

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2011-L-145
J.C. ROBINSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 03 CR 000117.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

J.C. Robinson, pro se, 14724 Shaw Avenue East, Cleveland, OH 44112 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, J.C. Robinson, pro se, appeals the judgment of the Lake County Court of Common Pleas denying his post-sentence motion to withdraw his guilty plea. This is appellant's second appeal following his conviction of trafficking in cocaine. At issue is whether the trial court abused its discretion in denying appellant's motion to withdraw his guilty plea. For the reasons that follow, we affirm.

{¶2} Between November 2001 and January 2002, appellant trafficked in cocaine or aided and abetted another in trafficking in cocaine by making sales of this controlled substance to a confidential informant working with the Lake County Narcotics Agency. With respect to the instant offense to which appellant pled guilty, on November 15, 2001, appellant, while acting with an accomplice, sold 1.18 grams of cocaine to said informant for \$200.

{¶3} On March 3, 2003, appellant was indicted in a three-count indictment in which he was charged with trafficking in cocaine in an amount less than one gram in the vicinity of a school (Count 1); complicity to trafficking in cocaine in an amount more than one gram but less than five grams (Count 2); and trafficking in cocaine in an amount more than one gram but less than five grams (Count 3), each being in violation of R.C. 2925.03 and a fourth degree felony. The indictment recited that upon conviction of Count 2, there is a presumption in favor of a prison term. Appellant pled not guilty.

{¶4} On May 6, 2005, appellant pled guilty to Count 2, complicity to trafficking in cocaine, and the remaining counts were dismissed. The court referred the matter to the probation department for a pre-sentence investigation report, and sentencing was scheduled for June 2, 2005. However, appellant failed to appear for his sentencing. The trial court revoked his bond and ordered that a warrant be issued for his arrest. Subsequently, appellant failed to appear for a bond forfeiture hearing and his bond was forfeited. Appellant remained a fugitive for more than four years.

{¶5} After appellant was arrested on the bench warrant, the court held a sentencing hearing on November 12, 2009. Appellant's counsel asked that the court impose a sentence of six months in prison. The prosecutor advised the court that,

based on appellant's absence from the court for four years and various outstanding warrants against him, there was nothing to overcome the presumption of imprisonment, and recommended a sentence of 12 months in prison.

{¶6} The trial court noted that appellant had previously been convicted of carrying a concealed weapon and attempted possession of drugs in 1999, theft and burglary in a separate case later in 1999, and theft in 2001.

{¶7} The trial court sentenced appellant to 17 months in prison and suspended his driver's license for five years. On December 14, 2009, appellant filed a motion to withdraw his guilty plea. On the same day, he appealed his conviction and sentence, asserting several assignments of error. He alleged that: (1) due to ineffective assistance of counsel, his guilty plea was not entered voluntarily; (2) the trial court abused its discretion in sentencing him to 17 months in prison and in suspending his driver's license; (3) the license suspension statute did not apply to him; (4) the trial court erred by imposing court costs; and (5) the trial court erred in accepting his guilty plea. The state argued appellant's challenge to the trial court's acceptance of his guilty plea was not ripe because his December 2009 motion to withdraw his guilty plea was still pending in the trial court. Appellant agreed and withdrew his assignment of error challenging the trial court's acceptance of his guilty plea.

{¶8} On September 16, 2011, in *State v. Robinson*, 11th Dist. No. 2009-L-168, 2011-Ohio-4695 ("*Robinson I*"), this court found no error in appellant's conviction but for the court's imposition of court costs. As a result, this court affirmed in part, reversed in part, and remanded the case to the trial court to give appellant an opportunity to ask the court to waive court costs.

{¶9} On remand, the trial court denied appellant's 2009 motion to withdraw his guilty plea and sua sponte waived appellant's court costs.

{¶10} Appellant appeals the court's judgment denying his motion to withdraw his guilty plea, asserting three assignments of error. Because the first two assigned errors are related, we shall consider them together. They allege:

{¶11} "[1.] Appellant's guilty pleas was enter under extreme duress and trial court erred in accepting plea where there was sufficient indication that Appellant did not understand charges for which he plead guilty to.

{¶12} "[2.] Trial court abuse their discretion when it refused to allow Appellant to Withdraw his guilty plea pursuant to Criminal Rule 32.1" (Sic throughout.)

{¶13} Appellant alleges the trial court erred in accepting his guilty plea because it was not entered knowingly, intelligently, and voluntarily.

{¶14} Crim.R. 32.1 provides that "[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 a defendant to withdraw his plea." A defendant who seeks to withdraw a guilty plea after sentence has the burden of establishing a manifest injustice. *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph one of the syllabus. Under such standard, a post-sentence withdrawal motion is allowable only in extraordinary cases to correct a manifest injustice. *Id.* at 264; *State v. Glenn*, 11th Dist. No. 2003-L022, 2004-Ohio-2917, ¶26. The rationale for this high standard is "to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe." *State v. Caraballo*, 17 Ohio St.3d 66, 67 (1985).

{¶15} “Manifest injustice is determined by examining the totality of the circumstances surrounding the guilty plea. Paramount in this determination is the trial court's compliance with Crim.R. 11(C), evidence of which must show in the record that the accused understood his rights accordingly.” *State v. Padgett*, 8th Dist. No. 64846, 1993 Ohio App. LEXIS 3374, *2 (Jul. 1, 1993). “A defendant seeking to withdraw a guilty plea following the imposition of sentence bears the burden of establishing manifest injustice with specific facts either contained in the record or supplied through affidavits submitted with the motion.” *State v. Jordan*, 10th Dist. No. 04AP-42, 2004-Ohio-6836, ¶5.

{¶16} The decision whether to grant or deny a post-sentence motion to withdraw a guilty plea is within the sound discretion of the trial court. *Smith, supra*, at paragraph two of the syllabus. The good faith, credibility, and weight of the movant's assertions in support of the motion are to be resolved by the trial court. *Id.* Thus, appellate review of the trial court's denial of a post-sentence motion to withdraw a guilty plea is limited to a consideration of whether the trial court abused its discretion. *State v. Pearson*, 11th Dist. Nos. 2002-G-2413 and 2002-G-2414, 2003-Ohio-6962, ¶7. “Abuse of discretion” connotes a judgment comporting with neither the record nor reason. *State v. Whitlow*, 11th Dist. No. 2007-L-005, 2007-Ohio-5907, ¶8, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925).

{¶17} Appellant argues the trial court abused its discretion in denying his motion to withdraw his guilty plea for two reasons. First, he argues the court should have granted his motion to withdraw because the prosecutor “called Appellant's Guilty Plea an ‘Outlandish Request’” at the guilty plea hearing. However, appellant did not make

this argument in his motion to withdraw his guilty plea. It is therefore waived on appeal. App.R. 16(A)(7); *State v. Awan*, 22 Ohio St.3d 120, 122 (1986). In any event, appellant misstates the prosecutor's comment. When the trial court asked the prosecutor during the guilty plea hearing to explain the plea bargain, the prosecutor said that appellant offered to plead to Count 2. The prosecutor said he felt the plea to that count was sufficient to allow the court to address appellant's criminal conduct and would assist him in obtaining employment after he served his sentence. The prosecutor said he did not think appellant's request to plead guilty to Count 2 was "outlandish." Thus, the prosecutor did not refer to the guilty plea as an "outlandish request;" to the contrary, he said he did *not* think that appellant's request to plead to this count was outlandish.

{¶18} Second, appellant argues the trial court erred in denying his motion to withdraw because "the Lake County Narcotics [sic] notes are proof that the elements of charges was not sufficient to sustain of conviction [sic]," and that if he had "this notes [sic] prior to his guilty plea he would have not plead guilty." However, aside from the inscrutable nature of this argument, appellant did not assert it in his motion to withdraw. It is thus waived. *Awan, supra*.

{¶19} Moreover, appellant does not reference any evidence showing "extreme duress" or that his plea was not voluntary.

{¶20} As a result, appellant failed to establish manifest injustice by reference to any evidence or affidavits in the record. For this reason alone, these assigned errors lack merit.

{¶21} Further, in *Robinson I*, this court held that appellant's guilty plea was made knowingly, intelligently, and voluntarily. This court stated:

{¶22} Based on our review of the transcript of the guilty plea hearing, the trial court scrupulously complied with Crim.R. 11. First, the court explained to appellant the nature of the charge by explaining to him the elements of Count 2 as set forth in the indictment, and appellant said he understood the charge. Further, the court advised appellant concerning, and appellant said he understood, the maximum sentence and the presumption of prison time associated with Count 2. Second, the court also explained to appellant the consequences of his guilty plea by advising him that if he entered such a plea, he would be admitting he committed the crime charged and that the court could immediately proceed to sentencing. After this explanation, appellant said he understood. Third, the court explained to appellant each of the rights he would be waiving by pleading guilty and he waived each such right.

{¶23} For the foregoing reasons, the transcript of the guilty plea hearing shows that appellant's guilty plea was made knowingly, intelligently, and voluntarily. *Robinson I, supra*, at ¶21-22.

{¶24} Because this court held in *Robinson I* that appellant's guilty plea was knowing, intelligent, and voluntary, his argument that his guilty plea was not knowing, intelligent, and voluntary is barred by res judicata. *State v. Dudas*, 11th Dist. Nos. 2007-L-170 and 2007-L-171, 2008-Ohio-3260, ¶21.

{¶25} We therefore hold the trial court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea.

{¶26} Appellant's first and second assignments of error are overruled.

{¶27} For his third assignment of error, appellant contends:

{¶28} "The statute Ohio Rev. Code 2925.03(M), 2925.11(F)(1), 2925.23(H) violates appellant's Eighth and Fourteen Amendment rights as guaranteed by the Ohio and United States Constitution." (Sic throughout.)

{¶29} R.C. 2925.03(G) mandates a driver's license suspension of six months to five years for a defendant convicted of a drug law offense under R.C. 2925.03. In *Robinson I*, appellant argued this statute did not apply to him. He could also have challenged the constitutionality of the license-suspension statute in *Robinson I*. Because he failed to do so, his present challenge to the constitutionality of the statute is barred by res judicata. *Dudas, supra* (res judicata bars a defendant from litigating an issue in any proceeding that was raised or *could have been raised* at the trial which resulted in a conviction or on appeal from that conviction).

{¶30} Further, appellant fails to reference the record to show where he made a constitutional challenge in the trial court, in violation of App.R. 16(A)(7). In any event, based on our review of the record, he did not argue below that the statute mandating a driver's license suspension for a drug law conviction is unconstitutional. In *Awan, supra*, the Supreme Court of Ohio held:

{¶31} "An appellate court will not consider any error which * * * a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Childs*, 14 Ohio St.2d 56 (1968), paragraph three of the syllabus; * * *

Likewise, “[c]onstitutional rights may be lost as finally as any others by a failure to assert them at the proper time.” *Id.* at 62 * * *. Accordingly, the question of the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court. *Awan, supra*, at 122.

{¶32} Thus, because appellant failed to make any constitutional challenge to R.C. 2925.03(G) in the trial court, it is waived on appeal.

{¶33} In any event, Ohio Appellate Courts have held that R.C. 2925.03(G) and analogous license-suspension statutes are constitutional. In *State v. Smith*, 4th Dist. No. 94CA21, 1995 Ohio App. LEXIS 1995 (May 5, 1995), the Fourth District held that the license suspension provision for drug paraphernalia convictions does not violate equal protection or the prohibition against cruel and unusual punishment. *Id.* at *11-*12, *14. Further, in *State v. Fonseca*, 106 Ohio App.3d 115 (6th Dist.1995), the Sixth District held that the statutory predecessor to R.C. 2925.03(G) does not violate due process. *Id.* at 118-119.

{¶34} Appellant’s third assignment of error is overruled.

{¶35} For the reasons stated in this opinion, the assignments of error lack merit. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.