

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-389
Mark D. Miller, Jr.,	:	(C.P.C. No. 05CR-09-6013)
Defendant-Appellant.	:	(REGULAR CALENDAR)

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D E C I S I O N

Rendered on January 31, 2013

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*Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

*Shaw & Miller*, and *Mark J. Miller*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Mark D. Miller, Jr., is appealing from the refusal of the trial court to allow him to withdraw his guilty pleas. He assigns two errors for our consideration:

[I.] THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO HOLD A HEARING ON APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

[II.] THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE HIS PLEA WAS NOT MADE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY.

{¶ 2} Miller was indicted in 2005 after having been bound over from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch. Miller

was indicted on a total of seven felonies, including aggravated burglary with a firearm specification, aggravated robbery with a firearm specification and kidnapping with a firearm specification. He entered pleas of not guilty at arraignment and counsel was appointed to represent him.

{¶ 3} Counsel pursued discovery and filed a motion to suppress identification of Miller.

{¶ 4} Because a set of felonies was pending against another person whom the state of Ohio alleged was a co-defendant, Miller's case was transferred to another judge for his cases to be joined with that co-defendant. The cases were ultimately set for trial in April 2006.

{¶ 5} Miller did not go to trial on that date, but entered into a plea bargain under the terms of which he pled guilty to one count of aggravated burglary with a firearm specification and one count of kidnapping with a firearm specification. The other five charges in the indictment were dismissed.

{¶ 6} In conjunction with his guilty pleas, Miller and his attorney signed an entry of guilty plea form, which included advice that he would be subject to a period of five years of post-release control after he was released from prison. The five year period was mandatory because Miller was pleading guilty to felonies of the first degree.

{¶ 7} The trial court judge who accepted the pleas scheduled the case for sentencing on May 10, 2006, and ordered both a pre-sentence investigation and a mental health evaluation. Sentencing was later postponed first until May 24, 2006 and then until June 7, 2006.

{¶ 8} Counsel for Miller, in the interim, had filed a motion seeking to withdraw Miller's guilty pleas. The reason for the motion, as contained in its memorandum, was that a discussion of the likely prison sentences for Miller had occurred at the time Miller entered his guilty pleas but when the date for a sentencing hearing arrived, Miller was informed that he likely would receive a longer sentence of incarceration.

{¶ 9} On June 7, 2006, the sentencing hearing was conducted. Miller's court appointed attorney did not attend, but a family member who was an experienced criminal

defense lawyer appeared instead. The substitute counsel stated on the record that the motion to withdraw the guilty pleas was itself being withdrawn.

{¶ 10} Miller indicated that he had nothing to say by way of allocation.

{¶ 11} The trial judge then merged the two firearm specifications and sentenced Miller to a 3-year sentence of incarceration for the firearm specifications. The court also sentenced Miller to 8 years of incarceration on the aggravated burglary charge and 4 years of incarceration on the kidnapping charge. All three terms of incarceration were to be served consecutively, for a total of 15 years of incarceration.

{¶ 12} Miller did not pursue a direct appeal of the plea proceedings or the sentences imposed.

{¶ 13} Over five years later, Miller, with the help of retained counsel, filed a motion seeking to withdraw the pleas.

{¶ 14} The motion asserted that the mandate of Crim.R. 32.1 should not apply. Crim.R. 32.1 reads:

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.

{¶ 15} The Supreme Court of Ohio has made it clear that Crim.R. 32.1's manifest injustice standard does apply, even where there are problems with the precise languages used in sentencing a defendant to post-release control. *See State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238. To succeed in withdrawing his guilty pleas, Miller needed to demonstrate that a manifest injustice occurred in conjunction with his plea proceedings.

{¶ 16} Miller's counsel did not include in the motion any allegations that a manifest injustice had occurred. Instead, counsel argued that defects had occurred with respect to the advice of the court as to the issue of post-release control and with respect to the post-release control terms imposed.

{¶ 17} The trial court did advise Miller about the concept of post-release control at the time of the original plea proceedings. The trial court stated:

Upon your release from the institution, you will be placed on a mandatory period of supervision for a period of five years.

(Tr. 9.)

{¶ 18} The trial judge did not need to use the phrase "post-release control," but could use the advice that after prison Miller would be under supervision for five years. Further, as indicated earlier, the guilty plea form signed by Miller included the precise phrase "post-release control" and the correct length of post-release control.

{¶ 19} After advisement about supervision, at the time of his pleas, Miller was asked if he had any questions, and Miller said he had none.

{¶ 20} We cannot find that the failure to give a more detailed explanation of post-release control made the plea proceedings or the sentences a manifest injustice. Miller and his co-defendant abducted a man off the streets of Hilliard, Ohio, at gunpoint and made the man drive back to his home. They stole items from the home and made the man drive to an ATM with orders to withdraw money from his account. The kidnapping stopped when they encountered a police officer.

{¶ 21} Given the underlying facts, no manifest injustice occurred because the trial court judge did not repeat the information contained in the plea form Miller and his counsel signed.

{¶ 22} Further, any flaws in the proceedings with respect to post-release control were present before the sentencing hearing. The alleged flaws could have been the basis for a direct appeal or the continuing pursuit of his first motion to withdraw his guilty pleas. The fact that Miller and his counsel did not contest the proceedings for over five years is not insignificant.

{¶ 23} The lack of a manifest injustice was apparent from the time of the plea proceedings onward. The trial court did not need to conduct an in-court hearing to consider the possibility of a manifest injustice which was not alleged and which is not apparent from the record.

{¶ 24} The first assignment of error is overruled.

{¶ 25} The record before us also does not demonstrate that the trial court failed to substantially comply with the requirements of Crim.R. 11 or the requirements as to

advisement as to post-release control. The record also does not indicate that Miller's plea was less than knowing, intelligent and voluntary.

{¶ 26} The second assignment of error is overruled.

{¶ 27} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned active duty under the Ohio Constitution, Article IV, Section 6(C).

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