[Cite as *State v. McFarland*, 2009-Ohio-4391.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 JE 25
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
JON McFARLAND,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 07CR114.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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Prosecuting Attorney
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For Defendant-Appellant:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: August 6, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Jon McFarland appeals the decision from the Jefferson County Common Pleas Court denying his motion to withdraw his guilty plea. The issue in this case is whether the trial court abused its discretion in denying the motion to withdraw the guilty plea. For the reasons expressed below, we find that it did not and affirm the judgment of the trial court.

STATEMENT OF THE CASE

¶{2} McFarland was indicted on September 5, 2007 for four counts of unlawful sexual conduct with a minor, violations of R.C. 2907.04(A) and (B)(3), third degree felonies; and one count of pandering sexually oriented matter involving a minor, a violation of R.C. 2907.322(A)(1), a second degree felony. The four counts of unlawful sexual conduct with a minor each contained the specification that McFarland was more than 10 years older than the victim (the victim was 13 years old).

¶{3} McFarland originally pled not guilty to the charges, but after a Crim.R. 11 plea negotiation, he withdrew his not guilty plea and entered a guilty plea to all five counts and the specifications. 01/07/08 Tr. 16; 01/14/08 J.E. Part of the plea agreement was that the state and the defense agreed to a recommended sentence of six years for the five offenses. 01/07/08 Tr. 3-4; 01/14/08 J.E. After a Crim.R. 11 colloquy, the trial court accepted the guilty plea and proceeded immediately to sentencing. The trial court followed the agreed recommendation of sentence and sentenced McFarland to an aggregate sentence of six years. Specifically, he received one year for each of the four counts of unlawful sexual conduct with a minor and two years for the one count of pandering sexually oriented matter involving a minor; the sentences were ordered to be served consecutive to each other.

¶{4} McFarland did not appeal from the sentence and conviction. Instead, in a letter filed with the trial court on January 17, 2008, McFarland expressed his desire to withdraw his guilty plea. The trial court overruled that request on January 18, 2008. Then, on May 6, 2008, McFarland filed a motion titled "Motion to Withdraw Guilty Plea Pursuant to Criminal Rule 32.1." Before the trial court ruled on the motion, McFarland filed an "Amended Motion to Withdraw Guilty Plea Pursuant to Criminal Rule 32.1."

07/22/08 Motion. The trial court overruled both motions on August 26, 2008. McFarland filed a timely notice of appeal from that decision.

STANDARD OF REVIEW

¶{5} Prior to addressing the assignments of error, the standard of review must be explained. The motions filed in the trial court clearly indicate that McFarland was attempting, postsentence, to withdraw his guilty plea. Crim.R. 32.1 guides review of motions to withdraw guilty pleas. It provides:

¶{6} "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."

¶{7} Thus, McFarland was required to demonstrate "manifest injustice" before his plea could be vacated. Crim.R. 32.1; *State v. Bush,* 96 Ohio St.3d 235, 2002-Ohio-3993, ¶8; *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. A "manifest injustice" can only be established in "extraordinary cases" and has been defined by the Ohio Supreme Court as a "clear or openly unjust act." *Smith*, 49 Ohio St.2d at 264; *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, 208. "Manifest injustice" has been defined by our court as "an extraordinary and fundamental flaw in the plea proceedings." *State v. Reed*, 7th Dist. No. 04MA236, 2005-Ohio-2925, ¶8, citing *State v. Lintner* (Sept. 21, 2001), 7th Dist. No. 732.

¶{8} In reviewing a trial court's denial of a postsentence motion to withdraw a guilty plea we have explained that "[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." *Reed*, 7th Dist. No. 04MA236, 2005-Ohio-2925, at ¶7, citing *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph two of the syllabus. Thus, we must engage in an abuse of discretion analysis. An abuse of discretion is more than an error of law or judgment; it is the trial court acting in an unreasonable, arbitrary, or unconscionable manner. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

¶{9} McFarland, at times, incorrectly cites to R.C. 2953.21, the statute on postconviction relief, for the standard of review. The Ohio Supreme Court has

explained that R.C. 2953.21 "does not govern a postsentence motion to withdraw a guilty plea. Postsentence motions to withdraw guilty or no contest pleas and postconviction relief petitions exist independently." *State v. Bush,* 96 Ohio St.3d 235, 2002-Ohio-3993, ¶14. See, also, *State v. Gegia,* 9th Dist. No. 21438, 2003-Ohio-3313, ¶7 ("It is clear * * * that a motion made pursuant to Crim.R. 32.1, regardless of whether it raises a constitutional issue, is separate and distinct from a petition filed pursuant to R.C. 2953.21 * * *."); *State v. Wooden,* 10th Dist. No. 02AP-473, 2002-Ohio-7363, ¶18 ("As a motion to withdraw his guilty plea, the motion would not constitute a petition for post-conviction relief under *Bush.*"); *State v. Yuen,* 10th Dist. No. 01AP-1410, 2002-Ohio-5083, ¶29 ("Under *Bush,* defendant's motion to withdraw a guilty plea is not a petition for postconviction relief under R.C. 2953.21.").

¶{10} Thus, since the motion in this instance is clearly a motion to withdraw a guilty plea filed under Crim.R. 32.1, R.C. 2953.21 is inconsequential to our review of the trial court's denial of the motion to withdraw a guilty plea.

STATE'S CONTENTION THAT MCFARLAND CANNOT APPEAL A RECOMMENDED SENTENCE

¶{11} Additionally, prior to addressing the assignment of error, we take this opportunity to address the state's argument that McFarland cannot appeal the denial of a motion to withdraw a guilty plea because the case involves a jointly recommended sentence that was ordered by the trial court. It seems that the state is of the opinion that if a defendant and the state agree to a recommended sentence and that sentence is given, the defendant does not have a right to appeal anything, including the denial of the motion to withdraw a guilty plea or the voluntariness of the plea itself.

¶{12} The state is wrong in this belief. If a sentence is jointly recommended and the trial court follows the recommendation, sentencing issues cannot be appealed. *State v. Dingess,* 10th Dist. No. 02AP-150, 2002-Ohio-6450, ¶46-51 (stating the trial court will be affirmed on appeal as to sentencing issues when the trial court hands down a jointly recommended sentence). However, that rule of law only applies to sentencing, it does not apply to the plea or a motion to withdraw a guilty plea. See id.

¶{13} The state claims our decision in *State v. Hawkins*, 7th Dist. No. 07JE14, 2008-Ohio-1529, supports its belief. In that appeal, Hawkins solely raised issues with

his sentence that was a jointly recommended sentence. In that case, we stated that a sentence that is jointly recommended by the defendant and the prosecutor and issued by the court cannot be appealed. Id. at ¶6. Our decision clearly applied to sentencing issues and made no rule of law concerning the plea or a motion to withdraw a guilty plea. As such, that case does not support the state. Accordingly, the denial of the motion to withdraw can be appealed even if the sentence was a recommended one and the trial court followed the recommendation. Thus, we now turn to the assignments of error.

FIRST AND SECOND ASSIGNMENTS OF ERROR

¶{14} "THE TRIAL COURT WAS IN ERROR BY NOT BEING AN IMPARTIAL ARBITER AND ADVOCATING FOR THE STATE. REF: AMENDED MOTION TO WITHDRAW GUILTY PLEA (JUL. 22, 2008), MOTION TO WITHDRAW GUILTY PLEA (OCT. 3, 2008) AND JAN. 7, 2008, TRANSCRIPTS."

¶{15} "THE TRIAL COURT ERRORED [SIC] BY ACCEPTING A PLEA AGREEMENT NEGOTIATED SOLELY IN REGARDS TO PUNISHMENT. REF: JAN. 7, 2008, TRANSCRIPTS AND JUDGMENT ENTRY OF SENTENCE."

¶{16} The first two assignments of error are discussed together because they both address reasons why McFarland believes the trial court erred in overruling his motion to withdraw his guilty plea.

¶{17} McFarland contends that his plea was not knowingly, intelligently or voluntarily entered into because the trial court actively participated in the plea negotiations and made it clear that if he did not plead guilty and if he was convicted at trial he would receive a harsher sentence than the recommended sentence. He also asserts that the state threatened to seek the maximum sentence if he went to trial. He contends that these acts together induced him to enter the plea. He also asserts that since he pled to the full indictment including the specifications, there was no negotiation since a mere recommendation of sentence by the prosecution and defense is not a guarantee that the trial court will follow the recommendation. Thus, in his opinion, pleading guilty did not reduce his exposure to the full penalty. He then asserts that he was denied effective assistance of counsel by the state and the trial court's action of interfering with his counsel's ability to make its own decisions about

the case. He asserts that the trial court instructed counsel on what to do and told counsel that McFarland should plead guilty.

¶{18} As stated above, McFarland filed a pro se letter requesting the trial court to permit him to withdraw his guilty plea. That request was denied and McFarland did not appeal that denial. We have previously held that res judicata applies to postsentence motions to withdraw guilty pleas; issues that could have been raised in the first motion are barred from being raised in any subsequent motion. *State v. Lankford*, 7th Dist. No. 07BE3, 2007-Ohio-3330, ¶7-9. See, also, *State v. Zhao,* 9th Dist. No. 03CA008386, 2004-Ohio-3245, ¶8 (finding that res judicata barred appeal from trial court's denial of his second Crim.R. 32.1 post-sentence motion to withdraw plea when defendant failed to appeal from the trial court's denial of his first Crim.R. 32.1 motion); *State v. Rexroad,* 9th Dist. No. 22214, 2004-Ohio-6271, ¶6-11 (reaching the same conclusion where defendant failed to directly appeal from his plea and sentence despite the court's alleged errors being apparent on the face of the record at the time of his conviction); *State v. McDonald*, 11th Dist. No. 2003-L-155, 2004-Ohio-6332, ¶22.

¶{19} The letter written to the trial judge requesting to withdraw his guilty plea was hand dated January 10, 2008, postmarked January 14, 2008 and received by the trial court on January 17, 2008. The plea and sentencing hearing was jointly held on January 7, 2008, but the order was not journalized until January 14, 2008. Given these dates, we find that the letter was a postsentence motion to withdraw a guilty plea. That letter indicated that McFarland wanted to withdraw his guilty plea because he was not fully informed by his attorney about the plea and he only had two hours to make up his mind. The letter did not reference any alleged wrong doing (threatening or coercing him to enter the plea) by the trial court or state, which are issues that are raised in the subsequent motions. Those issues could have been raised in the initial postsentence motion to withdraw a guilty plea. Likewise, any issue regarding McFarland's attorney's alleged ineffectiveness was raised in the first motion and thus is also barred by res judicata. Consequently, the doctrine of res judicata bars his current challenge and as such, the trial court did not abuse its discretion in denying the subsequent motion to withdraw a guilty plea. These assignments of error lack merit.

THIRD ASSIGNMENT OF ERROR

¶{20} "THE TRIAL COURT ABUSED ITS DISCRETION BY DISPOSING OF MOTION TO WITHDRAW WITHOUT GRANTING AN EVIDENTIARY HEARING. REF: CASE DOCKET AND ORDER OVERRULING MOTION TO WITHDRAW PLEA (AUG. 26, 2008)."

¶{21} In this assignment of error, McFarland contends that the trial court erred when it did not hold an evidentiary hearing. McFarland cites to R.C. 2953.21 in support of his argument. However, as explained above, that is the statute on postconviction relief and McFarland's motion was a Crim.R. 32.1 motion to withdraw a guilty plea. As such, the postconviction relief statute is not applicable in this instance.

¶{22} That said, sometimes a Crim.R. 32.1 postsentence motion to withdraw a guilty plea requires an evidentiary hearing. *State v. Borecky*, 11th Dist. No. 2007-L-197, 2008-Ohio-3890, ¶30. It has been explained that "an evidentiary hearing is required if the facts alleged by a defendant, accepted as true, would require the trial court to grant the motion. However, if the record, on its face, conclusively and irrefutably contradicts a defendant's allegations in support of his Crim.R. 32.1 motion, an evidentiary hearing is not required." Id. Or in other words an evidentiary hearing is not warranted on a postsentence motion to withdraw a guilty plea if the "record indicates that the movant is not entitled to relief and the movant has failed to submit evidentiary documents sufficient to demonstrate a manifest injustice." *State v. Bari*, 8th Dist. No. 90370, 2008-Ohio-3663, ¶9. The Eighth Appellate District has also stated that "[t]he trial court cannot grant a motion to withdraw a plea based upon an affidavit which directly contradict[s] the record." Id., citing *State v. Yearby* (Jan. 24, 2002), 8th Dist. No. 79000.

¶{23} Here, as explained above, the motion was barred by res judicata, thus it did not warrant an evidentiary hearing. This assignment of error lacks merit.

FOURTH ASSIGNMENT OF ERROR

¶{24} "THE TRIAL COURT FAILED TO MAKE AND FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO THE ALLEGED ISSUES IN THE MOTION. REF: MOTION TO WITHDRAW PLEA (MAY 6, 2008), AMENDED

MOTION TO WITHDRAW GUILTY PLEA (JUL. 22, 2008), ORDER OVERRULING MOTION TO WITHDRAW PLEA (AUG. 26, 2008)."

¶{25} In this assignment of error, McFarland contends that the trial court erred when it failed to issue findings of fact and conclusions of law on his allegations that the trial court coerced or threatened him into entering the plea. McFarland once again cites to the postconviction statute in support of his argument. However, as stated above, that statute is not applicable, rather Crim.R. 32.1 applies.

¶{26} The Eleventh Appellate District has aptly explained that Crim.R. 32.1 does not require a trial court to issue findings of fact and conclusions of law.

¶{27} "In making this argument, appellant confuses the requirements for the denial of a motion for post conviction relief with those for a denial of a motion to withdraw a guilty plea. It is well settled that while R.C. 2953.21(G) requires that the trial court make and file findings of fact and conclusions of law if it does not find grounds for granting post conviction relief, Crim.R. 32 .1 has no such requirement.

¶{28} "In *State ex rel. Chavis v. Griffin,* 91 Ohio St.3d 50, 51, 2001-Ohio-241, the Supreme Court of Ohio held:

¶{29} "'Finally, as courts of appeals have held, Crim.R. 32.1 does not require a court to issue findings of fact and conclusions of law when ruling on a motion to withdraw a guilty plea. See *State ex rel. Wilson v. Lanzinger,* (Nov. 5, 1998), Lucas App. No. L-98-1273; *State v. Hemphill* (July 27, 1989), Franklin App. No. 89AP-245; *State ex rel. Sneed v. Russo* (Sept. 27, 2000), Cuyahoga App. No. 78441.'

¶{30} "Based upon this authority, a trial court, when denying a motion to withdraw a guilty plea, is not required to make and file findings of fact and conclusions of law." *State v. Combs*, 11th Dist No. 2007-P-0075, 2008-Ohio-4158, ¶46-49. See, also, *State v. Woods*, 8th Dist. No. 84993, 2005-Ohio-3425, ¶11; *State v. Davis*, 158 Ohio App.3d 478, 2004-Ohio-5354, ¶16 (4th Appellate District); *State v. Elswick*, 9th Dist. No. 03CA0134-M, 2004-Ohio-4324, ¶5; *State v. Brown*, 1st Dist. No. C-010755, 2002-Ohio-5813, ¶19; *State v. Talley* (Jan. 20, 2998), 2d Dist. No. 16479; *State v. Marshall* (June 30, 1989), 6th Dist. No. WD-88-63.

¶{31} Consequently, given the above, this assignment of error lacks merit.

CONCLUSION

¶{32} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Waite, J., concurs.
DeGenaro, J., concurs.