ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

vs.

RICKY D. DRISKILL

Defendant-Appellant.

Supreme Court
Case No. 09-1019

On Appeal from the Mercer County Court of Appeals, Third Appellate District

C.A. No. 10-08-10/11
T.C. No. 05-CRM-067
06-CRM-097

MEMORANDUM IN OPPOSITION TO JURISDICTION

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EXPLANATION OF WHY THIS CASE IN NOT A CASE OF PUBLIC CONCERN OR GREAT GENERAL INTEREST AND ALSO DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Though Defendant Ricky Driskill claims that this matter presents a case of great public concern or great general interest and a substantial constitutional question, he is incorrect.

The Third District Court of Appeals properly applied this Court's most recent pronouncements when it affirmed the Trial Court's decision.

None of the issues or claims of this defendant present issues of great interest, concern or constitutional issues, and present no issues that effect anyone other than this defendant.

STATEMENT OF CASE AND FACTS

On May 1, 2005, Ricky Driskill, after having binged on alcohol and illegal drugs, drove his Chevy Trailblazer, a motor vehicle as defined under Ohio Law, eastbound on Watkins Road near Dull and Rindler Roads, in rural, southern Mercer County, Ohio. He operated his car in such a reckless manner, that despite their best efforts to avoid collision, the car driven by Driskill struck a car driven by Roger Huwer, in which his wife and young daughter were passengers. It struck the Huwer vehicle with such force, the Huwer car was thrown from the roadway, and the Driskill car skidded to an eventual stop in a farm field. Nate Bomholt, a first responder, arrived in his personal pickup truck. Driskill stole the Bomholt truck. He fled at a high rate of speed into the farm field, and eventually drove the truck head first into the Wabash River. Driskill fled on foot, and was located by law enforcement officers from the multiple agencies that had responded. He brandished a box cutter type knife, threatened the officers with the knife and refused to comply with their

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orders to desist. After lunging with the knife toward Deputy Doug Timmerman of the Mercer County Sheriff's Office, Timmerman discharged his service weapon to protect himself and his fellow officers, striking Driskill in the stomach. Despite Driskill's gunshot wound, he continued to threaten the officers, and was only finally subdued after throwing the knife at Patrolman Randy Waltmire, of the Coldwater Police Department.

After months of plea negotiations in Case No. 05-CRM-067, the defendant was convicted of Felonious Assault in violation of R.C. 2903.11(A)(2);(D), a Felony of the First Degree and Theft of a Motor Vehicle, in violation of R.C. 2913.02(A)(1);(B)(5), a Felony of the Fourth Degree. The State nollied the additional Count of Felonious Assault in violation of R.C. 2903.11(A)(2)(d), a Felony of the First (F-1) degree. In Case No. 06-CRM-097, the defendant was convicted of Vehicular Assault, in violation of R.C. 2903.08(A)(2)(b);(C)(2) a Felony of the Third Degree. The State nollied Count One of Aggravated Vehicular Assault, in violation of R.C. 2903.08(A)(1)(a);(B)(1)(a), a Felony of the Second (F-2) degree.

The underlying facts in this case are undisputed. At the change of plea hearing on August 25, 2006, the State submitted an oral stipulation of facts in Case 06-CRM-097. Transcript of Proceeding at 11. It reads as follows:

MR. FOX: I would prefer to do it first, then, your Honor, in 06-CRM-097.

THE COURT: All right.

MR. FOX: Thank you, your Honor. Your Honor, with regard to that case, on our about May 1, 2005, deputies from the Mercer County Sheriff's Office along with volunteer EMS personnel were dispatched to an injury accident on Watkins Road near Rindler and Dull Roads in rural southern Mercer County.

That investigation revealed that Mr. Driskill had been operating his

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motor vehicle westbound on Watkins Road in a reckless manner including, but not limited to, traveling at a high rate of speed and crossing left of center when he struck a vehicle driven by Roger Huwer in which Mr. Huwer also had with him his wife Karla and their small child.

As a result of that collision, though Mr. Huwer was treated and released that day, his injuries continue to malinger today and he, I believe the defendant would stipulate, has suffered from serious physical harm as a sole and proximate cause o that collision. I believe those are facts sufficient to support the allegation in the 06-97 case, your Honor.

THE COURT: Mr. Poppe, are you and Mr. Driskill able to so stipulate to the accuracy of those facts so that they could be reduced to writing and submitted to the court - -

MR. POPPE: Yes, your Honor.

THE COURT: - - in the form of a written stipulation?

MR. POPPE: Yes.

THE COURT: You heard those facts. Can you tell the court that those are accurate at this time?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you willing to submit or enter into a written stipulation as to the accuracy of those facts?

THE DEFENDANT: Yes, your Honor.

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The stipulation was reduced to writing and submitted to the Court and filed September 27, 2006. The written stipulation offered the following sentencing facts:

On or about May 1, 2005, Defendant Ricky Driskill was operating his motor vehicle east bound on Watkins Road near Dull and Rindler Roads, in rural Mercer County Ohio. He did so in a reckless manner, including traveling at a high rate of speed and traveling left of center. As a result of his reckless operation of his motor vehicle, the motor vehicle collided with a motor vehicle operated by Roger Huwer in which

his wife Carla and their minor infant daughter were present. The Huwers were traveling eastbound, and slowed and took other evasive measures to avoid the collision.

With regard to Case No. 05-CRM-067, the State offered the following statement of facts at the same change of plea hearing as follows:

THE COURT: Now, Mr. Fox, with regard to Case No. 05-67, you may recite those facts that lead to these two charges in this case.

MR. FOX: Thank you, your Honor. Your Honor, shortly after what happened, as I've just described in the 06-CRM-97 case, Nate Bomholt, who was a volunteer EMS professional here from, I believe St. Henry, he responded in his personal motor vehicle which was a 2000 Silverado to the scene of the collision as people were using cell phones and letting law enforcement know that an impact had occurred.

While at that scene after Mr. Bomholt arrived and was attending to injured parties and making sure people were okay, Mr. Driskill commandeered Mr. Bomholt's 2000 Chevy Silverado without Mr. Bomholt's consent or permission and took that car for his own use and benefit and fled the scene of the collision by traveling north - - I believe northbound into the field.

That trip in the Silverado ended when Mr. Driskill drove that car or truck into the Wabash River and then was on foot afterwards where he was subsequently approached by Doug Timmerman of the Mercer County Sheriff's Office, Randy Waltmire of the Coldwater Police Department, Chief Garman of the St. Henry Police Department and other law enforcement officers on a bridge that traverses the Wabash River there in the field.

He was approached by those officers and was brandishing a box-cutter-type knife at the time he was approached by officers. He refused to comply with their instructions to drop the weapon, and at some point made an aggressive lunge toward Deputy Timmerman with the knife. Deputy Timmerman discharged his service Clock handgun and that bullet struck Mr. Driskill.

Mr. Driskill still, although injured, refused to comply with the orders to drop the weapon, and physical confrontation commenced between the officers and Mr. Driskill.

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Eventually Mr. Driskill was disarmed when he threw the knife at Randy Waltmire of the Coldwater Police Department. Randy Waltmire was not struck by the knife nor was anyone struck by or injured by the knife that Mr. Driskill was wielding. He was again then subsequently apprehended and taken into custody, transported to the hospital for his injuries. I believe those are facts sufficient with regard to Case No. 05-CRM-067.

THE COURT: Mr. Driskill, you've heard that recitation of what's been represented as facts which brought about these two charges in this case. Is that accurate?

THE DEFENDANT: Yes, your Honor.

The Court conducted an extensive and exhaustive sentencing hearing in this case. The Court bifurcated the hearing, permitting the production of witnesses and testimony at the October 13, 2006 hearing, and delayed pronouncing judgment until a hearing on October 19, 2007.

At the evidentiary sentencing hearing, the Court heard from five defense witnesses, including the defendant. The defendant presented testimony from his boss Wayne Stringfield, his Aunt Marsha Fair, his wife Pamela Driskill, and an "expert" witness, Dr. Richard Nockowitz. The Court also admitted four defense exhibits including reports from Dr. Solomon Folero, Dr. Kim Stookey, Dr. Richard Nockowitz, and a letter from Wayne Stringfield. The Court also admitted the pre-sentence investigation as a court exhibit. The State did not object to the admission of any of the exhibits, and offered no testimony, but did offer the victim impact statement from Deputy Doug Timmerman. Both Defense Counsel and the State made arguments.

In Case No. 05-CRM-067, the Court sentenced the Defendant to a term of incarceration of five years and four months. In Case No. 06-CRM-097, the Court sentenced the Defendant to a term of incarceration of two years. The Court ordered this term to be consecutive to the term imposed in Case No. 05-CRM-067.

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On October 24, 2006, in Case No. 05-CRM-067, the Defendant filed a motion to supplement and reconsider sentencing and filed the same motion in Case No. 06-CRM-097 on October 27, 2006. The State filed responses in both cases. On November 7, 2006, the Court denied the motions in both cases.

On November 21, 2006, in Case No. 05-CRM -067, the Defendant filed a notice of direct appeal and filed a similar notice in Case No. 06-CRM-097 on November 22, 2006.

During the pendency of these direct appeals, the Defendant also filed petitions for post conviction relief in both cases on December 20, 2006. After the filing of a response by the State of Ohio, the Court denied both petitions without hearings by Judgment Entry filed March 5, 2007.

The Defendant filed notices of appeals from the denials of the post conviction relief petitions on March 22, 2007.

On April 2, 2007, the Defendant filed a Motion to Withdraw Direct Appeal. Moreover, by journal entries filed April 3, 2007, the Court dismissed the direct appeals for want of prosecution (Appellate Case Numbers 10-06-35 and 10-06-36).

On March 3, 2008, the Third District Court of Appeals denied defendant claims of error and affirmed the trial court's denial of the post conviction relief motions. The defendant did not prefect any appeal of this decision to this court. However, On November 5, 2008, the Defendant filed an application to reopen his direct appeal in Case No. 10-06-35[1]. The Third District Court of Appeals denied the claim by Judgment Entry filed January 14, 2009.

The Court of Appeals properly recognized that the motion to reopen was governed by

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[1] His application to reopen had both Case Nos. 10-06-35 and 10-06-36 in the captions, but it appears that it was only filed in Case No. 10-06-35 because Driskill provided only one original applications.

Appellate Rule 26(B), that more than the 90 days pursuant to Appellate Rule 26(B)(1) had passed from the March 28, 2006 to the November 5, 2008 application to reopen, and that Driskill failed to establish good cause of the applications untimely filing, as required by Appellate Rule 26(B)(1) and (B)(2)(b). The Court found that the Defendant was not deprived of effective assistance of counsel on appeal, citing State v. Reed (1996), 74 Ohio St. 3d 534 and Strickland v. Washington (1984),466 U.S. 668. Relevant to the Courts analysis was the fact that the notice of appeal and motion to withdraw were filed by the same retained attorney, the same attorney filed motions to withdraw plea and motions for post conviction relief and is prosecuting appeals of those issues. The Court concluded that the representation may not have been exactly what the Defendant wanted, but it was not legally ineffective.

The Defendant claimed jurisdiction to this Court regarding the denial of the application for delayed appeal in Case No. 2009-0354. This Court, by entry field May 26, 2009, found the issue did not involve any substantial constitutional issues and therefore denied Defendant's jurisdictional claim.

Also, on May 22, 2008, the Defendant, filed two additional motions in both cases. The Defendant filed a Motion to Declare Sentence Void and Re-sentence Defendant and Motion to Withdraw Plea.

The Trial Court denied these requests by Journal Entry dated September 18, 2008. Defendant appealed this denial to the Third District Court of Appeals. Oral Argument commenced on March 31, 2009, and on May 4, 2009, the Third District Court of Appeals affirmed the Trial Court's denial of the motions.

It is from these decisions that Defendant now claims jurisdiction.

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ARGUMENT

FIRST PROPOSITION OF LAW

WHEN A DEFENDANT FILES A MOTION TO VACATE A GUILTY PLEA BASED ON THE TRIAL COURT'S FAILURE TO ADVISE HIM OR HER OF MANDATORY POSTRELEASE CONTROL SANCTIONS, THE MOTIONS SHOULD BE GRANTED BECAUSE THE FAILURE TO SO ADVISE RENDERS THE SUBSEQUENT PLEA INVOLUNTARY; MOREOVER, RES JUDICATA DOES NOT BAR SUCH A CLAIM WHEN THE INITIAL MOTION WAS FILED WITHIN A FEW MONTHS OF SUPREME COURT PRECEDENT ESTABLISHING THAT RIGHT.

STATE'S RESPONSE

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PROPERLY DENIED DEFENDANT'S MOTIONS.

The Third District Court of Appeals properly applied this Court's most recent pronouncements as well as clear past precedent when it affirmed the Trial Court's denial of Defendants Motion to Declare Sentence Void and Motion to Withdraw Plea. The Court of Appeals also properly reviewed Criminal Rule 11. As such, there are no errors for this Court to review.

Criminal Rule 11 governs entry of pleas and is designed to ensure that pleas are entered knowingly, intelligently, and voluntarily. Specifically, it provides:

> In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the *maximum penalty involved*, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

The Court of Appeals properly found that where a defendant asserts that his plea was not entered voluntarily and knowingly because he was not adequately advised of his Crim.R. 11 non-constitutional rights, a court will not invalidate the plea unless the defendant suffered

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prejudice. State v. Nero (1990), 56 Ohio St.3d 106.

The Court of Appeals properly found that, although Driskill was not orally notified at his plea hearing that he would be subject to postrelease control, he was orally notified of such at the pronouncement of sentence, and postrelease control was properly included in the judgment entry of sentence. Therefore, the Court of Appeals properly distinguished this case from Bezak, Simpkins, Boswell, and Whatley. Driskill's sentence was not void.

Moreover, the Court properly recognized that any error was apparent on the face of the record and should have been raised by Driskill on direct appeal or in a timely petition for postconviction relief. Therefore, the Trial Court did not abuse its discretion in finding that Driskill's argument in regard to his sentence was barred by res judicata.

A motion that is not filed pursuant to a specific rule of criminal procedure must be categorized by the court in order for the court to know the criteria by which the motion should be judged State v. Bush, 96 Ohio St.3d 235. "Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for post-conviction relief as defined in R.C. 2953.21." State v. Reynolds, (1997) 79 Ohio St.3d 158. In State v. Deaton 2008 Ohio 4162, Case No. 4-08-03, August 18, 2008, Defiance County, this Court affirmed the trial court's rejection of Deaton's Motion to Vacate Voidable Setence claimed to be filed under Civil Rule 60(B). This Court stated that this type of motion was actually a motion for post conviction relief governed by RC 2953.21.

Post conviction motions are civil in nature and are a "means of collaterally attacking a criminal conviction." State v. Kelly, No. L-05-1237 Sixth District, Lucas County, (March 24,

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2006), citing State v. Calhoun (1999), 86 Ohio St. 3d 279, 281. Therefore, the Defendant was required to follow the procedural requirements of RC 2953.21.

Revised Code 2953.21(A)(1)(a)states as follows:

> Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that 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, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

Pursuant to R.C. 2953.21(A)(2), a petition for post-conviction relief must be filed no later than 180 days after the day the trial transcript is filed in the direct appeal from the judgment of conviction and sentence, or, if no direct appeal is taken, 180 days after the expiration of the time to file an appeal. See App.R. 3(A) & 4(A). A trial court need not entertain a motion that is filed after the time frame set forth in R.C. 2953.21(A)(2). State v. Gopp., No. 06CA0034 Ninth District, Wayne County (October 23, 2006).

Pursuant to R.C. 2953.23(A)(1), a court has no jurisdiction to hear an untimely filed petition for post-conviction relief unless both of the following apply:

> (a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies

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retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted, or if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable fact finder would have found the petitioner eligible for the death sentence.

Moreover, the Court of Appeals properly found that appellate review of the trial court's denial of a motion to withdraw a guilty plea is limited to whether the trial court abused its discretion. State v. Nathan (1995), 99 Ohio App.3d 722, 725. An abuse of discretion connotes more than an error of law or judgment and implies that the trial court acted unreasonably, arbitrarily, or unconscionably. When applying an abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. Id.

Criminal Rule 32.1 governs withdrawal of guilty and no contest pleas and provides:

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.

The Court found that Driskill's sentence was not void because postrelease control was properly included in his sentence. Accordingly, the holding of Boswell that a motion to withdraw a guilty plea be considered as a presentence motion where the defendant's sentence is void did not apply. Therefore, Driskill bore the burden of establishing. The party moving to withdraw his plea of guilty post-sentence bears the burden of establishing a manifest injustice. A manifest injustice is an exceptional defect in the plea proceedings so a post-sentence motion to withdraw a guilty plea is only granted in "extraordinary cases."

The Court also properly found that this Court has held that a trial court may not

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categorize or construe a Crim.R. 32.1 post-sentence motion to withdraw a guilty plea as a petition for postconviction relief pursuant to R.C. 2953.21 because these motions exist independently. Citing State v. Brown, 3d Dist. No. 14-08-11. A trial court has no jurisdiction to consider a Crim.R. 32.1 motion to withdraw a guilty plea after the judgment of conviction has been affirmed by an appellate court. State v. Bright, 3d Dist. No. 9-07-51, 2008 Ohio 1341, P11, citing State ex rel. Special Prosecutors v. Judges, Court of Common Pleas (1978), 55 Ohio St.2d 94, 97-98..

Although the trial court erred when it categorized Driskill's motion to withdraw his plea as a petition for postconviction relief, the Court properly found that this error alone does not warrant reversal,

The Court of Appeals found that the trial court's error in failing to orally notify Driskill of postrelease control at his plea hearing was apparent on the face of the record as the trial court notified Driskill of postrelease control at the pronouncement of sentence and in the judgment entry of sentencing. Driskill could have raised on appeal the trial court's failure to orally notify him of postrelease control at his plea hearing, and could have raised this issue in his previousl postconviction relief filings.

Even if Driskill's argument was not barred by res judicata, the Court of Appeals distinguished this case from the facts presented in Sarkozy stating:

> First, in *Sarkozy*, the defendant sought to withdraw his plea in a pro se oral motion prior to sentencing and in his direct appeal. Here, Driskill did not seek to withdraw his plea prior to sentencing or in his direct appeal. Additionally, in *Sarkozy*, there was no evidence that the defendant was advised of postrelease control via a signed, written plea agreement and a signed, written waiver of constitutional rights prior to entering his plea. Here, as Driskill signed both a written plea agreement and waiver of constitutional rights that notified him he would be subject to postrelease control, he had actual notice of such. Cf. *State v. Abuhashish*, 6th Dist. No. WD-07-048, *2008 Ohio 3849, PP35-36* (finding

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that trial court substantially complied with *Crim.R. 11* when, although the trial court did not expressly outline the maximum penalties defendant faced, the written plea agreement was correct and trial court questioned defendant as to whether he understood the terms of the agreement) *State v. Aleshire, 5th Dist. No. 2007-CA-1, 2008 Ohio 5688.*

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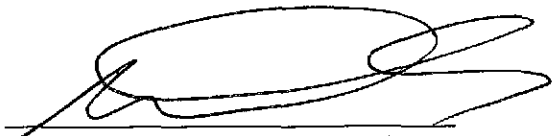
CONCLUSION

The Third District Court of Appeals properly affirmed the finding of the trial court denying Defendant's motions. There is nothing presented by this defendant of great general or public interest or of constitutional concern. For the foregoing reasons, the State of Ohio respectfully requests this Court decline jurisdiction herein.

Respectfully submitted,



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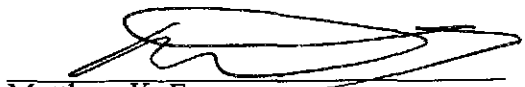
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was issued by U.S. Mail to Jon Paul Rion, P.O. Box 10126, 130 W. Second St., Suite 2150, Dayton, OH 45402, attorney for the Defendant on this 2nd day of July, 2009.



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