

IN THE SUPREME COURT OF OHIO

ORIGINAL

On Appeal from the Ninth Appellate District Court
for Lorain County, Ohio
Case No. 08 CA 009509

09-1823

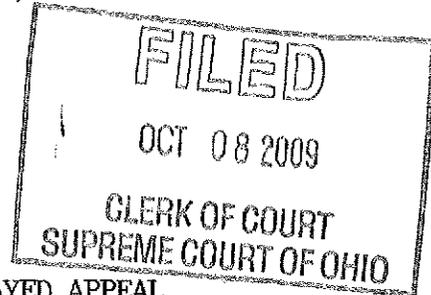
STATE OF OHIO,
Plaintiff/Appellee,

Supreme Court No. _____
COA No. 08 CA 009509

- vs -

MOTION FOR LEAVE TO FILE A 'DELAYED APPEAL,'
S. Ct. Prac. R. II, Section 2

RANULFO RAZO,
Defendant/Appellant.



MOTION FOR LEAVE TO FILE DELAYED APPEAL

[C]omes now, 'RANULFO RAZO,' [d]efendant/appellant ('pro se') in the above entitled cause, and does hereby respectfully move this Honorable Court for: 'LEAVE TO FILE DELAYED APPEAL,' pursuant to S. Ct. Prac. R. II, Section 2(A)(4)(a), from the: 'July 13, 2009-Judgment' of the Ohio Ninth Appellate District Court for Lorain County, Ohio, Case No. 08 CA 009509.

Supreme Court Prac. R. II, Section 2(A)(4)(a), in turn provides in relevant part, that:

"In a felony case, when the time has expired for filing a notice of appeal in the Supreme Court, the appellant may seek to file a delayed appeal by filing

a motion for delayed appeal and a notice of appeal. The motion shall state the date of the entry of the judgment being appealed and adequate reasons for the delay. Facts supporting the motion shall be set forth in an affidavit. A copy of the court of appeals opinion and the judgment entry being appealed shall be attached to the motion." id.

This action does thus follow.

[E]xecuted this 21 day of September, 2009.

Ranulfo Razo

Ranulfo Razo, #431-044

R.I.C.I.

P.O. Box 8107

Mansfield, Ohio

44901

AFFIDAVIT OF VERITY
OF THE SUPPORTING FACTS

STATE OF OHIO)
) ss:
RICHLAND COUNTY, OHIO)

[I], 'RANULFO RAZO,' being first duly sworn according to the laws of the State of Ohio, deposes and says, that:

Proceudral History:

[T]his case originated in the Lorain County Common Pleas Court as the criminal matter entitled: State of Ohio v. Ranulfo Razo, Case No. 02 CR 059992, therein charging the offenses of: *rape (ten counts) to which appellant pled

guilty to each of those offenses and was sentence to a stated prison term of (18) eighteen years.

The record however revealed that appellant was not properly sentenced to any term of postrelease control, State v. Bezak, 114 Ohio St. 3d 94, and upon filing a motion for 'resentencing' on the matter, a resentencing hearing was held to properly include postrelease control.

At that sentencing hearing, appellant (a non-English speaking person) was never accorded or provided an interpreter nor did the trial court first vacate the underlying void sentence before automatically reimposing the original sentence. see: Romito v. Maxwell (1967), 10 Ohio St. 2d 266, 267-268.

Nonetheless, *** and at the resentencing hearing, appellant sought to withdraw his guilty plea, State v. Boswell, 121 Ohio St. 3d 575, and the trial court, realizing that this request was in fact a pre-sentence motion to withdraw plea, Crim. R. 32.1, denied the motion 'without hearing' and a timely appeal followed to the Ohio Ninth Appellate District Court.

The Court of Appeals affirmed the judgment and procedures employed by the trial court on: 'July 13, 2009,' to which this application for leave to file 'delayed appeal' does thus follow.

Appellant raised the following Assignments of Error in the proceedings below:

ASSIGNMENT OF ERROR NO. 1

Whether the trial court abused its discretion thereby depriving [Razo] due process of law in conjunction with a resentencing hearing pursuant to State v. Bezak, when it failed to first vacate the underlying void sentence before attempting to impose a new sentence; failed to comply with the mandatory provisions of Romito v. Maxwell, and, thereupon yet still failed to impose a statutorily valid sentence.

ASSIGNMENT OF ERROR NO. 2

Whether the trial court violated [Razo's] due process rights under the provision of State v. Sarkozy; O.R.C. § 2943.032(E); and, Woods v. Telb, when it refused to permit [Razo] to withdraw his guilty plea.

Each of the assignments of error listed above were raised in a clearly recognizable federal constitutional context and appellant, if granted leave to file delayed appeal, would seek to raise each of these assignments (as propositions of law) in and before this court therefore.

There is no question from the record that the trial court completely failed to comply with the mandatory provisions of: Romito v. Maxwell, 10 Ohio .St. 2d 266, 267-268, by failing to accord appellant a (de novo) resentencing hearing.

The trial court mere and only advised the defendant about the imposition of postrelease control and automatically reimposed the original sentence in violation of the Due Process Clause of the Federal Constitution's Fourteenth Amendment.

In addition to the above, and after having failed to accord defendant a de novo sentencing hearing, the trial court committed reversable error by failing to accord appellant a 'hearing' with respect to his pre-sentence motion to withdraw his guilty plea(s).

Appellant has specifically urged that had he known that postrelease control was mandatory in his case and a period of up to 50 percent of the original sentence and that such sanction would be employed in 'nine month increments,' he would not have pled guilty and would have insisted on a trial. see: State v. Nero, ___ Ohio St. 3d ___ (citation omitted); and, State v. Boswell, 121 Ohio St. 3d 575.

The Court of Appeals in turn committed constitutional error of the first magnitude where it affirmed the erroneous judgment of the trial court to which again, this action does thus follow.

It must also be remembered that the trial court (as well the court of appeals) each failed to appoint counsel for the non-English speaking appellant on 'appeal as of right' to which the prejudice did systemically attach. see: Crim. R. 44(A); U.S.C.A. Const. Amend. 6; and, Strickland v. Washington, 466 U.S. 668.

The [right to counsel] had clearly attached and under the facts and circumstances redolent here, appellant is entitled to relief for this reason standing alone.

Reason for the Delay in Filing the Instant Appeal:

[A]s was stated above, appellant is a non-English speaking person; he has no understanding of the English language; and was deprived of his Sixth Amendment right to counsel on appeal throughout the proceedings below.

Appellant recognizes that in 'ignorance of the law is no excuse,' however, 'ignorance of the language' does constitute an except to the rule.

Appellant was required to rely on 'inmate assistance' to timely file the instant appeal and was ultimately left with no options at the Richland Correctional Institution for timely filing his appeal to the court and in fact, appellant was required to contact an inmate at the Toledo Correctional Institution, 2001 East Central Avenue, Toledo, Ohio, 43608, to in fact prepare the instant application for leave to file delayed appeal.

Inmate law clerks are not required to prepare documents for anyone and especially persons who have no working knowledge of the English language.

As such, appellant was required to search out inmate assistance who could actually prepare and competent, intelligent, and cogent appeal to which, and after only just finding such person, a delayed appeal was all that remained available to appeal to the protection of his vested constitutional and statutory rights.

Appellant states that he has employed ever good faith effort to timely file his appeal in and before this Honorable Court to which his only remaining viable option was to seek leave to file 'delayed appeal.'

This action does thus follow.

[E]xecuted this 21 day of September, 2009.

Ranulfo Razo
Ranulfo Razo, #431-044

[]

[I], 'RANULFO RAZO,' do hereby certify, swear and attest under penalty of perjury, that each of the foregoing statements and factual allegations are true and correct to the best of my knowledge and belief and that I am competent to so testify.

[E]xecuted this 21 day of September, 2009.

Ranulfo Razo
Ranulfo Razo, #431-044
R.I.C.I.
P.O. Box 8107
Mansfield, Ohio

44901

Subscribed and sworn before me
this 21 day of September, 2009.

Christine A. McMullen
Notary Public



CHRISTINE A. McMILLEN
NOTARY PUBLIC, STATE OF OHIO
My Commission Expires

06/14

CONCLUSION:

[W]herefore, *** and for each of those reasons stated above, appellant hereby respectfully moves this Honorable Court to grant file to file 'delayed appeal' therefore.

[R]elief is accordingly sought.

[E]xecuted this 21 day of September, 2009.

Ranulfo Razo

Ranulfo Razo, #431-044

R.I.C.I.

P.O. Box 8107

Mansfield, Ohio

44901

CERTIFICATE OF SERVICE:

This is to certify that the foregoing was duly served by United States Mail on the Office of the Lorain County Prosecutor, at: 225 Court Street, 3rd Floor, Elyria, Ohio, 44035, on this 21 day of September, 2009.

Ranulfo Razo

Ranulfo Razo, #431-044

R.I.C.I.

P.O. Box 8107

Mansfield, Ohio

44901

[]

STATE OF OHIO
COUNTY OF LORAIN

FILED
LORAIN COUNTY IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
2009 JUL 13 A 11:07

STATE OF OHIO

C. A. No. 08CA009509

Appellee

CLERK OF COMMON PLEAS
RON NABAKOWSKI

v.

RANULFO RAZO

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 02CR059992

Appellant

DECISION AND JOURNAL ENTRY

Dated: July 13, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Ranulfo Razo, appeals from the decision of the Lorain County Court of Common Pleas. This Court affirms.

I

{¶2} On March 20, 2002, the Lorain County Grand Jury indicted Appellant, Ranulfo Razo, on ten counts of rape, in violation of R.C. 2907.02(A)(1)(b); each count of rape carried a sexually violent predator specification. Razo withdrew his previously entered plea of not guilty to the charges and entered a plea of guilty to every count contained in the indictment. The trial court classified Razo as a sexual predator, and sentenced him to an agreed, aggregate eighteen years of incarceration. Razo appealed his sentence. This Court affirmed Razo's conviction and sentence on June 30, 2004.

{¶3} On December 20, 2004, Razo filed a motion to withdraw his guilty plea. The trial court denied the motion on January 6, 2005. On July 27, 2005, this Court affirmed the trial

court's denial of Razo's motion to withdraw his guilty plea. On July 21, 2008, Razo filed a motion for resentencing pursuant to *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, along with another motion to withdraw his guilty plea. On September 5, 2008, the trial court resentenced Razo to an aggregate term of 18 years of incarceration and informed him of his postrelease control obligations. In addition, the court informed Razo that this sentence would run concurrently with the sentence imposed in Case No. 01CR058101. At the resentencing hearing, the trial court also denied Razo's successive motion to withdraw his guilty plea. Razo timely appealed the trial court's decision. He has raised two assignments of error for our review.

II

ASSIGNMENT OF ERROR I

“WHETHER THE TRIAL COURT ABUSED ITS DISCRETION THEREBY DEPRIVING [RAZO] DUE PROCESS OF LAW IN CONJUNCTION WITH A RESENTENCING HEAR[ING] [SIC] PURSUANT TO: STATE V. BEZAK [] WHEN IT FAILED TO FIRST VACATE THE UNDERLYING ‘VOID SENTENCE’ BEFORE ATTEMPTING TO IMPOSE A [] NEW SENTENCE; FAILED TO COMPLY WITH THE MANDATORY PROVISIONS OF: ROMITO V. MAXWELL [] AND THEREUPON YET STILL FAILED TO IMPOSE A STATUTORILY VALID SENTENCE.”

{¶4} In his first assignment of error, Razo asserts that the trial court abused its discretion thereby depriving him of due process of law in conjunction with a resentencing hearing pursuant to *State v. Bezak* when it failed to first vacate the underlying void sentence before attempting to impose a new sentence and failed to comply with *Romito v. Maxwell*. Razo asserts that as a result, the court failed to impose a statutorily valid sentence. We disagree.

{¶5} In *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, the Ohio Supreme Court held as follows:

“When a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense,

the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense.” (Emphasis added.) *Bezak* at syllabus.

The Ohio Supreme Court further explained that “[t]he effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.” *Id.* at ¶12, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268.

{¶6} The Ohio Supreme Court also addressed the notification issue in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, wherein the Court explained that a trial court “is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence.” *Jordan*, at paragraph one of the syllabus. See, also, *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at syllabus.

{¶7} Here, the trial court failed to include the mandatory postrelease control provision in Razo’s sentencing entry. Accordingly, Razo’s sentence was void and the trial court properly held a de novo resentencing hearing. *Bezak* at syllabus. As there is no dispute that (1) Razo’s underlying sentence was void and (2) the trial court imposed a new sentence after conducting a de novo sentencing hearing, we need not consider whether the trial court had to first vacate the void sentence.

{¶8} Razo contends that the trial court erred in reimposing the same sentence he had originally agreed to at his initial sentencing hearing. However, Razo has cited no authority for the proposition that the trial court could not reimpose the agreed-upon 18 year sentence. He also does not suggest in this assignment of error that there is any legal defect in the underlying sentencing agreement that he reached with the assistance of his counsel. Furthermore, while the trial court cannot “merely inform the offender of the imposition of postrelease control and automatically reimpose the original sentence”, there is no prohibition against ultimately

reimposing the same sentence. (Emphasis added.) *Bezak*, at ¶13. Moreover, “[t]he effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and *the parties are in the same position as if there had been no judgment.*” (Emphasis added.) *Id.*, at ¶12, quoting *Romito*, 10 Ohio St.2d at 267-268. For Razo, just before his initial sentence was imposed improperly, he had negotiated an agreed plea and sentence. Accordingly, the trial court did not abuse its discretion in imposing the agreed sentence. Razo’s first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“WHETHER THE TRIAL COURT VIOLATED [RAZO’S] DUE PROCESS RIGHTS [] UNDER THE PROVISIONS OF: STATE V. SARKOZY [], O.R.C. § 2943.032(E); AND, WOODS V. TELB [], WHEN IT REFUSED TO PERMIT [RAZO] TO WITHDRAW HIS GUILTY PLEA.”

{¶9} In his second assignment of error, Razo contends that the trial court violated his due process rights under *State v. Sarkozy*, R.C. 2943.032(E), and *Woods v. Telb*, when it refused to permit him to withdraw his guilty plea. We disagree.

{¶10} Rule 32.1 of the Ohio Rules of Criminal Procedure provides that “[a] motion to withdraw a plea of guilty *** 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.” As set forth in the rule, the manifest injustice standard governs post-sentence plea withdrawals. However, where the motion to withdraw comes before sentencing, the trial court should freely and liberally grant the motion. *State v. Xie* (1992), 62 Ohio St.3d 521, 527. Accordingly, before reviewing the trial court’s decision, this Court must determine whether Razo’s motion to withdraw his guilty plea was a presentence motion or a postsentence motion.

{¶11} While Razo filed the within motion five years after his initial sentence, the Ohio Supreme Court has recently held that “[a] motion to withdraw a plea of guilty *** made by a defendant who has been given a void sentence must be considered as a presentence motion under Crim.R. 32.1.” *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at paragraph one of the syllabus. As Razo’s sentence was void under *Bezak*, his motion must be considered as a presentence motion under Crim.R. 32.1.

{¶12} Where a defendant files a presentence motion to withdraw a guilty plea, the general rule is that the motion should be “freely and liberally granted.” *Id.* at ¶1, quoting *Xie*, 62 Ohio St.3d at 526-27. Even so, it is the defendant’s burden to demonstrate “a reasonable and legitimate basis for withdrawing a plea[.]” *State v. DeWille* (Nov. 4, 1992), 9th Dist. No. 2101, at *1. “One who enters a guilty plea has no right to withdraw it.” (Internal quotations and citations omitted.) *Xie*, 62 Ohio St.3d at 526. The trial court has the discretion to determine whether a defendant has provided a reasonable and legitimate basis to withdraw her plea, as well as to determine whether the circumstances justify a withdrawal. *State v. Keith*, 9th Dist. Nos. 07CA009263, 07CA009267, 07CA009268, 07CA009269, 07CA009270, 07CA009271, 07CA009272, 2008-Ohio-3724, at ¶¶7-8. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. This Court has held that a trial court does not abuse its discretion in denying a motion to withdraw a presentence plea when a defendant had competent counsel, a full Crim.R. 11 hearing prior to the acceptance of the plea, and a hearing on the motion to withdraw. *State v. Mack*, 9th Dist. No. 05CA0024-M, 2005-Ohio-6325, at ¶8.

{¶13} On appeal, Razo contends that the trial court violated his due process rights in refusing to allow him to withdraw his guilty plea pursuant to the Ohio Supreme Court's recent holding in *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, wherein the Court held that

"If a trial court fails during a plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control, the defendant may dispute the knowing, intelligent, and voluntary nature of the plea either by filing a motion to withdraw the plea or upon direct appeal." *Sarkozy*, at paragraph one of the syllabus.

{¶14} Razo contends that the record is clear that he was not advised that his sentence would include a mandatory term of postrelease control. He contends that had he known that he would be subject to five years of mandatory postrelease control, he would not have pled guilty and would have instead insisted on a trial.

{¶15} In *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, the Ohio Supreme Court explained that

"[I]f the trial judge imperfectly explained nonconstitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies. Under this standard, a slight deviation from the text of the rule is permissible; so long as the totality of the circumstances indicates that the defendant subjectively understands the implications of his plea and the rights he is waiving, the plea may be upheld.

"When the trial judge does not *substantially* comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court partially complied or failed to comply with the rule. If the trial judge partially complied *** the plea may be vacated only if the defendant demonstrates a prejudicial effect. The test for prejudice is whether the plea would have otherwise been made." (Internal citations and quotations omitted.) *Clark* at ¶¶ 31-32.

{¶16} Here, the record reflects that the trial court advised Razo that

"When you are released from prison, you will be released on post release control sanctions for a period of 5 years. Any violation of a post release control sanction could see you returned to the institution. Do you understand?"

{¶17} Upon review, we cannot conclude that the trial court abused its discretion in denying Razo's motion to withdraw his guilty plea. The record reflects that Razo had competent

counsel, a full Crim.R. 11 hearing prior to the acceptance of the plea, and a hearing on the motion to withdraw his plea. *Mack*, supra, at ¶8. The trial court adequately advised Razo regarding the implications of his plea and the rights he was waiving by pleading guilty. In addition, the trial court informed Razo that he would be subject to postrelease control sanctions for five years after his release from prison and that if he violated the postrelease control sanctions, he could be returned to prison. While the trial court did not expressly use the term “mandatory”, the totality of the circumstances reflects that the court only slightly deviated from the postrelease control language. *Clark*, supra, at ¶¶31-32. The transcript reflects that Razo understood the implications of his guilty plea. Accordingly, the trial court substantially complied with Crim.R. 11.

{¶18} Razo’s second assignment of error is overruled.

III

{¶19} Razo’s assignments of error are overruled and the judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

 for
CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

RANULFO RAZO, pro se, Appellant.

DENNIS WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.