

[Cite as *State v. Hoaja*, 2010-Ohio-3651.]

IN THE COURT OF APPEALS FOR CHAMPAIGN COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 31
v.	:	T.C. NO. 2007 CR 00077
NICHOLAS HOAJA	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 6th day of August, 2010.

NICK A. SELVAGGIO, Atty. Reg. No. 0055607, 200 North Main Street, Urbana, Ohio 43078
Attorney for Plaintiff-Appellee

GEORGE A. KATCHMER, Atty. Reg. No. 0005031, 115 Brookside Drive, Yellow Springs,
Ohio 45387
Attorney for Defendant-Appellant

WILLAMOWSKI, J., (by assignment)

{¶ 1} Defendant-Appellant Nicholas E. Hoaja (“Hoaja”) brings this appeal from the judgment of the Court of Common Pleas of Champaign County finding him guilty of operating a motor vehicle under the influence of alcohol. For the reasons set forth below, the judgment is affirmed.

{¶ 2} On April 19, 2007, the Champaign County Grand Jury indicted Hoaja on one

count of operating a vehicle under the influence of alcohol or a drug of abuse, in violation of R.C. 4511.19(A)(1)(a)(G)(1)(d) with a specification that Hoaja had previously been convicted of five or more equivalent offenses in the prior twenty years. The offense was a felony of the fourth degree. Hoaja entered a plea of not guilty on May 3, 2007. On August 3, 2007, Hoaja, pursuant to a negotiated plea agreement, changed his plea to one of guilty. In exchange, the State agreed to recommend a one-year sentence. Hoaja withdrew his guilty plea on October 29, 2007, and a jury trial was set. On January 31, 2008, Hoaja again changed his plea to guilty to the offense and the specification. The State, in exchange, agreed to recommend a one-year sentence on the specification and six months on the underlying offense. The sentencing hearing was held on February 4, 2008. The trial court sentenced Hoaja to a total sentence of three years and six months. No appeal was taken from this judgment.

{¶ 3} On December 22, 2008, Hoaja filed a motion to withdraw his guilty plea. The State filed its memorandum in opposition of the motion on January 30, 2009. The trial court denied the motion on July 10, 2009. Hoaja appeals from this judgment and raises the following assignments of error.

First Assignment of Error

{¶ 4} “THE TRIAL COURT ERRED IN DENYING [HOAJA] A HEARING ON HIS MOTION TO WITHDRAW PLEA SINCE HIS PLEA WAS NOT KNOWING, INTELLIGENT, OR VOLUNTARY.”

Second Assignment of Error

{¶ 5} “A PLEA MUST BE VACATED WHERE BUT FOR THE INEFFECTIVE

ASSISTANCE OF COUNSEL THE PLEA WOULD NOT HAVE BEEN ENTERED.”

{¶ 6} In the interest of clarity, the assignments will be taken out of order.

{¶ 7} Hoaja claims in the second assignment of error that he was denied effective assistance of counsel when he agreed to enter his guilty plea. This court notes that no direct appeal of the conviction and sentence were taken in this matter. “Reversal of convictions on ineffective assistance requires the defendant to show ‘first that counsel’s performance was deficient and, second that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.’” *State v. Cassano*, 92 Ohio St.3d 94, 2002-Ohio-3751, ¶105. The defendant must show that there was a reasonable probability that but for counsel’s errors, the result of the trial would have been different. *Id.* at ¶108.

{¶ 8} Hoaja argues that he would not have entered a guilty plea except for a promise made by his attorney that he would only receive a one year sentence. A review of the record indicates that initially Hoaja and the State agreed that the State would recommend a one year sentence. Later, the State learned that the agreed sentence recommendation would not be possible. Hoaja was then permitted to withdraw his guilty plea and enter a plea of not guilty. Hoaja subsequently entered a new guilty plea to the indicted offense and specification with the State agreeing to recommend a total sentence of eighteen months. The Plea of Guilty Agreement and Entry specifically stated that the range of sentence on Count 1 of the indictment was six to thirty months in prison and that the specification carried a sentence of one to five years of mandatory prison time. The agreement also indicated that Hoaja understood that the sentences may be ordered to be served consecutively and that the Court has discretion to impose any sentence within the statutory range. Specifically, the agreement stated that Hoaja was

neither threatened by anyone nor given any promises except that the State would recommend a certain prison term. Thus, even if Hoaja's attorney did tell him he would receive a one year sentence, Hoaja was aware of the fact and informed that this was not guaranteed. The Agreement indicates such and the trial court indicates that it complied with Criminal Rule 11 and warned him of the consequences of a guilty plea. Although Hoaja has failed to provide this court with transcripts of the hearing, the trial court's entry indicates that the trial court discussed the case with Hoaja personally before entering sentence. The record contains abundant evidence to indicate that Hoaja knew the potential sentence he could receive when he entered his guilty plea. Thus, the record lacks any evidence that counsel was ineffective or that Hoaja was prejudiced. The second assignment of error is overruled.

{¶ 9} In the first assignment of error, Hoaja claims that the trial court erred in denying his motion without holding a hearing. "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." Crim.R. 32.1. The burden is on the defendant who files a post-sentence motion to withdraw the guilty plea to establish manifest injustice. *State v. Minkner*, Champaign App. No. 2009 CA 16, 2009-Ohio-5625. "A manifest injustice has been defined as 'a clear or openly unjust act' that involves 'extraordinary circumstances.'" *Id.* at ¶25 (quoting *State v. Stewart*, Green App. No. 2003-CA-28, 2004-Ohio-3574). "[A] 'manifest injustice' comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her." *Id.* (quoting *State v. Hartzell* (Aug. 20, 1999), Montgomery App. No. 17499).

{¶ 10} When reviewing a post-sentence motion to withdraw a guilty plea, a trial court is not required to hold a hearing. *Id.* “A hearing is required only if the facts alleged by the defendant, if accepted as true, would require the plea be withdrawn.” *Id.* at ¶18 (quoting *State v. McComb*, Montgomery App. Nos. 22570, 22571, 2009-Ohio-295). Hoaja claims in his motion that he should be allowed to withdraw his guilty plea because his trial counsel was ineffective. Having already determined that counsel was not ineffective, there are no facts alleged upon which a manifest injustice could be found. Therefore, the first assignment of error is overruled.

{¶ 11} The judgment of the Court of Common Pleas of Champaign County is affirmed.

.....

FAIN, J. and FROELICH, J., concur.

(Hon. John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Nick A. Selvaggio
George A. Katchmer
Hon. Roger B. Wilson