**MOTION TO WITHDRAW GUILTY PLEA EPISODE NOTES**

**Wade: Hello folks, and welcome to another edition of “The Good Judge-ment Podcast. I’m ½ of your hosting dream team and my name is Wade Padgett**

*Tain: And I’m Tain Kell. The other half of that hosting dream team. Today’s topic concerns something that seems to be coming up with more regularity now: motions to withdraw a guilty plea*

**Wade: That’s right. We’re going to talk about motions to withdraw a guilty plea which have become more prevalent after the Supreme Court’s decision in *Collier*.**

*Tain: Let’s dive in, Wade. First, let’s talk about the Uniform Superior Court Rule that governs motions to withdraw guilty pleas*

**Wade: U.S.C.R. 33.12: (A) After sentence is pronounced, the judge should allow the defendant to withdraw a plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.**

**(B) In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw a plea of guilty or nolo contendere as a matter of right once sentence has been pronounced by the judge.**

**Timeliness:**

Motion must be filed within the same term of court as the written sentence was entered *Humphrey v. State*, 299 Ga. 197 (2016);

[Terms of court can be found at O.C.G.A. § 15-6-3].

When the term of court has expired in which a defendant was sentenced pursuant to a guilty plea, the trial court lacks jurisdiction to allow the withdrawal of the plea; once the term of court in which a defendant was sentenced has expired, the only available means for an appellant to withdraw his guilty plea is through habeas corpus proceedings.  *Dupree v. State*, 279 Ga. 613 (2005).

**Void sentence**

All of the foregoing relating to timeliness relates to a sentence that is otherwise legal. The trial court retains jurisdiction to correct a ***void*** sentence at any time. A void sentence is one that imposes a sentence that the law does not allow. *Daniels v. State*, 344 Ga. App. 190 (2018), citing *Spargo v. State*, 332 Ga. App. 410, 411 (2015). See O.C.G.A. § 17-9-4.

A void sentence is essentially a nullity which makes the “same term of court” discussion irrelevant. *Hanh v. State*, 338 Ga. App. 498, 499 (2016).

But where the appellate court only declares a portion of the sentence to be improper, that original sentence is not “void,” despite the fact that the appellate court may have declared a portion of the sentence to be improper. Therefore, in the later scenario, the defendant does not have the right to withdraw his plea on remand. *Humphrey v. State*, 299 Ga. 197, 198-199 (2016).

**Applicability**

Applies to *Alford* pleas. *Williams v. State*, 337 Ga. App. 381, 389 (2016). By the terms of U.S.C.R. 33.12, also applies to *nolo contendre* pleas.

**Pro Se Filings (A/K/A “JAIL MAIL”)**

Any *pro se* filings made while the defendant is represented by counsel is treated as a legal nullity and of no force or effect. *White v. State*, 302 Ga. 315, 316 (2017), citing *Tolbert v. Toole*, 296 Ga. 357, 363 (2014).

And a *pro se* motion to withdrawn a guilty plea that is followed by an untimely motion to withdraw a guilty plea filed by counsel does not “relate back” to the legal nullity that was the *pro se* filing. *White v. State*, 302 Ga. 315, 320 (2017).

**Appointment of counsel/hearing requirement**

The defendant is entitled to appointed counsel in connection with a motion to withdraw a guilty plea.*Williams v. State*, 339 Ga. App. 158, n.8 (2016).

Such a motion generally requires a hearing so that an appellate court can evaluate whether the trial court properly exercised its discretion or abused that discretion. *Banhi v. State*, 252 Ga. App. 475 (2001); *Williams v. State*, 339 Ga. App. 158, n.8 (2016).

However, where the motion to withdraw a guilty plea is filed after the term of court in which the defendant was sentenced, it would appear that the trial court can deny the motion without a hearing. *Adams v. State*, 302 Ga. 891 (2018).

**Applicable standard**

“After sentencing, the decision on a motion to withdraw a guilty plea is within the trial court's discretion and withdrawal of the plea is allowed only when necessary to correct a manifest injustice.” (Citations omitted) *Allen v. State*, 333 Ga.App. 853, 855 (3), 777 S.E.2d 699 (2015).

“The test for manifest injustice will by necessity vary from case to case, but it has been said that withdrawal is necessary to correct a manifest injustice if, for instance, a defendant is denied effective assistance of counsel, or the guilty plea was entered involuntarily or without an understanding of the nature of the charges.” *Gay v. State*, 342 Ga. App. 242 (2017), citing *Allen v, State*, 333 Ga. App. 853, 855 (2015).

Once a guilty plea is validly challenged, the State bears the burden of showing “affirmatively from the record that the defendant entered his plea knowingly, intelligently, and voluntarily and with an understanding of the nature of the charges and the consequences of entering the plea.” *Gay v. State*, 342 Ga. App. 242, 243 (2017), citing *Maples v. State*, 293 Ga. App. 232, 234 (2008).

“State may meet its burden of showing that guilty plea which defendant seeks to withdraw was intelligently and voluntarily entered in two ways: (1) showing on record of guilty plea hearing that defendant was cognizant of all the rights he was waiving and possible consequences of his plea; or (2) filling silent record by use of extrinsic evidence that affirmatively shows that guilty plea was knowing and voluntary.” *Voils v. State*, 266 Ga. App. 738 (2004).

[i.e. written rights waiver forms]

Where the defendant seeks to withdraw his/her guilty plea based upon alleged ineffective assistance of plea counsel, “[the defendant] bears the burden of showing that his attorney’s performance was deficient and that, but for counsel’s errors, a reasonable probability exists that he would have insisted on a trial.” *Williams v. State*, 337 Ga. App. 381, 389 (2016); *Berrien v. State*, 300 Ga. 489 (2017); *Sims v. State*, 299 Ga. App. 698 (2009).

In the context of a motion to withdraw a guilty plea, where there is conflicting evidence relating to the underlying case, the trial court is not to determine credibility of witnesses. *Berrien v. State*, 300 Ga. 489, 492 (2017), citing *Glover v. State*, 300 Ga. 88, 90 (2016). Credibility determinations are in the discretion of the court. *McGuyton v. State*, 298 Ga. 351, 355 (2016).

“[A] trial court's acceptance of a knowing and voluntary guilty plea with a sufficient factual basis from a defendant who is unwilling or unable to admit his participation in the crime does not amount to a ‘manifest injustice,’ such as where the defendant was ‘denied effective assistance of counsel, or the guilty plea was entered involuntarily or without an understanding of the nature of the charges.’ ” *Berrien*, supra, at 492.

**Specific Examples**

The trial court is required to correctly advise the defendant of the direct consequences of entering the plea. “Direct consequences” in this regard “may be described as those within the sentencing authority of the trial court, as opposed to the many other consequences to a defendant that may result from a criminal conviction.” *Gay v. State*, 342 Ga. App. 244 (2017), citing *Smith v. State*, 287 Ga. 391, 394 (2010).

While there may be some debate as to whether certain consequences are direct or collateral, it is clear that the sentencing range is a direct consequence of a guilty plea and failing to correctly state the sentencing range is a potential ground for allowing a defendant to withdraw a guilty plea. *Gay v. State*, 342 Ga. App. 242, 244 (2017).

[ Note: there are cases where it has been held that failure of the trial court to correctly set forth the sentencing range does not invalidate a guilty plea. *Adams v. State*, 285 Ga. 744, 746-747 (2009); *Hill v. Hopper*, 233 Ga. 633, 634 (1975); *Arnold v. State*, 292 Ga. 95, 97 (2012). See also *Pike v. State*, 245 Ga. App. 518 (2000).]

This error is particularly problematic where the plea is an “open plea” or is not negotiated as to the sentencing range. *Gay v. State*, 342 Ga. App. 242, 245 (2017).

Where defendant claims he was incompetent to enter plea, trial court may deny the motion where there was a mental evaluation that found the defendant competent and where the plea colloquy shows that the defendant was oriented as to time, place and person to which the defendant gave appropriate responses. *Allen v. State*, 333 Ga. App. 853 (2015).

[The plea colloquy transcript is important evidence in a motion to withdraw guilty plea. *Maddox v. State*, 278 Ga. 823 (2005)]

***Collier* and *Schoicket***

We previously recorded an episode addressing *Collier v. State*, 307 Ga. 363 (2019). Pretty awesome, if we do say so ourselves

As a summary, *Collier* allows for a hearing on whether plea counsel advised the defendant of his/her right to file an appeal from a guilty plea and, if the record shows that the lawyer did not tell the defendant he/she had that right, the trial court should grant out-of-time appeal. (over-simplified explanation of *Collier*)

As expected, some defendants have attempted to read more into *Collier* than was actually there, resulting in the Supreme Court walking back some of the broad statements contained in *Collier*. *Kelly v. State*, 311 Ga. 827, 830-831 (2021).

Enter the decision in *Schoicket v. State*, \_\_ Ga. \_\_, 865 S.E.2d 170 (2021). Justice Peterson authored the decision where he noted that some of the broad language in *Collier* had created an assumed right to file a motion to withdraw plea if the motion to file and out-of-time appeal was granted.

To be clear, that same Justice Peterson had authored the special concurring opinion in *Collier* wherein he noted, “’it would appear to be merely a logical extension of statements we have previously made’ to hold that ‘a granted motion for out-of-time appeal from a guilty plea authorizes not only an appeal but also a motion to withdraw the guilty plea[.]’” *Collier* at 380 (Peterson, J. concurring)

Peterson, writing for the majority in *Schoicket*, noted that some of the other cases implied that the grant of a motion for out-of-time appeal started the post-conviction rights “anew.” The decision in *Schoicket* concludes by making it clear that merely because a defendant is allowed to file an out-of-time appeal DOES NOT mean that the defendant is also authorized to file an out-of-time motion to withdraw guilty plea.

“For these reasons, we hold today that a granted motion for out-of-time appeal does not confer a right to file an otherwise-untimely motion to withdraw a guilty plea.” *Schoicket*, at \_\_, 176.

**Well let’s recap what we’ve learned today. First, a motion to withdraw a guilty plea must be filed in the same term of court as the one in existence when the plea was entered.**

*If the motion is not timely filed, the defendant must seek relief via habeas corpus and not via a out-of-time filing.*

**Second, if the motion is timely filed, the state has the burden of proving that the plea was knowingly and voluntarily entered.**

*You may want to listen to our episode on guilty pleas – U.S.C.R. 33.8 ensures the judge addresses all of the appropriate issues and we discussed all of the issues associated with accepting a guilty plea in that other episode.*

**Finally, merely because a defendant can late-file a motion to appeal from a guilty plea if it is established that plea counsel did not advise the defendant of the right to appeal, that does NOT mean that the defendant also can then late-file a motion to withdraw his/her plea.**

*The Schoicket case is really new and it had two dissenting opinions. All of the opinions reference the “tangled mess” of Georgia law relating to post-conviction relief. It seems this may prove to be an ongoing “conversation.”*

**Well, folks, as always, we hope this has been helpful to you in your daily practice. If you’d like more information, don’t forget to check our website at goodjudgepod.com where we will post the episode notes (including the citations of authority)**

*That’s right, and be sure to follow The Good Judge-ment podcast on your favorite platform and “like” us just for fun!*

**I’m Wade Padgett**

*And I’m Tain Kell… [insert funny thing]*