

NOS. 2007-2373

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NOS. 88292, 88293

STATE OF OHIO
Plaintiff-Appellant

-vs-

PARRIS BOSWELL
Defendant-Appellee

APPELLANT'S REPLY BRIEF

Counsel for Plaintiff-Appellee

WILLIAM D. MASON (0037540)
CUYAHOGA COUNTY PROSECUTOR

THORIN FREEMAN (0079999)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellant

TIMOTHY YOUNG(0059200)
KELLY K. CURTIS(0079282)
8 East Long Street
Columbus Ohio 43215

RICHARD AGOPIAN (0030924)
1415 West Ninth Street 2nd Floor
Cleveland Oh 44113

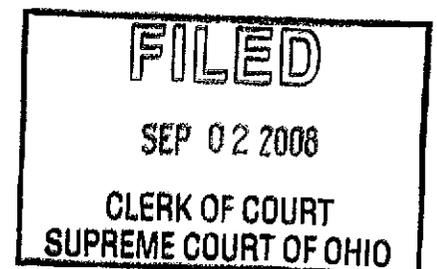


TABLE OF CONTENTS

After the State filed its brief, this Court decided <i>State v. Clark</i>	1
Boswell argues prejudice is not a factor in a postsentence motion to withdraw a guilty plea.	3
Boswell argues that the trial court did not abuse its discretion in allowing his plea to be withdrawn.	3
Boswell argues that the State’s res judicata argument is not properly before this Court and if it is, it lacks merit.....	5
The trial court’s advisement that Boswell may be subject to postrelease control was correct on the facts of this case.	7
If this Court reinstates Boswell’s plea, his sentence must be addressed.....	8
Conclusion.....	8
Service	9

TABLE OF AUTHORITIES

Cases

<i>State ex rel. Gordon v. Rhodes</i> (1952), 158 Ohio St. 129, 48	7
<i>State v. Bush</i> , 96 Ohio St.3d 235, 2002-Ohio-3993	5, 6, 7
<i>State v. Clark</i> , ___ Ohio St.3d ___, 2008-Ohio-3748	1, 2
<i>State v. Hartzell</i> (Aug. 20, 1999), Montgomery App. No. 17499	2
<i>State v. Kidd</i> , Clark App. No. 2007-CA-47, 2008-Ohio-3618	2
<i>State v. Payne</i> , 114 Ohio St.3d 502, 2007-Ohio-4642	7

Statutes

R.C. 2929.191	8
---------------------	---

Rules

Crim.R. 11(C).....	1
Crim.R. 32.1	5, 6

The State files this reply to discuss a case decided after the State filed its brief and to respond to five issues raised by Boswell.

A. After the State filed its brief, this Court decided *State v. Clark*.

After the State filed its brief, this Court released *State v. Clark*. The Court was answering a certified question concerning advising a defendant about postrelease control when the defendant faced parole. The Court discussed the substantial compliance standard and opined that “[i]f the trial judge partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated *only* if the defendant demonstrates a prejudicial effect.”¹ This Court went on to hold that “[b]ecause the trial court partially complied with [Cramer. 11(C)(A)(2)], Clark must show that he was *prejudiced* by the trial court’s misinformation to successfully vacate his plea.”²

Boswell challenged the trial court’s recitation of his maximum penalty. Boswell never argued that he was *prejudiced* by the incorrect recitation of the maximum penalty. But the trial court partially complied with Crim.R. 11(C)(2)(a) by mentioning postrelease control. Boswell must

¹ *State v. Clark*, ___ Ohio St.3d ___, 2008-Ohio-3748, at ¶ 32.

² *Id.* at ¶ 40. (emphasis added).

show that he was prejudiced. When the Eighth District vacated this requirement, they changed the law.

Because Boswell does not argue that he was prejudiced, there is no prejudice. Based on *Clark*, the plea should be reinstated.

B. Boswell argues prejudice is not a factor in a postsentence motion to withdraw a guilty plea.

Boswell argues that a postsentence motion to withdraw a guilty plea involves no prejudice analysis.³ According to Boswell, the standard only involves a manifest injustice analysis. For two reasons, the State disagrees. First, within the manifest injustice standard itself, there is a concept of prejudice. “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.”⁴ The Eighth District’s decision has now changed this requirement and eliminated the requirement that a defendant prove prejudice before proving that there is a manifest injustice.

This case also involves prejudice analysis because of the claim Boswell raised. Boswell argued that a nonconstitutional aspect of the plea colloquy was insufficient. To review a plea colloquy, the court must

³ Appellee’s Merit Brief at pg 6-7.

⁴ *State v. Kidd*, Clark App. No. 2007-CA-47, 2008-Ohio-3618, at ¶ 8 (quoting *State v. Hartzell* (Aug. 20, 1999), Montgomery App. No. 17499).

undertake a substantial compliance analysis. If a trial court substantially complied, the court must decide if the plea colloquy prejudiced the defendant.

Any analysis of this case or similar claims, necessarily involves a determination of prejudice. If a defendant is not prejudiced, a manifest injustice can never be shown. If a defendant is prejudiced, then he must meet the additional burden of proving that the prejudice is so great that it is an openly unjust act to allow the conviction to stand despite the prejudice.

Now, the Eighth District holds that a defendant does not have to show prejudice. This is the elimination of the first step in a manifest injustice analysis. The Eighth District decision is the creation of a new standard when reviewing manifest injustice claims. And prejudice should always be required to be proven when a trial court substantially complies with the postrelease control advisement. The Eighth District's new approach alters years of postsentence motion to withdraw jurisprudence. It should not be permitted to stand.

C. Boswell argues that the trial court did not abuse its discretion in allowing his plea to be withdrawn.

Boswell points out that the State failed to argue that the trial court abused its discretion. The State agrees that a postsentence motion to withdraw a guilty plea is committed to the trial court's discretion. The State

did not separately argue this point because there is no evidence to support the required finding of prejudice and manifest injustice. If this Court agrees with the State's analysis, the trial court automatically abused its discretion in vacating the plea without any evidence submitted concerning prejudice.

Boswell goes further and states that "the trial court's decision is supported by *substantial evidence* in the record demonstrating that Mr. Boswell was unaware of the maximum penalty involved at the time he entered his plea."⁵ But Boswell fails to point to this "substantial evidence."

The State showed that the trial court abused its discretion. There is no evidence nor was the argument even made that if Boswell had been perfectly informed of postrelease control he would not have pleaded guilty.

When a trial court's decision is not based on any fact in evidence—it is arbitrary. When a defendant does not argue that he would not have pleaded guilty if he was perfectly informed of postrelease control and the trial court allows the plea to be withdrawn—it is unreasonable. And not requiring a defendant to prove prejudice and a manifest injustice before vacating a five-year old plea is not fair or just—it is unconscionable. The plea should be reinstated.

⁵ Appellee's Brief at pg 11.

D. Boswell argues that the State's res judicata argument is not properly before this Court and if it is, it lacks merit.

The issue of res judicata is properly before this Court. The State's proposition relates to the Eighth District's decision to not require a criminal defendant to show prejudice before withdrawing a guilty plea. Because the Eighth District eliminated the prejudice requirement, the State has to show that the Eighth District changed the law. The State also has to show what the proper "multitiered analysis" is when reviewing a postsentence motion to withdraw a guilty plea. Res judicata is proper under the proposition and the required analysis.

Boswell further argues that the restrictive doctrine of res judicata should not apply to a postsentence motion to withdraw a guilty plea because 1) res judicata is not part of the language Crim.R. 32.1 and 2) this Court implicitly rejected the res judicata argument in *State v. Bush*.⁶ The State disagrees with Boswell's argument for two reasons.

1. Res judicata should apply to Crim.R. 32.1 motions based on alleged errors in the record.

Boswell is correct that Crim.R. 32.1 does not contain the phrase res judicata. But the postconviction statute does not contain the phrase res judicata and res judicata is routinely applied to postconviction petitions

⁶ 96 Ohio St.3d 235, 2002-Ohio-3993.

based on claims found in the record. Res judicata is a doctrine of finality and should apply to a postsentence motion to withdraw a guilty plea that is based on the record.

Res judicata's purpose is to settle litigation. It helps preserve scarce judicial resources and in criminal cases allows victims to know that the issue is at a close and their life can continue. Additionally, not applying res judicata to motions to withdraw guilty pleas that are based on claims found in the record improperly penalizes those criminal defendants that exercise their constitutional right to a trial. If a defendant exercises his right to trial and wants to attack his conviction based on an error in the record, res judicata will bar the claim. That defendant is limited to raising recorded error in a direct appeal. Boswell's argument is that because he pleaded guilty he should be provided two opportunities to raise recorded error—either a direct appeal or at his leisure whenever he decides to file a motion to withdraw his plea. An individual that chooses to admit his guilt should not be permitted to raise errors in the record in both a direct appeal and a Crim.R. 32.1 motion.

2. State v. Bush does not apply to this case.

In *Bush*, this Court had to decide if the postconviction statute's time requirement applied to Crim.R. 32.1 motions. This Court answered the

question in the negative. Res judicata was not considered. Boswell's claim that "the holding in *Bush* implicitly rejected" the res judicata argument is incorrect. "[A] reported decision, although a case where the question might have been raised, is entitled to no consideration whatever as settling * * * a question not passed upon or raised at the time of the adjudication."⁷ *Bush* does not answer the res judicata issue.

E. The trial court's advisement that Boswell may be subject to postrelease control was correct on the facts of this case.

In Boswell's statement of the facts, he states that the trial court "incorrectly informed [him] that 'after you do your time, you *may* be subject to postrelease control.'" Boswell pleaded guilty to first-degree felonies. As the law stands in 2008, he will be subject to five years of postrelease control. But when Boswell pleaded guilty in May 2000, postrelease control was unconstitutional in the Eighth District. The trial court's advisement was correct because postrelease control may or may not be constitutional. There was no way to inform Boswell whether he would serve postrelease control. Based on the facts of this case, that portion of the advisement was proper.

⁷ *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶ 11 (quoting *State ex rel. Gordon v. Rhodes* (1952), 158 Ohio St. 129, 48, paragraph one of the syllabus).

F. If this Court reinstates Boswell's plea, his sentence must be addressed.

Boswell argues that the issue of his sentence is not properly before this Court because the issue was not raised in a separate proposition. A criminal defendant's sentence is always a factor on appeal. If this Court agrees with the State's argument and reinstates Boswell conviction, the issue of his sentence becomes a factor. The legislature has supplied the mechanism, R.C. 2929.191, by which Boswell can be advised of postrelease control. If Boswell's plea is reinstated, this Court should remand the case for a R.C. 2929.191 hearing.

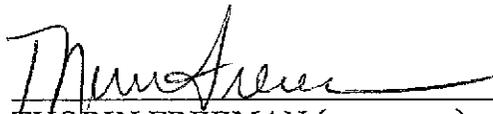
G. Conclusion

The Eighth District's decision has created new law by eliminating prejudice review. That decision should be reversed, Boswell's plea reinstated, and the case remanded for an R.C. 2929.191 hearing.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

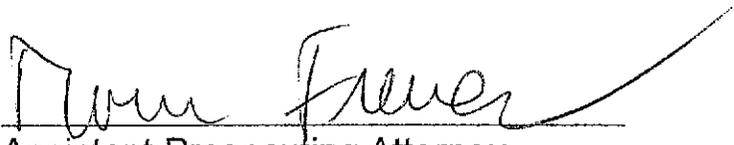
BY:



THORIN FREEMAN (0079999)
Assistant Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
216.443.7800

SERVICE

A copy of the foregoing Reply Brief has been mailed this 29th day of August 2008, to Timothy Young, Kelly K. Curtis, 8 East Long Street, Columbus Ohio 43215 and Richard Agopian, 1415 West Ninth Street 2nd Floor, Cleveland Oh 44113


Assistant Prosecuting Attorney