

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

vs.

ROBERT MYNATT,

Defendant-Appellant

CASE NO. **11-0762**

C.A. No. **C 1000298**

C 1000319

T.C. No. **B0801815,**

B0802346

B0708125

**ON APPEAL FROM THE COURT OF APPEALS
FOR THE FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

**APPELLANT'S MEMORANDUM IN SUPPORT
OF SUPREME COURT JURISDICTION**

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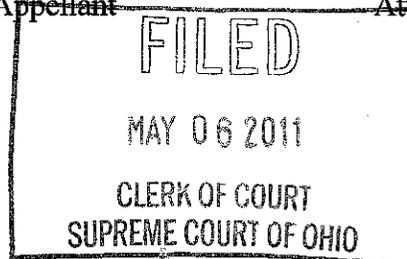


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WHY THIS COURT SHOULD GRANT JURISDICTION

The First District Court committed error in affirming the trial court's decision to deny Appellant's motion to vacate his plea. There are two compelling reasons why this court should consider the merits of this case and accept jurisdiction. First, Appellant alleged at the trial court that his plea was not knowingly or voluntarily entered because the alleged victim recanted her testimony. She claimed the injuries allegedly caused by Appellant were not caused by him, and in fact were caused by her own actions. Further, the alleged victim was also the registered owner of the firearms for which Appellant was convicted of possessing. All of these facts, and possible defenses were unbeknownst to Appellant at the time he entered his plea. Therefore, his plea was not knowingly entered into as he was unaware of the possible defenses available to him at trial. When Appellant presented these arguments to the trial court, in the form of a motion to vacate his plea, the trial court overruled the motion and simply stated:

This matter having come before the Court on the defendant's motion to vacate plea. The defendant having entered into an Agreed Plea and Sentence, and the Court, being fully advised and after due consideration, finds the said motion not well taken, and hereby OVERRULES the same.

The trial court did not even consider the merits of the motion. They never addressed the possible defenses he referenced, and simply overruled the motion without any consideration of the reason it was filed. Thus, the trial court erred in its analysis and decision.

Second, on review, the First District performed its own analysis, independent

of the trial court, and affirmed the decision. The appellate court held that Appellant did not have a defense to the weapons charge, as ownership of a weapon by a third party is never a defense to possessing a weapon under disability. This is incorrect as several courts have held this is a relevant factor. The appellate court also erred in justifying the trial court's decision by applying *State v. Calhoun*, (1999), 86 Ohio St.3d 279, which provides a test for discrediting affidavits in support of post-conviction petitions. *Calhoun* requires a trial court to conduct a detailed analysis on a post-conviction motion and, if discrediting an affidavit, requires the trial court to make specific findings of fact and conclusions of law so that it may be properly reviewed on appeal. The trial court never made a reference to *Calhoun*, and the appellate court substituted its judgment for that of the trial court.

If a reviewing court considers an issue not suggested by the parties, it should give notice of its intention and an opportunity to brief the issue. *State v. Peagler* (1996), 76 Ohio St.3d 496. To decide an issue not briefed without the opportunity to brief or raise it is a denial of due process. *State v. 1981 Dodge Ram* (1988), 36 Ohio St.3d 168. "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Jefferson v. Upton* (2010), 130 S.Ct. 2217. This was an improper application of *Calhoun*.

STATEMENT OF THE CASE AND FACTS

A) Procedural Posture

In 2007, Appellant was charged with having a weapon while under disability. He entered a plea on November 16, 2007 and was sentenced to community control sanctions in December. In March of 2008, Appellant was charged with felonious assault, domestic violence, and abduction. While out on bond on that case, Appellant was charged with drug trafficking and two counts of having a weapon while under disability. On June 24, 2008, Appellant entered a plea to all six charges, with an agreed sentence of six years incarceration. This included a concurrent sentence for a probation violation. Appellant was sentenced that same day to six years.

In April of 2010, Appellant filed a motion to vacate his plea, and supplemented the motion with a detailed affidavit of the alleged victim on April 14, 2010. However, the court overruled the motion immediately, without a hearing. Appellant timely filed a notice of appeal. Appellant's two appellate cases were consolidated. The First District affirmed the decision of the trial court on March 25, 2011. Appellant now files this appeal.

B) Statement of Facts

On June 24, 2008, Appellant entered a plea to an agreed sentence. During that plea, the court placed on the record the terms of the agreement as follows: he would

enter a plea to six counts, and would be sentenced to six years incarceration (Plea, pg. 2). The court stated his time would not be reduced under the agreement (Plea, pg. 3). Defendant stated he understood the nature of the charges (Plea, pg. 3-7). The judge reviewed the rights he was waiving, and Appellant acknowledged he understood (Plea, pg. 15, 19-23). The court then sentenced him to six years incarceration based upon the agreement (Plea, pg. 29).

In April of 2010, Appellant filed a motion to vacate his plea, and supplemented the motion with a detailed affidavit of the alleged victim on April 14, 2010. The affidavit read as follows:

1. I, Latrice R. Johnson-Mynatt, am the wife of Robert Mynatt;
2. On the day of the incident that his charges are based, I was extremely emotional due to his infidelity and a recent death in the family;
3. An argument took place and we shoved each other;
4. During the argument, I was wearing heels and injured my ankle;
5. Robert Mynatt never did anything more than shove me;
6. I do not believe that Robert Mynatt was attempting to cause serious, physical harm to me;
7. After my ankle injury, I attempted to walk upstairs but had difficulty walking so Robert helped me up to the bed;
8. Robert Mynatt never prevented me from leaving the house, neither physically or verbally;
9. Robert Mynatt never abducted me;
10. I never felt as though I was not permitted to leave the house;
11. Both firearms involved in Robert Mynatt's case belong to me;
12. I purchased both firearms;
13. One of the firearms is and has been registered to me and I was in the process of registering the other under my name;
14. Robert Mynatt never purchased or owned either firearm.

However, the court overruled the motion immediately, without a hearing. In overruling the motion, the trial court simply stated: "...[t]he defendant having entered

into an Agreed Plea and sentence, and the Court, being fully advised and after due consideration, finds the said motion not well taken, and hereby overrules the same.”

ARGUMENT

FIRST PROPOSITION OF LAW

OWNERSHIP OF A FIREARM BY A THIRD-PARTY IS A RELEVANT CONSIDERATION AND POSSIBLE DEFENSE TO POSSESSING A WEAPON WHILE UNDER DISABILITY, IN VIOLATION OF R.C. 2923.13

In support of Appellant’s motion to vacate his plea for the Weapons Under Disability, Appellant sought to present evidence that he had evidence that a third party owned and was registering the guns. Specifically, Appellant contends the alleged victim’s testimony that she owned and was registering the guns for which he was charged is a relevant consideration, and the First District erred in holding it was not. The First District found that Appellant did not have a defense to the Weapons Under Disability charge, as he alleged in the motion to vacate his plea, because possession and ownership are not analogous, and her after-plea testimony that she owned the gun is irrelevant. However, this is an error, as her testimony would go to the weight of whether Appellant knowingly possessed the firearm(s).

This court has held that the requisite mental state for possessing a weapon while under disability, in violation of R.C. 2923.13, requires the offender to knowingly

possess a firearm. In *State v. Johnson* (2010), 128 Ohio St.3d 107, this court held the state must prove beyond a reasonable doubt that the offender knowingly possessed the firearm (but is not required to prove a culpable mental state that the offender was under indictment or previously convicted of a disqualifying offense).

Whether one is in possession of a gun is a factual determination. Constructive possession of an item, including a weapon, is based upon the circumstances of the case. Appellant argues the ownership of the gun is one such factor; used to prove (or disprove) possession or whether Appellant knowingly possessed it. See *State v. Wolery* (1976), 46 Ohio St.2d 316 where this court held "the prevailing rule at common law and in most jurisdictions is that actual physical possession is not a requisite of receiving. Possession may be constructive." This principle has been applied to weapons charges as well. In *State v. Cherry* (2007), 171 Ohio App.3d 375, the defendant was never identified with a weapon, but a weapon was found in the car, on the passenger's floor, where Defendant had been sitting. The Second district held that constituted constructive possession sufficient to support a conviction of and affirmed the trial court's decision to overrule the Crim.R.29 motion. (It should be noted the conviction of Cherry was reversed and remanded for sentencing errors under *State v. Foster*). In *State v. Thomas*, 2006 Ohio 4241, the Ninth District held constructive possession was sufficient where the weapon was in the residence where Appellant resided.

Likewise, circumstantial evidence can prove the offender was not in constructive possession of the weapon. In *State v. Duganitz* (1991), 76 Ohio App.3d 363, the court held there was insufficient evidence that the defendant was in constructive possession of the weapon. In that case, the car was stopped and the defendant exited it quickly. The passenger remained inside. A weapon was found underneath a blanket, which covered the bulk of the front seat, but not the driver's side entirely. The officer testified the gun was accessible by both the passenger and driver. The gun was not registered. On appeal, the Eighth district reversed the weapon conviction holding it was insufficient to establish that the defendant was in actual or constructive possession of the gun. The court further held there was no direct evidence of defendant's knowledge of the weapon. *Id.* Also of significance was the court's consideration of the officer's testimony that the gun registration was not obtainable, implying this was a relevant defense. See also *State v. Hart* (1988), 61 Ohio App.3d 37, where the Eighth District reversed a weapon conviction because the weapon was found at the foot of the defendant's companion.

The facts of these cases illustrate that possession can be based upon the surrounding facts. This includes the location of the weapon, whether the offender had access to the area where the weapon was found, and (Appellant contends) ownership. In *Duganitz*, the Court felt one factor to determine possession was ownership of the gun. Additionally, in *State v. McCauley*, 2003 Ohio 3211, the court held the evidence

of ownership of the gun was sufficient to sustain a conviction for possessing a weapon under disability when the co-defendant testified defendant admitted to owning the gun.

Similarly, Appellant contends the ownership of this weapon is relevant to prove either that he did or did not possess the gun. While the victim's statement that she owned the gun and was in the process of registering it does not, in and of itself, determine Appellant did not have possession, it is at the least a valid consideration.

The First district erred in affirming the trial court, by disregarding this factor, stating:

His argument fails in its central premise. The weapons-under-disability charges did not, as Mynatt insisted, require proof that he had owned the weapons; the charges could have been proved with evidence demonstrating actual or constructive possession of the weapons... Thus, his guilty pleas to the weapons-under-disability charges could not be said to have been the unknowing or unintelligent product of his misunderstanding of the legal significance of his wife's ownership of the guns.

(Decision, pg. 6, paragraphs 15-16)

This decision shows that the court failed to even consider her ownership as a factor. The trial court entirely side-stepped this issue and overruled the motion. The court of appeals addressed the merits of the argument, and addressed ownership versus possession. However, the court did not address that ownership by a third party can be evidence the jury could have considered in finding Appellant was not in possession of the gun. The court took only the opposite position, the ownership does not preclude possession. This was an error as Appellant's argument was that ownership by a third party could have been presented as a defense, or at least a factor, against his

possession. The trial court failed to even consider this, which constitutes an error, and defies established legal authority that says otherwise. The appellate court erroneously held this was irrelevant. Both courts erred and thus review by this court is necessary.

SECOND PROPOSITION OF LAW

IN DISCREDITING AN AFFIDAVIT IN SUPPORT OF A POST-CONVICTION PETITION WITHOUT A HEARING, THE TRIAL COURT MUST MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW TO SUPPORT ITS DENIAL OF THE PETITION.

The First District improperly applied the *Calhoun* factors in affirming the trial court's decision to overrule Appellant's motion to vacate his plea. The trial court denied the motion to vacate his plea without any reference to *Calhoun*. In fact, the trial court overruled the motion by simply stating that Appellant entered an plea to an agreed sentence, disregarding all of Appellant's arguments to vacate his plea. The appellate court, on its own, applied *State v. Calhoun* (1999), 86 Ohio St.3d 279, which addresses affidavits in support of post-conviction petitions, and assessing their credibility. The First District stated that the trial court:

[v]iewed in the context of the record as a whole, her disavowal in her affidavits of the accusations underlying the [charges] may fairly be perceived as an effort designed not to correct the 'manifest injustice' wrought by Mynatt's convictions, but to secure his early release and thereby alleviate the hardships caused by his incarceration. Thus, the common please court could properly have discounted the credibility of the affidavits.

(Decision, pg. , paragraph 22)

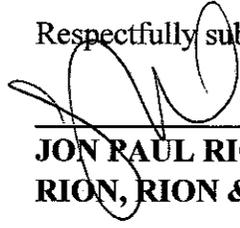
This was an improper application of *Calhoun* by the appellate court because the trial court never performed this analysis. The trial court's decision made no reference to any contradictory letters or affidavits submitted by the victim. However, the appellate court conducted an extensive analysis of all of the correspondence to the court by the alleged victim, including letters requesting his early release, letters of her accusations, and the affidavits in support of his motion to vacate his plea. This was improper because the trial court never conducted this analysis. *Calhoun* requires a trial court which discounts the credibility of an affidavit, to include an explanation for its basis to discount the affidavits through its findings of fact and conclusions of law, to allow for appellate review. The trial court did not make any findings of fact or conclusions of law to discount the affidavits, and thus the appellate court improperly did so.

Additionally, the appellate court's independent review and analysis did not address Appellant's arguments raised on appeal. Appellant argued the trial court abused its discretion in not addressing his potential defenses. The First District never addressed the trial court's failure and simply conducted the analysis the trial court failed to do. This was improper as it was not raised or presented to the court of appeals.

CONCLUSION

For the reasons stated above, appellant asks this Court to accept jurisdiction in this matter.

Respectfully submitted,



**JON PAUL RION of
RION, RION & RION, L.P.A., INC.**

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of this Notice of Appeal was delivered to Scott Heenan, 230 E. Ninth, Suite 4000, Cincinnati, Ohio 45202 by regular mail on the same day as filing.



**JON PAUL RION of
RION, RION & RION, L.P.A., INC.**

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

FILED
COURT OF APPEALS

MAR 25 2011

PATRICIA M. CLANCY
CLERK OF COURTS
HAMILTON COUNTY

STATE OF OHIO, : APPEAL NOS. C-100298
 : C-100319
 Plaintiff-Appellee, : TRIAL NOS. B-0708125
 : B-0801815
 vs. : B-0802346
 :
 ROBERT MYNATT, : *DECISION.*
 :
 Defendant-Appellant. :

PRESENTED TO THE CLERK
OF COURTS FOR FILING

MAR 25 2011

Criminal Appeals From: Hamilton County Court of Common Pleas

Judgments Appealed From Are: Affirmed

COURT OF APPEALS

Date of Judgment Entry on Appeal: March 25, 2011

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Rion, Rion & Rion and *John Paul Rion*, for Defendant-Appellant.

FILED

MAR 25 A 8:16



D92420888

Please note: We have removed this case from the accelerated calendar.

Per Curiam.

{¶1} Defendant-appellant Robert Mynatt appeals from the Hamilton County Common Pleas Court's judgments overruling his Crim.R. 32.1 motions to withdraw his guilty pleas. We affirm the court's judgments.

{¶2} In December 2007, in the case numbered B-0708125, Mynatt was found guilty and sentenced to community control upon his guilty plea to having weapons under a disability. In June 2008, he was convicted upon guilty pleas, in the case numbered B-0801815, to felonious assault, domestic violence, and abduction, and, in the case numbered B-0802346, to having weapons under a disability and marijuana trafficking. And based on his 2008 convictions, he was convicted upon his guilty plea to violating the community-control sanction imposed in the case numbered B-0708125.

{¶3} Mynatt took no direct appeals from his convictions. Instead, in December 2009, he filed in each case a Crim.R. 32.1 motion to withdraw his guilty pleas. The common pleas court overruled the motions.

I. The Assignments of Error

{¶4} On appeal, Mynatt presents two assignments of error, challenging the common pleas court's exercise of its discretion in overruling his Crim.R. 32.1 motions without an evidentiary hearing. The challenge is untenable.

{¶5} A court may grant a postsentence motion to withdraw a guilty plea only upon a showing of a "manifest injustice."¹ The defendant bears the burden of establishing a "manifest injustice."² The decision whether the defendant has

¹ Crim.R. 32.1.

² See *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus.

sustained this burden is committed to the sound discretion of the trial court and will not be disturbed on appeal unless the court abused its discretion.³

{¶6} Crim.R. 32.1 does not expressly require a court to hold a hearing on a postsentence motion to withdraw a guilty plea. But this court has effectively adopted a rule that requires a hearing if the facts alleged in the motion, and accepted as true by the court, would require that the plea be withdrawn. The decision to hold a hearing is discretionary with the trial court and may be reversed only if the court abused its discretion.⁴

{¶7} *The grounds for relief.* In his motions, Mynatt advanced two grounds for relief. He claimed that he was actually innocent of the offenses, and that, because he was actually innocent, his trial counsel had been ineffective in investigating his case and in counseling him to plead.

{¶8} A counseled, knowing, voluntary, and intelligent guilty plea constitutes a complete admission of the facts underlying the charged offense and thus effectively removes from the case any issue concerning the defendant's factual guilt of the offense.⁵ Therefore, Mynatt's challenges to his convictions are limited to the knowing, voluntary, or intelligent nature of his guilty pleas.⁶

{¶9} The record shows that the trial court accepted Mynatt's guilty pleas in conformity with Crim.R. 11. Mynatt does not contend otherwise.

³ See *id.*, paragraph two of the syllabus.

⁴ See *State v. Brown*, 1st Dist. No. C-010755, 2002-Ohio-5813.

⁵ See Crim.R. 11(B)(1); *State v. Wilson* (1979), 58 Ohio St.2d 52, 388 N.E.2d 745, paragraph one of the syllabus.

⁶ See *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130, 595 N.E.2d 351, citing *Tollett v. Henderson* (1973), 411 U.S. 258, 267, 93 S.Ct. 1602; accord *State v. Morgan*, 1st Dist. No. C-080011, 2009-Ohio-1370, ¶25.

{¶10} Rather, his claim of actual innocence concerning the weapons-under-a-disability charges may fairly be read to allege that his guilty pleas to the charges had been unknowing and unintelligent because he had mistakenly believed that his wife's ownership of the guns would not have exonerated him. His actual-innocence claim concerning the felonious-assault, domestic-violence, and abduction charges may fairly be read to allege that his guilty pleas to the charges had been unknowing, involuntary, and unintelligent because he had mistakenly believed that his wife would have testified against him at a trial of the charges. And his ineffective-counsel claim may fairly be read to allege that his guilty pleas were the unknowing, involuntary, and unintelligent product of his trial counsel's ineffectiveness in failing to reasonably investigate his case, and in counseling his pleas, upon his protestations of innocence.

{¶11} *The affidavits.* In support of his motions, Mynatt offered two affidavits made by his wife. With respect to the weapons-under-a-disability charges, Mynatt's wife averred that the firearms for which he had been charged had "belong[ed]" to her, that one firearm had been registered to her, and that she had been in the process of registering the other firearm. With respect to the felonious-assault, domestic-violence, and abduction charges, she averred that Mynatt "did not restrain her from leaving the house, * * * punch, bite, or drag her by [her] hair, [or] cause an injury to [her] ankle," but "only * * * pushed [her] onto the sofa, and screamed at [her]." She stated that their "argument" had occurred on a day when she had been "extremely emotional due to [Mynatt's] infidelity and a recent death in the family," that they had "shoved each other," and that, because she had been "wearing heels," she had "injured [her] ankle," requiring Mynatt to "help" her

upstairs to her bed. He did not, she insisted, "prevent [her] from leaving the house, [e]ither physically or verbally."

{¶12} Mynatt also supported his motions with copies of two letters written by his wife. In her first letter, dated two months after Mynatt's convictions and addressed to the trial judge, Mynatt's wife asked that her husband's six-year prison sentence be "shorten[ed]." She stated that she had had no intention of testifying against him, "since [she] did not want [her] four children's father in jail." She stated that, although she had known of the domestic-violence charge, she had not learned of the felonious-assault and abduction charges until a week before the initial court date, and that "arguments where [they] both became physical against each other," while "common" during their ten-year relationship, had, in the past, resulted only in domestic-violence arrests, not in "any [jail] time." She asserted that, if she could, she would "take back what [she had] said and accused him of and get counseling instead, so her family would stay intact." In the second letter, dated a year later and addressed "To Whom It May Concern," Mynatt's wife sought his "early release." She provided further detail concerning her own culpability in their "fight[s]" and her family's hardships due to her husband's incarceration.

{¶13} Finally, Mynatt offered a September 2009 letter from a woman claiming to be the mother of another of Mynatt's children. The letter detailed the hardships experienced by her and her son as a consequence of Mynatt's incarceration and asked that Mynatt's case "be looked into."

Having Weapons Under a Disability

{¶14} In support of his claim of actual innocence concerning the weapons-under-a-disability charges, Mynatt alleged in his motion, and his wife averred in her

affidavits, that she, and not he, had been the registered, or soon-to-be-registered, owner of the firearms for which he had been charged. Thus, Mynatt argued, his guilty pleas to having weapons under a disability had not been knowing or intelligent, because he had not known when he entered his pleas that his wife's ownership of the firearms would have exonerated him of the charges.

{¶15} His argument fails in its central premise. The weapons-under-a-disability charges did not, as Mynatt insisted, require proof that he had owned the weapons; the charges could also have been proved with evidence demonstrating his actual or constructive possession of the weapons.⁷ And Mynatt, by his guilty pleas, had admitted the allegations of his indictments that he had “knowingly * * * *ha[d]*” the weapons.⁸

{¶16} Thus, his guilty pleas to the weapons-under-a-disability charges could not be said to have been the unknowing or unintelligent product of his misunderstanding of the legal significance of his wife's ownership of the guns. And the common pleas court did not abuse its discretion in declining to conduct a hearing or in denying relief on this ground.

Felonious Assault, Domestic Violence, and Abduction

{¶17} Nor did the court abuse its discretion in overruling, or in denying a hearing on, Mynatt's claims of actual innocence concerning the felonious-assault, domestic-violence, and abduction charges.

{¶18} ***The Calhoun factors.*** We note, as a preliminary matter, that for the purpose of determining the need for an evidentiary hearing on an R.C. 2953.21

⁷ See *State v. English*, 1st Dist. No. C-080872, 2010-Ohio-1759, ¶31-32; *State v. Bailey*, 1st Dist. Nos. C-060089 and C-060091, 2007-Ohio-2014, ¶36-39.

⁸ See R.C. 2923.13(A) (emphasis added).

petition for postconviction relief, the Ohio Revised Code provides a standard similar to the judicially developed standard for determining the need for an evidentiary hearing on a Crim.R. 32.1 motion.⁹ And in *State v. Calhoun*,¹⁰ the Ohio Supreme Court set forth factors for a common pleas court to consider in assessing the credibility of affidavits submitted in support of, and thus in determining the need for an evidentiary hearing on, a postconviction petition.

{¶19} The supreme court in *Calhoun* stated that the common pleas court must accord such affidavits “due deference,” but that the court “may, in the sound exercise of discretion, judge their credibility,” and that the court “may, under appropriate circumstances * * *, deem affidavit testimony to lack credibility without first observing or examining the affiant.”¹¹ In determining whether, in a “so-called paper hearing,” to “accept * * * affidavits as true statements of fact,”¹² or to instead discount their credibility, the common pleas court must consider “all relevant factors,” including “(1) whether the judge reviewing the postconviction relief petition also presided at the [proceedings below], (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner’s efforts, * * * (5) whether the affidavits contradict evidence proffered by the defense [in the proceedings below],” (6) whether the affidavits are “contradicted

⁹ See R.C. 2953.21(C) and (E) (providing that a postconviction claim is subject to dismissal without a hearing if the petitioner has failed to submit with his petition evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief, and that a hearing is required if “the petition and the files and records of the case show the petitioner is entitled to relief”).

¹⁰ 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

¹¹ Id. at 284.

¹² Id.

by” the other sworn statements of the affiants, and (7) whether the affidavits are “internally inconsistent.”¹³

{¶20} The supreme court declared that the *Calhoun* analysis was “supported by common sense” and advanced “the interests of eliminating delay and unnecessary expense[] and furthering the expeditious administration of justice.”¹⁴ Those same interests would be served by applying the *Calhoun* factors to assess the credibility of affidavits submitted in support of, and thus to determine the need for an evidentiary hearing on, a Crim.R. 32.1 motion to withdraw a plea. We, therefore, join those appellate districts that have adopted the *Calhoun* analysis for that purpose.¹⁵

{¶21} In the proceedings below, the judge reviewing Mynatt’s Crim.R. 32.1 motion had also presided at his plea and sentencing hearings. Mynatt’s wife was, of course, related to him, and her letters, which detailed the impact of his incarceration on their family, disclosed her substantial interest in his release. She was present at the plea hearing on the felonious-assault, domestic-violence, and abduction charges, but she did not dispute the assistant prosecuting attorney’s statement that she (Mynatt’s wife) was “in agreement with the plea[s].” And she stood mute during the assistant prosecuting attorney’s statement of the facts underlying the charges, thus acquiescing in Mynatt’s admissions, by virtue of his guilty pleas, that he had “restrained the liberty of his wife * * * under circumstances which created a risk of physical harm * * * or placing [her] in fear,” and that he had “caused serious physical

¹³ Id. at 284-285.

¹⁴ Id. at 284.

¹⁵ See, e.g., *State v. Spencer*, 8th Dist. No. 92992, 2010-Ohio-1667, ¶21; *State v. Hoffman*, 2nd Dist. No. 2006 CA 19, 2006-Ohio-6119, ¶36; *State v. Robinson* (Sept. 30, 2005), 11th Dist. No. 2003-A-0125, ¶28; *State v. Garn*, 5th Dist. No. 02 CA 45, 2003-Ohio-820, ¶31.

harm * * * by punching her in the face, dragging [her] by her hair, and biting [her] and twisting [her] ankle causing her to sustain a fractured ankle.”

{¶22} In her letter to the trial court, sent two months after his convictions, Mynatt’s wife effectively admitted that she had “accused him” of the conduct giving rise to the felonious-assault, domestic-violence, and abduction charges. But in her affidavits, made over a year after his convictions, she disavowed those accusations, asserting that Mynatt had not prevented her from leaving the house, punched her, bitten her, dragged her by the hair, or broken her ankle. Viewed in the context of the record as a whole, her disavowal in her affidavits of the accusations underlying the assault, domestic-violence, and abduction charges may fairly be perceived as an effort designed not to correct the “manifest injustice” wrought by Mynatt’s convictions, but to secure his early release and thereby alleviate the hardships caused by his incarceration. Thus, the common pleas court could properly have discounted the credibility of the affidavits.

{¶23} And in the absence of credible evidence demonstrating Mynatt’s claims that his guilty pleas to felonious assault, domestic violence, and abduction had been unknowing, involuntary, or unintelligent, the common pleas court did not abuse its discretion in declining to conduct a hearing or in denying relief on this ground.

Ineffective Assistance of Trial Counsel

{¶24} Finally, Mynatt asserted in his motion that his guilty pleas were the unknowing and unintelligent product of his trial counsel’s ineffectiveness in investigating his case and in counseling his pleas. A defendant who seeks to withdraw a guilty plea on the ground that the plea was the involuntary, unknowing, or unintelligent product of his counsel’s ineffectiveness must show, “first, * * * that

counsel's performance was deficient,"¹⁶ and, second, "that there is a reasonable probability that, but for counsel's [deficient performance, the defendant] would not have pleaded guilty and would have insisted on going to trial."¹⁷

{¶25} On the record before us, we cannot say that trial counsel violated a substantial duty to Mynatt, when counsel's investigation in the case was not demonstrably inadequate, and when he recommended that Mynatt, in lieu of pursuing baseless legal theories or less-than-credible claims of innocence, plead guilty to the charged offenses in exchange for substantially reduced sentences of confinement. Therefore, the common pleas court did not abuse its discretion in declining to hold a hearing or in denying relief on this ground.

II. We Affirm

{¶26} We thus concur with the common pleas court's conclusion, implicit in its overruling of his Crim.R. 32.1 motions, that Mynatt had failed to sustain his burden of demonstrating that withdrawal of the pleas on the grounds advanced was necessary to correct a manifest injustice. We, therefore, hold that the court did not abuse its discretion in overruling the motions without an evidentiary hearing. Accordingly, we overrule the assignments of error and affirm the court's judgments.

Judgments affirmed.

DINKELACKER, P.J., HENDON and FISCHER, JJ.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this decision.

¹⁶ *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052.

¹⁷ *Hill v. Lockhart* (1985), 474 U.S. 52, 59, 106 S.Ct. 366; see *State v. Xie* (1992), 62 Ohio St.3d 521, 524, 584 N.E.2d 715.