[Cite as *State v. Bowman*, 2004-Ohio-6372.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	CASE NO. 03-BE-40
	)	
- VS -	)	OPINION
	)	
CHRIS S. BOWMAN,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 03 CR 014
JUDGMENT:	Affirmed
APPEARANCES:	
For Plaintiff-Appellee:	Attorney Frank Pierce Prosecuting Attorney Attorney Thomas M. Ryncarz Asst. Prosecuting Attorney 147-A West Main St. St. Clairsville, Ohio 43950
For Defendant-Appellant:	Attorney David S. Trouten, Jr. 185 W. Main St. St. Clairsville, Ohio 43950
JUDGES:	
Hon. Gene Donofrio Hon. Cheryl L. Waite Hon. Mary DeGenaro	
	Dated: November 24, 2004

DONOFRIO, J.

{¶1} Defendant-appellant, Chris Bowman, appeals a decision of the Belmont County Common Pleas Court denying his post-sentence motion to withdraw a guilty plea.

{¶2} On February 5, 2003, the Belmont County grand jury indicted appellant on four counts: Counts I and II, receiving stolen property, in violation of R.C. 2913.51(A), a felony of the fifth degree; Count III, having weapons while under disability, in violation of R.C. 2923.13(A)(1), a felony of the fifth degree; and Count IV, possession of criminal tools, in violation of R.C. 2923.24(A), a felony of the fifth degree.

{¶3} On March 10, 2003, appellant entered a guilty plea, pursuant to a plea agreement, to Counts I and IV of the indictment. In exchange for his guilty plea, plaintiff-appellee, State of Ohio, agreed to dismiss Counts II and III of the indictment and stand silent on the issue of sentencing.

{¶4} On April 8, 2003, the trial court found that appellant failed to report his residency to his pre-sentence investigator and failed to appear at the East Ohio Correctional Center for an evaluation as required by court order.

{¶5} On April 18, 2003, appellant failed to appear for his sentencing hearing and a warrant was issued for his arrest. On June 4, 2003, the trial court was informed that appellant had been arrested in West Virginia. Appellant was later extradited to Belmont County, Ohio.

{¶6} On June 17, 2003, the trial court sentenced appellant to eleven months imprisonment for Count I and eleven months for Count IV of the indictment, with both terms to be served consecutively for a total of twenty-two months imprisonment.

{¶7} On June 23, 2003, appellant filed a motion to withdraw his guilty plea. On July 14, 2003, appellant filed his notice of appeal. On May 28, 2004, this court remanded the case to the trial court to rule on appellant's pending motion. On remand, the trial court overruled appellant's motion.

{¶8} Appellant's first assignment of error states:

{¶9} "THE LOWER COURT ERRED BY NOT HOLDING A HEARING ON THE DEFENDANT'S MOTION TO WITHDRAW HIS PLEA OF GUILTY AND NOT MAKING A RULING ON SAID MOTION."

{¶10} As a preliminary note, this court remanded the case to the trial court to make a ruling on the motion to withdraw. The trial court overruled that motion, so that issue is now moot. The sole remaining issue is whether the court erred by not holding a hearing on the motion. Appellant claims that the burden of withdrawing a guilty plea post-sentence is on the defendant and that the defendant cannot meet this burden unless the court grants a hearing.

{¶11} An appellate court reviews a trial court's denial of a defendant's Crim.R. 32.1 motion under an abuse of discretion standard. *State v. Smith* (1977), 49 Ohio St.2d 261, 3 O.O.3d 402, 361 N.E.2d 1324, paragraph two of the syllabus. The term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144.

{¶12} Pursuant to Crim.R. 32.1:

{¶13} "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."

{¶14} The burden of establishing the existence of manifest injustice is upon the individual seeking to vacate the plea. *Smith*, 49 Ohio St.2d 261, 3 O.O.3d 402, 361 N.E.2d 1324, paragraph one of the syllabus. "This term has been variously defined, but it is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases. * * * The standard rests upon practical considerations important to the proper administration of justice, and seeks to avoid the possibility of a defendant pleading guilty to test the weight of potential punishment." (Internal citations omitted.) Id. at 264, 3 O.O.3d 402, 361 N.E.2d 1324. Furthermore, although there is no time limit to make this motion after a

sentence is imposed, an undue delay between the time when the motion is filed and the reason for filing the motion is a factor adversely affecting the credibility of the movant. Id.

{¶15} As for a hearing, "[a] hearing on a post-sentence Crim.R. 32.1 motion is not required if the facts alleged by the defendant and accepted as true by the trial court would not require the court to permit a guilty plea to be withdrawn." *State v. Blatnik* (1984), 17 Ohio App.3d 201, 17 O.B.R. 391, 478 N.E.2d 1016, paragraph three of the syllabus. Thus, appellant is entitled to a hearing on a motion to withdraw only if the trial court determines he alleges facts sufficient to prove a manifest injustice.

{¶16} In the present case, appellant alleged no facts to support his motion. Because appellant alleged no facts at all, the trial court did not abuse its discretion in determining that appellant did not allege sufficient facts to prove a manifest injustice. Instead, it appears, as the trial court suggested, that appellant seeks to withdraw his guilty plea because he received a harsher sentence than he expected.

{¶17} Appellant now claims that a hearing is required as a forum to assert the necessary facts to prove manifest injustice. However, appellant could have sought leave to amend the motion and add the necessary factual allegations while the motion was pending, but chose otherwise. Therefore, the trial court did not err when it denied appellant's motion to withdraw without a hearing.

{¶18} Accordingly, appellant's first assignment of error is without merit.

{¶19} Appellant's second assignment of error states:

{¶20} "THE LOWER COURT ERRED IN SENTENCING THE DEFENDANT WITHOUT A PRE-SENTENCE INVESTIGATION."

{¶21} Appellant claims that in a felony case, the trial court must consider a pre-sentence investigation report under Crim.R. 32.2 before sentencing. Appellant claims that because no pre-sentence investigation report was completed in this case, the court erred when it sentenced appellant.

{¶22} Pursuant to Crim.R. 32.2:

{¶23} "In felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation and report before imposing community control sanctions or granting probation."

{¶24} The Supreme Court of Ohio addressed a similar issue in *State v. Cyrus* (1992), 63 Ohio St.3d 164, 166, 586 N.E.2d 94. As the rule itself indicates, Crim.R. 32.2 requires a pre-sentence investigation only before granting probation or community control sanctions. *State v. Cyrus* (1992), 63 Ohio St.3d 164, 166, 586 N.E.2d 94. If probation or community control sanctions are not at issue, the rule does not apply. Id.

{¶25} In this case, the trial court sentenced appellant to a twenty-two month prison term. The trial court did not issue probation or community control sanctions; therefore, it need not comply with the pre-sentence investigation requirements of Crim.R. 32.2. In addition, it should be noted that the trial court did in fact order a pre-sentence investigation, but it was not successfully completed through the fault of appellant. Thus, the trial court did not err when it sentenced appellant without a pre-sentence investigation report.

{¶26} Accordingly, appellant's second assignment of error is without merit.

{¶27} Appellant's third assignment of error states:

{¶28} "DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNCIL [sic]."

{¶29} Appellant claims that he was denied effective assistance of counsel on two bases, both relating to the motion to withdraw the plea. First, appellant claims that he asked counsel to file a motion to withdraw his guilty plea before the sentencing hearing. Instead, counsel filed the motion to withdraw on June 23, 2003, six days after the hearing. Second, appellant reiterates that his counsel listed no facts to support the motion to withdraw. Appellant claims this caused him to face a higher burden under Crim.R. 32.2 with no factual support, resulting in the motion's denial.

{¶30} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. Second, appellant must demonstrate that he was prejudiced by counsel's performance. Id. To show that he has been prejudiced by counsel's deficient performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus.

{¶31} Appellant bears the burden of proof on the issue of counsel's effectiveness. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289, 714 N.E.2d 905. In Ohio, a licensed attorney is presumed competent. Id.

{¶32} "Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965. Rather, trial counsel is entitled to a strong presumption that all decisions fell within the wide range of reasonable, professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267.

{¶33} In the present case, appellant has not met the burden of proof for demonstrating ineffective assistance of counsel. Primarily, appellant has not proven that his counsel's performance fell below an objective standard of reasonable representation. Appellant's claim that counsel failed to file a pre-sentencing motion to withdraw as requested remains uncorroborated by any evidence. In addition, appellant has yet to offer any factual basis to substantiate the post-sentence motion to withdraw his plea. To prove counsel's performance fell below an objective standard of reasonable representation by not providing reasoning for the motion, appellant should at least highlight the obvious factual arguments that his counsel missed. Appellant does not explain how this behavior fell below the reasonableness

standard. Instead, appellant chooses to rely on a bare assertion that his counsel was ineffective, which is not enough to meet the burden of proof.

{¶34} Because appellant failed the first prong of the *Strickland* test, it is unnecessary to analyze whether appellant was prejudiced.

{¶35} Accordingly, appellant's third assignment of error is without merit.

{¶36} The judgment of the trial court is hereby affirmed.

Waite, P.J., concurs.
DeGenaro, J., concurs.