

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
	:	CASE NOS. CA2010-12-327
Plaintiff-Appellee,	:	CA2011-02-019
	:	
- vs -	:	<u>OPINION</u>
	:	6/20/2011
	:	
CALVIN JOHNSON,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-08-1403

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Fred S. Miller, Baden & Jones Bldg., 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Calvin Johnson, appeals from his conviction in the Butler County Court of Common Pleas for aggravated robbery with a firearm specification and having weapons while under disability. For the reasons outlined below, we affirm in part, reverse in part, and remand this matter to the trial court for the limited purpose of issuing a nunc pro tunc judgment of conviction entry.

{¶2} On September 22, 2010, appellant was indicted for one count of aggravated robbery and one count of aggravated burglary, both of which included

firearm specifications, as well as two counts of having weapons while under disability. On October 27, 2010, after entering into a plea agreement, appellant pled guilty to one count of aggravated robbery with its accompanying firearm specification and one count of having weapons while under disability. In exchange for his guilty plea, the state merged the remaining counts.

{¶3} On December 1, 2010, appellant was sentenced to serve a total of nine years in prison, which, due to the firearm specification, included a mandatory consecutive one-year prison term. As it relates to the firearm specification, the trial court explicitly stated at appellant's sentencing hearing that it "will impose one year in the Ohio Department of Corrections which must run consecutive to the eight-year and five-year concurrent sentence[.]"

{¶4} On December 8, 2010, appellant, acting pro se, filed a post-sentence motion to withdraw his guilty plea alleging that he received ineffective assistance of counsel for his attorney "misled [him] with improper sentencing information." On January 5, 2010, following a hearing, the trial court denied appellant's motion.

{¶5} Appellant now appeals from his conviction, as well as the trial court's decision denying his post-sentence motion to withdraw his guilty plea, raising two assignments of error for review. For ease of discussion, appellant's two assignments of error will be addressed out of order.

{¶6} Assignment of Error No. 2:

{¶7} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT REFUSED TO ALLOW HIM TO WITHDRAW HIS PLEA OF GUILTY."

{¶8} In his second assignment of error, appellant argues that the trial court

erred by denying his post-sentence motion to withdraw his guilty plea. We disagree.

{¶9} Pursuant to Crim.R. 32.1, "[a] defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice." *State v. Degaro*, Butler App. No. CA2008-09-227, 2009-Ohio-2966, ¶10, quoting *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. A manifest injustice "is a fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the requirements of due process." *State v. McMahon*, Fayette App. No. CA2009-06-008, 2010-Ohio-2055, ¶6. A post-sentence motion to withdraw a guilty plea is allowable only in extraordinary cases, and therefore, because the decision to grant or deny a post-sentence motion to withdraw a guilty plea is within the sound discretion of the trial court, an appellate court will not reverse a trial court's decision absent an abuse thereof. *State v. Williams*, Warren App. No. CA2009-03-032, 2009-Ohio-6240, ¶11; *State v. Powell*, Clermont App. No. CA2009-05-028, 2009-Ohio-6552, ¶10.

{¶10} Ineffective assistance of counsel is a proper basis for seeking a post-sentence withdrawal of a guilty plea. *State v. Eberle*, Clermont App. No. CA2009-10-065, 2010-Ohio-3563, ¶56; *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, ¶8. When an alleged error underlying a motion to withdraw a guilty plea is the ineffective assistance of counsel, such as the case here, the defendant must show (1) that his counsel's performance was deficient and (2) that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty. *State v. Finkbine*, Warren App. No. CA2005-06-068, 2006-Ohio-1788, ¶7; *State v. Xie* (1992), 62 Ohio St.3d 521, 524, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

{¶11} Initially, appellant argues that he received ineffective assistance of counsel

because his trial counsel promised him a "much shorter sentence" than he received, "rushed and pressured him to agree to the plea bargain," only met with him "the few times that [he] was brought to the courthouse," and had "not prepared any strategy or defense." The record, however, actually indicates that the opposite is true.

{¶12} For instance, when the trial court asked appellant at his October 27, 2010 plea hearing whether anyone forced him to enter his plea, or if anyone had made promises to him in exchange for his plea, appellant responded in the negative. In addition, when asked if he had an opportunity to consult with his attorney, and if he was satisfied with counsel's advice, appellant answered "Yes" to both questions. The record also contains a "Plea of Guilty and Jury Waiver" form, a document that appellant admittedly signed after reviewing it with his trial counsel, which specifically said he was "satisfied with [his] attorney's advice and competence." Moreover, during appellant's December 1, 2010 sentencing hearing, the prosecutor informed the trial court that appellant's trial counsel "essentially wore [him] out on the phone talking about this case," thus prompting the favorable plea agreement.

{¶13} As can be seen, besides his bare assertions to the contrary, the record is devoid of any evidence to support appellant's claims. See, e.g., *State v. Moncrief*, Franklin App. No. 08AP-153, 2008-Ohio-4594, ¶14, ¶22-23. A defendant's "bare unsubstantiated assertions" are insufficient to demonstrate a manifest injustice. *State v. Graham*, Allen App. No. 1-04-27, 2004-Ohio-4397, ¶22, quoting *State v. Grigsby* (1992), 80 Ohio App.3d 291, 300; *State v. Harris*, Montgomery App. No. 19013, 2002-Ohio-2278, 2002 WL 940186, at *3. Therefore, appellant's first argument is overruled.

{¶14} Appellant also argues that the trial court erred by denying his post-sentence motion to withdraw his guilty plea when it "did not provide any type of analysis

or reasoning why it overruled the motion." However, appellant never requested the trial court to provide any further explanation following the hearing on his motion, nor did he request the trial court to provide findings of fact and conclusions of law. It is well-established that "a trial court, when denying a motion to withdraw a guilty plea, is not required to make and file findings of fact and conclusions of law." *State v. Combs*, Portage App. No. 2007-P-0075, 2008-Ohio-4158, ¶49; see, also, *State ex rel. Chavis v. Griffin*, 91 Ohio St.3d 50, 2001-Ohio-241, *State v. McFarland*, Jefferson App. No. 08 JE 25, 2009-Ohio-4391, ¶25-31; *State v. Foster*, Cuyahoga App. No. 84851, 2005-Ohio-1008, ¶7. Therefore, appellant's second argument is likewise overruled.

{¶15} In light of the foregoing, because the record is simply devoid of the type of extraordinary circumstances that would necessitate allowing appellant to withdraw his guilty plea, we find no abuse of discretion in the trial court's decision denying appellant's post-sentence motion to withdraw his guilty plea. Accordingly, appellant's second assignment of error is overruled.

{¶16} Assignment of Error No. 1:

{¶17} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ISSUED AN AMBIGUOUS JUDGMENT OF CONVICTION ENTRY REGARDING THE LENGTH OF APPELLANT'S TERM OF IMPRISONMENT FOR THE GUN SPECIFICATION."

{¶18} In his first assignment of error, appellant argues that his judgment of conviction entry is ambiguous and does not comport with the trial court's sentence imposed at his sentencing hearing. The state concedes, and we agree, that appellant's judgment of conviction entry, which states, in pertinent part, that appellant shall serve an additional prison term of "three (1) year" resulting from the firearm specification, is

ambiguous and contains a clerical error.

{¶19} As this court has stated previously, a nunc pro tunc entry "may be used to correct a sentencing entry to reflect the sentence the trial court imposed upon a defendant at a sentencing hearing." *State v. Harrison*, Butler App. Nos. CA2009-10-272, CA2010-01-019, 2010-Ohio-2709, ¶24; *State v. Gann*, Butler App. No. CA2010-07-153, 2011-Ohio-895, ¶23. Therefore, because a clerical error such as this may be corrected by the trial court through the issuance of a nunc pro tunc entry, we sustain appellant's first assignment of error and remand this matter to the trial court for the limited purpose of issuing the necessary nunc pro tunc judgment of conviction entry conforming to the sentence pronounced at appellant's December 1, 2010 sentencing hearing.

{¶20} Judgment affirmed in part, reversed in part, and remanded.

POWELL, P.J., and HUTZEL, J., concur.