

[Cite as *State v. Ocel*, 2009-Ohio-2633.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 08 JE 22
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
JOSHUA E. OCEL	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Jefferson County, Ohio Case No. 03 CR 151
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JUDGMENT:	Reversed and Remanded.
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APPEARANCES:

For Plaintiff-Appellee:	Atty. Thomas R. Straus Prosecuting Attorney Jefferson County Justice Center 16001 State Route 7 Steubenville, Ohio 43952
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For Defendant-Appellant:	Atty. Dennis W. McNamara 88 East Broad Street Suite 1350 Columbus, Ohio 43215
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JUDGES:

Hon. Cheryl L. Waite  
Hon. Gene Donofrio  
Hon. Joseph J. Vukovich

Dated: June 5, 2009

WAITE, J.

{¶1} Appellant, Joshua Eric Ocel, appeals the judgment entry of the Jefferson County Court of Common Pleas denying his postsentence motion to withdraw his guilty plea. Appellant pleaded guilty to a felony of the first degree, and, as a consequence, he is subject to a mandatory five-year term of post-release control. Appellant contends that the trial court did not substantially comply with Crim.R. 11 because the trial court informed him that post-release control was discretionary and that it could vary in duration between three and five years.

{¶2} During the pendency of this appeal, the Ohio Supreme Court issued its decision in *State v. Boswell*, Slip Opinion No. 2009-Ohio-1577. In that case, the Supreme Court held that a motion to withdraw a plea following the imposition of a void sentence must be treated as a presentence motion under Crim.R. 32.1. *Id.* at syllabus. Pursuant to the mandate announced in *Boswell*, we must sua sponte review Appellant's sentence and find that it is void. *Id.* at ¶13.

{¶3} As a consequence, we reverse the decision of the trial court on the motion to withdraw Appellant's plea and remand this matter to the trial court to consider the motion under the presentence standard. We are also required to vacate Appellant's void sentence and order resentencing if his motion to withdraw his guilty plea is ultimately denied.

{¶4} On August 13, 2003, Appellant was indicted on one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), a felony of the first degree, with a firearm specification, two counts of felonious assault, in violation of R.C. 2903.11(A)(2), felonies of the second degree, with firearms specifications, one count

of having a weapon under a disability, in violation of R.C. 2923.13(A)(3), a felony of the fifth degree, one count of obstructing justice, in violation of R.C. 2921.32(A)(1)(d), a felony of the third degree, two counts of evidence tampering in violation of R.C. 2921.12(A)(1), felonies of the third degree, and one count of unlawful possession of a dangerous ordnance, in violation of R.C. 2923.17(A), a felony of the fifth degree.

{¶5} On March 16, 2004, the matter proceeded to trial. Immediately prior to the start of the trial, the state nolleed the felonious assault charges (and the firearms specifications associated with those charges) and the obstruction charge. The trial court entered a directed verdict on the evidence tampering charges. Appellant was convicted of possessing a weapon under a disability and unlawful possession of a dangerous ordnance. The jury could not reach a verdict on the aggravated robbery charge, but on September 30, 2004, Appellant pleaded guilty to this charge.

{¶6} Prior to accepting Appellant's change of plea, the trial court provided the following explanation of post-release control:

{¶7} "THE COURT: I need to explain to you post-release control as well because since you face a term of incarceration post-release control [sic] are conditions and restrictions that are placed upon somebody after they have served their term of incarceration. So, if you're sentenced to a term of incarceration, you serve that term of incarceration and then you get released you can have post-release control placed upon you anywhere from three to five years by the Adult Parole Authority. Do you understand that?

{¶8} "THE DEFENDANT: Yes, Your Honor.

**{¶9}** “THE COURT: And if you violate any of those post-release controls you can go back to prison nine months at a time for each violation up to one-half of whatever the original sentence is that I give you.

**{¶10}** “THE DEFENDANT: Yes, Your Honor.

**{¶11}** “THE COURT: All right. And whatever happens if you should violate a post-release control sanction happens [sic] as the administrative authority of the adult parole board and I would probably not know that they did that, they would not have to get my permission to do that but they’re permitted to do that as part of the original sentence that you receive in this court.

**{¶12}** “THE DEFENDANT: Yes, Your Honor.

**{¶13}** “THE COURT: In addition, if you violate a post-release control sanction by committing a new crime not only can you go back to prison for violating a post-release control sanction but you could face whatever the penalty is for the new crime as well.

**{¶14}** “THE DEFENDANT: Yes.

**{¶15}** “THE COURT: So, you could get punished twice for the same offense if you committed a new offense which was a violation of a post-release control sanction.” (9/30/04 Hrg., pp. 18-19.)

**{¶16}** After Appellant entered his guilty plea on the aggravated robbery charge and the firearms specification in count one of the indictment, the trial court immediately proceeded to sentencing. The court imposed an eight-year prison term for the aggravated robbery charge, plus a three-year term for the gun specification.

This sentence was ordered to run concurrently with two eleven-month sentences for the convictions on possessing a weapon under a disability and unlawful possession of a dangerous ordnance, as well as sentences for crimes indicted under two other case numbers. No written plea agreement was filed.

{¶17} The trial court was required to give notice of post-release control both at the sentencing hearing and by incorporating it into the sentencing entry. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, paragraph one of the syllabus. During sentencing, the trial court did not make any reference to post-release control. The judgment entry memorializing the sentencing hearing merely states that, “[d]efendant has been given notice of Post Release Control.” (10/1/04 J.E., pp. 2-3.)

{¶18} Appellant did not file a direct appeal. Approximately four years after he was sentenced in the above-captioned case, on August 18, 2008, Appellant filed a motion to withdraw his plea. The trial court denied the motion on August 22, 2008, based upon the conclusion that it had substantially complied with Crim.R. 11 at the sentencing hearing. Appellant filed his notice of appeal on August 28, 2008.

#### ASSIGNMENT OF ERROR

{¶19} “THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT’S MOTION TO WITHDRAW HIS GUILTY PLEA.”

{¶20} Crim. R. 32.1 reads, in its entirety, “[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.”

{¶21} Presentence motions to withdraw a guilty plea are to be freely and liberally granted. *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715. The “manifest injustice” standard, on the other hand, is designed, “to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence is unexpectedly severe.” *State v. Caraballo* (1985), 17 Ohio St.3d 66, 67, 477 N.E.2d 627, and can only be met in “extraordinary cases.” *State v. Smith* (1997), 49 Ohio St.2d 261, 264, 361 N.E.2d 1324.

{¶22} “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.” *Smith*, at paragraph two of the syllabus. The term “abuse of discretion” connotes more than an error of law or judgment; rather, it implies that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶23} After the briefing in this case was complete, the Supreme Court of Ohio announced its decision in *State v. Boswell*, supra. The procedural history in *Boswell* is remarkably similar to the procedural history in the case sub judice.

{¶24} In 2000, Boswell pleaded guilty to aggravated burglary, aggravated robbery, felonious assault, assault, and having a weapon while under a disability. At the plea hearing, the trial court told Boswell that he “may be subject to post-release

control,” but did not explain post-release control. *Boswell* at ¶2. Because aggravated burglary and aggravated robbery are first-degree felonies, Boswell was subject to five years of post-release control. In the sentencing entry, Boswell was sentenced to a 16-year prison term, but was not sentenced to post-release control.

{¶25} In 2004 and 2005, Boswell filed two motions for a delayed appeal, but both were denied. On June 8, 2005, more than five years after being sentenced, Boswell filed a motion to vacate his plea, arguing that the trial court had failed to properly inform him during the plea hearing of the mandatory term of post-release control and the penalties associated with violating post-release control. The trial court granted his motion without opinion and vacated the plea.

{¶26} The state appealed the trial court’s decision, but it was affirmed by the court of appeals. *State v. Boswell*, 8th Dist. Nos. 88292 and 88293, 2007-Ohio-5718, 2007 WL 3105264. The Eighth District Court of Appeals held that the trial court had not substantially complied with Crim.R. 11(C)(2)(a) and R.C. 2943.032 at the sentencing hearing, because it did not advise Boswell of the maximum penalty for his crimes before he entered his guilty plea.

{¶27} The Ohio Supreme Court accepted a discretionary appeal, in which the state asserted that the court of appeals improperly applied the substantial-compliance analysis by failing to require Boswell to demonstrate that he was prejudiced by the inaccurate plea colloquy.

{¶28} Neither Boswell nor the state challenged Boswell’s sentence on appeal, but both parties admitted that the sentence was void based upon the Ohio Supreme

Court's decision in *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. In that case, the Court held that sentences that fail to impose a mandatory term of post-release control are void. *Id.* at syllabus. As a consequence of its earlier ruling in *Bezak*, the *Boswell* Court held that a motion to withdraw a plea of guilty or no contest made by a defendant who has been given a void sentence must be considered a presentence motion under Crim.R. 32.1. *Id.*

{¶29} Here, Appellant entered his guilty plea on the aggravated robbery charge and the firearms specification in count one of the indictment and the trial court immediately proceeded to sentencing. The trial court was required to give notice of post-release control both at the sentencing hearing and by incorporating it into the sentencing entry. *Jordan*, *supra*, paragraph one of the syllabus.

{¶30} During sentencing, the trial court did not make any reference to post-release control. The judgment entry memorializing the sentencing hearing merely states that, "[d]efendant has been given notice of Post Release Control." (10/1/04 J.E., pp. 2-3.)

{¶31} Pursuant to the Ohio Supreme Court's mandate in *Boswell*, *supra*, we have sua sponte reviewed the transcript of the sentencing hearing and the judgment entry and come to the conclusion that Appellant's sentence is void. Because Appellant's sentence is void, his motion to withdraw his guilty plea should have been considered as a presentence motion. Thus, the trial court applied the wrong standard in ruling on his motion.

{¶32} Because the trial court applied the wrong standard, we reverse the trial court's decision on the motion and remand the matter for a hearing where the trial court shall determine "whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Xie* at 527, 584 N.E.2d 714. Likewise, we vacate Appellant's void sentence and order resentencing if his motion to withdraw his guilty plea is ultimately denied.

Donofrio, J., concurs.

Vukovich, P.J., concurs.