[Cite as *State v. Jones*, 2019-Ohio-4355.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

Nos. 108073 and 108089

v. :

LEE JONES, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 24, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-07-504454-A and CR-08-514849-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Jennifer Meyer, Assistant Prosecuting Attorney, *for appellee*.

Lee Jones, *pro se*.

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Lee Jones, appeals pro se from the trial court's decision denying his Crim.R. 32.1 postsentence motion to withdraw his guilty pleas in Cuyahoga C.P. Nos. CR-07-504454-A and CR-08-514849-A. He raises the following assignments of error for review:

1. Trial court abused its discretion when it denied Jones's postsentence motion to withdraw his guilty plea in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

2. Trial court erred when it denied Jones's postsentence motion to withdraw his guilty plea without a hearing where Jones presented sufficient operative facts to support aforementioned motion.

{¶ 2} After careful review of the record and relevant case law, we affirm the trial court's judgment denying Jones's motion to withdraw his guilty pleas, because Jones has failed to meet his burden of demonstrating the existence of a manifest injustice.

I. Procedural and Factual History

{¶ 3} In December 2007, Jones was named in a five-count indictment in Cuyahoga C.P. No. CR-07-504454-A. He was charged with kidnapping in violation of R.C. 2905.01(A)(2), with one- and three-year firearm specifications; rape in violation of R.C. 2907.02(A)(2), with one- and three-year firearm specifications; kidnapping in violation of R.C. 2905.01(A)(2), with a sexual motivation specification and sexually violent predator specifications; rape in violation of R.C. 2907.02(A)(2), with a sexually violent predator specification and one- and three-year firearm specifications; and rape in violation of R.C. 2907.02(A)(2), with a sexually violent predator specification and one- and three-year firearm specifications.

{¶ 4} In August 2008, Jones was named in a five-count indictment in Cuyahoga C.P. No. CR-08-514849-A. He was charged with rape in violation of R.C. 2907.02(A)(2); felonious assault in violation of R.C. 2903.11(A)(1); felonious assault in violation of R.C. 2903.11(A)(2); kidnapping in violation of R.C. 2905.01(A)(4),

with a sexual motivation specification; and aggravated burglary in violation of R.C. 2911.11(A)(1).

{¶ 5} In November 2008, the trial court held a consolidated plea hearing. Following an extensive Crim.R. 11 colloquy, Jones pleaded guilty in Case No. CR-07-504454-A to kidnapping, as amended in Count 1; rape, as amended in Count 2; kidnapping, as amended in Count 3; and rape as amended in Count 4. As part of the plea agreement, the specifications attached to Counts 1-4 were deleted. The remaining count was nolled. In Case No. CR-08-514849-A, Jones pleaded guilty to rape and felonious assault as charged in Counts 1 and 2 of the indictment. The remaining counts were nolled.

{¶ 6} In December 2008, Jones was sentenced to a 20-year prison term in Case No. CR-07-504454-A. Jones was further sentenced to a 10-year prison term in Case No. CR-08-514849-A. The sentences imposed in each case were ordered to run consecutively to each other, and consecutive to a 10-year prison term imposed in an unrelated case. Accordingly, the trial court imposed a total prison sentence of 40 years.

{¶ 7} Jones did not file a direct appeal in either case. However, in November 2018, nearly ten years after sentencing, Jones filed a consolidated motion to withdraw his guilty pleas pursuant to Crim.R. 32.1. In his motion to withdraw, Jones argued that his convictions in Case Nos. CR-07-504454-A and CR-08-514849-A must be vacated because he "was deprived of effective assistance of counsel prior to entering his plea, thereby, [his] plea was not knowingly, intelligently

entered." Referencing his "mental handicap" and "learning disability," Jones suggested that trial counsel coerced his guilty plea by inaccurately advising him that he "would receive an aggregate sentence of 2 to 3 years of probation for [C.P. Nos. CR-07-504454-A and CR-08-514849-A]." Jones further maintained that "trial counsel never investigated any possible defenses, nor contacted any potential witnesses for the defense, but counsel allowed Jones to enter a guilty plea, despite Jones telling his attorney that he wanted to take the aforementioned case to trial."

{¶ 8} In support of his claims, Jones submitted affidavits from himself; his mother, Carrie Jones ("Carrie"); and his brother, Freddie Jones ("Freddie"). Collectively, the affidavits alleged that (1) trial counsel privately led Jones, Carrie, and Freddie to believe Jones would be sentenced "to 2-3 years of probation for his 2007 and 2008 cases"; (2) Jones is "mentally challenged"; and (3) Jones wished to proceed with a trial, but pleaded guilty due to trial counsel's "false promises."

{¶ 9} In December 2018, the trial court denied the motion to withdraw without a hearing. The court stated, in relevant part:

> As defendant's motion was not made until ten years after sentencing, the court finds that this motion is not timely. Defendant has not presented any evidence to demonstrate that he was unable to learn of any factual basis for his claims. The court finds that case law cited by defendant is not applicable to the circumstances herein, inasmuch as a hearing is not required as to a motion made after sentencing.
>
> Contrary to claims asserted in affidavits in support of defendant's motion, there was no claim made and there is no evidence presented as to defendant being mentally challenged or having a learning disability. Furthermore, defendant was advised on the record at the time of his plea that probation was not possible in either case. Additionally,

> defendant was assisted at all times by retained counsel and was so advised. Defendant's competency/sanity examination finds a history of psychotic disorder, "in remission" and "mild mental retardation," which were not found to render defendant not competent.

{¶ 10} Jones now appeals from the trial court's judgment.

II. Law and Analysis

{¶ 11} Collectively, Jones argues in his first and second assignments of error that the trial court abused its discretion by denying his postsentence motion to withdraw his guilty plea without holding an evidentiary hearing. We address his assignments of error together.

{¶ 12} Crim.R. 32.1 governs motions to withdraw previously entered guilty pleas.

> Under Crim.R. 32.1, a defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice. A manifest injustice is a fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the requirements of due process. *State v. Sneed*, 8th Dist. Cuyahoga No. 80902, 2002-Ohio-6502, ¶ 13. This heightened standard is in place because "a defendant should not be encouraged to plead to test the potential punishment and withdraw the plea if the sentence is unexpectedly severe." *Cleveland v. Jaber*, 8th Dist. Cuyahoga Nos. 103194 and 103195, 2016-Ohio-1542, ¶ 18.

State v. Thomas, 8th Dist. Cuyahoga No. 105375, 2018-Ohio-1081, ¶ 39, citing *State v. Colon*, 8th Dist. Cuyahoga No. 104944, 2017-Ohio-8478, ¶ 7.

{¶ 13} The determination of whether a defendant has demonstrated a manifest injustice is left to the sound discretion of the trial court. *Colon* at ¶ 9, citing *State v. Blatnik*, 17 Ohio App.3d 201, 202, 478 N.E.2d 1016 (6th Dist.1984), *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph two of the syllabus,

and *Jaber* at ¶ 17. Thus, we review a trial court's determination of whether a defendant demonstrated a manifest injustice for an abuse of discretion. *Colon* at *id.*, citing *Blatnik* at 202. An abuse of discretion occurs where the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 14} A trial court is not required to hold a hearing on every postsentence motion to withdraw a guilty plea. *State v. Vihtelic*, 8th Dist. Cuyahoga No. 105381, 2017-Ohio-5818, ¶ 11, citing *State v. Chandler*, 10th Dist. Franklin No. 13AP-452, 2013-Ohio-4671, ¶ 7. "A hearing is required only if the facts alleged by the defendant, accepted as true, would require that the defendant be allowed to withdraw the plea." *Vihtelic* at *id.*, citing *Chandler* at *id.*, and *State v. Rodriguez*, 8th Dist. Cuyahoga No. 103640, 2016-Ohio-5239, ¶ 23. The trial court's decision whether to hold a hearing on a postsentence motion to withdraw a guilty plea is also reviewed for an abuse of discretion. *Vihtelic* at *id.*

{¶ 15} On appeal, Jones reiterates the arguments raised in his motion to withdraw, asserting that his pleas were not knowingly and voluntarily made because trial counsel rendered ineffective assistance of counsel.

{¶ 16} Under certain circumstances, ineffective assistance of counsel can constitute a manifest injustice warranting a withdrawal of a guilty plea. *See, e.g.*, *State v. Montgomery*, 8th Dist. Cuyahoga No. 103398, 2016-Ohio-2943, ¶ 4. However, where a defendant enters a guilty plea, he or she waives ineffective assistance of counsel except to the extent that the ineffective assistance of counsel

caused the defendant's plea to be less than knowing, intelligent, and voluntary. *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11. A defendant who has entered a guilty plea can prevail on a claim of ineffective assistance of counsel only by demonstrating (1) deficient performance by counsel, i.e., that counsel's performance fell below an objective standard of reasonable representation, that caused the defendant's guilty plea to be less than knowing, intelligent, and voluntary; and (2) that there is a reasonable probability that, but for counsel's deficient performance, the defendant would not have pled guilty to the offenses at issue and would have, instead, insisted on going to trial. *Williams* at *id*., citing *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992), and *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); s*ee also Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Strickland* at 694.

{¶ 17} As stated, Jones did not file a direct appeal from his convictions and sentence following the trial court's acceptance of his plea in Case Nos. CR-07-504454-A and CR-08-514849-A.

> Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in that judgment of conviction, or on an appeal from that judgment.

State v. Szefcyk, 77 Ohio St.3d 93, 671 N.E.2d 233 (1996), syllabus.

{¶ 18} In *State v. Dent*, 8th Dist. Cuyahoga No. 100605, 2014-Ohio-3141, this court explained the applicability of res judicata to a Crim.R. 32.1 postsentence motion to withdraw, stating:

> The doctrine of res judicata, however, prohibits all claims raised in a Crim.R. 32.1 postsentence motion to withdraw a guilty plea that were raised or could have been raised on direct appeal. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 59; *State v. Conner*, 8th Dist. Cuyahoga No. 98084, 2012-Ohio-3579, ¶ 7. This concept extends to situations involving defendants who failed to file the direct appeal. *State v. Walters*, 4th Dist. Scioto No. 12CA3482, 2013-Ohio-695, ¶ 14; *State v. Maggianetti*, 7th Dist. Mahoning No. 10-MA-169, 2011-Ohio-6370, ¶ 15; *State v. Aquino*, 8th Dist. Cuyahoga No. 99971, 2014-Ohio-118, ¶ 12; *State v. Wilson*, 9th Dist. Summit No. 26511, 2013-Ohio-1529, ¶ 7; *State v. Britford*, 10th Dist. Franklin No. 11AP-646, 2012-Ohio-1966, ¶ 13.

Id. at ¶ 4; *see also State v. Mackey*, 4th Dist. Scioto No. 14CA3645, 2014-Ohio-5372, ¶ 15, citing *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.3d 9, ¶ 59 ("Ohio courts of appeals have applied res judicata to bar the assertion of claims in a motion to withdraw a guilty plea that were or could have been raised at trial or on appeal"); *State v. Muhumed*, 10th Dist. Franklin No. 11AP-1001, 2012-Ohio-6155, ¶ 15 ("res judicata applies * * * to issues raised in a post-sentencing Crim.R. 32.1 motion that were or could have been raised in direct appeal"); *State v. Vincent*, 4th Dist. Ross No. 03CA2713, 2003-Ohio-3998, ¶ 11 ("The doctrine of res judicata bars claims raised in a Crim.R. 32.1 post-sentence motion to withdraw guilty plea that were raised or could have been raised in prior proceedings.").

{¶ 19} Thus, to the extent Jones's ineffective assistance of counsel arguments could have been raised in a direct appeal based on facts in the record, his arguments are barred by res judicata. *See State v. Hodges*, 8th Dist. Cuyahoga No. 105789, 2017-Ohio-9025, ¶ 15, citing *State v. Kraatz*, 8th Dist. Cuyahoga No. 103515, 2016-Ohio-2640, ¶ 9 ("In a postconviction proceeding, res judicata bars the assertion of claims against a valid, final judgment of conviction that have been raised or could have been raised on appeal. * * * Courts have repeatedly applied the doctrine of res judicata to postconviction motions to withdraw a guilty plea under Crim.R. 32.1."); *State v. Congress*, 8th Dist. Cuyahoga No. 102867, 2015-Ohio-5264, ¶ 6. Such arguments include Jones's vague reference to issues of competency and his challenges to counsel's strategy and preparation.

{¶ 20} With that said, however, we recognize that arguments regarding threats or promises made by an attorney that rely upon evidence dehors the record are generally not barred by res judicata. *Hodges* at ¶ 16; *Kraatz* at ¶ 11. In this case, the primary basis of Jones's ineffective assistance of counsel claim is that trial counsel "informed" him that he would be sentenced to probation if he accepted the state's proposed plea agreement. The affidavits submitted in support of his motion to withdraw allege that counsel's advisement was made during private conversations between trial counsel, Jones, and Jones's family members. Accordingly, for the purposes of this appeal, we find Jones's ineffective assistance of counsel arguments predicated on off-the-record conversations with defense counsel are not barred by res judicata.

{¶ 21} Nevertheless, having viewed the motion to withdraw and its accompanying affidavits in their entirety, we are unable to conclude that counsel's performance rendered Jones's plea to be less than knowing, intelligent, and voluntary. In our view, Jones has merely demonstrated that counsel provided Jones and his family with a good faith, albeit inaccurate, estimate as to what the aggregate sentence might be in light of the relevant facts and counsel's experience with the court. However, even if trial counsel had, in fact, led Jones to believe that he could be placed on probation, this court has routinely held that "a lawyer's mistaken prediction about the likelihood of a particular sentence is insufficient to demonstrate ineffective assistance of counsel." *State v. Durrette*, 8th Dist. Cuyahoga No. 104050, 2017-Ohio-7314, ¶ 17, citing *State v. Bari*, 8th Dist. Cuyahoga No. 90370, 2008-Ohio-3663, ¶ 11, and *State v. Williams*, 8th Dist. Cuyahoga No. 88737, 2007-Ohio-5073. Moreover, notwithstanding the allegations raised in the affidavits submitted by Jones, the trial court noted in its judgment entry that "[Jones] was advised on the record at the time of his plea that probation was not possible in either case." Because Jones did not file a transcript of the plea hearing, we must presume regularity with the trial court's sentencing advisements and the validity of the trial court's acceptance of his pleas. *See State v. Woody*, 8th Dist. Cuyahoga No. 92929, 2010-Ohio-72, ¶ 10.

{¶ 22} Finally, we are cognizant that Crim.R. 32.1 does not prescribe a time limitation for filing a postsentence motion to withdraw a plea. However, the Ohio Supreme Court has explained that "[t]he timeliness of a motion to withdraw is a

factor courts consider when exercising their discretion under Crim.R. 32.1." *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph three of the syllabus ("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."). In this case, Jones has provided no information to suggest that the allegations raised in his motion to withdraw, including the relevant averments of his family members, were not immediately apparent upon the imposition of his sentence in 2008. Nevertheless, Jones waited approximately ten years before filing his motion to withdraw, without explanation for the delay.

{¶ 23} Based on the foregoing, we find Jones has not alleged any facts that could reasonably support the conclusion that withdrawal of his guilty plea was necessary to correct a manifest injustice. Accordingly, the trial court did not abuse its discretion in denying Jones's postsentence motion to withdraw his guilty plea without a hearing.

{¶ 24} Jones's first and second assignments of error are overruled.

{¶ 25} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR