[Cite as *State v. Ervin*, 2011-Ohio-3121.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-L-113**
- vs -	:	
JAMES D. ERVIN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 08 CR 000556.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

James D. Ervin, pro se, PID# 561-940, Richland Correctional Institution, P.O. Box 8107, Mansfield, OH 44901 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, James D. Ervin, appeals the decision of the Lake County Court of Common Pleas, denying his Motion to Withdraw Guilty Pleas, on the grounds that he failed to demonstrate that he was the victim of a manifest injustice pursuant to Crim.R. 32.1. For the following reasons, we affirm the decision of the court below.

{¶2} On October 30, 2008, the Grand Jury of Lake County returned a twelve-count Indictment, charging Ervin with the following: one count of Attempted Grand Theft

of a Motor Vehicle, a felony of the fifth degree in violation of R.C. 2923.02, two counts of Receiving Stolen Property, felonies of the fifth degree in violation of R.C. 2913.51(A); one count of Possessing Criminal Tools, a felony of the fifth degree in violation of R.C. 2923.24; one count of Theft, a felony of the fifth degree in violation of R.C. 2913.02(A)(1); four counts of Breaking and Entering, felonies of the fifth degree in violation of R.C. 2911.13(B); one count of Burglary, a felony of the second degree in violation of R.C. 2911.12(A)(1); one count of Burglary, a felony of the fourth degree in violation of R.C. 2911.12(A)(4); and one count of Resisting Arrest, a misdemeanor of the second degree in violation of R.C. 2921.33(A).

{¶3} On December 11, 2008, Ervin entered a Written Plea of Guilty to Attempted Grand Theft, two counts of Receiving Stolen Property, one count of Breaking and Entering, and to a reduced charge of Burglary, being a felony of the third degree in violation of R.C. 2911.12(A)(3).

{¶4} At the change of plea hearing, the trial court advised Ervin as follows regarding the rights he would be waiving by pleading guilty:

> **{¶5}** Trial Judge: Now, you have certain trial rights. You're giving them up by pleading guilty. I'm going to go through them one at a time. I need to make sure that you know and understand you have these rights and that you're voluntarily giving them up. As I explain your rights to you, if you have any question about what I am saying or need a better explanation, then you need to let me know. Otherwise, I will assume you answered exactly the question I asked. Fair enough?
>
> **{¶6}** Ervin: Yes, sir.
>
> **{¶7}** ***
>
> **{¶8}** Trial Judge: You have the right to use the subpoena power of the Court to get any witnesses you need to come here to testify for you, especially witnesses that are reluctant to come to Court, witnesses that are out of state, witnesses that are locked up someplace; I can get them here for you. Do you understand that?
>
> **{¶9}** Ervin: Yes, sir.

> **{¶10}** Trial Judge: You have the right to tell your side of the story and testify in your own defense, or you can refuse to testify. It's one way or the other, but it is your choice. No one could make you testify if you did not want to, and if you chose not to testify, that could not be used against you to prove that you were guilty. In fact, the prosecutor could not even comment on your silence to infer that you might be guilty, have something to hide, or maybe you have a prior conviction. The jurors would be told you have that constitutional right not to take the stand and testify. We would only select jurors who agree to uphold that right. Do you understand that?
>
> **{¶11}** Ervin: Yes, sir.

{¶12} On January 22, 2009, the trial court issued its Judgment Entry of Sentence, sentencing Ervin to twelve months in prison for each count of Attempted Grand Theft, Receiving Stolen Property (two counts), and Breaking and Entering, and five years in prison for Burglary. Additionally, the court sentenced Ervin to three years in prison for violating post release control imposed as part of the sentence in another case (Lake C.P. No. 03-CR-000038). All prison sentences were ordered to be served consecutively for an aggregate prison sentence of twelve years. Finally, the court ordered Ervin to pay restitution in the amount of $387.48.

{¶13} Ervin appealed his sentence in these cases.

{¶14} On December 7, 2009, this court affirmed Ervin's sentence. *State v. Ervin*, 11th Dist. Nos. 2009-L-025 and 2009-L-026, 2009-Ohio-6382.

{¶15} On August 18, 2010, Ervin filed a Motion to Withdraw Guilty Pleas pursuant to Criminal Rule 32.1. Ervin argued that his guilty pleas were constitutionally invalid because the trial court failed to comply with Crim.R. 11(C)(2) when accepting the pleas.

{¶16} On September 14, 2010, the trial court entered an Order Denying Motion to Withdraw Guilty Plea. The court concluded that Ervin had failed to satisfy the "manifest injustice" standard of Crim.R. 32.1, "find[ing] that a review of the transcript of

the defendant's change of plea hearing held on December 11, 2008, shows that the court fully complied with the requirements of Crim.R. 11(C)(2)."

{¶17} On September 27, 2010, Ervin filed his Notice of Appeal. On appeal, Ervin raises the following assignments of error:

{¶18} "[1.] The trial court erred to the prejudice of defendant-appellant when it failed to inform him of his guaranteed constitutional right against compulsory self-incrimination. Thus, violating defendant's Fifth and Fourteenth Amendments [sic] to the United States Constitution."

{¶19} "[2.] The trial court erred to the prejudice of defendant-appellant when it failed to inform him of his constitutionally guaranteed right to have compulsory process to present his own evidence at trial."

{¶20} "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); *State v. Clark*, 11th Dist. No. 2009-A-0038, 2010-Ohio-1491, at ¶13 (citation omitted). "Paramount in this determination is the trial court's compliance with Crim.R. 11(C), evidence of which must show in the record that the accused understood his rights accordingly." *State v. DelManzo*, 11th Dist. No. 2009-L-167, 2010-Ohio-3555, at ¶22 (emphasis removed) (citation omitted); but cf. *State v. Minkner*, 2nd Dist. No. 2009 CA 16, 2009-Ohio-5625, at ¶31 ("a court's failure to comply with the

requirements of Crim.R. 11(C) is not an extraordinary circumstance demonstrating a form of manifest injustice required for Crim.R. 32.1 relief").

{¶21} "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.

{¶22} According to Crim.R. 11(C)(2)(c), the trial judge "shall not accept a plea of guilty *** without first addressing the defendant personally and *** [i]nforming the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself." *State v. Ballard* (1981), 66 Ohio St.2d 473, at paragraph one of the syllabus ("Prior to accepting a guilty plea from a criminal defendant, the trial court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses."), following *Boykin v. Alabama* (1969), 395 U.S. 238.

{¶23} "Failure to use the exact language contained in Crim. R. 11(C), in informing a criminal defendant of his constitutional right to a trial and the constitutional rights related to such trial, including the right to trial by jury, is not grounds for vacating a plea as long as the record shows that the trial court explained these rights in a manner

reasonably intelligible to that defendant." *Ballard*, 66 Ohio St.2d 473, at paragraph two of the syllabus.

{¶24} Ervin asserts, in his first assignment of error, that "nowhere does the court ever tell [him] that he *** had the right 'not to testify against himself.'" In the second assignment of error, Ervin claims that "[t]here is not one scintilla of evidence that the court ever advised [him] of his right to compulsory process to present his own evidence at a trial, and have the benefit of subpoena in obtaining such evidence for presentation at a trial." We disagree.

{¶25} Ervin's assertions are flatly contradicted by the transcript of the December 11, 2008 change of plea hearing. In the colloquy, the trial judge advised Ervin that he could refuse to testify, that he could not be compelled to testify, and that no inference of guilt could be made from the exercise of his "constitutional right not to take the stand and testify."

{¶26} Ervin relies on this court's decision in *State v. Singh* (2000), 141 Ohio App.3d 137, where we held that the advisement, "You could testify but you need not testify if you desire not to," did not "adequately apprise appellant of his constitutional right against self-incrimination." Id. at 143. *Singh*, however, is readily distinguishable from the circumstances of the present case. Whereas the trial judge in *Singh* merely advised that the appellant could testify or choose not to testify, in the present case the judge advised that Ervin could not be compelled to testify, that his refusal to testify could not be used to prove his guilt, and that potential jurors would have to acknowledge his right not to take the stand and testify. The trial judge's colloquy in the present case

explained the right against self-incrimination in a manner reasonably intelligible to Ervin, i.e., in accord with the *Ballard* mandate.[1]

{¶27} We further note that the issue of compliance with Crim.R. 11(C) in *Singh* arose on direct appeal, whereas in the present case, the issue is raised in the context of a post-sentence motion to vacate. Unlike the appellant in *Singh*, Ervin was required to demonstrate that his case was an "extraordinary" situation resulting in a manifest injustice. Ervin's arguments merely demonstrate that the trial judge did not use the "exact language contained in Crim. R. 11(C)" to inform him of his rights.

{¶28} With respect to the issue of compulsory process, Ervin concedes that he was informed of the right to subpoena witnesses, but faults the trial judge for not advising him of the right to "put on his own defense" and introduce physical evidence, such as DNA, medical records, and forensic reports. Pursuant to Crim.R. 11(C), however, the trial judge is not required to advise a defendant of the right to introduce physical evidence. In the present case, the trial judge not only advised Ervin of the right to subpoena witnesses, but also informed him that he had "the right to tell your side of the story," and to "test every aspect of the State's case, factual and legal." Thus, the trial judge fully complied with Crim.R. 11(C) with respect to informing Ervin of the right of compulsory process.

{¶29} Ervin's assignments of error are without merit.

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1. In *Ballard*, the Ohio Supreme Court upheld the following plea colloquy: "Now, you know that you do have the right to take the witness stand in your own behalf should you desire *** and you further have the right to not take the witness stand and should you decide not to assume the witness stand, neither the Judge nor the jury has any right whatsoever to hold the mere fact that you don't take the witness stand against you in any way inasmuch as you would be acting fully and completely within your constitutional rights in not taking the witness stand ***." 66 Ohio St.2d at 479, fn. 7. In *State v. Stewart* (1977), 51 Ohio St.2d 86, the Ohio Supreme Court upheld a plea colloquy which stated, with respect to self-incrimination, "Q. You further understand that if you stood trial that you would not have to testify? A. Yes." Id. at 90-91. In neither *Ballard* nor *Stewart*, however, was the colloquy regarding self-incrimination being directly challenged.

{¶30} For the foregoing reasons, the Judgment of the Lake County Court of Common Pleas, denying Ervin's Motion to Withdraw Guilty Pleas, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.