

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	No. 15AP-968
Plaintiff-Appellee,	:	(C.P.C. No. 09CR-882)
	:	and
v.	:	No. 15AP-970
	:	(C.P.C. No. 13CR-3494)
Tracy J. Salter,	:	
a.k.a. Tracy J. Lucas,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
	:	

D E C I S I O N

Rendered on June 30, 2016

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Michael P. Walton*, for appellee.

On brief: *Yeura R. Venters*, Public Defender, and *David L. Strait*, for appellant.

APPEALS from the Franklin County Court of Common Pleas

BROWN, J.

{¶ 1} In these consolidated appeals, defendant-appellant, Tracy J. Salter, a.k.a. Tracy J. Lucas, appeals from judgments of the Franklin County Court of Common Pleas denying his motion to withdraw guilty pleas in Franklin C.P. Nos. 09CR-882 and 13CR-3494.

{¶ 2} On February 12, 2009, appellant was indicted in case No. 09CR-882 on one count of receiving stolen property, a felony of the fourth degree, and one count of failure to comply with an order or signal of a police officer, a felony of the third degree. On February 10, 2010, appellant entered a guilty plea to Count 2, failure to comply with an

officer's signal or order, and the trial court entered a nolle prosequi as to Count 1 (receiving stolen property). By entry filed May 11, 2010, the trial court sentenced appellant to a prison term of four years, to run concurrent with his sentence in case No. 09CR-5080 and consecutive with an 11-month sentence in case No. 09CR-2545.

{¶ 3} On September 15, 2011, the trial court granted appellant judicial release and placed him on community control for a period of four years; the court advised appellant that the balance of his sentence could be re-imposed if he failed to comply with the conditions of his community control.

{¶ 4} On July 1, 2013, appellant was indicted in case No. 13CR-3494 on one count of breaking and entering, in violation of R.C. 2911.13, one count of theft, in violation of R.C. 2913.02, and one count of possessing criminal tools, in violation of R.C. 2923.24.

{¶ 5} On November 8, 2013, appellant's probation officer filed a "Request for Revocation of Probation and Statement of Violation(s)," alleging that appellant had committed multiple violations of the conditions of his community control.

{¶ 6} On January 30, 2014, appellant entered a guilty plea to one count of breaking and entering in case No. 13CR-3494, in exchange for the prosecutor's recommendation that the remaining two counts be dismissed. On February 13, 2014, the trial court conducted a revocation sentencing hearing.

{¶ 7} By entry filed February 19, 2014, the trial court imposed an 11-month sentence in case No. 13CR-3494 (breaking and entering), to be served consecutive to the sentence imposed in case No. 09CR-882, and the court entered a nolle prosequi as to Counts 2 and 3 of the indictment. Also on that date, the trial court filed a revocation entry in case No. 09CR-882, imposing a prison term of three years.

{¶ 8} The state appealed the three-year sentence in case No. 09CR-882, and in *State v. Salter*, 10th Dist. No. 14AP-211, 2014-Ohio-5524, this court sustained the state's assignment of error and reversed the judgment of the trial court. Specifically, this court held that, upon revocation of appellant's judicial release, "the trial court erred by imposing a sentence different from the four-year sentence it previously imposed." *Id.* at ¶ 10.

{¶ 9} Based on this court's remand in *Salter*, the trial court conducted a re-sentencing hearing on April 23, 2015. During the hearing, counsel for appellant argued

that the trial court should maintain a total aggregate sentence of 3 years and 11 months. By entry filed April 27, 2015, the trial court imposed a prison term of 4 years in case No. 09CR-882, to be served consecutively with the 11-month sentence in case No. 13CR-3494.

{¶ 10} On July 14, 2015, appellant filed a pro se motion to withdraw his guilty pleas in case Nos. 09CR-882 and 13CR-3494. In his motion, appellant requested an order by the court granting him an "evidentiary hearing, appointing him counsel for such hearing and ultimately modifying his consecutive to concurrent sentences because a manifest injustice occurred during both the plea process and sentencing because of the ineffective assistance of defense counsel." On July 20, 2015, appellant filed a "motion to amend withdraw plea" in case Nos. 09CR-882 and 13CR-3494, arguing that his trial counsel had made misrepresentations, and that he was "promised by [his] attorney that [he] would do the rest of [his] sentence on judicial release along with [his] previous charges." By entries filed August 31, 2015, the trial court denied appellant's motion to withdraw his guilty pleas in both cases.

{¶ 11} Appellant filed appeals in case Nos. 09CR-882 and 13CR-3494. By entry filed October 27, 2015, this court consolidated the cases for purposes of appeal. On appeal, appellant sets forth the following assignment of error for this court's review:

The trial court erred by denying Appellant's postconviction motion to withdraw his plea.

{¶ 12} Under his single assignment of error, appellant argues the trial court erred in denying his motion to withdraw the guilty pleas in case Nos. 09CR-882 and 13CR-3494. Appellant contends that his pro se filings suggest the guilty pleas may not have been knowing, intelligent, and voluntary and that the trial court should have conducted an evidentiary hearing.

{¶ 13} Crim.R. 32.1 states in part: "A motion to withdraw a plea of guilty * * * 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." Here, "[b]ecause appellant's motion to withdraw his guilty plea was filed after sentence was imposed, it shall only be granted to correct manifest injustice." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶ 5, citing *State v. Xie*, 62 Ohio St.3d 521, 526 (1992). A defendant seeking to withdraw a guilty plea after the imposition

of 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." *State v. Hagler*, 10th Dist. No. 10AP-291, 2010-Ohio-6123, ¶ 7.

{¶ 14} A "[m]anifest injustice relates to some fundamental flaw in the proceedings which result in a miscarriage of justice or is inconsistent with the demands of due process." *Williams* at ¶ 5, citing *State v. Hall*, 10th Dist. No. 03AP-433, 2003-Ohio-6939, ¶ 12. Under Ohio law, "[a] guilty plea that was not entered knowingly, intelligently, or voluntarily, creates a manifest injustice that would entitle a defendant to withdraw a guilty plea." *Id.*, citing *State v. Bush*, 3d Dist. No. 14-2000-44, 2002-Ohio-6146, ¶ 11.

{¶ 15} Further, "a guilty plea is not voluntary if it is the result of ineffective assistance of counsel." *State v. Masterson*, 8th Dist. No. 90505, 2008-Ohio-4704, ¶ 10, citing *State v. Banks*, 9th Dist. No. 01CA007958, 2002-Ohio-4858, ¶ 16. A claim of ineffective assistance of counsel requires a defendant to show that his or her attorney's conduct "fell below professional standards and that the defendant was prejudiced as a result." *Id.* at ¶ 11, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant claiming ineffective assistance after entering a guilty plea "must also show that the ineffective assistance precluded him from entering the plea knowingly and voluntarily." *Masterson* at ¶ 11.

{¶ 16} A trial court is not always required to hold an evidentiary hearing on a motion to withdraw a guilty plea; rather, "[a] hearing is required if the facts alleged by the defendant and accepted as true would require the court to permit that plea to be withdrawn." *Williams* at ¶ 6, citing *State v. Kent*, 10th Dist. No. 03AP-722, 2004-Ohio-2129, ¶ 8. Further, "[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." *Hagler* at ¶ 9.

{¶ 17} In denying appellant's motion to withdraw his guilty pleas in the instant case, the trial court held in relevant part:

Crim.R. 32.1 allows withdrawal of a guilty plea after sentencing only "to correct manifest injustice." No showing of a factual basis which might meet that demanding standard has been made.

As the foregoing recitation of the chronology of these two cases demonstrates, Mr. Salter has had many court hearings in his 09CR-882 case since he pleaded guilty in February 2010. In all of them he had legal counsel. Not once did he suggest - much less file a motion asserting - that there was any basis to withdraw his guilty plea. While Case No. 13CR-3494 is more recent, there was no request to withdraw his B & E guilty plea for almost a year and a half after he was sentenced. Obviously, that substantial delay does not suggest there is any genuine justification to seek to withdraw these pleas.

The Motion to Withdraw filed July 14, 2015 does not set out any factual grounds that might qualify under Rule 32.1, or even require a hearing. The motion just complains that the additional 12 months he is now required to serve in prison "is illegal." * * * That extra term of imprisonment was within the contemplation of the parties back in 2010 when Salter entered his guilty plea, since at that time the maximum term of imprisonment for an F-3 was up to five years. He was not misled. He cannot seriously assert that he plead [sic] guilty anticipating he could not be sentenced to four years in prison. In short, these motions reflect at most unhappiness with the Court of Appeals' decision * * *.

(Aug. 31, 2015 Journal Entry at 2-3.)

{¶ 18} In his pro se motion to withdraw his guilty pleas, appellant argued that his counsel had made misrepresentations and promised he would serve "the rest of [his] sentence on judicial release along with [his] previous charges." Appellant also argued that, following the state's appeal of the revocation entry in case No. 09CR-882, he was "given an additional 12 months" which, according to appellant, "[b]y law * * * is illegal because I was already sentenced."

{¶ 19} In response, the state argues that the record demonstrates appellant was not promised anything regarding his sentences in connection with his plea of guilty in either case. The state notes that, while appellant was granted judicial release in case No. 09CR-882 in September 2011, he did not enter his plea in case No. 13CR-3494 until January 30, 2014; further, the trial court revoked appellant's judicial release in case No. 09CR-882 on the same day (February 13, 2014) the court sentenced him in case No. 13CR-3494. The state argues that appellant could not have reasonably expected the trial court to grant judicial release in case No. 13CR-3494 when it had yet to impose a prison

sentence. The state further argues that appellant could not have reasonably expected the trial court to continue his judicial release in case No. 09CR-882 in light of the fact he stipulated to probable cause and to the actual violations of the terms of his judicial release.

{¶ 20} Upon review, the record does not support appellant's assertions as to misrepresentations and/or promises by his counsel with respect to his pleas; rather, we agree with the state that the record in case Nos. 09CR-882 and 13CR-3494 contradicts appellant's assertion he was promised by counsel that he would "do the rest of [his] sentence on judicial release along with [his] previous charges."

{¶ 21} We initially observe, with respect to case No. 09CR-882, that appellant waited over five years before challenging that plea. Although Crim.R. 32.1 does not prescribe a time limitation, "an undue delay between the occurrence of the alleged cause for the withdrawal of a guilty plea and the filing of a Crim.R. 32.1 motion is a factor that may adversely affect the credibility of the defendant and weighs against allowing a defendant's plea to be withdrawn." *State v. Cioffi*, 11th Dist. No. 2002-T-0037, 2003-Ohio-2374, ¶ 10, citing *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph three of the syllabus. In the present case, the trial court found no reason for appellant's "substantial" delay in filing his motion to withdraw the pleas.

{¶ 22} A review of statements by defense counsel during the 2010 sentencing proceedings in case No. 09CR-882 undermines any claim that counsel made specific promises that appellant would be granted judicial release. During the hearing, defense counsel noted on the record a discussion with appellant that "a motion for judicial release could be filed in the future," and that "a program in that motion setting forth how * * * money could be paid and restitution could be accomplished * * * might convince the court, or at least influence the court, in your decision as to whether or not to grant the judicial release." (Apr. 29, 2010 Tr. at 7.) Thus, while counsel explained to appellant the possibility of judicial release in the future, the record does not suggest appellant was promised anything in return for his plea. Further, appellant signed a plea form in case No. 09CR-882 which acknowledged no promises were made in return for the plea, and we note that appellant's 2011 motion for judicial release did not suggest any promise of judicial release. As set forth under the facts, the trial court ultimately granted appellant

judicial release in 2011; however, the trial court advised appellant that judicial release could be revoked and the balance of his sentence re-imposed if he violated the conditions of his community control.

{¶ 23} A review of the 2014 plea hearing in case No. 13CR-3494 indicates that appellant entered a plea of guilty to one count of breaking and entering in exchange for the prosecutor's request that the court enter a nolle prosequi as to the remaining two counts. Nothing in the transcript of the plea colloquy suggests that appellant's plea was motivated by the promise of a specific sentence, including judicial release. During that hearing, defense counsel also stipulated to "both probable cause and to the violations" of community control with respect to the request for revocation by the probation department. (Jan. 30, 2014 Tr. at 14.)

{¶ 24} Upon review, the record belies appellant's contention that his counsel promised he would serve the rest of his sentence on judicial release. Further, "a self-serving affidavit or statement is insufficient to demonstrate manifest injustice." *State v. Rockwell*, 5th Dist. No. 2008-CA-00009, 2008-Ohio-2162, ¶ 42. *See also State v. Laster*, 2d Dist. No. 19387, 2003-Ohio-1564, ¶ 8 ("where nothing in the record supports a defendant's claim that his plea was not knowingly and voluntarily made other than his own self-serving affidavit or statement, the record is insufficient to overcome the presumption that the plea was voluntary"). In the present case, appellant did not submit any affidavits or other evidentiary materials in support of his motion, and his unsupported assertion as to an alleged promise was insufficient to establish manifest injustice based on alleged deficient performance.

{¶ 25} We also find no merit to appellant's contention that the trial court was required to conduct an evidentiary hearing on the motion to withdraw. Under Ohio law, where allegations upon which a defendant's Crim.R. 32.1 motion was based are contradicted by the record, an evidentiary hearing is not required. *State v. Farley*, 4th Dist. No. 02CA32, 2003-Ohio-7338, ¶ 24. Here, because appellant failed to allege sufficient facts to establish manifest injustice, and where the record contradicts appellant's claims of ineffectiveness, "the trial court was not required to hold an evidentiary hearing on such claims." *State v. Hernandez*, 10th Dist. No. 11AP-202, 2011-Ohio-5407, ¶ 29.

{¶ 26} We note that appellant's primary contention in his motion to withdraw appears to be displeasure with the fact the trial court re-imposed the original four-year sentence in case No. 09CR-882 following this court's remand in *Salter*. As noted, appellant asserted in his motion that the "additional 12 months" imposed by the trial court "is illegal because I was already sentenced." As found by the trial court, however, such extra term of imprisonment "was within the contemplation of the parties back in 2010" when appellant entered his guilty plea, as the maximum term of imprisonment was up to five years, and we agree with the trial court that appellant "cannot seriously assert" he entered his guilty plea "anticipating he could not be sentenced to four years in prison." To the extent appellant disagrees with this court's determination in *Salter*, remanding the matter for the trial court to re-impose the original sentence, such argument is not a proper basis upon which to assert manifest injustice as contemplated by Crim.R. 32.1.

{¶ 27} Based upon the foregoing, appellant's single assignment of error is overruled, and the judgments of the Franklin County Court of Common Pleas, denying appellant's motion to withdraw his guilty pleas in case Nos. 09CR-882 and 13CR-3494, are hereby affirmed.

Judgments affirmed.

KLATT and SADLER, JJ., concur.
