[Cite as *State v. Hernandez*, 2011-Ohio-5407.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-202 (C.P.C. No. 08CR-01-0594)
Raul A. Hernandez,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on October 20, 2011

Ron O'Brien, Prosecuting Attorney, and *Susan M. Suriano*, for appellee.

Gregg D. Slemmer and *Jeremy Dodgion*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Raul A. Hernandez, appeals from the judgment of the Franklin County Court of Common Pleas denying his motion to withdraw guilty plea pursuant to Crim.R. 32.1. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} The charges herein arose out of the shooting death of Courtney Wallace. According to the facts as presented by the state at the plea hearing, on August 9, 2007, Wallace and his friend Nicholas Ballard were at 3804 Zephyr Place when Columbus police were dispatched to that address at approximately 9:48 p.m. on reports of a shooting. When officers arrived at the location, they found Ballard inside the home and Wallace lying on the ground outside. Both Ballard and Wallace were suffering from gunshot wounds and were transported for medical attention. Ballard survived his injuries, but Wallace died at the hospital. Subsequently, Ballard informed the police that appellant was the shooter.

{¶3} Because he was 17 years old at the time of the offense, proceedings against appellant were initiated in the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch. On August 13, 2007, the state filed a motion to relinquish jurisdiction. A hearing was held on January 25, 2008, and, on January 28, 2008, the juvenile court sustained the motion and ordered that the matter be transferred to the Franklin County Court of Common Pleas, General Division, for prosecution.

{¶4} On February 21, 2008, a Franklin County Grand Jury indicted appellant on one count of aggravated murder, one count of attempted murder, and one count of felonious assault. All three counts contained firearm specifications.

{¶5} A jury trial commenced on April 7, 2009. The following day, voir dire proceedings were interrupted for the trial court's inquiry into appellant's expressed dissatisfaction with his court-appointed counsel. Appellant indicated he wanted a new lawyer to "work harder" on his case because he felt like he could "get a better deal" if a different attorney was involved. (Tr. 3.) The trial court informed appellant that appellant's

dislike of his attorneys' advice was not a basis upon which the trial court would appoint new counsel. Discussions ensued and the court asked the prosecutor to put the plea offer on the record. Appellant confirmed that the stated plea offer had been previously conveyed to him by counsel. Thereafter, a recess was taken as the trial court gave appellant time to consult with his counsel.

{¶6} When proceedings resumed, the state informed the court that a plea agreement had been reached. Subsequently, appellant entered pleas of guilty to one count of murder with a firearm specification and one count of attempted murder. The trial court proceeded immediately to sentencing and imposed the jointly recommended sentence of 15 years to life, plus three years for the firearm specification, concurrent to ten years, for an aggregate sentence of 18 years to life. Additionally, appellant was awarded 606 days of jail-time credit.

{¶7} Over one year later, on May 20, 2010, appellant filed through counsel a motion to withdraw guilty plea pursuant to Crim.R. 32.1. In his motion, appellant alleged his trial counsel was ineffective for failing to communicate with him, and that he was prejudiced thereby because it resulted in him entering a plea that was not knowing and voluntary. According to appellant, but for his counsel's ineffectiveness, he would not have entered the pleas of guilty. In support of his motion, appellant attached his own affidavit and an affidavit from his mother. The state opposed the motion, and, on February 2, 2011, the trial court overruled appellant's motion to withdraw guilty plea. The trial court concluded that not only was appellant's motion untimely, but, also, appellant failed to establish that his counsel was ineffective. Additionally, the trial court concluded

appellant's contention that his guilty plea was not knowingly and voluntarily entered was not supported by the record.

{¶8} This appeal followed, and appellant brings the following three assignments of error for our review:

> [1.] THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA WHERE THE APPELLANT DEMONSTRATED THAT TRIAL COUNSEL WAS INEFFECTIVE AND APPELLANT WAS PREJUDICED BY COUNSEL'S INEFFECTIVE PERFORMANCE IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.
>
> [2.] THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA WHERE COUNSEL'S INEFFECTIVE ASSISTANCE RENDERED APPELLANT'S PLEA UNINTELLIGENT AND INVOLUNTARY.
>
> [3.] THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA WITHOUT HOLDING AN EVIDENTIARY HEARING WHERE APPELLANT ALLEGED FACTS THAT ESTABLISHED MANIFEST INJUSTICE.

{¶9} Motions to withdraw pleas of guilty are governed by Crim.R. 32.1, which provides 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." In the case sub judice, the motion to withdraw guilty plea was made after sentencing, therefore the issue is whether granting the motion is necessary to 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. " '[I]t is clear that under such standard, a postsentence withdrawal motion is allowable only in the extraordinary cases.' " *State v. Gripper*, 10th Dist. No. 10AP-1186, 2011-Ohio-3656, ¶7, quoting *State v. Smith* (1977), 49 Ohio St.2d 261, 264. 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.

{¶10} A trial court is not automatically required to hold a hearing on a post-sentence motion to withdraw a plea of guilty. A hearing must only be held if the facts alleged by the defendant, accepted as true, would require that the defendant be allowed to withdraw the plea. *Williams*, citing *State v. Kent*, 10th Dist. No. 03AP-722, 2004-Ohio-2129.

{¶11} 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. *Smith*. "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. In deciding a Crim.R. 32.1 motion, the good faith, weight, and credibility of a moving party's assertions are a matter for resolution by the trial court. *Smith*. Thus, the trial court has great discretion in assessing the credibility of affidavits used to support a Crim.R. 32.1 motion. *State v. Roberts*, 8th Dist. No. 93439, 2010-Ohio-1436.

{¶12} Appellant argues he should have been allowed to withdraw his guilty pleas because his right to effective assistance of counsel was violated. Specifically, appellant

contends his attorneys were ineffective for (1) failing to adequately investigate the case; (2) failing to maintain adequate communication with appellant; and (3) coercing appellant into entering guilty pleas.

{¶13} Ineffective assistance of counsel can form the basis for a claim of manifest injustice to support withdrawal of a guilty plea pursuant to Crim.R. 32.1. *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813. A defendant seeking to withdraw a guilty plea based on ineffective assistance of counsel must show: (1) that counsel's performance was deficient, and (2) that there is a reasonable probability that, but for counsel's errors, the defendant would not have agreed to plead guilty. *State v. Xie* (1992), 62 Ohio St.3d 521; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. Additionally, a guilty plea waives the right to assert ineffective assistance of counsel unless the counsel's errors affected the knowing and voluntary nature of the plea. *State v. Hill*, 10th Dist. No. 10AP-634, 2011-Ohio-2869, ¶15, citing *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130.

{¶14} We note at the outset that appellant's motion to withdraw his guilty pleas was filed over one year after his sentencing. While not dispositive on its own, "[a]n 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." *Smith* at paragraph three of the syllabus.

{¶15} The first deficiency alleged is counsel's failure to investigate the case. According to appellant, a failure to investigate is affirmatively established by the Inmate Visitor Information slates from the Franklin County Jail showing that, during his

incarceration, appellant was visited only once by Gary Phillips, the investigator hired by his counsel. Appellant posits that "one visit by an investigator is not constitutionally reasonable under the circumstances of this case." (Appellant's brief at 7.)

{¶16} Appellant, however, fails to identify, either through affidavit or argument, any particular investigation that should have been conducted or any particular evidence or benefit that may have been ascertained had there been additional visits by the investigator. More importantly, however, appellant fails to assert how counsel's alleged failure to investigate renders his pleas not knowing and not voluntary. *Hill*.

{¶17} Further, when considering whether counsel's performance was deficient, a reviewing court must presume that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Smith*, 10th Dist. No. 08AP-420, 2008-Ohio-6520, ¶16. With respect to counsel's actions, the record demonstrates counsel conducted an investigation into the case. The record reveals a notice of alibi was filed on August 19, 2008 naming five witnesses whose testimony would be presented in support of the defense. A second notice of alibi, including the names of two alibi witnesses, was filed on April 2, 2009. Additionally, counsel filed witness lists, engaged in discovery, and issued subpoenas in advance of trial, all of which suggest that an investigation into the case was conducted. The invoice submitted by Phillips indicates he met with appellant and appellant's mother on several occasions, reviewed transcripts, engaged in witness location, and met with defense counsel on three occasions. At the April 8, 2009 plea hearing, counsel stated to the court that Phillips "did an incredibly thorough job following every possible lead" while going through discovery. (Tr. 26.)

{¶18} Accordingly, we find appellant has not established that his counsel was ineffective for failing to adequately investigate the case.

{¶19} The second deficiency alleged by appellant is counsel's failure to maintain adequate communication with appellant. According to appellant, neither his counsel nor co-counsel met with him prior to trial "in any meaningful sense" despite appellant's repeated requests that counsel do so. (Appellant's brief at 7.) The record, however, does not support this contention.

{¶20} In support of his motion for payment, appellant's counsel attached 12 letters that were sent from counsel's office to appellant during his incarceration, and appellant's affidavit confirms counsel communicated with him via postal correspondence. Appellant's affidavit also states that he met with counsel in person on days he was at the courthouse for scheduled court appearances. Further, it appears from the transcript that appellant's concern was not that his counsel was not communicating with him, but, rather, appellant's concern was that he did not care for the advice he was being given by counsel. When asked what concerns appellant had with counsel, appellant stated:

> I said I feel like I need a new lawyer because I feel like I can get a better deal. I can like – instead of having somebody like not like just giving up, like totally giving up saying that you can't win, just go with another lawyer. So see what – look at some other instead, get another lawyer.

(Tr. 3.)

{¶21} The trial court then reiterated to appellant that he was the client and could proceed with the trial if that is what he wanted to do. Subsequently, the plea offer and potential sentences were discussed, and appellant confirmed that the stated plea offer was the one that had been previously conveyed to him. When asked during the plea

hearing whether he discussed the charges with counsel, whether counsel satisfactorily answered his questions, and whether he was satisfied with counsel's representation, appellant responded, "Yes, sir." (Tr. 13.) Additionally, the entry of guilty plea signed by appellant and filed on April 15, 2009, states that appellant reviewed the facts and law of the case with counsel and that appellant was completely satisfied with the legal representation and advice received from counsel.

{¶22} Accordingly, we conclude appellant has not established that his counsel was ineffective for failing to communicate with appellant.

{¶23} The third deficiency alleged by appellant is that his counsel "coerced" him into pleading guilty. In support, appellant directs us to the following dialogue from the plea hearing:

> THE COURT: Has anyone promised you anything in an effort to get you to change your plea?
>
> [APPELLANT]: No, sir.
>
> THE COURT: Okay. Has anyone threatened you in any way in an effort to get to you change your plea?
>
> [APPELLANT]: Man, I was going to lose at trial anyway, so. No, sir.
>
> THE COURT: Well, no, there's no guarantees in life one way or the other. You could go to trial and win. But if you go to trial and lose the consequences are greater.
>
> Has anyone threatened you in any way in an effort to get you to accept this plea or that you feel threatened that if you don't take the plea something is going to happen to you in a more physical way?

> [APPELLANT]: I was told I was going to lose at trial so might as well take this offer.

(Tr. 14-15.)

{¶24} Appellant also asserts that his counsel told his mother that she could leave the court proceedings during voir dire because the case would not be disposed of at that time, but then his counsel "coerced and pressured" him into pleading guilty after his mother left. (Appellant's brief at 11.) According to appellant's mother's affidavit, she believes appellant's counsel told her to leave so that "he could convince [appellant] to plead guilty," and that this would not have occurred in her presence.

{¶25} Once again, however, the record belies appellant's position. Immediately following the dialogue from the plea hearing quoted above, the following exchange occurred:

> THE COURT: Well, as I indicated to you previously that's the professional opinion of your attorneys.
>
> [APPELLANT]: Uh-huh.
>
> THE COURT: You are the client. Okay.
>
> [APPELLANT]: I understand that.

(Tr. 15.)

{¶26} The trial court then reiterated to appellant "[y]ou don't have to follow the advice of your attorneys" because "ultimately it is your decision" whether or not to enter a guilty plea. (Tr. 15.) Further, the entry of guilty plea signed by appellant indicates that no person had coerced or induced him to plead guilty. Thus, the record indicates appellant was aware that it was his decision whether or not to enter a guilty plea and that he was not coerced by his counsel to do so. While appellant's counsel may have recommended

that he take the plea offer based on the evidence anticipated to be presented at trial, such recommendation does not equate to a finding of coercion.

{¶27} Moreover, a defendant seeking to withdraw a guilty plea post-sentence bears the burden of establishing manifest injustice based on specific facts either contained in the record or supplied through affidavits attached to the motion. *Orris* at ¶8; *Smith* at paragraph one of the syllabus. The good faith, credibility, and weight to be given to assertions made by a defendant in support of a motion to withdraw a guilty plea are matters to be resolved by the trial court. *State v. Smith*, 10th Dist. No. 07AP-985, 2008-Ohio-2802, ¶10. While appellant attached an affidavit to his motion stating that he "felt pressured" to plead guilty by his counsel, we note that "[g]enerally, a self-serving affidavit made by the moving party is not sufficient to demonstrate manifest injustice." Id.; *State v. Moncrief*, 10th Dist. No. 08AP-153, 2008-Ohio-4594, ¶13.

{¶28} For the foregoing reasons, we conclude the trial court did not abuse its discretion in denying appellant's motion to withdraw guilty plea, and, accordingly, overrule appellant's first and second assignments of error.

{¶29} In his third assignment of error, appellant contends the trial court erred in denying his motion to withdraw guilty plea without holding an evidentiary hearing. "An evidentiary hearing on a post-sentence motion to withdraw a guilty plea is not required if the facts as alleged by the defendant, and accepted as true by the court, would not require that the guilty plea be withdrawn." *State v. Griffith*, 10th Dist. No. 10AP-94, 2010-Ohio-5556, ¶17 (internal citations omitted). As we have concluded in our disposition of appellant's first and second assignments of error, not only do the affidavits of appellant and his mother fail to allege sufficient facts to establish a manifest injustice, but, also the

record contradicts appellant's claims of ineffectiveness, and, therefore, the trial court was not required to hold an evidentiary hearing on such claims. *State v. Oluoch*, 10th Dist. No. 07AP-45, 2007-Ohio-5560, ¶50 (where the record contradicts a defendant's claims asserted in support of a motion to withdraw guilty plea the trial court is not required to hold an evidentiary hearing); *State v. Moore,* 4th Dist. No. 01CA674, 2002-Ohio-5748, ¶18 (an evidentiary hearing on a plea withdrawal motion is not required if the defendant's allegations are "conclusively and irrefutably contradicted by the record").

{¶30} Accordingly, we overrule appellant's third assignment of error.

{¶31} Based on the foregoing, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT, J., concurs.
TYACK, J., concurs separately.

TYACK, J., concurring separately.

{¶32} I agree with the majority that Raul Hernandez did not demonstrate the existence of a manifest injustice such that his guilty pleas could or should be set aside. However, I cannot agree that defense counsel properly functioned in his role as counselor to Hernandez.

{¶33} Hernandez was indicted on February 21, 2008 and charged with three extremely serious charges: aggravated murder, attempted murder, and felonious assault. He was facing the possibility of spending the rest of his life in prison. He was only 17 years old when the offenses occurred.

{¶34} On February 25, 2008, an attorney was appointed to represent Hernandez. On March 3, 2008, someone filed a standard form "Request for Discovery." The form has an ink-stamped signature both after the "respectfully submitted" line and in the certificate of service, not the actual signature of the assigned attorney.

{¶35} Also on March 3, 2008, someone filed a standard form motion for a bill of particulars. Again, both signatures are stamped signatures.

{¶36} On March 24, 2008, the State of Ohio responded to both the request and the motion. The first trial date of March 26, 2008 was continued at the request of both parties so the case could be more fully investigated. On that same March 26, 2008 date, the assigned trial judge signed an entry granting $1,500 of public funds for payment of a private investigator. The entry and a related entry both have stamped signatures for defense counsel.

{¶37} On the second trial date a second lawyer appeared and the case was continued again, this time to August 25, 2008. Less than two weeks before this trial date, someone filed a defense list of witnesses, again with an ink-stamped signature. At the same time, defense counsel filed a motion asking that a transcript of the proceedings in juvenile court be prepared at state expense. Almost six months had elapsed since the attorney had been appointed to represent Hernandez. A notice of alibi was also filed, again without the attorney's own signature. The notice of alibi was not timely, being filed less than seven days before the trial date. See Crim.R. 12.1.

{¶38} The case was continued once again, this time to December 1, 2008. The reason assigned was the necessity of obtaining the juvenile court transcript requested in August.

{¶39} The December 1, 2008 trial date was also moved, first to February 23, 2009 and then to April 7, 2009.

{¶40} Assigned counsel's office filed a second motion for funds to retain an investigation, again with an ink-stamped signature of counsel. The motion makes no mention of the fact an investigator had been appointed almost one year earlier and funds for payment were approved. Defense subpoenas were issued for the April 7, 2009 trial date. Defense counsel's signature is not on the subpoenas.

{¶41} On April 8, 2009, Hernandez entered his guilty pleas. He was sentenced to a term of incarceration of 18 years to life. He would later claim and prove that his assigned counsel had never once come to see him in jail during the period of over 15 months of representation, despite his age and the seriousness of the charges. What that implies is that defense counsel never had a private meeting or consultation with his client. All telephone calls from the jail are recorded, and sometimes monitored, so no confidentiality is possible. Meetings with clients in the holding cells outside the courtroom are usually in the presence of numerous other defendants and possibly deputy sheriffs or other counsel.

{¶42} The assigned attorney claimed for billing purposes that he personally worked almost 80 hours out of court and 16.7 hours in court on Hernandez's case. The court file does not reflect the almost 80 hour figure claimed. If the 80 hour figure is correct, the billing reflects the fact that the attorney worked less than 1 hour and 20 minutes a week out of court on Hernandez's case over a period of over 15 months. Again, Hernandez faced charges of aggravated murder, attempted murder, and felonious assault, each with a firearm specification.

{¶43} Given the gruesome facts of the homicide and shooting, I cannot find that a manifest injustice occurred for purposes of Crim.R. 32.1. However, I cannot condone what to me is the utter failure of counsel to give his client the personal attention he deserved. I concur in the result reached by the majority, but not a significant part of its reasoning.

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