[Cite as *State v. Kerns*, 2006-Ohio-6435.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 06AP-372 (M.C. No. 2005CRB10730)
v.	:	(ACCELERATED CALENDAR)
David Kerns,	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on December 7, 2006

Richard C. Pfeiffer, Jr., City Attorney, *Stephen L. McIntosh, Matthew A. Kanai,* and *Tannisha D. Bell*, for appellee.

Mark L. Hockensmith, for appellant.

APPEAL from Franklin County Municipal Court.

McGRATH, J.

{¶1} Defendant-appellant, David Kerns ("appellant"), appeals from the judgment of the Franklin County Municipal Court denying his post-sentence motion to withdraw his guilty plea. Because we find the trial court did not abuse its discretion in denying said motion, we affirm that court's judgment.

{¶2} On May 7, 2005, appellant was arrested and charged with assault and two open container violations. At his arraignment on May 9, 2005, appellant entered a plea of not guilty to all charges. Thereafter, a jury trial was scheduled for May 25, 2005. On that

date, the trial court continued the matter until June 27, 2005, and appellant was released from jail on his own recognizance. On June 27, 2005, appellant entered, and the trial court accepted, a plea of guilty to attempted assault, a misdemeanor of the second degree, in violation of R.C. 2923.02. In exchange for appellant's guilty plea to the reduced charge, the two open container violations were dismissed. Appellant was sentenced to two years of community control. Approximately eight months later, on February 13, 2006, appellant, through counsel, filed a motion to withdraw his previously entered guilty plea. On March 24, 2006, the trial court held a hearing on appellant's motion. Subsequently, the trial court denied appellant's motion to withdraw his guilty plea.

{¶3} On appeal, appellant brings the following three assignments of error for our review:

> First Assignment of Error:
>
> THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA WHERE SUCH DENIAL RESULTED IN A MANIFEST INJUSTICE UPON THE APPELLANT.
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> Second Assignment of Error:
>
> THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA WHERE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
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> Third Assignment of Error:
>
> THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA WHERE SUCH GUILTY PLEA WAS MADE UNINTELLIGENTLY IN VIOLATION OF CRIMINAL RULE 11.

{¶4} Appellant's three assignments of error all concern the trial court's denial of his motion to withdraw his guilty plea. Crim.R. 32.1 governs motions to withdraw guilty pleas, and provides:

> 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.

{¶5} Because appellant's request was made post-sentence, the standard by which the motion was to be considered was "to correct a manifest injustice." Id.; *State v. Franks*, Franklin App. No. 04AP-362, 2005-Ohio-462. A manifest injustice has been defined as a "clear or openly unjust act." *State v. Honaker*, Franklin App. No. 04AP-146, 2004-Ohio-6256 at ¶7, discretionary appeal not allowed by 105 Ohio St.3d 1472, 2005-Ohio-1186, citing *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, 208. A manifest injustice has also been found to "[relate] 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. Wooden*, Franklin App. No. 03AP-368, 2004-Ohio-588, at ¶10, discretionary appeal not allowed by, 102 Ohio St.3d 1484, 2004-Ohio-3069. It is the defendant who has the burden of establishing the existence of a manifest injustice warranting the withdrawal of a guilty plea. *State v. Smith* (1977), 49 Ohio St.2d 261, at paragraph one of the syllabus. Further, under the manifest injustice standard, a post-sentence withdrawal motion is allowable only in "extraordinary cases." Id. at 264.

{¶6} Absent an abuse of discretion, a reviewing court will not disturb a trial court's decision on whether to grant a motion to withdraw a guilty plea. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. The term "abuse of discretion" connotes more than a

mere error in judgment; it signifies an attitude on the part of the trial court that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. The good faith, credibility, and weight of the movant's assertions in support of the motion to withdraw a guilty plea are matters to be resolved by the trial court. *Smith*, paragraph two of the syllabus.

{¶7} In his first assignment of error, appellant argues the trial court erred when it relied on this court's prior decision in *Honaker* to deny his motion to withdraw his guilty plea because *Honaker* is readily distinguishable from the case at bar. Therefore, according to appellant, the trial court's judgment should be reversed to correct a manifest injustice.

{¶8} In *Honaker*, three years after he was sentenced, the defendant filed a motion to withdraw his guilty plea. The trial court denied the defendant's motion for several reasons, and suggested that the time delay affected the defendant's credibility. This court, noting the three-year delay in filing the motion to withdraw his plea, stated that "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." Id. at ¶10, quoting *Smith*, paragraph three of the syllabus. The court in *Honaker*, went on to reiterate the well-established precedent that "a mistaken belief as to the consequences of the plea is insufficient to withdraw such a plea," and that a " 'change of heart' does not create a manifest injustice." Id. at ¶17.

{¶9} Appellant asserts the instant case is distinguishable from *Honaker* because (1) he moved to withdraw his plea within eight months of being sentenced; and (2) there is no post-sentence "change of heart" scenario present here because he maintained his

innocence on the assault charge throughout the proceedings. At the hearing on appellant's motion to withdraw his plea, appellant stated he "hadn't a clue of the seriousness of the plea" and that he's become "unemployable" and his life has been "devastated." (Tr. at 6.) Appellant testified he told his prior trial counsel that he did not assault the alleged victim and if he accepted the plea bargain, it would be "a complete lie." Id. At the hearing, appellant also complained that he spent very little time with his attorney, and that she incorrectly informed him that if he went to trial, there would be six members on the jury rather than eight.

{¶10} We reject appellant's arguments for several reasons. Initially, we note that though the trial court cited *Honaker*, it did not reference the length of time between appellant's sentencing and the filing of his motion to withdraw his plea, and this appears not to have been a factor that weighed heavily in the court's determination. Instead, the trial court focused on *Honaker*'s language relating to the meaning of "manifest injustice," and this court's holding that a defendant's change of heart regarding the decision to enter a guilty plea does not create a manifest injustice. Contrary to appellant's suggestion, the *Honaker* decision focuses on more than just the time lapse between a defendant's sentencing and a motion to withdraw a guilty plea. Accordingly, we do not find the trial court's reliance on *Honaker* to be misplaced.

{¶11} Secondly, though appellant argues that the present set of facts does not suggest a "change of heart," because appellant maintained his innocence throughout the proceedings, we find to the contrary. To accept appellant's argument would lead to the illogical conclusion that so long as a defendant maintains his or her innocence, the decision to request withdrawal of a guilty plea cannot constitute a mere "change of heart."

There is no evidence in the record that appellant professed his innocence to the court either at the time he entered the guilty plea, or at any other time prior to the court's acceptance of the same. Though appellant stated in his affidavit, and at the hearing on the motion to withdraw that he told his attorney pleading guilty would be a "complete" and "utter" lie, it is well-settled that a defendant's self-serving declarations or affidavits are "insufficient to demonstrate manifest injustice." *Honaker* at ¶9, citing *State v. Patterson*, Stark App. No. 2003CA00135, 2004-Ohio-1569.

{¶12} It is equally well-settled that when a defendant protests innocence after a guilty plea has been accepted, a trial court is not required to inquire into a defendant's reasons for pleading guilty despite the assertions of innocence. *State v. Darks*, 05AP-982, 2006-Ohio-3144; *State v. Gales* (1999), 131 Ohio App.3d 56; *State v. Auble* (July 27, 2000), Cuyahoga App. No. 76789. Moreover, even where an accused maintains his innocence, his or her pleading guilty to avoid a potentially harsher sentence does not necessarily invalidate the plea. *State v. Marable*, Franklin App. No. 03AP-97, 2003-Ohio-6653; *State v. Bailey*, Portage App. No. 2004-P-0086, 2005-Ohio-6900 at ¶30, discretionary appeal not allowed by, 109 Ohio St.3d 1458, 2006-Ohio-2226 (finding that the defendant's assertion that his presentence motion to withdraw his guilty plea should have been granted because he continuously maintained his innocence, was not sufficient grounds to warrant reversal of the trial court's denial of said motion). In exchange for appellant's guilty plea to the reduced charge of attempted assault, the two open container violations were dismissed. A defendant may plead guilty even though he or she is innocent to avoid the risks of trial. *State v. Thompson*, Mahoning App. No. 99 CA 211, 2003-Ohio-2380, citing *Gales*, supra.

{¶13} We find that appellant has failed to establish that withdrawal of the plea is necessary to correct manifest injustice due to the trial court's reliance on *Honaker.* Accordingly, we overrule appellant's first assignment of error.

{¶14} In his second assignment of error, appellant contends that the trial court erred in denying his motion to withdraw his guilty plea when he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. To prevail on this claim, appellant must meet the test for ineffective assistance of counsel established in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. According to *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

{¶15} "In the context of a guilty plea, however, 'a defendant must also demonstrate that there is a reasonable probability that, but for his counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *State v. Glass*, Franklin App. No. 04AP-967, 2006-Ohio-229, at ¶33, quoting *State v. Curd,* Lake App.

No. 2003-L-030, 2004-Ohio-7222, at ¶110, reversed on other grounds, 109 Ohio St.3d 313, 2006-Ohio-2109.

{¶16} Under his second assignment of error, appellant essentially sets forth two arguments: (1) his trial attorney's lack of communication made it impossible for appellant to implement the essential basics for his defense; and (2) his trial counsel informed him incorrectly about the number of jurors that would hear his case. It is appellant's contention that in addition to misinforming him about the number of jurors, he had no contact with his trial counsel during his two-week period of incarceration, and his counsel failed to subpoena witnesses or otherwise prepare for a jury trial. The record reflects appellant's trial counsel made discovery requests and appeared for all court appearances. Appellant presents no evidence that he ever attempted to contact his attorney during his period of incarceration, or that he informed her of any potential witnesses to be subpoenaed. Appellant also complains his trial counsel continued to advise him to enter a guilty plea to the reduced charge in spite of his desire to do otherwise. However, a trial counsel's strategic decisions are to be given broad deference, *Strickland*, 466 U.S. at 689, and we see nothing in the record to demonstrate counsel's decision to advise appellant to plead guilty amounted to objectively unreasonable representation.

{¶17} Appellant also argues his trial counsel misinformed him about the number of jurors that would hear his case. According to appellant, his counsel stated the jury would be made up of six members rather than eight, and that knowing the correct number of jurors would have made "all the difference in the world" because the chances would have been greater that he "would persuade a juror, or a couple of jurors, in [his] favor."

(Tr. at 7.) The only evidence appellant presents on this issue is his statement regarding the same made in his affidavit, and at the hearing on the motion to withdraw the plea. However, appellant presented to the court a signed waiver of trial by jury, which stated:

> I, David Kerns defendant, charged with a serious offense in this court, having been advised by the judge of my right to have a trial by a jury of eight persons in this matter, do hereby knowingly and voluntarily waive my right to such jury trial and consent to be tried by the court.
>
> I understand that a jury for my case would be composed of 8 members of the community. I understand that I may participate in the selection of those jurors. I understand that all 8 jurors would have to agree on their verdict. I understand that if I give up my right to a jury trial, the judge alone will decide my guilt or innocence.
>
> I realize that my penalty may or may not consist of jail time and/or a monetary fine. No person has promised me any reward or leniency for entering this plea and I have not been forced or coerced in any way into pleading.

(July 27, 2005 Entry of Jury Waiver.)

{¶18} At the hearing on the motion to withdraw the guilty plea, the trial court inquired about the jury waiver and the following exchanged occurred:

> [The Court]: * * * And you signed this. You presented this to me at the plea hearing when you entered your plea of guilty, correct?
>
> [Appellant]: Yes, ma'am.
>
> [The Court]: And it states three times that a jury is composed of eight people.
>
> [Appellant]: Ma'am, I – I don't believe I read it. I just believe I signed it.

(Tr. at 19.)

{¶19} Appellant's contentions that his counsel was ill prepared and failed to inform him of the correct number of jurors is uncorroborated. Accordingly, his "allegations are insufficient to support the withdrawal of a plea unless the record otherwise indicates the plea was not made in compliance with Crim.R. 11." *Wooden*, supra, at ¶16, quoting *State v. Hastings* (Dec. 15, 1998), Franklin App. No. 98AP-421.

{¶20} Further, to satisfy the second prong of the *Strickland* test, appellant must show that he would not have pleaded guilty to the reduced charge, if his attorney's actions and information had been correct. Appellant attempted to make this showing to the trial court at his hearing to withdraw his plea, but was not successful. The trial court was obviously not convinced that even if trial counsel provided misinformation, a withdrawal of the plea was justified. We decline to second-guess the trial court's finding in this regard, as the trial court was in the better position to evaluate appellant's motivations behind the guilty plea, than an appellate court reviewing only a record of the hearing. *Xie*, supra, at 525, citing *Smith*, supra.

{¶21} We find appellant's allegations do not require a conclusion that he received ineffective assistance of counsel, and, therefore, the trial court was not required to find that a manifest injustice occurred. Consequently, we overrule appellant's second assignment of error.

{¶22} In his third assignment of error, appellant contends because his plea was not made intelligently, the plea was entered in violation of Crim.R. 11. The basis for this assignment of error is again the alleged incorrect information provided by his trial counsel regarding the number of jurors that would hear his case.

{¶23} Pursuant to Crim.R. 11(C), a trial court may not accept a guilty plea from a criminal defendant in a felony case without first addressing the defendant personally and informing him or her of the consequences, and determining that he or she understands the consequences of his or her guilty plea. Crim.R. 11(C)(2) provides, in part:

> (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
>
> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶24} However, the trial court need only substantially comply with those requirements of Crim.R. 11 that do not involve the waiver of a constitutional right. *State v. Ballard* (1981), 66 Ohio St.2d 473, 476. *State v. Jordan* (Mar. 2, 1999), Franklin App. No. 97APA11-1517. The test is whether the plea would have otherwise been made. Id. "Substantial compliance means that under the totality of the circumstances the defendant

subjectively understands the implications of his [or her] plea and the rights he [or she] is waiving." *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶25} Here, appellant does not contend the trial court failed to address any particular right being waived by entering the guilty plea. Rather, appellant argues that because he was misinformed regarding the number of jurors that would be on his jury panel, his plea was not intelligently made, and therefore, was in violation of Crim.R. 11. Initially, we note that while Crim.R. 11 requires a defendant to be informed that entering a guilty plea results in a waiver of the right to a jury trial, absent from Crim.R. 11(C), is a requirement that the trial court inform a defendant as to the number of jurors that would hear a particular case.

{¶26} Additionally, the record reveals appellant was instructed by the trial court, as follows: "if I accept this waiver and I accept your guilty plea you *would be giving up your right to a trial*, *a trial by jury*, your right to confront your accuser and cross-examine witnesses, present your own witnesses and your own evidence, your right to testify or remain silent, your right to appeal the decision of this court, and the requirement that the State prove your guilt beyond a reasonable doubt." (Tr. at 17.) (Emphasis added.) Thereafter, appellant was asked if he was willing to give up those rights, to which he responded, "Yes, your Honor." Id. Moreover, as previously discussed, appellant also signed a jury waiver that stated three times that a jury would be comprised of eight persons.

{¶27} Given the record, we find that appellant's self-serving declarations that he entered his guilty plea unintelligently because he was under the impression that his jury would be made up of six persons, instead of eight, is insufficient to demonstrate that his

plea was entered in violation of Crim.R. 11. " Where nothing in the record supports a defendant's claim that his plea was not knowingly and voluntarily made, other than his own self-serving affidavit or statement, the record is insufficient to overcome the presumption that the plea was voluntary." *Honaker*, at ¶18, quoting *State v. Laster*, Montgomery App. No. 19387, 2003-Ohio-1564, at ¶8. Because the trial court is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible, 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*, supra, at paragraph two of the syllabus. Based upon this court's review of the record, under the totality of the circumstances, we find that the trial court substantially complied with Crim.R. 11(C), and appellant entered his guilty plea knowingly, voluntarily, intelligently, and with the full knowledge and understanding of the consequences to such plea. Consequently, we overrule appellant's third assignment of error.

{¶28} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Franklin County Municipal Court is hereby affirmed.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.

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