

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

FILED

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BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

STATE OF OHIO :
Plaintiff : CASE NO. 2013 CR 00083
vs. : 2013 CR 00173
TIMOTHY ALLEN VANDERGRIFF, : Judge Jerry R. McBride
Defendant : DECISION/ENTRY

Nick Horton, assistant prosecuting attorney for the state of Ohio, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Timothy Allen Vandergriff, *pro se* defendant, Inmate No. 679-452, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601.

This cause is before the court for consideration of a motion for a new trial based on newly discovered evidence filed by the defendant Timothy Allen Vandergriff on October 17, 2019.

Upon consideration of the motion, the written arguments of the state and the defendant, the evidence submitted, the record of this case, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The defendant Timothy Allen Vandergriff was indicted February 6, 2013, in Case No. 2013 CR 00083, on four counts of gross sexual imposition in violation of R.C.

2907.05(A)(4) and one count of domestic violence in violation of R.C. 2919.25(A).¹ A bill of information was filed March 22, 2013, in Case No. 2013 CR 00173, alleging one count of sexual battery in violation of R.C. 2907.03(A)(5).²

The bill of particulars for Case No. 2013 CR 00083 states that, pursuant to Count 1, the defendant "on or about August of 2012 through December, 2012, had sexual contact with juvenile victim D.B. * * * by touching her breasts through her clothing and pinching her buttocks."³ As to Count 3 of the same case, the bill of particulars states that the defendant "on or about August of 2012 through December, 2012, had sexual contact with juvenile victim T.V. * * * by touching her breasts through her clothing while she was watching tv in the bedroom."⁴ As to Count 5 of the same case, the bill of particulars states that the defendant, "on January 21, 2013, punched his son, J.V. * * * a juvenile victim, in the face causing physical harm, including two black eyes."⁵

The bill of particulars for the single count of sexual battery in Case No. 2013 CR 00173 alleges that the defendant, "on or [sic] December, 2011, engaged in sexual conduct with juvenile victim T.V. * * * T.V. was in her bed watching cartoons when the defendant came into her room, sat on the bed, put his hand under her nightgown and panties and inserted his fingers into her vagina * * * This incident occurred at a separate time and date from the incidents alleged in 2013-CR-00083."⁶

As to Case No. 2013 CR 00083, on March 26, 2013, the defendant pled guilty to Counts 1 and 3, which are charges of gross sexual imposition, with a specification of

¹ Indictment, Case No. 2013 CR 00083, filed Feb. 6, 2013.

² Bill of Information, Case No. 2013 CR 00173, filed Mar. 22, 2013.

³ Bill of Particulars, Case No. 2013 CR 00083, filed Feb. 14, 2013.

⁴ Bill of Particulars, Case No. 2013 CR 00083, filed Feb. 14, 2013.

⁵ Bill of Particulars, Case No. 2013 CR 00083, filed Feb. 14, 2013.

⁶ Bill of Particulars, Case No. 2013 CR 00173, filed Mar. 26, 2013.

evidence other than the testimony of the victim corroborating the violation, in violation of R.C. 2907.05(A)(4), felonies of the third degree. He also pled guilty to Count 5, domestic violence, in violation of R.C. 2919.25(A), a misdemeanor of the first degree. On April 9th, the court sentenced the defendant to a stated prison term of ten years, consisting of a mandatory prison term of five years on each of the two felony counts of gross sexual imposition and 180 days on the misdemeanor count of domestic violence, with the felony prison terms to be served consecutively to each other and consecutively to an eight year prison term imposed in Case No. 2013 CR 00173.⁷ On April 10th, the sentencing hearing was continued in progress for the purpose of the court informing the defendant that he was being classified as a Tier II sex offender on the gross sexual imposition charges. The court journalized its sentencing entry on April 15th.

Also, on March 26th, in Case No. 2013 CR 00173, the defendant pled guilty to the single sexual battery count, charging a violation of R.C. 2907.03(A)(5), a felony of the second degree.⁸ On April 9th, the court sentenced the defendant to a mandatory stated prison term of eight years, with the prison term to be served consecutively to the ten year term imposed in Case No. 2013 CR 00083 that same day. The court journalized its sentencing entry on April 16, 2013.

The defendant did not file a direct appeal from the judgment, but did file a motion for leave to file a delayed appeal, which the Twelfth District Court of Appeals denied.⁹ The defendant then filed a Delayed Petition to Vacate or Set Aside Judgment of

⁷ The sentence for the misdemeanor offense of domestic violence was to be served concurrently.

⁸ Written Plea of Guilty, Case No. 2013 CR 00083, filed Mar. 26, 2013; Written Plea of Guilty, Case No. 2013 CR 00173, filed Mar. 26, 2013.

⁹ *State v. Vandergriff*, 12th Dist. Clermont Nos. CA2014-01-005, CA2014-01-006, Entry denying motion for delayed appeal (Mar. 10, 2014).

Conviction on May 9, 2014. The court construed it as a postconviction petition for relief and denied it on May 28, 2014.¹⁰ The defendant filed a notice of appeal on January 7, 2015. The Twelfth District Court of Appeals affirmed this court's ruling on August 10, 2015.¹¹

The defendant then filed a motion to withdraw his guilty plea on February 22, 2016. On November 29, 2016, the court issued a decision denying the defendant's motion. The defendant did not appeal the decision.

On April 30, 2018, the defendant filed a motion to correct sentence, which the court construed as a petition for postconviction relief. On December 28th, the court denied the petition for postconviction relief. However, it *sua sponte* found that the case of *State v. Bevly*, 142 Ohio St.3d 41, 2015-Ohio-475, 27 N.E.3d 516, required the court to resentence the defendant regarding the mandatory nature of the defendant's gross sexual imposition convictions in Case No. 2013 CR 00083.

As such, the court resentenced the defendant on February 12, 2019, removing the mandatory nature of the prison terms imposed for the convictions of gross sexual imposition. The court issued an entry on re-sentencing on February 28th. The defendant then filed a notice of appeal on September 3rd, requesting permission to file a delayed appeal. The Twelfth District Court of Appeals denied the motion on October 17th.

¹⁰ Entry Denying Request for Appointed Counsel and Request for Evidentiary Hearing and Dismissing Petition for Postconviction Relief, Case Nos. 2013 CR 00083, 2013 CR 00173, filed May 28, 2014.

¹¹ *State v. Vandergriff*, 12th Dist. Clermont Nos. CA2015-01-008 and CA2015-01-009, 2015-Ohio-3177.

That same day, the defendant filed the present motion for new trial based on newly discovered evidence.¹² The state filed a response in opposition on November 15th. The defendant filed a reply in support on December 9th. On December 10th, the court took the motion under advisement.

LEGAL ANALYSIS

I. RECASTING THE DEFENDANT'S MOTION

The state has argued that the defendant's motion for new trial should be construed as a petition for postconviction relief under R.C. 2953.21. A petition for postconviction relief is a motion by the defendant, "subsequent to his or her direct appeal," that seeks "vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated."¹³ A motion is a petition for postconviction relief under R.C. 2953.21(A)(1) if it was "(1) filed subsequent to [the defendant's] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked for vacation of the judgment sentence."¹⁴

In the present case, the defendant in his motion has not claimed any denial of a constitutional right. As such, his motion cannot be recast as a petition for postconviction

¹² In his reply, the defendant contends he filed this motion prior to October 17, 2019. However, the time stamp on the motion indicates it was filed on October 17, 2019.

¹³ *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), at the syllabus. See *State v. Keith*, 12th Dist. Butler No. CA2015-12-213, 2016-Ohio-7359, ¶ 15, quoting *Reynolds*, 79 Ohio St.3d 158 (holding same).

¹⁴ *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, ¶ 12, quoting *Reynolds*, 79 Ohio St.3d at 160.

relief. Even so, the Ohio Supreme Court has indicated that a court “may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged.”¹⁵

Here, the defendant has specifically invoked Crim.R. 33(A)(6) and requested a new trial. The state is correct that under Crim.R. 33 the defendant, who pled guilty, cannot receive a new trial. As other Ohio courts have explained, the defendant “cannot be entitled to a new trial because he never had a trial.”¹⁶ Indeed, the Ohio Supreme Court has long held that “[a] plea of guilty in a criminal case precludes the defendant from thereafter making a motion for new trial.”¹⁷

In such an instance, the proper mechanism through which the defendant could request a trial after pleading guilty is a motion to withdraw his guilty pleas pursuant to Crim.R. 32.1.¹⁸ If the court allowed a defendant to file a motion for new trial instead of a motion to withdraw the plea, it would be permitting “the defendant to circumvent the more stringent standard set forth in seeking a withdrawal of a plea.”¹⁹ Moreover, because the defendant entered guilty pleas, the court does not have jurisdiction to review his motion as a motion for a new trial.²⁰ For these reasons, the court will examine the defendant’s

¹⁵ *Schlee*, 2008-Ohio-545 at ¶ 12, citing *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522. See *State v. Wilkins*, 12th Dist. Clinton No. CA2013-05-012, 2013-Ohio-5372, ¶ 10 (finding that where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21).

¹⁶ *State v. Vincent*, 4th Dist. Ross No. 02CA2654, 2003-Ohio-473, ¶ 21. See *State v. Aleshire*, 5th Dist. Licking No. 09-CA-132, 2010-Ohio-2566, ¶ 54, citing *State v. Frohner*, 150 Ohio St. 53, 80 N.E.2d 868 (1948), paragraph thirteen of the syllabus.

¹⁷ *Frohner*, 150 Ohio St. at paragraph thirteen of the syllabus.

¹⁸ *Vincent*, 2003-Ohio-473 at ¶ 20, citing *State v. Carter*, 4th Dist. Pike No. 99CA636, 2000 WL 246254 (Feb. 25, 2000).

¹⁹ *Aleshire*, 2010-Ohio-2566 at ¶ 54, citing *Frohner*, 150 Ohio St. at paragraph thirteen of the syllabus.

²⁰ *Aleshire*, 2010-Ohio-2566 at ¶ 56.

motion for new trial under the framework of a motion to withdraw guilty plea under Crim.R. 32.1.

II. LEGAL STANDARD FOR WITHDRAWAL OF GUILTY PLEA

The withdrawal of guilty pleas is governed by Crim.R. 32.1. Crim.R. 32.1 provides: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."²¹ Hence, a criminal defendant who wishes to withdraw a guilty plea after sentencing must "demonstrate that such action is necessary to remedy a manifest injustice."²²

Hence, a criminal defendant who wishes to withdraw a guilty plea after sentencing must "demonstrate that such action is necessary to remedy a manifest injustice."²³ "In general, 'manifest injustice relates to a miscarriage of justice or is inconsistent with the demands of due process.'²⁴ "The requirement of demonstrating a manifest injustice is designed to discourage a defendant from pleading guilty to test the weight of the potential

²¹ Crim.R. 32.1.

²² *State v. Pringle*, 12th Dist. Brown No. CA2015-08-023, 2016-Ohio-1149, ¶ 6, citing *State v. Degaro*, 12th Dist. Butler No. CA2008-9-227, 2009-Ohio-2966, ¶ 10. See *State v. Reeder*, 12th Dist. Butler No. CA2013-05-075, 2014-Ohio-2233, ¶ 23, quoting *State v. Williams*, 12th Dist. Clermont No. CA2012-08-060, 2013-Ohio-1387, ¶ 11 ("On the other hand, '[a] defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of a manifest injustice.'").

²³ *State v. Pringle*, 12th Dist. Brown No. CA2015-08-023, 2016-Ohio-1149, ¶ 6, citing *State v. Degaro*, 12th Dist. Butler No. CA2008-9-227, 2009-Ohio-2966, ¶ 10. See *Reeder*, 2014-Ohio-2233 at ¶ 23, quoting *Williams*, 2013-Ohio-1387 at ¶ 11 ("On the other hand, '[a] defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of a manifest injustice.'").

²⁴ *State v. Jordan*, 12th Dist. Warren No. CA2014-04-051, 2015-Ohio-575, ¶ 10, quoting *State v. Kelly*, 12th Dist. Butler No. CA2013-01-020, 2013-Ohio-3675, ¶ 19.

reprisal, and later attempting to withdraw the plea if the sentence was unexpectedly severe."²⁵

As such, showing a manifest injustice is an "extremely high standard that is allowable only in extraordinary circumstances."²⁶ Moreover, the Twelfth District Court of Appeals has "consistently stated, 'an 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.'"²⁷

The decision whether to grant a motion to withdraw a guilty plea is within the trial court's discretion.²⁸ The court resolves the "good faith, credibility, and weight of the movant's assertions in support of the motion."²⁹ Additionally, the "trial court need not hold an evidentiary hearing on every postsentence motion to withdraw a guilty plea."³⁰ The

²⁵ *State v. Sturgill*, 12th Dist. Clermont No. CA2014-09-066, 2015-Ohio-1933, ¶ 9, quoting *State v. Daugherty*, 12th Dist. Clermont No. CA2013-08-063, 2014-Ohio-2236, ¶ 14.

²⁶ *State v. Lampe*, 12th Dist. Warren No. CA2015-03-028, 2015-Ohio-3837, ¶ 9, citing *State v. Worthington*, 12th Dist. Brown No. CA2014-12-022, 2015-Ohio-3173, ¶ 14. See *Sturgill*, 2015-Ohio-1933 at ¶ 9, citing *Daugherty*, 2014-Ohio-2236 at ¶ 14 (holding same).

²⁷ *Jordan*, 2015-Ohio-575 at ¶ 9, quoting *State v. Resendiz*, 12th Dist. Preble No. CA2009-04-012, 2009-Ohio-6177, ¶ 22. See *State v. McMahon*, 12th Dist. Fayette No. CA2009-06-008, 2010-Ohio-2055, ¶ 7, citing *Smith*, 49 Ohio St.2d at paragraph three of the syllabus ("Crim.R. 32.1 does not prescribe a time limitation of filing a motion, but an 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.").

²⁸ *State v. McGlosson*, 12th Dist. Butler No. CA2012-03-057, 2013-Ohio-774, ¶ 9, citing *Smith*, 49 OhioSt.2d at 264. See *State v. Powell*, 12th Dist. Clermont No. CA2009-05-028, 2009-Ohio-6552, ¶ 10 (stating that a Crim.R. 32.1 motion is addressed to the trial court's sound discretion).

²⁹ *State v. Williams*, 12th Dist. Warren No. CA2009-03-032, 2009-Ohio-6240, ¶ 13, citing *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), at paragraph two of the syllabus.

³⁰ *McMahon*, 2010-Ohio-2055 at ¶ 8, citing *Degaro*, 2009-Ohio-2966 at ¶ 13.

trial court is "not required to hold an evidentiary hearing on a post-sentence motion to withdraw a guilty plea where the record is devoid of evidence warranting relief."³¹

The doctrine of *res judicata* may apply to claims brought in a motion to withdraw a guilty plea. "It is well established by pertinent Ohio case law that claims submitted in support of a Crim.R. 32.1 motion to withdraw a plea that could have been raised on direct appeal, but were not raised in direct appeal, are barred by *res judicata*."³² So too, claims that could have been raised in a prior postconviction petition for relief³³ or a prior motion to withdraw a guilty plea,³⁴ but were not, are likewise barred by *res judicata*.

III. RES JUDICATA

As discussed directly above, the doctrine of *res judicata* bars claims that could have previously been raised on direct appeal, in a postconviction petition for relief, or in a prior motion to withdraw a guilty plea.

³¹ *Pringle*, 2016-Ohio-1149 at ¶ 14, citing *State v. Taylor*, 12th Dist. Madison No. CA2007-12-037, 2009-Ohio-924, ¶ 34. See *Reeder*, 2014-Ohio-2233 at ¶ 28, citing *McMahon*, 2010-Ohio-2055 at ¶ 8 (stating that the trial court is not required to have an evidentiary hearing unless the defendant has established a "reasonable likelihood that a withdrawal of plea was necessary.").

³² *Jordan*, 2015-Ohio-575 at ¶ 14, quoting *State v. Hendrix*, 12th Dist. Butler No. CA2012-05-109, 2012-Ohio-5610, ¶ 11. See *Hendrix*, 2012-Ohio-5610 at ¶ 11, quoting *State v. Madrigal*, 6th Dist. Nos. L-10-1142, L-10-1143, 2011-Ohio-798, ¶ 16 (holding same).

³³ *State v. Lawson*, 12th Dist. Clermont No. CA2013-12-093, 2014-Ohio-3554, ¶ 53.

³⁴ *State v. Green*, 12th Dist. Butler No. CA2016-09-187, 2017-Ohio-2800, ¶ 13, citing *State v. Jordan*, 2015-Ohio-575 at ¶ 14 and *State v. Swinson*, 12th Dist. Clermont No. CA2016-05-024, 2017-Ohio-150, ¶ 12. See *State v. McLeod*, 5th Dist. Tuscarawas No. 2004 AP 03 0017, 2004-Ohio-6199, ¶ 12, quoting *State v. Zhao*, 9th Dist. Lorain No. 03CA008386, 2004-Ohio-3245, ¶ 8 (holding same).

There is an "exception to the res judicata bar when the petitioner presents competent, relevant, and material evidence outside the record *that was not in existence and available to the petitioner in time to support the direct appeal.*"³⁵

In examining the present case, the defendant argues that he is entitled to a new trial because of newly discovered evidence. As discussed, this motion must be construed as a motion to withdraw his guilty pleas. The purportedly new evidence consists of records from Cincinnati Children's Hospital in 2013 concerning victim T.V., which he claims show that there was no evidence to support his sex crime convictions. In addition to attaching the medical records to his motion, the defendant also attached the affidavit of his girlfriend, Tammy Groves.

In the defendant's prior-2016 motion to withdraw his guilty plea he likewise argued that the records from Cincinnati Children's Hospital would have proven his innocence, although he did not attach the records to that motion. He also submitted the same affidavit from Tammy Groves to this motion as he did to his 2016 motion, wherein she provided hearsay statements regarding the Cincinnati Children's Hospital records. Both his 2016 motion and Tammy Groves's affidavit indicate that the defendant had seen the records as of the time of the 2016 motion. Thus, not only could the defendant have raised this issue in his prior motion to withdraw his guilty plea, but he in fact did raise the issue of these records. Furthermore, as the state highlights, the records from Cincinnati Children's Hospital indicate a printing date of September 3, 2015. The fact that these records were available at the time of the defendant's motion to withdraw his guilty plea, filed on

³⁵ (Emphasis original.) *State v. Boles*, 12th Dist. Brown No. CA2016-07-014, 2017-Ohio-786, ¶ 20, citing *State v. Piesciuk*, 12th Dist. Butler No. CA2013-01-011, 2013-Ohio-3879, ¶ 18. See *State v. Sheldon*, 12th Dist. Brown No. CA2016-04-010, 2016-Ohio-6984, ¶ 30, quoting *Piesciuk*, 2013-Ohio-3879 at ¶ 18 (holding same).

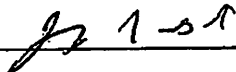
February 22, 2016, further undercut the defendant's argument that he could not have previously made arguments based on these records. For these reasons, the defendant's challenge is subject to *res judicata*, which bars the defendant's claim.³⁶

CONCLUSION

For the foregoing reasons, the defendant's motion for new trial is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: 5-25-20



Judge Jerry R. McBride

³⁶ Of note, even if the defendant's motion should be construed as a petition for postconviction relief, and not a motion to withdraw guilty plea, the court would reach the same result since *res judicata* can bar claims in postconviction petitions for relief as well.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent by e-mail on this 26th day of May 2020 to Nick Horton, Assistant Prosecuting Attorney, at nhorton@clermontcountyohio.gov, and by regular U.S. Mail to Timothy Allen Vandergriff, Defendant, #A679452, Chillicothe Correctional Institution, 15802 State Route North 104, Chillicothe, Ohio 45601.

A handwritten signature in black ink, appearing to be 'JL', written over a horizontal line.

Judicial Assistant to Judge McBride