

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 08AP-923 (M.C. No. 2006 CRB 016699)
Aaron K. Richey,	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 23, 2009

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, Chief Prosecutor, and *Melanie R. Tobias*, for appellee.

Yeura R. Venters, Public Defender, *William Safford*, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶1} Appellant, Aaron K. Richey ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Municipal Court denying his motion to withdraw his plea of no contest. For the reasons that follow, we affirm.

{¶2} On July 2, 2006, a sworn complaint was filed charging appellant with sexual imposition in violation of R.C. 2907.06(A)(1), a third-degree misdemeanor. The Franklin County Public Defender's office entered a plea of not guilty on appellant's behalf. At some point, the trial court granted a motion by the public defender's office to withdraw as counsel.¹ The entry, which is styled as a motion, states:

Defense counsel, Elizabeth Westfall, hereby requests this Court to allow leave to withdraw as counsel in the above captioned case.

The Defendant has failed to comply with the income verification requirements of the Public Defender's Office.

{¶3} On August 24, 2006, the trial court signed a continuance entry setting a pre-trial for September 22, 2006. The entry states, "D to hire private counsel." The case was set for trial on September 28, 2006. On that date, appellant executed a waiver of his rights to a jury trial and counsel and entered a plea of no contest to the charge of sexual imposition. At the plea hearing, the trial court addressed appellant regarding his waiver of his rights:

THE COURT: Aaron Richey, 16699. This is an M-3 offense sir, a 2907.06(A)(1). Now, you could face up to a \$500 maximum fine and up to 60 days in jail. Also, upon conviction you may be required to register with the State, registration for sex offenders.

Now, do you understand that?

THE DEFENDANT: (Nods head.)

THE COURT: You would still be entitled to an attorney today. You signed a waiver indicating that you are waiving that right?

¹ The copy of the signed entry in the record is neither dated nor time stamped as having been filed with the Clerk of Courts for the Franklin County Municipal Court.

THE DEFENDANT: (Nods head.)

THE COURT: Now, if you cannot afford an attorney, one would be appointed for you. Now, if you wish to hire your own attorney, then a reasonable continuance would be granted to give you that opportunity. Otherwise, you would be proceeding today without the advice and counsel of an attorney as to your legal rights and any possible defenses.

Any questions on this?

THE DEFENDANT: No.

THE COURT: Now, you could receive jail time. Jail time could be suspended. In any event, since jail time is involved here, you do have an absolute right to have an attorney if you want one.

THE DEFENDANT: I'm not sure if I can afford one.

THE COURT: Have you talked to the Public Defender?

THE DEFENDANT: I didn't bring in my check stub that day when I was supposed to, so I don't know. I think that the money that I do make, I might qualify for the Public Defender, but I'm not sure.

THE BAILIFF: I believe, if I remember the story correctly, I believe they asked him to provide income information. He declined to do that. That's why they got off the case, because he declined to provide them with income verification.

THE COURT: It's been reassigned for counsel, this would be two times before.

MR. STEINBERG: I think this is the third time.

THE COURT: And, as a matter of fact, you did speak with the Public Defender's Office, and an attorney was assigned, but you failed to comply with the income verification. So the question I ask you today, sir, do you want to proceed today without an attorney?

THE DEFENDANT: Yeah.

THE COURT: And you understand the possible consequences if there's a conviction?

THE DEFENDANT: Yeah.

THE COURT: You might have to register with the State and could receive jail and probation?

THE DEFENDANT: (Nods head.)

THE COURT: With that understanding, the Court will accept the waiver of right to an attorney.

(Plea Hearing Tr. 2-4.)

{¶4} The trial court then accepted appellant's plea of no contest and entered a finding of guilty on the charge. After a pre-sentence investigation, the court sentenced appellant to 60 days of incarceration and a \$500 fine. The court also designated appellant a Sexually Oriented Offender, and at the sentencing hearing appellant was provided with forms that fully spelled out the sex offender registration requirements appellant would be required to follow.

{¶5} On September 5, 2008, appellant, represented by the public defender's office, filed a motion seeking to have his conviction vacated and to withdraw his plea of no contest pursuant to Crim.R. 32.1. Appellant argued that his plea had not been entered knowingly, voluntarily, and intelligently. On October 2, 2008, the court held a hearing to consider appellant's motion. The trial court denied the motion.

{¶6} Appellant then filed this appeal, asserting three assignments of error:

FIRST ASSIGNMENT OF ERROR

The trial court erred in finding that Appellant "knowingly, voluntarily and intelligently waived his right to counsel".

SECOND ASSIGNMENT OF ERROR

The trial court erred in finding that Appellant's plea was intelligently entered.

THIRD ASSIGNMENT OF ERROR

The trial court erred in finding that the enhancements and increases of Senate Bill 10 do not require plea withdrawal.

{¶7} Motions to withdraw pleas of no contest are controlled by Crim.R. 32.1, which provides, in relevant part, 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." Because the motion in this case was made after sentencing, the issue before the trial court was whether granting the motion would correct a 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 post-sentence guilty plea bears the burden of establishing manifest injustice based on specific facts 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} A trial court's decision to deny a post-sentence motion to withdraw a plea of guilty, and the decision whether to hold a hearing on the motion, are subject to review for abuse of discretion. *State v. Smith* (1977), 49 Ohio St.2d 261. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶9} In his first assignment of error, appellant argues that he did not knowingly, voluntarily, and intelligently waive his right to counsel at the time he entered his no contest plea. Specifically, appellant argues that the trial court improperly allowed appellant to enter his plea of no contest without the benefit of counsel, and that this constitutes a manifest injustice making withdrawal of his plea appropriate.

{¶10} Appellant argues that the trial court erred both when it signed the entry allowing the public defender's office to withdraw from representation and accepted appellant's waiver of his right to counsel without conducting its own inquiry into whether appellant was indigent. Although in briefing appellant appears to suggest that the duty of determining a defendant's indigence, and therefore a defendant's right to appointed counsel, lies exclusively with the trial court, R.C. 120.15(D) makes it clear that it is the public defender's office that has the responsibility of determining indigence, subject to review by the court.²

{¶11} The entry allowing the public defender's office to withdraw from representation stated that the reason was appellant's failure to provide income verification. Thus, the withdrawal was not based on appellant's ineligibility to be represented by the public defender's office, but, rather, was based on appellant's failure to cooperate with the process of determining his eligibility. Failure of a client to meet obligations to an attorney is a basis for the attorney to withdraw from representation. See Prof.Con.R. 1.16.

² In briefing, the public defender's office argues at great length that the action taken that resulted in the public defender's office withdrawing from representation was unlawful, which has the effect of constituting a challenge by the public defender's office to its own conduct in this case specifically, as well as to the manner in which it determines indigence generally.

{¶12} Prior to the date on which appellant entered his plea, the court continued appellant's trial date for the specific purpose of allowing appellant to obtain counsel. On the date of the plea, the trial court offered appellant another continuance so appellant could obtain counsel. At that time, there was a discussion regarding appellant's failure to cooperate with the public defender's office in determining his eligibility for appointed counsel. Appellant did not disagree with the assertions regarding his lack of cooperation, did not state that he was willing to begin cooperating with the public defender's office, and did not accept the trial court's offer to continue the case so he could obtain counsel. Instead, he signed the form waiving his right to counsel, stated on the record that he was waiving that right, and proceeded to enter a plea of no contest.

{¶13} Given these facts, the trial court did not abuse its discretion in finding that the circumstances surrounding appellant's waiver of his right to counsel do not constitute a manifest injustice requiring that appellant be allowed to withdraw his plea of no contest. Accordingly, appellant's first assignment of error is overruled.

{¶14} In his second assignment of error, appellant argues that he should have been allowed to withdraw his plea of no contest based on the trial court's failure to accurately inform him of the consequences of being found guilty of a sexually oriented offense. Specifically, appellant argues that at the time he entered his plea of no contest, the trial court told him two different times that he "may" or "might" be required to register as a sex offender, when in actuality sex offender registration was required. Appellant argues that the trial court's statements regarding the effect of a plea on his status as a sex offender were flawed in two respects: first, in failing to make it clear that registration

would be mandatory, and second, in failing to explain the full scope of what registration would involve.

{¶15} Crim.R. 11 sets forth certain specific advisements that a court must give a defendant at a plea hearing in order to assure that a plea is entered knowingly, voluntarily, and intelligently. The rule does not specifically require that a defendant be notified of registration requirements in the event that a plea is entered to a sexually oriented offense for which registration is required under R.C. Chapter 2950. Ohio courts have held that a trial court is not required to inform a defendant regarding the sex offender registration requirements prior to accepting a plea. *State v. Cupp*, 2d Dist. No. 21176, 2006-Ohio-1808; *State v. Omiecinski*, 8th Dist. No. 90510, 2009-Ohio-1066.

{¶16} Furthermore, in its decision and entry denying appellant's motion to withdraw his plea of no contest, the trial court noted that at the time of his sentencing, appellant was provided two forms that fully described the registration requirements. Appellant argues that his receipt of the forms is irrelevant because that occurred at the time of his sentencing, which occurred approximately one month after the entry of the plea. However, a trial court's uncertainty regarding the specifics of the sex offender registration requirements at the time a plea is entered can be remedied by provision of full information at the time of sentencing such that the plea was still entered knowingly, voluntarily, and intelligently. *State v. Stape*, 2d Dist. No. 22586, 2009-Ohio-420.

{¶17} Moreover, the fact that appellant was properly informed of the registration requirements at the time of his sentencing is relevant to the credibility of his claim that he would not have entered the plea if he had known of the full requirements at the time the plea was entered. Approximately two years passed between the time appellant was fully

informed of the registration requirements and the time appellant sought to withdraw his plea. The passage of time between the occurrence alleged as the basis for a motion to withdraw a plea and the filing of that motion is a factor adversely affecting the movant's credibility and militating against granting such a motion. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894.

{¶18} The trial court did not abuse its discretion in finding that the trial court's statements regarding the sex offender registration requirements at the time appellant entered his plea did not constitute a manifest injustice requiring that appellant be allowed to withdraw that plea. Accordingly, appellant's second assignment of error is overruled.

{¶19} In his third assignment of error, appellant argues that amendments to R.C. Chapter 2950 enacted in Am.Sub.S.B. No. 10 of the 127th General Assembly drastically rewrote the sex offender registration laws, making them much more burdensome to persons in appellant's situation. Appellant argues that these amendments created a manifest injustice requiring that he be allowed to withdraw his plea of no contest.

{¶20} Appellant cites no authority for the proposition that the changes in the laws governing sex offender registration in and of themselves can constitute a manifest injustice requiring that defendants who entered pleas of guilty or no contest under the old provisions must be allowed to withdraw those pleas. We note that the provisions of R.C. Chapter 2950 have generally been recognized as remedial in nature, and thus not unconstitutionally retroactive. See *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824.

{¶21} We cannot say that the trial court abused its discretion in concluding that the Am.Sub.S.B. No. 10 amendments to the laws governing sex offender registration do

not constitute a manifest injustice. Accordingly, appellant's third assignment of error is overruled.

{¶22} Having overruled appellant's assignments of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BROWN, J., concurs.
BRYANT, J., concurring separately.

BRYANT, J., concurring separately.

{¶23} Unlike the majority, I believe the trial court's inquiry regarding appellant's alleged indigency is questionable, if not deficient. Appellant advised he was not sure he could afford an attorney. The trial court, however, did not inquire further but instead appeared to rest on the fact that the public defender concluded appellant failed to submit the needed income verification to the public defender's office. Additional inquiry was appropriate. See generally *State v. Tymcio* (1975), 42 Ohio St.2d 39.

{¶24} I further believe the trial court misled appellant in advising that he may have to comply with sex offender registration laws, since appellant's guilty plea necessarily subjected him to those provisions. While I acknowledge the trial court is not required to advise a defendant of the repercussions a guilty plea will have under the sex offender registration laws, the trial court, if it decides to advise of the registration provisions, should not understate the consequences.

{¶25} Nonetheless, I cannot conclude the trial court abused its discretion in denying appellant's motion to withdraw his guilty plea when he did not file the motion until two years after his conviction, a date that coincided generally with increased requirements

under the amended sex offender registration laws. Accordingly, I concur in the majority's conclusion that the judgment of the trial court be affirmed.
