

[Cite as *State v. Taylor*, 2017-Ohio-8913.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

V.

DESMOND TAYLOR

Defendant-Appellant

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Appellate Case No. 27542

Trial Court Case No. 2004-CR-2771

(Criminal Appeal from
Common Pleas Court)

OPINION

Rendered on the 8th day of December, 2017.

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Defendant-Appellant-Pro Se

WELBAUM, J.

{¶ 1} In this case, Defendant-Appellant, Desmond Taylor, appeals pro se from a decision of the trial court overruling his post-sentence motion to withdraw a guilty plea. In a single assignment of error, Taylor contends that the trial court erred in refusing to let him set aside the guilty plea. We conclude that the trial court did not abuse its discretion in overruling Taylor's motion, because Taylor failed to establish manifest injustice, as is required by Crim.R. 32.1. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Course of Proceedings

{¶ 2} On August 11, 2004, an indictment was filed, accusing Taylor of the following offenses: (1) the murder of Sharice Allen, as a proximate result of committing or attempting to commit felonious assault; (2) felonious assault (serious harm) of Allen; and (3) felonious assault (deadly weapon) of Allen. These offenses allegedly occurred on August 1, 2004, and the indictment was filed to initiate Case No. 2004 CR 02771 in Montgomery County Common Pleas Court.

{¶ 3} Previously, on June 21, 2004, an indictment had been filed accusing Taylor of the felonious assault of April Turner. This indictment was filed to initiate Case No. 2004 CR 01799 in Montgomery County Common Pleas Court.

{¶ 4} The case before us involves the charges in Case No. 2004 CR 02771. In that case, trial counsel entered an appearance on Taylor's behalf, and Taylor pled not guilty to the charges. Ultimately, Taylor pled guilty to all the charges in the indictment, and the trial court sentenced him on August 4, 2005, to fifteen years to life on the murder charge, and to five years on each of the other two charges. These sentences were to

be served concurrently with each other and to the sentence imposed in Case No. 2004 CR 01799. The termination entry indicated that Taylor was to serve five years of post-release control for the felonious assault charges.

{¶ 5} Taylor did not appeal from his conviction and sentence. However, on October 3, 2006, Taylor filed a motion to withdraw his guilty pleas pursuant to Crim.R. 32.1. According to Taylor, the trial court had originally misinformed him of his potential sentence if he were convicted of all three charges, when a lesser potential sentence applied due to merger of the felonious assault charges with the murder charge. After the trial court overruled the motion to withdraw the guilty plea, Taylor appealed to our court. See *State v. Taylor*, 2d Dist. Montgomery No. 21947, 2008-Ohio-432, ¶ 2-3.

{¶ 6} Upon considering the matter, we concluded that the trial court originally had properly advised Taylor of the sentence he faced, and that Taylor “failed to demonstrate that he was the victim of a manifest injustice.” *Id.* at ¶ 12. We, therefore, affirmed the judgment overruling the motion to withdraw the plea. *Id.*

{¶ 7} Subsequently, on December 18, 2013, Taylor filed pro se motions to withdraw his guilty pleas in both cases, i.e., Case Nos. 2004 CR 02771 and 2004 CR 01799. See *State v. Taylor*, 2d Dist. Montgomery No. 26500, 2015-Ohio-3510, ¶ 4. This time, Taylor alleged that the trial court had violated his due process rights by failing to make sure that he understood the nature of the charges before accepting the guilty pleas. *Id.* In addition, Taylor argued that his sentence was void because the court failed to tell him that he was subject to mandatory post-release control for the felonious assault charges. *Id.*

{¶ 8} Regarding the due process argument, the trial court held that Taylor had

been fully advised of the nature of his charges. *Id.* at ¶ 5. The court noted that Taylor waited almost nine years after entering the plea to file the motion, and concluded that Taylor should have included these arguments “in his first post-sentencing motion and/or direct appeal * * *.” *Id.*

{¶ 9} Concerning post-release control, the trial court agreed that it had erred in imposing five years of post-release control rather than three years. However, because Taylor had already served the time imposed for the felonious assault convictions, the court found that it could not alter his sentence. The court did order, nunc pro tunc, that Taylor would not be required to serve any post-release control for the assault convictions. *Id.* at ¶ 6.

{¶ 10} On appeal, we concluded that the trial court did not abuse its discretion in overruling the motion to withdraw the guilty pleas because Taylor failed to demonstrate that a manifest injustice had occurred. *Taylor*, 2d Dist. Montgomery No. 26500, 2015-Ohio-3510, at ¶ 14. We agreed that the only remedy for the trial court’s error was to vacate the part of the sentence imposing post-release control. *Id.* at ¶ 13. Taylor did not raise, and we did not specifically address, Taylor’s argument in the trial court about his awareness of the nature of the charges. However, we did state that the trial court had “thoroughly reviewed the plea colloquy that took place on July 11, 2005 and [the trial court] determined that ‘the record shows that the State and the Court detailed the nature of the charges several times during the plea hearing.’ ” *Id.* at ¶ 5. We further observed that the trial court “concluded that ‘it is clear on the record that Defendant was properly informed as to the nature of the charges against him before entering his guilty pleas.’ ” *Id.*

{¶ 11} Taylor appealed our decision to the Supreme Court of Ohio, but the court declined to accept his appeal for review. See *State v. Taylor*, 145 Ohio St.3d 1422, 2016-Ohio-1173, 47 N.E.3d 166.

{¶ 12} Several months after the Supreme Court of Ohio rejected his appeal, Taylor filed another motion in the trial court. This motion asked the court to vacate Taylor's judgment of conviction and sentence as contrary to statute and void ab initio. Taylor also asked for an evidentiary hearing and findings of fact and conclusions of law.

{¶ 13} As before, Taylor argued that felonious assault and murder are allied offenses and should have been merged for sentencing. The trial court overruled this motion on January 6, 2017. Taylor did not appeal from the trial court's judgment.

{¶ 14} Subsequently, on January 31, 2017, Taylor filed a third motion to withdraw his guilty plea pursuant to Crim.R. 32.1. This time, his motion was based on alleged ineffective assistance of counsel in connection with the plea bargain, and was supported by affidavits from two people. Taylor's mother, Kathy Griffith, stated that Taylor's attorney had told her that Taylor was going to receive a sentence of 15 years for involuntary manslaughter in the murder case and a sentence of five years for felonious assault on the other case (Case No. 2004 CR 01799, involving the alleged assault on April Turner). According to Griffith, she convinced Taylor to plead guilty, thinking that his sentence would be 15 years in prison, rather than 15 years to life.

{¶ 15} Another individual, Kisun Taylor, stated that Taylor's attorney told her and Griffith that Taylor was going to receive 15 years in prison – 10 years for involuntary manslaughter, and five years for felonious assault, for a total of 15 years in prison, not 15 years to life. As a result, Kisun Taylor convinced Taylor to plead guilty, thinking his

sentence would be 15 years.

{¶ 16} The State did not respond to the motion to withdraw the guilty plea. On March 16, 2017, the trial court overruled Taylor's motion. The court concluded, based on the two prior motions to withdraw the plea, that the current motion was barred by res judicata. In addition, the court found that Taylor had failed, again, to demonstrate manifest injustice. Taylor timely appealed from the trial court's decision.

II. Alleged Ineffective Assistance of Counsel

{¶ 17} Although Taylor's brief discusses one assignment of error, he did not specify the content of his assignment of error. We agree with the State that Taylor's assignment of error is properly construed as follows:

The Trial Court Erred in Denying Taylor's Post-Sentence Motion to Withdraw His Guilty Plea.

{¶ 18} Under this assignment of error, Taylor contends that he had a constitutional right to effective assistance during plea bargaining, that he is entitled to rely on forms of prejudice other than deprivation of a fair trial, and that he was prejudiced by receiving a longer sentence than would have been imposed absent his attorney's deficient performance.

{¶ 19} In connection with withdrawal of guilty pleas, Crim.R. 32.1 provides that:

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.

{¶ 20} Defendants who file post-sentence motions to withdraw pleas have “the burden of establishing the existence of manifest injustice.” *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. “The Ohio Supreme Court has defined a manifest injustice as a clear or openly unjust act.” *State v. Stewart*, 2d Dist. Greene No. 2003-CA-28, 2004-Ohio-3574, ¶ 6, citing *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1983). We have also described manifest injustice as “ ‘a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her.’ ” *State v. Wilson*, 2d Dist. Montgomery No. 26354, 2015-Ohio-1584, ¶ 16, quoting *State v. Brooks*, 2d Dist. Montgomery No. 23385, 2010–Ohio–1682, ¶ 8. (Other citation omitted.) Consequently, post-sentence withdrawal motions are permitted “only in extraordinary cases.” (Citation omitted.). *Smith* at 264.

{¶ 21} We agree with Taylor that manifest injustice sufficient to allow post-sentence withdrawal of guilty pleas may be established by ineffective assistance of counsel. See, e.g., *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813, 793 N.E.2d 509, ¶ 18 (10th Dist.); *State v. Banks*, 2d Dist. Montgomery No. 25188, 2013-Ohio-2116, ¶ 9; *State v. Nawman*, 2d Dist. Clark No. 2016-CA-43, 2017-Ohio-7344, ¶ 12; and *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992) (*Xie* considered ineffective assistance of counsel and motion to withdraw plea prior to sentencing).

{¶ 22} Ineffective assistance of counsel is shown when “(1) trial counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the defendant would not have entered a plea.” *Wilson* at ¶ 17, citing *State v.*

Jordan, 12th Dist. Warren No. CA2014-04-051, 2015-Ohio-575, ¶ 12, and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 23} Trial courts have sound discretion over motions to withdraw pleas, and they assess the “good faith, credibility and weight of the movant's assertions in support of the motion * * *.” *Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324, at paragraph two of the syllabus. We, therefore, review for abuse of discretion, which requires us to find that the trial court's attitude was “unreasonable, arbitrary or unconscionable.” (Citations omitted.) *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). Furthermore, “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.” *Smith* at paragraph three of the syllabus.

{¶ 24} In the case before us, the trial court concluded that Taylor failed to establish manifest injustice, but did not make specific factual findings other than commenting, as it had before in response to Taylor's motions to withdraw, that Taylor was properly advised of the nature of the charges. Our review of the record indicates that the trial court did not abuse its discretion in finding that Taylor failed to establish manifest injustice.

{¶ 25} Notably, Taylor did not file an affidavit supporting his motion to withdraw. His motion, however, claimed that the existence of a favorable plea bargain had been brought to his attention. Doc. #10, p. 2. One might infer from this statement that Taylor had only learned recently (more than 11 years after the guilty plea) of the alleged plea bargain. However, this assertion is belied by the affidavit of Taylor's mother, who stated that she convinced Taylor to plead guilty in 2005, based on the representation of Taylor's

attorney that Taylor would be sentenced to a maximum of 15 years in prison, rather than 15 years to life, for a plea to involuntary manslaughter. Taylor could not have been “convinced” to enter a plea in July 2005 if he were unaware of these facts.

{¶ 26} Furthermore, when Taylor pled to all the charges in the indictment, including murder, in July 2005, and was sentenced on those charges in August 2005, Taylor would have been aware that he was being sentenced for murder, not involuntary manslaughter, and that his sentence was 15 years to life, rather than a total of 15 years. To credit the affidavits that were submitted would require the trial court to believe that Taylor had not spoken with his mother in more than 11 years – a fact that defies belief. However, even if this were potentially true, a lack of communication for nearly 11 years was not mentioned in either affidavit filed in support of Taylor’s motion. Taylor, therefore, provided no reason for the undue delay in filing his motion. Accordingly, the trial court correctly concluded that Taylor failed to establish manifest injustice.

{¶ 27} The trial court also held that res judicata precluded Taylor’s motion to withdraw the guilty plea. We have held that “ ‘if a Crim.R. 32.1 motion asserts grounds for relief that were or should have been asserted in a previous Crim.R. 32.1 motion, res judicata applies and the second Crim.R. 32.1 motion will be denied.’ ” *State v. Fannon*, 2d Dist. Montgomery No. 25957, 2014-Ohio-2673, ¶ 11, quoting *State v. Brown*, 8th Dist. Cuyahoga No. 84322, 2004-Ohio-6421, ¶ 7. (Other citations omitted.) We also noted in *Fannon* that “ ‘res judicata applies to the second and all successive postsentence motions to withdraw a plea under Crim.R. 32.1, whether the original motion is properly labeled as a Crim.R. 32.1 motion or not.’ ” *Id.*, quoting *State v. Burnside*, 7th Dist. Mahoning No. 09 MA 179, 2010-Ohio-3158, ¶ 5. In view of the above discussion, the

motion to withdraw the guilty plea could not be re-litigated, based on the two prior motions to withdraw, during which Taylor could have asserted the alleged ineffective assistance of his trial counsel

{¶ 28} Accordingly, Taylor's sole assignment of error is overruled.

III. Conclusion

{¶ 29} Taylor's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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DONOVAN, J. and TUCKER, J., concur.

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