

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-060936
	:	TRIAL NO. B-9504527
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
TRACY J. BUSCH,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Tracy J. Busch appeals from the judgment of the trial court denying his Crim.R. 32.1 postsentence motion to withdraw his guilty plea to a charge of aggravated assault. Busch's plea was entered and accepted in 1995.

The offense had occurred when Busch, who was then 17 years old, and two friends had engaged in a fight with Todd Kuhr and a companion. The Hamilton County Juvenile Court held a hearing and bound Busch over to the grand jury. Busch was indicted on two counts of felonious assault with specifications that alleged that Busch had used a rock to attack and harm Kuhr. Busch was represented by experienced trial counsel. Following plea negotiations, Busch entered a plea of guilty to one count of the lesser-included offense of aggravated assault. Busch was found guilty and served an 18-month prison sentence.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

In 2004, Busch was convicted in federal court on a firearm-possession charge. Because of the 1995 aggravated-assault conviction and at least one other felony conviction,² the statutory 10-year maximum term of imprisonment was enhanced to a 25-year term under the federal Armed Career Criminal Act.

Busch was precluded from collaterally attacking the 1995 conviction at his federal sentencing.³ Thus he filed his Crim.R. 32.1 motion to withdraw his 1995 plea, arguing that it was a manifest injustice to have his federal sentence increased by 15 years because of a crime that he claimed he did not commit. Busch attached the affidavits of his fellow attacker, Steve Faulkner, and of the victim of the 1995 assault. The affidavits alleged that it was Faulkner who had struck Kuhr with a rock. Neither affidavit, however, indicated that Busch had not been a participant in the fight. Busch further alleged that his age in 1995 had affected his competence to evaluate his defense.

The state filed a responsive memorandum, and the trial court held a hearing on the motion in July 2006. On August 30, 2006, without elaboration, the trial court overruled Busch's motion to withdraw his guilty plea.

In his single assignment of error, Busch now claims that the trial court erred in overruling his motion to withdraw his 1995 guilty plea. 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.⁴ A Crim.R. 32.1 motion "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."⁵ An abuse of discretion connotes more than an error of judgment; it implies that the trial court's

² There were felony convictions for assault in 1997 and 2000.

³ See *Curtis v. United States* (1994), 511 U.S. 485, 496, 114 S.Ct. 1732.

⁴ See Crim.R. 32.1.

⁵ *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph two of the syllabus, cited with approval in *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, at ¶14.

decision was arbitrary, unreasonable, or unconscionable.⁶ In applying the abuse-of-discretion standard of review, we are not free to substitute our judgment for that of the trial court.⁷

Here, the trial court properly denied Busch's Crim.R. 32.1 motion to withdraw his guilty plea. Under R.C. 2923.03, a defendant can be convicted of complicity to commit assault or of aiding and abetting the principal offender, even where the indictment has charged him with the principal offense. Busch was an active participant in the melee that resulted in Kuhr's injuries, and thus he could have been convicted of the serious crimes charged in the indictment, which negated his assertion that his guilty plea had created a manifest injustice.⁸

In resolving the assignment of error, we note that two weeks before the trial court overruled the motion, and approximately one month after the motion hearing had been held, Busch filed a document captioned "Post-Hearing Brief." Rather than summarizing the arguments that he had already made in the trial court, in the document Busch advanced a new argument in support of the motion—that he had been denied the effective assistance of trial counsel and thus that his plea had not been knowingly and voluntarily made.⁹ It was, in effect, a supplemental motion to withdraw the 1995 guilty plea. The text of Crim.R. 32.1 does not forbid successive motions that raise new issues.¹⁰

But Crim.R. 49(A) requires that any "written motions [or] similar papers, shall be served upon each party." Here, Busch's supplemental motion lacked a signed certificate of service on the state.¹¹ The trial court shall not consider any paper "until proof of service is

⁶ See *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

⁷ See *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

⁸ See, e.g., *In re T.K.*, 109 Ohio St.3d 512, 2006-Ohio-3056, 849 N.E.2d 286.

⁹ See *Hill v. Lockhart* (1985), 474 U.S. 52, 58-59, 106 S.Ct. 366.

¹⁰ Cf. R.C. 2953.23(A) (limiting successive petitions for post-conviction relief).

¹¹ The record does not reflect any response by the state to Busch's supplemental motion.

endorsed thereon or separately filed.”¹² Thus, in resolving Busch’s motions to withdraw his guilty plea, the trial court could not have considered the ineffective-assistance-of-counsel argument raised for the first time in the successive motion. The new argument has been waived for purposes of appellate review. This is “consistent with the structure of our court system. An appellate court is not to be the first court to decide an issue; it is to review decisions made by the trial court after the lower court has had an opportunity to hear the arguments of the parties.”¹³ The assignment of error is overruled.

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., CUNNINGHAM and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 12, 2007
per order of the Court _____
Presiding Judge

¹² Crim.R. 49(C).

¹³ See *State v. Slagle* (1992), 65 Ohio St.3d 597, 604, 605 N.E.2d 916.