

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-P-0049
RONALD D. NICHOLAS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 05 CR 292.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Ronald D. Nicholas, pro se, PID# 494-947, Mansfield Correctional Institution, P.O. Box 788, Mansfield, OH 44901 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Ronald Dean Nicholas, appeals the Order and Journal Entry of the Portage County Court of Common Pleas, denying his Motion to Withdraw Plea of Guilty Pursuant to Crim.R. 32.1. For the following reasons, we affirm the decision of the court below.

{¶2} On June 9, 2005, Nicholas was indicted by the Portage County Grand Jury for three counts of Robbery, felonies of the second degree in violation of R.C. 2911.02(A)(2) and (B).

{¶3} On September 27, 2005, Nicholas entered a Written Plea of Guilty to three counts of Robbery as charged in the Indictment. According to the Written Plea, Nicholas acknowledged that “if I am imprisoned that after my release from prison I [**May** _ **Will** X] be supervised under post release control”; “I have been informed *** that by pleading guilty I waive the following Constitutional Rights and I understand these rights and it is my intention to waive them: (a) My right to a jury trial. (b) My right to confront and cross-examine the witnesses against me. (c) My right to have compulsory process, that is the right to Subpoena witnesses to Court to testify in my favor.”; and “I have been informed that by pleading guilty I waive my right to appeal any issues that might have been raised had I gone to trial and been convicted, and I understand that right of appeal and it is my intention to waive it.”

{¶4} On December 15, 2005, the trial court sentenced Nicholas to seven years imprisonment for each count of Robbery, to be served consecutively with each other. Thus, Nicholas received an aggregate prison sentence of twenty-one years.

{¶5} On July 31, 2009, Nicholas filed a Motion to Withdraw Plea of Guilty Pursuant to Crim.R. 32.1.

{¶6} On August 5, 2009, the trial court issued a Order and Journal Entry, denying Nicholas’ Motion.

{¶7} On August 17, 2009, Nicholas filed his Notice of Appeal. On appeal, Nicholas raises the following assignments of error:

{¶8} “[1.] The trial court erred to the prejudice of the defendant-appellant by failing to meet the requirements of Crim.R. 11 when it accepted defendant-appellant’s guilty plea.”

{¶9} “[2.] The trial court erred to the prejudice of the defendant-appellant when it failed during plea colloquy to fully and correctly advise defendant of all the possible penalties for the offenses he faced at sentencing in violation of his due process.”

{¶10} “[3.] The trial court erred when it failed to inform defendant-appellant of his appellate rights U.S.C.A. Const. Amends. 5 & 14.”

{¶11} “[4.] The trial court erred to the prejudice of the defendant-appellant when it allowed the defendant-appellant to enter a plea of guilty to a defective indictment that omitted the required mens rea of recklessness, violating due process.”

{¶12} “[5.] The trial court erred to the prejudice of the defendant-appellant when it failed to properly instruct the defendant of his right to compulsory process which is constitutionally protected under the Sixth Amendment to the United States Constitution and Section 10, Article I, of the Ohio Constitution.”

{¶13} The assignments of error will be considered out of order.

{¶14} “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.” Crim.R. 32.1. The phrase “manifest injustice” has been “variously defined,” however, “it is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases.” *State v. Smith* (1977), 49 Ohio St.2d 261, 264 (citation omitted); *Conneaut v. Donofrio*, 11th Dist. No. 2008-A-0072, 2009-Ohio-2947,

at ¶11 (citation omitted); *State v. Goist*, 11th Dist. No. 2003-T-0135, 2004-Ohio-3926, at ¶5 (citation omitted). The reason for such a high standard for granting a post-sentence motion to withdraw a guilty plea “is to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe.” *State v. Caraballo* (1985), 17 Ohio St.3d 66, 67 (citation omitted).

{¶15} “A defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice.” *Smith*, 49 Ohio St.2d 261, at paragraph one of the syllabus. “A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant’s assertions in support of the motion are matters to be resolved by that court.” *Id.* at paragraph two of the syllabus.

{¶16} As an initial matter, we note that the argument raised in Nicholas’ fourth assignment of error has been considered and rejected by this court in a separate appeal from another post-conviction motion. *State v. Nicholas*, 11th Dist. Nos. 2008-P-0080 and 2008-P-0082, 2009-Ohio-2953. Accordingly, this assignment of error is without merit.

{¶17} We further note that Nicholas is raising these arguments three and a half years after entering his plea. “[A]n undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.” *Smith*, 49 Ohio St.2d 261, at paragraph three of the syllabus. Nicholas

offers no explanation for the delay in filing the present Motion to Withdraw Plea of Guilty.

{¶18} Nicholas makes no express argument that a manifest injustice has occurred in the present case. Rather, he makes generic arguments as to why the trial court failed to comply with requirements of Criminal Rule 11.

{¶19} Criminal Rule 11(C)(2)(c) “requires that the defendant be advised of the right to a jury trial, the right to confront one’s accusers, the privilege against compulsory self-incrimination, the right to compulsory process to obtain witnesses, and the right to require the state to prove guilt beyond a reasonable doubt.” *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, at ¶19. A trial court must strictly comply with the obligation to inform a defendant of these rights. *Id.* at ¶18 (citation omitted).

{¶20} Of these five constitutional rights, Nicholas claims, in his fifth assignment of error, that the trial court only failed to inform him of the right to compulsory process. Nicholas’ assertion is controverted by his Written Plea of Guilty, which expressly sets forth this right as well as his intention to waive it. Similarly, at the change of plea hearing, the court advised Nicholas that, by pleading guilty, “you’re giving up the right to confront, cross-examination [sic] and subpoena witnesses.” Accordingly, the fifth assignment of error is without merit.

{¶21} In the second assignment of error, Nicholas claims the trial court failed to advise him of the “maximum penalty involved,” specifically postrelease control and the possibility of a \$15,000 fine. The Written Plea of Guilty, however, did advise Nicholas that he “will” be subject to postrelease control. At the sentencing hearing, the trial court advised Nicholas of the possibility of postrelease control on three occasions. As to the

possibility of a fine, the court did not impose a fine. Thus, there was no manifest injustice with respect to the maximum penalty involved. The second assignment of error is without merit.

{¶22} In the first assignment of error, Nicholas asserts the trial court failed to “ascertain for itself whether or not [he] under[stood] the gravity of entering a guilty plea,” e.g. by inquiring into his educational background, current health, or his “intellectual ability to understand the consequences of a guilty plea.”

{¶23} In the course of the present litigation, Nicholas has filed at least five Motions to Withdraw Guilty Plea, all of which assert that the plea was not entered “voluntarily, with a full understanding of the nature of the charges and of the maximum penalties involved.” The first of these Motions was filed prior to sentencing, and the trial court heard argument on its merits prior to sentencing. Nicholas claimed that he was “high” at the time he entered his plea and that this was the only reason he was not able to enter the plea knowingly and voluntarily. As the issue of the voluntariness of Nicholas’ plea has been raised and ruled upon several times previously, he is barred by the doctrine of res judicata from raising it again. *State ex rel. Sneed v. Anderson*, 114 Ohio St.3d 11, 2007-Ohio-2454, at ¶9 (“res judicata barred [appellant] from raising his claims, which he had previously raised in his postconviction litigation”).

{¶24} The first assignment of error is without merit.

{¶25} In the third assignment of error, Nicholas claims the trial court failed to advise him of his appellate rights. To the extent that Nicholas is referring to his appellate rights being waived by entering a plea of guilty, the Written Plea and transcript of the change of plea hearing contradict his assertion. According to these documents,

Nicholas was expressly advised of the appellate rights that would be waived by pleading guilty.

{¶26} Nicholas cites to the United States Supreme Court case of *Peguero v. United States* (1999), 526 U.S. 23, which stands for the proposition that the failure to advise a defendant of his right to appeal constitutes error. *Id.* at 27. *Peguero*, however, was construing the federal equivalent of Ohio Criminal 32(B)(2), which provides: “After imposing sentence in a serious offense, the court shall advise the defendant of the defendant’s right, where applicable, to appeal or to seek leave to appeal the sentence imposed.” This obligation to advise a defendant of his right to appeal becomes operative “after imposing sentence,” and has no bearing on the validity of a guilty plea. *State v. Atkinson*, 9th Dist. No. 05CA0079-M, 2006-Ohio-5806, at ¶22.

{¶27} The third assignment of error is without merit.

{¶28} For the foregoing reasons, the Judgment of the Portage County Court of Common Pleas, denying Nicholas’ Motion to Withdraw Plea of Guilty Pursuant to Crim.R. 32.1, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.