

[Cite as *State v. Muhumed*, 2010-Ohio-3968.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 09AP-936
v.	:	(C.P.C. No. 06CR-07-5428)
	:	
Mohamed S. Muhumed,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 24, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellee.

Mohamed S. Muhumed, pro se.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Mohamed S. Muhumed ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas denying his motion to withdraw his guilty plea. For the following reasons, we affirm.

{¶2} Appellant was indicted on 14 counts of robbery and five counts of aggravated robbery. Ten of the robbery counts and all of the aggravated robbery

counts contained firearm specifications. In November 2006, appellant pleaded guilty to seven of the robbery counts without their accompanying specifications. He signed a guilty plea form indicating that he understood that he could possibly receive consecutive eight-year prison sentences for each count.

{¶3} In December 2006, the trial court sentenced appellant to 17 years imprisonment and noted that prison was mandatory and that it did not approve of appellant's participation in an early release program. Afterward, appellant filed a motion to withdraw his guilty plea, claiming that the trial court failed to fulfill a promise it made to sentence him to ten years imprisonment if he pleaded guilty. The court denied the motion, stating that it "did not promise, or even suggest, anything regarding the sentence" to appellant. And, the court said that, until it actually issued the sentence, it "never indicated—indeed, had not even determined—what sentence would be imposed." Moreover, the court acknowledged that, at the guilty plea hearing, appellant confirmed that his plea was not induced by any promises.

{¶4} Appellant appeals, raising the following assignment of error:

THE COURT'S FAILURE TO PROVIDE ADEQUATE RULE
11 INSTRUCTIONS VIOLATED DEFENDANT'S DUE
PROCESS RIGHTS.

{¶5} In his single assignment of error, appellant argues that the trial court erred by denying his motion to withdraw his guilty plea. We disagree.

{¶6} After the imposition of sentence, a court may only permit a defendant to withdraw a guilty plea to correct a manifest injustice. Crim.R. 32.1. Manifest injustice relates to a "fundamental flaw in the proceedings that resulted in a miscarriage of

justice or was inconsistent with the requirements of due process.' " *State v. Eck*, 10th Dist. No. 08AP-675, 2009-Ohio-1049, ¶7, quoting *State v. Smith*, 10th Dist. No. 08AP-420, 2008-Ohio-6520, ¶9. A defendant filing a post-sentence motion to withdraw a guilty plea bears the burden of establishing a manifest injustice through evidence in the trial record or affidavits attached to the motion. *State v. Orris*, 10th Dist. No. 07AP-390, 2007-Ohio-6499, ¶8. We need not disturb the trial court's denial of a post-sentence motion to withdraw a guilty plea absent an abuse of discretion. *State v. Sappington*, 10th Dist. No. 09AP-988, 2010-Ohio-1783, ¶8. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶7} In his motion to withdraw his guilty plea, appellant argued that his 17-year sentence resulted in a manifest injustice because the trial court promised to sentence him to ten years imprisonment if he pleaded guilty. To be sure, a guilty plea is involuntary when induced by a trial court's unfulfilled promise. *State v. Aponte* (2001), 145 Ohio App.3d 607, 614. The record does not establish that the trial court made any promises to appellant about his sentence, however. Instead, when the court denied the plea-withdrawal motion, it confirmed that it did not "promise, or even suggest" a sentence to appellant when he pleaded guilty. Similarly, the court noted it had not determined what sentence would be imposed until it actually issued the sentence. In fact, at the guilty plea hearing, appellant was informed that he could receive up to 56 years imprisonment, and he verified that his plea was not induced by any promises.

{¶8} To support his argument on appeal, appellant has attached to his merit brief a letter from his attorney, but the letter is not in the trial record and, therefore, cannot be considered in this appeal. See *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus. In any event, the letter does not aid appellant's argument, even if we could consider it. The letter establishes that the trial court did not promise any particular sentence to appellant for pleading guilty, but instead wanted to base the sentence on the pre-sentence investigation conducted after the plea.

{¶9} Because appellant has not proven that the trial court promised him a ten-year prison sentence for pleading guilty, his 17-year sentence did not result in a manifest injustice. Next, appellant contends that, when he pleaded guilty, the court and his attorney assured him that he would be eligible for judicial release, but, during sentencing, the court disregarded these assurances when it did not approve of his participation in an early release program. Appellant also asserts that the assurances were an improper inducement of his guilty plea because, pursuant to R.C. 2929.20(A)(1)(a)(i), he was ineligible for judicial release due to his prison sentence being mandatory. Appellant did not raise this claim for relief in his motion to withdraw, and we need not consider it for the first time on appeal. See *Niehaus v. Columbus Maennerchor*, 10th Dist. No. 07AP-1024, 2008-Ohio-4067, ¶55. See also *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, ¶19 (recognizing that a party cannot raise new legal theories for the first time on appeal). In any event, appellant's argument fails because, as we have determined, the record does not establish that his guilty plea was induced by any promises about his sentence.

{¶10} Lastly, appellant argues that the trial court did not satisfy Crim.R. 11 requirements because it did not inform him at the guilty plea hearing that he was ineligible for community control sanctions due to prison being mandatory for his offenses. Appellant did not raise this issue in his motion to withdraw, and we need not consider it here for the first time, either. See *Niehaus* at ¶55; *Pilgrim* at ¶19. In any event, res judicata bars defendants from raising a Crim.R. 11 issue in a post-sentence motion to withdraw a guilty plea because the issue could have been raised in a direct appeal. *State v. Oluoch*, 10th Dist. No. 07AP-45, 2007-Ohio-5560, ¶28.

{¶11} In conclusion, the trial court did not abuse its discretion by denying appellant's motion to withdraw his guilty plea. Accordingly, we overrule his single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
