

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 09AP-435
Plaintiff-Appellee,	:	(C.P.C. No. 06CR02-1147)
	:	and
v.	:	No. 09AP-436
	:	(C.P.C. No. 06CR11-8567)
Robert Barbour, Jr.,	:	
	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 3, 2009

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Robert Barbour, Jr., pro se.

APPEALS from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Robert Barbour, Jr., appeals from judgments of the Franklin County Court of Common Pleas denying his motions to withdraw guilty pleas in these consolidated cases. Because the trial court did not abuse its discretion, we affirm.

{¶2} On February 13, 2006, a Franklin County Grand Jury indicted appellant in case No. 06CR02-1147 (hereinafter "the February case") with nine counts of aggravated robbery, robbery, kidnapping, and having a weapon while under disability. Appellant entered not guilty pleas to those charges. On August 18, 2006, appellant withdrew his

not guilty pleas and entered guilty pleas to two counts of robbery. The trial court accepted appellant's guilty pleas and found him guilty. The trial court delayed sentencing for the preparation of a presentence investigation. Appellant was released on recognizance bond pending sentencing.

{¶3} On November 16, 2006, another Franklin County Grand Jury indicted appellant in case No. 06CR11-8567 (hereinafter "the November case") with ten counts of aggravated robbery, robbery, aggravated burglary, kidnapping, and having a weapon while under disability. Appellant committed these offenses while he was awaiting sentencing in the February case. Appellant entered not guilty pleas to those charges.

{¶4} On December 12, 2006, appellant withdrew his not guilty pleas and entered guilty pleas to one count of aggravated robbery and aggravated burglary as well as attendant firearm specifications to each count. The trial court accepted appellant's guilty pleas and found him guilty. On the same day, the trial court sentenced appellant in both cases. In the February case, the trial court sentenced appellant to two years in prison for each count, to be served concurrently to each other but consecutively to the sentences imposed in the November case. In the November case, the trial court sentenced appellant to five years in prison for each count and three years for the firearm specification, to be served consecutively. Therefore, appellant received two years in the February case, consecutive to 13 years in the November case. On appeal, this court affirmed appellant's guilty pleas in the November case. *State v. Barbour*, 10th Dist. No. 07AP-11, 2007-Ohio-4416.

{¶5} On February 19, 2009, more than two years after his sentencing, appellant filed a motion to withdraw his guilty pleas pursuant to Crim.R. 32.1. In that motion, he

alleged that he pled guilty in the November case because his trial counsel promised him he would only receive six years in prison. Appellant claimed that the promise was made on the evening of December 11, 2006, after he was in court for a change of plea hearing but requested more time to consider his options.¹ The next day, appellant entered his guilty pleas. The trial court denied appellant's motion.

{¶6} Appellant appeals and assigns the following errors:

[1.] APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT.

[2.] THE TRIAL COURT ABUSED ITS DISCRETION WHEN DENYING APPELLANT[']S MOTION TO WITHDRAW HIS GUILTY PLEA.

{¶7} Appellant's assignments of error both address the trial court's denial of his motion to withdraw guilty pleas in the November case. Accordingly, we address them together.

{¶8} Crim.R. 32.1 permits a motion to withdraw a guilty plea "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." Because appellant's motion to withdraw his guilty pleas was filed after sentence was imposed, he must demonstrate manifest injustice. "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶5. A defendant seeking to withdraw a guilty plea post-sentence bears the burden of establishing manifest injustice based on specific facts

¹ Because the alleged promise was four months after he entered his guilty pleas in the February case, the promise could not be a basis to withdraw appellant's guilty plea in that case. Thus, it appears that this appeal concerns only the November case.

either contained in the record or supplied through affidavits attached to the motion. *State v. Orris*, 10th Dist. No. 07AP-390, 2007-Ohio-6499, ¶8; *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. Ineffective assistance of counsel can constitute manifest injustice sufficient to allow the post-sentence withdrawal of a guilty plea. *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813, ¶18, citing *State v. Lake* (Mar. 28, 1996), 10th Dist. No. 95APA07-847.

{¶9} The good faith, credibility, and weight to be given to assertions made by a defendant in support of a motion to withdraw a guilty plea are matters to be resolved by the trial court. *Smith* at 264; *State v. Smith*, 10th Dist. No. 07AP-985, 2008-Ohio-2802, ¶10. Generally, a self-serving affidavit made by the moving party is not sufficient to demonstrate manifest injustice. *Id.*; *State v. Moncrief*, 10th Dist. No. 08AP-153, 2008-Ohio-4594, ¶13. In addition, "[a]n 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*, 49 Ohio St. 2d 261, paragraph three of the syllabus.

{¶10} A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court. *Id.* at paragraph two of the syllabus. Therefore, this court's review of a trial court's denial of a post-sentence motion to withdraw a guilty plea is limited to a determination of whether the trial court abused its discretion. *State v. Peterseim* (1980), 68 Ohio App.2d 211. "Absent an abuse of discretion on the part of the trial court in making the ruling, its decision must be affirmed." *State v. Xie* (1992), 62 Ohio St.3d 521, 527. An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Widder*, 146 Ohio App.3d 445, 2001-Ohio-1521, ¶6.

{¶11} Appellant contends that he pled guilty in the November case because his trial counsel erroneously advised him that he would receive a six-year prison sentence. The only evidence in support of that claim is appellant's own affidavit. Such a self-serving affidavit, especially in light of the delay between his sentence and the filing of his motion to withdraw, is insufficient to demonstrate manifest injustice.

{¶12} Further, the record refutes the notion that appellant was promised a six-year prison sentence in the November case. In the "Entry of Guilty Plea" form appellant signed on December 12, 2006, appellant acknowledged that "no person has threatened me, promised me leniency, or in any other way coerced or induced me to plead 'Guilty.'" Appellant also acknowledged in that form that he could receive up to ten years for each count to which he pled guilty and that he would receive an additional mandatory three years for the firearm specification.

{¶13} Moreover, the trial court informed appellant at his sentencing hearing that he could receive up to 23 years as a result of his guilty pleas in the November case. Appellant told the trial court that he understood the potential prison sentences. Also, trial counsel acknowledged that appellant was "not looking at short sentences here" and that he told appellant "that it's going to be quite a number of years that he is going to spend [in prison]." (December 12, 2006 Tr. at 17, 18). Trial counsel also acknowledged that appellant's family, with whom appellant had many discussions before entering his guilty plea, understood that these convictions carried a long prison term. (December 12, 2006 Tr. at 17).

{¶14} For these reasons, appellant has failed to demonstrate manifest injustice. Accordingly, the trial court did not abuse its discretion by denying appellant's motion to

withdraw his guilty pleas. Appellant's two assignments of error are overruled, and we affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

FRENCH, P.J., and BRYANT, J., concur.
