[Cite as *State v. Lampson*, 2010-Ohio-3575.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-1159 (C.P.C. No. 09CR-1509)
Raymond J. Lampson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 3, 2010

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Shaw & Miller, *Douglas W. Shaw* and *J. Andrew Stevens*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Raymond J. Lampson ("appellant"), appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas following appellant's plea of guilty to one count of importuning, a fourth-degree felony, in violation of R.C. 2907.07.

{¶2} The conviction herein arises from appellant's interactions in an internet chat room and through instant messaging with a police officer posing as a 13-year-old girl named "Jordan." Upon his arrest, appellant admitted that he had chatted with a girl

named Jordan who stated she was 13 or 14 years old. Appellant also admitted that he asked Jordan about sexual things, asked her to perform sexual acts on a stranger, and told her that he could help her with her sexual experiences.

{¶3} Appellant was indicted for one count of importuning as a felony of the fourth degree in violation of R.C. 2907.07, and appellant entered a plea of guilty to said charge on September 2, 2009. A pre-sentence investigation report ("PSI") was ordered, and a sentencing hearing was scheduled. On October 23, 2009, the trial court imposed a sentence of 17 months' incarceration and awarded ten days of jail-time credit. Also on October 23, 2009, appellant moved to withdraw his guilty plea on the basis that he only entered the plea because he was promised a sentence of community control. The trial court denied the motion on November 13, 2009, finding that there was not a recommended sentence in this case but merely an agreement from the prosecutor that it would not oppose community control with intensive supervision if the trial judge decided such was appropriate.

{¶4} This appeal followed and appellant brings the following assignment of error for our review:

> The trial court erred in overruling Appellant's motion to withdraw his guilty plea, because Appellant was induced to enter a plea of guilty with the understanding that the trial court would grant him community control.

{¶5} 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.

{¶6} Though the motion to withdraw plea was filed on the same day as the sentencing hearing, it appears from the record that it was made after sentencing, as the motion is time-stamped several hours after the sentencing hearing concluded, and the motion itself references what occurred at the sentencing hearing. 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*, 10th Dist. No. 04AP-362, 2005-Ohio-462. A manifest injustice has been defined as a "clear or openly unjust act." *State v. Honaker*, 10th Dist. No. 04AP-146, 2004-Ohio-6256, ¶7, discretionary appeal not allowed by 105 Ohio St.3d 1472, 2005-Ohio-1186, citing *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 1998-Ohio-271. 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*, 10th Dist. No. 03AP-368, 2004-Ohio-588, ¶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, 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.

{¶7} 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.

{¶8} Here, appellant contends his plea was not knowing and voluntary because he entered it on the understanding that the trial court promised his counsel that a sentence of community control with intensive supervision would be imposed. In his affidavit, appellant states that he pleaded guilty to the indictment "SOLELY because [the trial judge] told my attorney that he would sentence me to community control rather than incarceration," and had he known he was going to receive a sentence of incarceration, he would have proceeded to a jury trial because he is innocent. (Nov. 2, 2009 affidavit.) In support of his contention that promises were made, appellant relies on the following statements of the trial court made during the plea hearing:

> Now, there is a joint recommendation here, which I intend to follow, that says, "order a presentence report," and then it says, "the State will not oppose community control with intensive supervision." Do you understand that?

(Tr. 4.)

{¶9} Indeed, the United States Supreme Court has held that "when a plea rests in any significant degree on a promise or argument of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise should be fulfilled." *Santobello v. New York* (1971), 404 U.S. 257, 92 S.Ct. 495. Therefore, we must look to the record to see what, if anything, was promised. The record reveals that no promises were made, and the only recommendation was that a PSI be ordered and that the prosecutor would not oppose community control with intensive supervision. Both of these

things occurred as the PSI was prepared and the prosecutor did not oppose community control or otherwise recommend a sentence of incarceration. Further, the record reflects the trial court engaged in the requisite Crim.R. 11 colloquy, including the following:

> Secondly, you are changing your plea from [sic] one of guilty to importuning, a felony of the fourth degree. Maximum penalty for that would be 18 months in prison, a fine of up to $5,000, and if you went to prison, there would be a mandatory five years post release control.
>
> Do you understand the nature of the offense and the maximum penalty?
>
> [Appellant]: Yes, sir.

(Tr. 4.)

{¶10} When asked if he had any questions about "any of this" that he would like to ask either the court or his attorney, appellant responded, "I don't believe so, sir." (Tr. 4.) Additionally, the entry of guilty plea signed by appellant states, "I hereby assert that no person has threatened me, promised me leniency, or in any other way coerced or induced me to plead 'Guilty' as indicated above; my decision to plead 'Guilty,' thereby placing myself completely and without reservation of any kind upon the mercy of the Court with respect to punishment, represents the free and voluntary exercise of my own will and best judgment." (Plea agreement at 2.)

{¶11} At sentencing, after studying the PSI, which concluded appellant was not amenable to a community control sanction because he had a prior felony sex offense and because the instant offense was committed while appellant was on post-release control, the trial court noted the PSI showed things that the court believed were "significant." The trial court stated:

> He had an importuning charge, pandering sexual material involving minors back in '03. He pled guilty and was sentenced to one year in prison. He has been to prison for this same thing in the past, and then he has the present case. * * * This offense was committed while he was on PRC.

(Tr. 8.)

{¶12} In his statement to the court, appellant stated he was sorry for his actions and that he would like to get therapy. Obviously concerned about appellant's prior conviction, the trial court stated, "All right, well I think you should have gotten therapy before this case came around. You had one before." (Tr. 12-13.) Thereafter, the trial court imposed the 17-month sentence.

{¶13} The record establishes appellant was aware of and understood the maximum penalties that could be imposed. Further, the record clearly reflects that the only "recommendation" was that a PSI be ordered and that the state not oppose a sanction of community control with intensive supervision. The record contains no evidence whatsoever of a jointly recommended sentence, nor is there any evidence appellant was promised he would receive a sentence that did not include a term of incarceration. While appellant's affidavit states the trial judge told his counsel there would be a sentence of community control rather than incarceration, it is well-settled that a defendant's self-serving declarations or affidavits are "insufficient to demonstrate manifest injustice." *State v. Kerns*, 10th Dist. No. 06AP-372, 2006-Ohio-6435, ¶11, citing *State v. Honaker*, 10th Dist. No. 04AP-146, 2004-Ohio-6256, ¶9, citing *State v. Patterson*, 5th Dist. No. 2003CA00135, 2004-Ohio-1569.

{¶14} It appears appellant had a change of heart after he was sentenced; however, a "defendant's change of heart or mistaken belief about the guilty plea or

expected sentence does not constitute a legitimate basis that requires the trial court to permit the defendant to withdraw the guilty plea." *State v. Brooks*, 10th Dist. No. 02AP-44, 2002-Ohio-5794, ¶51, citing *State v. Sabatino* (1995), 102 Ohio App.3d 483, 486. See also *State v. Drake* (1991), 73 Ohio App.3d 640, 645, citing *State v. Meade* (May 22, 1986), 8th Dist. No. 50678. See also *State v. Sabath*, 6th Dist. No. L-08-1148, 2009-Ohio-5726 (where the defendant was sentenced to incarceration rather than community control, the evidence in the record established that the state would not oppose community control, not that it would affirmatively recommend community control as a sanction; therefore, the trial court did not abuse its discretion in denying the defendant's motion to withdraw guilty plea); *State v. Lellock*, 2d Dist. No. 2005-CA-141, 2006-Ohio-4515 (even though at the plea hearing the state said it would not oppose a sentence of community control, the trial court found the motion to withdraw guilty plea was inspired by a change of heart where the defendant realized that as a result of the PSI recommendation he was going to be sentenced to prison rather than community control).

{¶15} Given the evidence in the record, we conclude the trial court's decision denying appellant's motion to withdraw guilty plea was not unreasonable, arbitrary, or unconscionable and, therefore, does not rise to the level of an abuse of discretion. Accordingly, appellant's assignment of error is overruled.

{¶16} Having overruled appellant's single assignment of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.

_____