[Cite as *State v. Javornicky*, 2024-Ohio-2567.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MICHAEL J. JAVORNICKY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 MA 0102

Criminal Appeal from the
Mahoning County Court #4 of Mahoning County, Ohio
Case No. 2004 CR B 00252 AUS

BEFORE:
Carol Ann Robb, Mark A. Hanni, Katelyn Dickey, Judges

JUDGMENT:
Affirmed.

Atty. Gina DeGenova, Mahoning County Prosecutor*, Atty. Ralph M. Rivera,* Chief Criminal Division, *Atty. Edward A. Czopur,* Assistant Prosecutor*, Atty. Anthony Carbone,* Assistant Prosecutor, Mahoning County Prosecutor's Office, for Plaintiff-Appellee and

Atty. Michael A. Partlow, for Defendant-Appellant.

Dated: July 1, 2024

Robb, P.J.

{¶1} Defendant-Appellant Michael J. Javornicky appeals the decision of Mahoning County Court No. 4 denying his motion to withdraw a misdemeanor guilty plea entered 19 years earlier. He contends his plea was not entered knowingly and voluntarily, resulting in a manifest injustice. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} In April 2004, Appellant was charged with domestic violence, a first-degree misdemeanor in violation of R.C. 2919.25(A). Trial was initially set for July 29, 2004. Appellant's original attorney moved for a continuance two days before trial, and the trial was reset for August 19, 2004. A week before this date, a different attorney moved for a continuance. Counsel said he was recently retained, had not yet received the file from prior counsel, and needed adequate time to prepare a defense. (8/12/04 and 8/13/04 Motions; 8/16/04 Amended Motion). The trial court issued an order denying the motion and stating the case would be handled as a pretrial "on this date." (8/16/04 J.E.).

{¶3} On August 19, 2004, Appellant appeared before the court and entered a guilty plea. The judgment entry memorializing the plea agreement was signed by Appellant, his attorney, the prosecutor, the victim, and the judge. (8/19/04 J.E.). In this entry, Appellant was sentenced to 90 days in jail suspended upon the completion of 12 months of reporting probation with anger management classes and no contact with the victim during the period of probation. He was also fined $100. In addition, the entry disclosed the imposition of a "firearms disability." No appeal was taken.

{¶4} Over thirteen years later, Appellant filed an application to seal his records with the assistance of a different attorney. (12/4/17 Motion). On the day of the expungement hearing, Appellant withdrew his motion. (3/19/18 J.E.).

{¶5} On July 20, 2023, nearly nineteen years after his guilty plea and sentence, Appellant filed a motion to withdraw his guilty plea with the assistance of his current counsel. The motion referred to an inability to meet with his first attorney, the denial of his second attorney's motion to continue, this attorney's inadequate time to prepare for trial, Appellant's belief the misdemeanor would eventually have no lasting effect on his life, and his resulting decision to enter a guilty plea, which he said was made under duress

and thus not knowingly or voluntarily entered. Appellant's affidavit was attached to the motion reiterating some of these contentions and stating it was not explained to him that a domestic violence conviction would permanently impact his right to own firearms.

{¶6} The court granted a hearing on the plea withdrawal motion. Appellant appeared with counsel and testified. He said his original attorney did not communicate with him sufficiently and canceled many appointments. (Tr. 6). He decided to hire a new attorney "about a week" before his scheduled trial date. (Tr. 7). According to Appellant, replacement counsel informed him that he intended to go to trial as scheduled but would seek a continuance. (Tr. 7-8). Appellant claimed when he appeared for the scheduled trial, his attorney had not prepared a defense, subpoenaed witnesses, or received his original attorney's file. (Tr. 9, 21).

{¶7} At the plea withdrawal hearing, the prosecutor asked Appellant about the discovery evidence his replacement attorney reviewed, including the victim's written statement, hospital records, and police reports with observations. Appellant said counsel did not review them in his presence. (Tr. 18-19, 21). Appellant acknowledged that after meeting with the assistant prosecutor (the same one appearing for the state at the plea withdrawal hearing), defense counsel advised Appellant that he did not have a "viable defense" (which he also said in his affidavit). (Tr. 13, 19). Appellant testified counsel opined Appellant should accept the plea deal to avoid going to jail that day. (Tr. 9).

{¶8} Appellant later came to believe this was bad advice, saying he had witnesses he wanted to subpoena to show he did not commit domestic violence or "put [the victim] in the hospital." (Tr. 13, 17-19). Appellant did not reveal what witnesses he believed should have been subpoenaed (and the victim was present during the plea proceedings). Appellant also claimed counsel merely had him sign the plea form without going over this half-page judgment entry with him. (Tr. 14-16). The attorney who signed the form with Appellant died five or six years before Appellant's plea withdrawal motion. (Tr. 12-13).

{¶9} In discussing the collateral consequences of the conviction after completing his probation, Appellant indicated he transferred to a factory in Indiana after the local branch closed because he lacked other job opportunities due to this 2004 misdemeanor domestic violence conviction. In addition, he said he was unable to purchase a firearm due to the conviction. (Tr. 10). He acknowledged being aware of these collateral issues

during his 2017-2018 expungement proceedings during which he learned the conviction was statutorily prohibited from being expunged. (Tr. 11-12).

{¶10} In closing, Appellant's attorney pointed out that compliance with Crim.R. 11 by the court at a plea hearing will not foreclose a plea withdrawal motion where the plea was nevertheless involuntarily entered. The defense cited an Eighth District case reversing a plea where issues with counsel forced a defendant to take a plea on the day of trial.

{¶11} In response, the prosecutor suggested the court's August 16, 2004 denial of the motion to continue was based on the trial date requested by counsel (the length of the requested continuance). It was urged the language in the entry stating a pretrial would proceed on the pertinent date meant the court partially granted the motion by changing the trial date to a pretrial. It was thus argued the date Appellant entered his plea was not a "win-all take-all date" for which counsel should have been fully trial-prepared as claimed by Appellant's motion.

{¶12} Additionally, the prosecutor opined defense counsel did "more than an adequate job based on the evidence that he was faced with" and the fact the plea offer likely would have been withdrawn if not accepted on that date. In arguing there was no manifest injustice here, the state pointed out defense counsel was no longer alive to explain his advice or preparedness. Emphasis was also placed on the number of years that had passed since the plea and since the attempted expungement, mentioning the difficulties in finding or eliciting memories from witnesses (and noting the sergeant who handled the case had been retired for 10 years).

{¶13} The trial court denied Appellant's motion to withdraw the plea. (8/28/23 J.E.). Appellant filed a timely notice of appeal.

ASSIGNMENT OF ERROR

{¶14} Appellant's sole assignment of error provides:

"THE TRIAL COURT ERRED [IN DENYING APPELLANT'S] MOTION TO WITHDRAW HIS GUILTY PLEA."

{¶15} "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. A post-sentence plea withdrawal motion is warranted "only in extraordinary

cases." *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). The defendant must show withdrawal is "necessary" to correct manifest injustice. *State v. Stumpf*, 32 Ohio St.3d 95, 104, 512 N.E.2d 598 (1987). Accordingly, the "defendant seeking to withdraw a plea of guilty after sentence has the burden of establishing the existence of manifest injustice." *Smith*, 49 Ohio St.2d at 264.

{¶16} The denial of a post-sentence plea withdrawal motion is reviewed under an abuse of discretion standard of review. *State v. Straley*, 159 Ohio St.3d 82, 2019-Ohio-5206, 147 N.E.3d 623, ¶ 15. In evaluating whether a court abused its discretion, we consider whether the trial court's ruling was unreasonable, arbitrary, or unconscionable. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). "The motion is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *Smith*, 49 Ohio St.2d at 264. "[U]ndue 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." *Id.* at paragraph three of the syllabus.

{¶17} Furthermore, when "seeking to invalidate a guilty plea based on ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and he was prejudiced by the deficiency, i.e., a reasonable probability that he would not have agreed to plead guilty but for counsel's deficiency." *State v. Helms*, 7th Dist. Mahoning No. 14 MA 96, 2015-Ohio-1708, ¶ 11, citing, *e.g., State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992) (a presentence motion case). The Sixth Amendment right to counsel does not guarantee a "meaningful relationship" with counsel. *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). A client's evaluation of counsel's advice is not the standard for effective assistance, and "even when there is a bona fide defense, counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances." *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), fn. 19, 21.

{¶18} Appellant complains about his need to replace his original counsel with a new attorney soon before trial and about the failure to grant a continuance when his new attorney was allegedly not prepared to proceed on the day of the scheduled trial. He says this left him with no choice but to plead guilty under duress after his attorney opined he

would go to jail that day in the absence of the plea agreement. Appellant cites to the conviction's collateral impacts on his life, especially his inability to own firearms. Appellant concludes the record shows his plea "was not made on a knowing and voluntary basis and manifest injustice has occurred."

{¶19} Appellant cites an Eighth District case where the prosecutor disclosed he had been unable to reach defense counsel to provide her with a new piece of evidence before the misdemeanor trial and defense counsel sent another attorney to the scheduled trial to seek a continuance; the substitute attorney had not prepared for trial or consulted with the defendant. *Cleveland v. Wells*, 8th Dist. Cuyahoga No. 111494, 2023-Ohio-1666. After the trial court denied the continuance, the defendant pled guilty. On direct appeal, the defendant urged the plea was involuntary, and the city conceded the court should not have proceeded in the absence of representation by counsel. *Id.* at ¶ 8-9. Under the totality of the circumstances, the appellate court agreed, vacated the conviction, and remanded for further proceedings. *Id.* at ¶ 16.

{¶20} This case is distinguishable. Contrary to Appellant's situation of entering a plea in the presence of the attorney he hired, the attorney for Wells did not appear for trial at all or assist him with the plea. Moroever, as Appellant acknowledges, *Wells* was a timely direct appeal rather than a long-delayed post-sentence plea withdrawal case. As emphasized by the state, Appellant pled guilty and was sentenced in 2004, nineteen years before filing his plea withdrawal motion. In addition, he filed an expungement motion in 2017, which he withdrew in 2018 with knowledge of the collateral consequences of his domestic violence conviction. Yet, he waited another five years to file the motion to withdraw a guilty plea. The state understandably cites the loss of memories over the nineteen-year period between the plea and the motion and the difficulty in locating witnesses if a trial were required due to plea withdrawal.

{¶21} At the post-sentence plea withdrawal hearing, the trial court heard Appellant claim he did not commit domestic violence and heard him claim his counsel was not prepared for trial. The trial court was not required to believe Appellant's theories or contentions. Appellant's good faith and credibility were matters for the trial court, who could evaluate his demeanor, voice inflection, gestures, and other indicators of untruthfulness. *See Smith*, 49 Ohio St.2d at 264; *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984); *State v. DeHass*, 10 Ohio St.2d 230, 227

N.E.2d 212 (1967). There was no indication Appellant's counsel failed to view the state's evidence before advising Appellant to plead guilty. Appellant acknowledges his attorney opined there was no viable defense to the charge and a plea would help him avoid jail time. Under the circumstances, counsel's advice could be viewed as sound.

{¶22} Additionally, Appellant's suggestion that he did not review the plea form prior to signing it lacks credibility. Notably, the plea agreement, which is a brief half-page judgment entry, specifically imposes a firearm disability. This fact along with the inordinate nineteen-year delay in seeking plea withdrawal further demonstrate the lack of a manifest injustice in this case. The trial court did not abuse its discretion in denying the motion to withdraw Appellant's guilty plea.

{¶23} As the state further points out, any issues that could have been raised on direct appeal are barred by the doctrine of res judicata. Specifically, res judicata bars a defendant from raising claims in a post-sentence motion to withdraw a guilty plea that could have been raised in a direct appeal from the conviction. *Straley*, 159 Ohio St.3d 82 at ¶ 15. *See also State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59-60. Appellant could have appealed his conviction to contest the voluntariness of the plea on grounds the trial court denied a continuance despite counsel being newly retained. And, the issue of whether he was advised about the firearm disability at the plea hearing could have been addressed in a direct appeal, at which time the plea transcript and any pretrial motion hearings would have been readily available for transcription.

{¶24} For the foregoing reasons, Appellant's assignment of error is without merit, and the trial court's judgment is affirmed.

Hanni, J., concurs.

Dickey, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is without merit and it is the final judgment and order of this Court that the judgment of the Mahoning County Court #4 of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.