial release, and motion to withdraw his guilty plea.

This court addressed the initial criminal appeal arising out of Case No. CR-429612 in *State v. William Caldero, Jr.*, Cuyahoga App. No. 83729, 2004-Ohio-2337 ("*Caldero I*"). The appellant challenged the trial court's granting of the State's motion to dismiss the postconviction relief petition before the civil and local rule response time had expired, denial of appellant's motion to withdraw guilty plea without a hearing, and denial of his motion for judicial release without oral hearing. This court overruled all three previous assignments of error.

This second appeal is an accelerated case on this court's docket as provided by App.R. 11.1. and Loc.R. 11.1. This allows for the statement of reasons for this decision to be in brief and conclusory form. Caldero asserts two assignments of error herein.

In his first assignment of error, Caldero asserts as follows:

"The trial court erred in not holding an oral hearing on the motion to withdraw guilty plea."

This court found appellant's argument to be unfounded in his first appeal challenging the denial of his first motion to withdraw guilty plea based on a similar affidavit by the same affiant, without oral hearing. This court in its decision *infra* stated: "An appellate court reviews a denial of a motion to withdraw a guilty plea under the abuse of discretion of standard." *State v. Yearby* (Jan. 24, 2002), Cuyahoga App. No. 79000. This court further found in *Yearby* that "a trial court need not hold an evidentiary hearing in a motion to withdraw a plea if the only evidence provided consists of affidavits from interested parties which conflict with the facts elicited at the plea hearing. *** When affidavits are offered in support of a petition for postconviction relief, the court has authority to weigh the credibility of those affidavits and deny based upon its assessment of them." *Id.* at 5 and 6.

This court recently has similarly held the following:

"The trial court need not hold an evidentiary hearing on the post-sentence motion to withdraw a guilty plea if the record indicates that the movant is not entitled to relief and the movant has failed to submit evidentiary documents sufficient to demonstrate a manifest injustice." *State v. Markupson*, Cuyahoga App. No. 89013, 2007-Ohio-5329, quoting *State v. Russ*, Cuyahoga App. No 81580, 2003-Ohio-1001.

Therefore, based on the evidence in the record and this court's precedent in *Caldero I*, supra, and in *Markupson*, supra, appellant's first assignment of error is overruled.

Appellant's second of assignment of error states:

"The trial court erred in not making a determination as to whether manifest injustice was demonstrated."

Appellant asserts that the trial court denied his second motion to withdraw guilty plea without making a specific determination that manifest injustice was not demonstrated.

The trial court denied the motion under review herein eight days after it was filed by appellant, without a brief in opposition from the State, in an entry that read, "[d]efendant's post-sentence motion to withdraw guilty plea is denied."

As reasoned by this court in *State v. Coniglio*, Cuyahoga App. No. 84302, 2004-Ohio-6909, the trial court, by summarily denying the motion without hearing, is impliedly stating that the movant failed to submit evidentiary material sufficient to demonstrate that any manifest injustice occurred. It is unnecessary for the court to say more, as the court found that even an oral hearing was unwarranted given the motion and material presented in support of same.

“[W]e reject Coniglio's complaint that the court erred by denying his motion to withdraw the guilty plea without a hearing. A hearing on a post-sentence motion to withdraw a guilty plea is not necessary if the facts alleged by the defendant, even if accepted as true, would not require the court to grant the motion to withdraw the guilty plea. *State v. Blatnik* (1984), 17 Ohio App.3d 201, 204. As our discussion of Coniglio's specific arguments shows, none of them have a legal basis. That being the case, he has utterly failed to establish the existence of a manifest injustice, and the court could *summarily* rule on the motion without a hearing.” Id. at ¶ 10. (Emphasis added.)

Thus, appellant's second assignment of error lacks merit and is overruled.

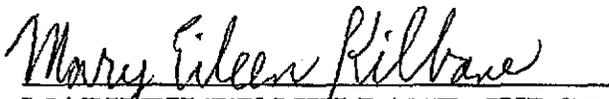
Judgment of the trial court is affirmed.

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.


MARYEILEEN KILBANE, JUDGE

JAMES J. SWEENEY, A.J., and
MELODY J. STEWART, J., CONCUR