

[Cite as *State v. Johnson*, 2009-Ohio-5512.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 08 CO 33
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
BRANDON WILLIAM JOHNSON,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 04 CR 235.
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JUDGMENT:	Affirmed.
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APPEARANCES:
For Plaintiff-Appellee:

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Prosecuting Attorney
Attorney Kyde L. Kelly
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For Defendant-Appellant:

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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: September 30, 2009DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. Appellant, Brandon William Johnson, appeals the August 11, 2008 decision of the Columbiana County Court of Common Pleas denying Johnson's motion for leave to withdraw his September 28, 2005 guilty plea. Johnson argues that the trial court erred in denying his motion, because Johnson's underlying plea was not knowing, voluntary or intelligent. Johnson further argues that he received ineffective assistance of his counsel, and was charged with a defective indictment.

{¶2} Johnson does not demonstrate that a manifest injustice was committed in the underlying proceedings which would merit a post-sentence plea withdrawal. The trial court's denial of Johnson's motion was thus not an abuse of discretion. Accordingly, the trial court's decision is affirmed.

Facts

{¶3} Johnson was indicted on September 23, 2004 for aggravated murder and unlawful termination of pregnancy, both in violation of R.C. 2903.01(A). Johnson entered a plea of not guilty, and was appointed counsel. Subsequent to initial discovery and medical evaluations, Johnson moved for an evaluation of his competence and entered a plea of not guilty by reason of insanity. On March 24, 2005, the trial court found Johnson competent to stand trial. On June 16, 2005, Johnson moved for a second evaluation of competence, which the trial court granted.

{¶4} On September 29, 2005, Johnson entered a change of plea, and pleaded guilty to one count of murder, in violation of R.C. 2903.02(A), and one count of involuntary manslaughter, in violation of R.C. 2903.04(A). The trial court filed Judicial Advice to Defendant, explaining the meaning and consequences of Johnson's plea. The trial court held a plea hearing, engaged Johnson in a lengthy colloquy, and found that his change of plea was voluntary, knowing and intelligent. The trial court accepted Johnson's plea, sentenced Johnson to fifteen years to life for murder and three years for involuntary manslaughter, to be served consecutively. Johnson did not file a direct appeal of the trial court's sentencing decision.

{¶5} On July 7, 2008, Johnson filed a Motion for Leave to Withdraw Plea of Guilty, arguing that his indictment was defective. Johnson attached an "Affidavit of

Truth," (originally filed on March 9, 2007), arguing that the trial court did not have jurisdiction to impose Johnson's sentence and that his trial counsel did not fully inform him about his charges. Johnson simultaneously filed a demand for oral hearing, including arguments that his confession was coerced, that his counsel mislead him, that the indictment did not include a mens rea, and that his guilty plea was not knowing, voluntary and intelligent. On August 11, 2008, subsequent to a briefing of the issues by both Johnson and the State, the trial court denied Johnson's motion. The trial court held that the indictment included a mens rea, that counsel was not ineffective, and the trial court further noted that Johnson's plea had been knowing, voluntary and intelligent.

Denial of Motion to Withdraw Guilty Plea

{¶6} In his first of three assignments of error, Johnson asserts:

{¶7} "Trial courts [sic] denial of motion to withdraw plea of guilty."

{¶8} A Crim.R. 32.1 motion is not a challenge to the validity of a conviction or sentence, and instead only focuses on the plea. *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, at ¶13. Subsequent to the imposition of a sentence, a trial court will only permit a defendant to withdraw his guilty plea in order to correct a manifest injustice. Crim.R. 32.1. A defendant bears the burden of proving a manifest injustice warranting the withdrawal of his 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. "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 any form of application reasonably available to him." *State v. McQueen*, 7th Dist. No. 08 MA 24, 2008-Ohio-6589, at ¶7. See also *Smith* at 264. Johnson argues that the trial court erroneously denied his motion for leave to withdraw guilty plea.

{¶9} A reviewing court will not disturb a trial court's decision to deny a motion to withdraw a guilty plea absent an abuse of discretion. *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715. An abuse of discretion is more than error of law or judgment; "it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144.

{¶10} In support of his argument, Johnson explains that his initial confession was

coerced and because of the influence of drugs, his trial counsel tricked him into thinking he had AIDS, and he was not informed of the elements of his charges or the repercussions to entering a guilty plea to charges not listed in the indictment. Johnson's arguments indicate that he is claiming his plea was not voluntary, knowing and intelligent.

{¶11} Johnson does not explain why he did not raise this issue in a direct appeal or any other proceeding during the almost three year span between his sentence and his motion to withdraw his guilty plea. Unlike a petition for post-conviction relief, a Crim.R. 32.1 motion may be filed at any time. *Bush* at ¶14. Although there is not a jurisdictional time limitation on a Crim.R. 32.1 motion, an "undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *State v. Smith* (1977), 49 Ohio St.2d 261, 3 O.O.3d 402, 361 N.E.2d 1324, paragraph three of the syllabus. Given the length of delay in Johnson's filing, he gives the strong impression that his motion to withdraw guilty plea stems from his displeasure at serving his sentence rather than the occurrence of any manifest injustice in his original proceedings.

{¶12} Additionally, the record of the proceedings below indicates that Johnson's plea was knowing, voluntary and intelligent, contrary to his claims. In order for a trial court to ensure that a defendant's plea is knowing, voluntary and intelligent, it must engage the defendant in a colloquy pursuant to Crim.R. 11(C). *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, at ¶25-26. During the colloquy, the trial court is to provide specific information to the defendant, including constitutional rights being waived (such as trial by jury and confrontation of witnesses) and non-constitutional information (such as nature of the charges and the maximum penalty involved) before the judge may accept the plea. Crim.R. 11(C)(2); *State v. Francis*, 104 Ohio St.3d 494, 2004-Ohio-6894, 820 N.E.2d 355.

{¶13} A trial court must strictly comply with Crim.R. 11 regarding constitutional rights, and must substantially comply regarding non-constitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. "Substantial compliance [with Crim.R. 11] means that under the totality of the circumstances the defendant subjectively

understands the implications of his plea and the rights he is waiving." *Id.*

{¶14} During his plea hearing, the trial court personally addressed Johnson, and ensured that he was not under the influence of any drugs and was otherwise competent to enter a plea. Johnson stated that he had read the trial court's Judicial Advice, completed the Defendant's Response to Court, and reviewed the elements of his offenses and ramifications of his plea with trial counsel. The trial court then engaged Johnson in a discussion of the rights Johnson was waiving with his plea, including the right to trial by jury, the right to compulsory process of witnesses, the right to confront witnesses against him, the right to refuse to testify, and the right to require the prosecutor to prove his guilt beyond a reasonable doubt. Thus, the record shows that the trial court strictly complied with Crim.R. 11 regarding Johnson's constitutional rights.

{¶15} The trial court further engaged Johnson in a discussion of the original charges against Johnson, the charges to which Johnson pleaded guilty, the elements of each charge, the possible range of sentences and financial penalties, and post-release control. During the trial court's frequent inquiries as to Johnson's understanding of the foregoing, Johnson stated that he understood and assented. Johnson's responses during colloquy indicate that he had a subjective understanding of the rights he was relinquishing, the meaning of the charges against him, and the ramifications of his plea. Thus, the record shows that the trial court substantially complied with Crim.R. 11 regarding Johnson's non-constitutional rights.

{¶16} The record demonstrates that the trial court made great efforts to ensure that Johnson's plea was voluntary, knowing and intelligent before providing him with the opportunity for allocution and imposing his sentence. There is no manifest injustice apparent in the proceedings leading up to Johnson's guilty plea. The trial court therefore did not abuse its discretion in denying Johnson's motion to withdraw his September 29, 2005 guilty plea. Johnson's first assignment of error is meritless.

Ineffective Assistance of Counsel

{¶17} In his second of three assignments of error, Johnson asserts:

{¶18} "Ineffective assistance of counsel."

{¶19} Johnson claims that his appointed attorneys were ineffective in their

representation, and caused his plea to be less than voluntary, knowing and intelligent. The entry of a guilty plea waives claims for ineffective assistance of counsel, except for the claim that the ineffective assistance caused the defendant's plea to be less than voluntary, knowing and intelligent. *State v. Buchanan*, 7th Dist. No. 05 MA 60, 2006-Ohio-5653, at ¶17. Thus, we must limit our review of this assignment of error accordingly.

{¶20} In order to prove that counsel was ineffective, a defendant must prove both of the following: first, that counsel's performance was deficient, and second that the result of the proceedings would have been different but for the deficient performance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. The appellant bears the burden of proving counsel's alleged ineffectiveness, as the law of Ohio presumes that a licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 1999-Ohio-102, 714 N.E.2d 905.

{¶21} Johnson claims that his attorneys misadvised him and misinformed him about his charges and the ramifications of pleading guilty. The credibility of Johnson's claim is undermined by his statement at his plea hearing that he was satisfied with counsel's representation, the unexplained delay in raising it, as well as the actions of counsel reflected in the record. Johnson stated during the plea colloquy with the trial court that prior to the hearing counsel reviewed with him the elements of the original charges and those he was pleading to, as well as the evidence the State had to present; the constitutional rights he would be waiving, and; the plea agreement and judicial advice. Thus, the record does not demonstrate that counsel's performance was deficient with respect to entering his guilty plea. Johnson therefore has not proven the first prong of *Strickland*.

{¶22} Additionally, even if trial counsel had misinformed Johnson, the trial court's colloquy with Johnson ensured that he attained a correct understanding about his charges and the ramifications of his plea. Even assuming arguendo that counsel was ineffective, nothing in the record indicates that the result of Johnson's plea hearing would have been different. Thus neither prong of *Strickland* has been met.

{¶23} Johnson did not demonstrate that he received ineffective assistance of counsel that would make his guilty plea less than voluntary, knowing and intelligent. The trial court's rejection of this argument was not an abuse of discretion, and Johnson's second assignment of error is meritless.

Defective Indictment

{¶24} In his third of three assignments of error, Johnson asserts:

{¶25} "Defective indictment."

{¶26} Johnson was indicted for two counts of Aggravated Murder. Following a plea agreement, Johnson pleaded guilty to one count of Murder and one count of Involuntary Manslaughter. Johnson argues that his indictment was defective because it did not list the charges to which he pleaded guilty.

{¶27} Because we concluded, *supra*, Johnson's plea was knowing, voluntary and intelligent, his guilty plea "constituted a waiver of his constitutional right to indictment or information." *Stacy v. Van Coren* (1969), 18 Ohio St.2d 188, 189, 47 O.O.2d 397, 248 N.E.2d 603. As he is thus precluded from raising this alleged error on appeal, Johnson's third assignment of error is meritless.

{¶28} Johnson had the benefit of the effective assistance of counsel when entering a guilty plea which was knowingly, voluntarily and intelligently given. Because the trial court's denial of Johnson's post-sentence motion for plea withdrawal was not an abuse of discretion, the judgment of the trial court is affirmed.

Vukovich, P.J., concurs

Waite, J., concurs.