[Cite as *State v. Sterling*, 2011-Ohio-5598.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-A-0010**
- vs -	:	
CAMERON STERLING,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 13207.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Robert Troll Lynch, Lynch Legal Services, 26300 Seville Drive, Suite 104, Beachwood, OH 44122 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Cameron Sterling, appeals from the judgment of the Ashtabula County Court of Common Pleas denying his motion for withdrawal of his Alford plea. For the reasons that follow, the judgment is affirmed.

{¶2} On December 4, 1990, appellant was indicted on one count of rape, in violation of R.C. 2907.02(A)(1)(b), a felony in the first degree. This charge stemmed

from appellant's alleged sexual abuse of his girlfriend's 11-year-old daughter. Appellant entered a plea of not guilty at his arraignment.

{¶3} On January 2, 1991, appellant entered an Alford plea to one count of rape pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25. In exchange for appellant's plea, the state agreed to remove language from the indictment that appellant "purposely compelled [a] female minor to submit by force or threat of force," thereby removing the possibility of a life sentence. The trial court sentenced appellant to an indefinite term of six to 25 years imprisonment.

{¶4} On August 12, 2003, appellant moved to have DNA evidence tested, which the state, pursuant to former R.C. 2953.82(D),[1] had authority to deny without the possibility of appeal. The statute provided:

{¶5} "If the prosecuting attorney disagrees that the inmate should be permitted to obtain DNA testing under this section, the prosecuting attorney's disagreement is final and is not appealable by any person to any court, and no court shall have authority, without agreement of the prosecuting attorney, to order DNA testing regarding that inmate and the offense or offenses for which the inmate requested DNA testing in the application." Former R.C. 2953.82(D).

{¶6} In *State v. Sterling*, 11th Dist. No. 2003-A-0135, 2005-Ohio-6081, at ¶43, this court held that the aforementioned statute violated the separation of powers doctrine under the Ohio Constitution. Ultimately, the trial court's judgment was reversed and remanded such that DNA testing could be permitted notwithstanding the state's

1. We note that R.C. 2953.82 was subsequently repealed. However, for purposes of this appeal, we cite the former statute as it was in effect at the time of appellant's motion.

objection. The Supreme Court of Ohio accepted the state's appeal and affirmed this court's judgment. *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, at ¶43.

{¶7} Following his release from prison, appellant, through counsel, renewed his request for DNA testing under the surviving statutory scheme. The trial court denied the request by its entry of August 1, 2008, finding: (1) that there were no available samples to be tested; (2) that R.C. 2953.82 only allows for DNA testing if the defendant is incarcerated and has at least one year remaining on the prison term; and (3) that a DNA exclusion result would not be outcome determinative, citing *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246.

{¶8} On December 16, 2010, appellant filed a motion to withdraw his Alford plea, arguing that in order for the trial court to proceed with the reverse and remand orders of both this court and the Supreme Court of Ohio, it would be necessary for him to withdraw his guilty plea and enter a plea of not guilty. The trial court did not agree, finding that appellant did not set forth how manifest injustice would result if he were not allowed to withdraw his plea.

{¶9} Appellant timely appeals and asserts five assignments of error, which are addressed out of sequence. Three of appellant's assignments of error are as follows:

{¶10} "[1.] The trial court erred by not recognizing the involuntariness of defendant's Alford plea.

{¶11} "[3.] The trial court erred by failing to recognize the *Brady* [*v. Maryland*] violation dealing with the DNA statute.

{¶12} "[5.] The trial court erred by failing to recognize coercion from misinformation as to the DNA statute which was Ohio law at the time of trial."

{¶13} These three errors are built around the same argument: that the unconstitutional nature of the DNA law at the time of the original plea hearing destroyed the "knowing" and "voluntary" elements of appellant's Alford plea. Appellant contends that his plea was essentially coerced because the voluntariness of the plea was made without the knowledge that the state had statutory "veto power" on the matter of DNA testing. Stated differently, appellant argues the trial court erred in denying his motion to withdraw his plea because the court did not recognize that the DNA statute made his plea involuntary (assignment one), in violation of *Brady v. Maryland* (1963), 373 U.S. 83 (assignment three), and coerced (assignment five).

{¶14} Crim.R. 32.1 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."

{¶15} An appellate court is limited in its review of a trial court's decision regarding a motion to withdraw a guilty plea to determine whether the trial court abused its discretion. *State v. Gibbs* (June 9, 2000), 11th Dist. No. 98-T-0190, 2000 Ohio App. LEXIS 2526, at *6-7. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11. "In *Alford*, supra, the United States Supreme Court held that a plea of guilty may be accepted by the trial court despite the fact that the defendant maintains actual innocence of the charges." *State v. Prinkey*, 11th Dist. No. 2010-A-0029, 2011-Ohio-2583, at ¶8, citing *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, at ¶13.

{¶16} This court previously addressed appellant's Alford plea in *State v. Sterling,* 11th Dist. No. 2002-A-0026, 2004-Ohio-526. There, appellant argued that the trial court abused its discretion by not adhering to the requirements set forth by the United States Supreme Court when accepting an Alford-type plea. We held "that the trial court did not err and properly conducted the plea hearing in accordance with Crim.R. 11 and *North Carolina v. Alford*." *Sterling*, 2004-Ohio-526, at ¶30. Because we previously addressed the validity of appellant's plea, the only issue that remains is whether, in light of appellant's new argument concerning the unconstitutionality of former R.C. 2953.82(D), his plea remains valid.

{¶17} The state argues that appellant did not raise this issue at the trial level and is precluded from raising it now. However, while this issue is properly before this court procedurally, it is a double-edged sword for appellant: the reason this court has jurisdiction to hear the case is the same reason it fails on the merits. Appellant could not have been able to raise this issue at his original plea hearing because, as noted previously in *Sterling*, 2005-Ohio-6081, at ¶25, "the statutory right to apply for DNA testing did not become effective until October 29, 2003, or twelve years after his conviction." But, because the statute in question did not exist at the time he entered his plea, it cannot be said that the DNA statute, and the subsequent finding of unconstitutionality, affected his plea in any manner. That the DNA statute was enacted 12 years later, and subsequently repealed and deemed unconstitutional, does not diminish the "voluntary" or "knowing" element of appellant's 1991 plea. Further, appellant fails to demonstrate how *Brady v. Maryland*, supra, is applicable to the present case.

{¶18} Appellant also fails to draw a connection between the remand orders of this court and the Supreme Court of Ohio and the trial court's judgment to deny his motion to withdraw the guilty plea. Appellant's Alford plea and DNA motion are two distinct issues. The remand orders involved appellant's motion to test DNA evidence, which was denied due to the determination that the prosecutor had overbroad statutory discretion under former R.C. 2953.82(D). The record indicates that the trial court reconsidered appellant's DNA motion after the remand orders. The trial court found that both the state and appellant's former attorney agreed no DNA samples existed to be tested. Thus, the trial court followed the remand order by reconsidering the DNA motion without the necessity of considering former R.C. 2953.82(D).

{¶19} Appellant believes that the trial court has refused to follow the order on remand, arguing that withdrawal of a guilty plea is part of any remanded case because remanded cases start de novo with no plea entered. This assertion is, at best, fallacious. The issue before this court in *Sterling*, 2005-Ohio-6081, was appellant's right to DNA testing and the constitutionality of former R.C. 2953.82(D). This court addressed that very issue, and the matter was remanded accordingly; appellant was permitted to reassert his DNA motion without the prosecutor's unfettered ability to deny it. Contrary to appellate counsel's position, a defendant's conviction or plea is not blindly vacated on every case where there is a remand order as a result of another issue concerning the same defendant.

{¶20} Appellant's first, third, and fifth assignments of error lack merit.

{¶21} Appellant's fourth assignment of error states:

{¶22} "The trial court failed to recognize the strong case law precedent as to the issue of 'manifest injustice' in this matter."

{¶23} "If a defendant does not submit his motion to withdraw until after his sentence has been imposed, the burden he must carry in order to be entitled to relief becomes much more difficult. As expressly stated in Crim.R. 32.1, a post-sentence motion to withdraw a guilty plea should only be granted when a 'manifest injustice' is shown to have taken place. Under this higher standard [of manifest injustice], a defendant is entitled to prevail on the motion only if the existence of extraordinary circumstances has been established." *State v. Combs*, 11th Dist. No. 2007-P-0075, 2008-Ohio-4158, at ¶34. (Citations omitted.) In the present case, appellant fails to illustrate extraordinary circumstances that rise to the level of manifest injustice that would permit a withdrawal of his plea. Appellant additionally fails to direct this court to the strong case precedent referred to in his assignment of error.

{¶24} Appellant again argues that this court reversed his conviction in 2007, and that a "withdrawal of guilty plea is part of any remanded case"; as stated, that simply is not the case. This court found the provisions of former R.C. 2953.82 that allowed the prosecution to be the sole arbiter of DNA test requests to be unconstitutional. Appellant's conviction was not disturbed in any way.

{¶25} Appellant's fourth assignment of error lacks merit.

{¶26} Appellant's remaining assignment of error states:

{¶27} "The trial court erred by failing to conduct a hearing of defendant's motion to withdraw guilty plea."

{¶28} A motion to withdraw a guilty plea made after sentencing does not require a hearing unless "'the facts alleged by the defendant and accepted as true would require the trial court to permit withdrawal of the plea.'" *State v. Vernon*, 11th Dist. No. 2002-L-182, 2003-Ohio-6408, at ¶17. (Citation omitted.) Appellant has failed to assert any facts that establish a manifest injustice would occur if he were not permitted to withdraw his plea. As a result, the facts alleged, if true, would not require the trial court to permit withdrawal of the plea. Since appellant's motion to withdraw his plea was made post-sentence and failed to allege facts that, if true, would require the trial court to permit withdrawal of the plea, the trial court was not required to hold a hearing.

{¶29} Appellant's second assignment of error lacks merit.

{¶30} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.