[Cite as *State v. McKee*, 2004-Ohio-6370.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 02 CA 161
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
DAVID R. McKEE	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case Nos. 02 CR 16; 02 CR 53

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Martin P. Desmond
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant:

Atty. Jeffrey A. Kurz
219 West Boardman Street
Youngstown, Ohio 44503

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: November 24, 2004

WAITE, P.J.

{¶1} Appellant David R. McKee contends that the Mahoning County Court of Common Pleas should have allowed him to withdraw his guilty plea after he was sentenced to a total of seven years in prison in two separate criminal cases involving burglary and receiving stolen property. The trial court had previously allowed Appellant to withdraw his plea because the court would not agree to a four-year prison term. Nevertheless, Appellant decided to plead guilty a second time, and the prosecutor fulfilled its obligation to recommend a four-year prison term. The record reflects that Appellant knowingly and voluntarily entered into his plea, and the judgment of the trial court is affirmed.

{¶2} This appeal has been pending since 2002 because Appellant's original counsel failed to pursue the appeal, and the appeal was later reopened after new counsel was appointed.

{¶3} On January 10, 2002, the Mahoning County Grand Jury indicted Appellant on one count of burglary in violation of R.C. §2911.12(A)(1), a third degree felony. This was designated as Case No. 02-CR-16.

{¶4} On January 17, 2002, Appellant was indicted on a separate third degree felony charge of burglary, along with two fourth degree and one fifth degree felony charges of receiving stolen property. This was designated as Case No. 02-CR-53. The two cases were joined on January 26, 2002. On April 25, 2002, the initial burglary charge was changed to a second degree felony.

{¶5} On April 26, 2002, Appellant pleaded guilty to two counts of burglary and two counts of receiving stolen property. The prosecutor recommended a total sentence of four years in prison. During the sentencing phase of the hearing, the trial court learned that much more was stolen from the victims than the court was previously led to believe. The court informed Appellant that it would not honor the four-year recommended prison sentence, and allowed Appellant to withdraw his plea. After consulting with his attorney, Appellant withdrew his plea. (4/26/02 Tr., p. 25.) The case was reset for trial.

{¶6} On August 1, 2002, Appellant agreed to plead guilty to one count of burglary in Case No. 02-CR-16, and to plead guilty to one count of burglary, two counts of felony receiving stolen property, and one misdemeanor count of receiving stolen property in Case No. 02-CR-53. Appellant was now represented by new counsel. At the beginning of the plea hearing, Appellant's counsel stated on the record that he knew that the trial judge would not honor a recommendation of four years in prison, and that Appellant was aware of the judge's position. (8/1/02 Tr., p. 4.) The court informed Appellant that he could receive up to 18 years in prison, based on all the charges that were part of the plea. (8/1/02 Tr., pp. 11-12.) The court informed Appellant that probation would not be part of the sentence. (8/1/02 Tr., p. 12.) The court explained that Appellant was placing himself at the mercy of the court by pleading guilty to the charges. (8/1/02 Tr., pp. 15-16.) Despite these many warnings from the court, Appellant agreed to plead guilty to the charges a second time.

{¶7} At the sentencing hearing on August 29, 2002, the prosecutor once again recommended a combined prison term of four years. The prosecutor explained that the four-year recommendation was based in part on Appellant's cooperation in providing information on an unrelated robbery case. (8/29/02 Tr., p. 4.) The court indicated that it would consider this information when it rendered its sentence. (8/29/02 Tr., p. 12.) The prosecutor also explained that Appellant's cooperation was not based on Appellant actually receiving a four-year prison sentence, but rather, on a recommendation that a four-year sentence be imposed. (8/29/02 Tr., p. 20.) Appellant's counsel did not contradict or attempt to correct the prosecutor's explanation of its sentencing recommendation. Appellant's counsel reiterated that the prosecutor did not promise the sentence would be four years, and that Appellant's cooperation was not based on whether or not he actually received a four-year prison sentence. (8/29/02 Tr., p. 25.) At no point prior to sentencing did Appellant or his counsel indicate that he wished to withdraw his plea.

{¶8} The court sentenced Appellant to three years in prison on each of the two burglary counts, and six months on each of the two felony counts of receiving stolen property. These were all to be served consecutively to each other, for a total of seven years in prison. The court also imposed six months of jail time for the misdemeanor count of receiving stolen property, to be served concurrently with the remainder of the sentence. Immediately after the court announced its sentence, Appellant began arguing with the judge over the length of the sentence. Appellant did not, however, request to withdraw his plea.

{¶9} The court filed its judgment entry on August 30, 2002. Appellant filed timely appeals of the judgment entries in the two criminal cases on September 4, 2002. The appeals were designated as Appeal No. 02 CA 161 and 02 CA 162. On May 29, 2003, this Court dismissed the appeals for lack of prosecution. On October 10, 2003, this Court reopened Appeal No. 02 CA 161 due to ineffective assistance of appellate counsel, and consolidated it with Appeal No. 02 CA 162 for record purposes. This single appeal now encompasses both criminal cases. New counsel was also appointed to pursue the appeal.

{¶10} Appellant's sole assignment of error asserts:

{¶11} "THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING DEFENDANT TO WITHDRAW HIS GUILTY PLEA."

{¶12} Appellant correctly states that after sentence has been imposed, a court will only allow a defendant to withdraw a guilty plea in order to correct a manifest injustice. Crim.R. 32.1 states: "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."

{¶13} The accused has the burden to show a manifest injustice warranting the withdrawal of a guilty plea. *State v. Smith* (1977), 49 Ohio St.2d 261, 3 O.O.3d 402, 361 N.E.2d 1324, paragraph one of the syllabus. "The logic behind this precept is to discourage a defendant from pleading guilty to test the weight of potential reprisal, and

later withdraw the plea if the sentence was unexpectedly severe." *State v. Caraballo* (1985), 17 Ohio St.3d 66, 67, 477 N.E.2d 627.

{¶14} Generally, a reviewing court will not disturb a trial court's decision to overrule a motion to withdraw a plea absent an abuse of discretion. *Smith*, supra, at paragraph two of the syllabus. In the instant case, Appellant did not actually ask the trial court if he could withdraw his plea, and thus, there is no lower court ruling to review. Nevertheless, this Court has previously allowed appeals to go forward challenging the voluntariness of a plea even when the defendant has failed to file a postsentence motion to withdraw a plea. *State v. Jackson* (May 9, 2001), 7th Dist. No. 99 CO 57; *State v. Brum* (June 29, 2000), Columbiana App. No. 99-CO-28.

{¶15} In this appeal, though, the record reflects that the trial court actually offered Appellant the chance to withdraw his plea a second time, and Appellant refused. At the end of the August 29, 2002, sentencing hearing, Appellant began arguing with the trial judge about the length of the prison sentence. (8/29/02 Tr., pp. 43f.) The judge stated that he never guaranteed at any point in time that the sentence would be less than five years in prison. (8/29/02 Tr., p. 45.) The judge then stated:

{¶16} "I can't make a guarantee of sentence. I have to follow the law. And, in fact, I think as I did follow the law there you got a substantial break today. And if you don't like what happened today, then you can withdraw your plea and you could go to trial on these charges and we'll be done with that." (8/29/02 Tr., p. 45.)

{¶17} Instead of accepting the judge's offer, Appellant continued to argue about the length of the sentence. Eventually the judge stated, "[g]et him out of here. I've heard enough of this." (8/29/02 Tr., p. 47.)

{¶18} This case falls into the category of invited error, given that Appellant could have accepted the court's offer to withdraw his plea at the sentencing hearing and failed to do so. "Pursuant to the 'invited error' doctrine, appellant cannot now assert sentencing errors that appellant himself induced the court to make." *State v. Baker,* 152 Ohio App.3d 138, 2002-Ohio-7295, 787 N.E.2d 17, ¶23.

{¶19} Even if Appellant had not committed invited error, we would find no merit in his argument. It is Appellant's contention that he did not understand the maximum penalty that could have been imposed because of certain assurances made by his attorney. The record does not support Appellant's complaint.

{¶20} First, Appellant does not point to anything in the record that could even remotely be interpreted as an assurance from Appellant's counsel, or from anyone else, that Appellant was likely to receive a four-year prison term. The trial judge made it clear at the first plea hearing on April 26, 2002, that four years in prison was not enough punishment for Appellant's crimes. (4/26/02 Tr., pp. 22, 25, 27.) At the subsequent plea hearing on August 1, 2002, the judge repeatedly stated that he could not go along with the recommended four-year prison sentence. (8/1/02 Tr., pp. 5-6.) Later in the hearing, the judge told Appellant that he could receive up to 18 years in prison for all the crimes that he committed. (8/1/02 Tr., p. 11.) The trial judge told Appellant that the prison terms for each crime might be ordered to be served

consecutively to one another. (8/1/02 Tr., p. 12.) The judge stated that Appellant was placing himself at the mercy of the court by pleading guilty to the charges. (8/1/92 Tr., p. 16.) Appellant's counsel himself stated at the hearing that he knew that the judge would not go along with the recommended four-year prison term. (8/1/02 Tr., p. 4.) It was only after Appellant heard and understood all of these comments that he pleaded guilty to the charges.

{¶21} Appellant also attempts to support his argument by reference to two cases, *State v. Blatnik* (1984), 17 Ohio App.3d 201, 478 N.E.2d 1016, and *State v. Longo* (1982), 4 Ohio App.3d 136, 446 N.E.2d 1145. *Blatnik* held that counsel's mere speculation about the type of sentence that would be imposed does not constitute manifest injustice in order to allow a defendant to withdraw his or her plea after sentence has been rendered. *Blatnik* at 204. In the instant case, the record does not reflect any speculation on counsel's part about the length of the possible sentence. Counsel simply argued in favor a shorter sentence, while acknowledging that the trial court had already made it clear that the sentence would be longer than four years in prison. *Blatnik* does not support Appellant's position.

{¶22} *Longo* allowed the defendant to withdraw his plea because the trial court was convinced that the defendant was involved in a larger conspiracy and, accordingly, imposed a harsher sentence. Id. at 141. This larger conspiracy was not part of the charges against the defendant, and was not part of the evidence before the court. Id. *Longo* found that: "the actions of the [trial] court went beyond any defensible limit and, in effect, sentenced the defendant for acts neither charged nor

proven. An abuse of discretion is clear." Id. In the instant case, there is no allegation that the trial court was influenced by impermissible factors during sentencing. Thus, *Longo* is inapposite to the issue now on appeal.

{¶23} It is clear from our review of the record that Appellant failed to take advantage of the opportunity the trial judge gave him to withdraw his plea. In addition, there is nothing in the record indicating that Appellant's counsel or anyone else misled him about the possible length of the prison term that would be imposed. In fact, the record reflects that everyone involved was very clear as to the possibilities for a much longer sentence. For these reasons, Appellant's assignment of error is overruled and the judgment of the Mahoning County Court of Common Pleas is affirmed.

Donofrio, J., concurs.

Vukovich, J., concurs.