[Cite as *State v. Harrington*, 2009-Ohio-5042.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 84
v.	:	T.C. NO. 2005 CR 406
PAUL HARRINGTON, JR.	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 25th day of September, 2009.

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FROELICH, J.

{¶ 1} Paul Harrington appeals from a judgment of the Greene County Court of Common Pleas, which denied his Motion to Withdraw a guilty plea entered in 2005.

{¶ 2} For the reasons that follow, the trial court did not abuse its discretion in denying Harrington's Motion to Withdraw his plea.

I

{¶ 3} In June 2005, Harrington was indicted for the following offenses: Trafficking in Cocaine in an amount exceeding 1,000 grams, with a major drug offender specification (Count I); Possession of Cocaine exceeding 1,000 grams, with a major drug offender specification (Count II); three counts of Possession of Criminal Tools (Counts III, V, and VII); and two counts of Trafficking in Cocaine in an amount exceeding five grams but less than twenty-five grams (Counts IV and VI). Harrington entered into a plea agreement whereby he pled guilty to Count I, with a stipulated sentence of ten years, in exchange for which the State dismissed the major drug offender specification on Count I and all other counts (including the other major drug offender specification) in the indictment. Harrington was convicted and sentenced accordingly. Harrington appealed, and we affirmed his conviction in *State v. Harrington*, Greene App. No. 06-CA-29, 2007-Ohio-1335.

{¶ 4} On July 22, 2008, Harrington filed a Motion to Withdraw his guilty plea pursuant to Crim.R. 32.1. He claimed that his trial counsel had been ineffective in failing to communicate a more favorable plea offer to him and that he had not known the "true" weight of the drugs at issue when he entered his plea. Following a hearing, the trial court overruled Harrington's motion to withdraw his plea.

{¶ 5} Harrington appeals from the trial court's denial of his Motion to Withdraw his plea. Harrington's appointed appellate counsel filed a brief containing one assignment of error. Harrington then filed an "Amended Brief," pro se, which advanced a second assignment. This court does not consider assignments of error raised by an appellant when that appellant is represented by counsel. In any event, these assignments raise very similar

arguments.

II

{¶ 6} Harrington's assignment of error, as framed by his attorney, states:

{¶ 7} "DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT HIS MOTION TO WITHDRAW HEARING AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION."

{¶ 8} Harrington claims that his counsel provided ineffective representation at the hearing on his Motion to Withdraw his plea, because counsel did not call any witnesses in support of Harrington's claim that the State had initially offered a plea agreement under which he would have received a prison term of seven years, rather than ten years. He asserts that this offer was never communicated to him. He also claims that counsel was ineffective in failing to offer evidence refuting the amount of cocaine found in his possession.

{¶ 9} Under Crim.R. 32.1, a defendant who files a post-sentence motion to withdraw his guilty plea bears the burden of establishing a "manifest injustice." *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus; *State v. Milbrandt*, Champaign App. No. 2007-CA-3, 2008-Ohio-761, at ¶8. A manifest injustice has been defined as "a clear or openly unjust act" that involves "extraordinary circumstances." *State v. Stewart*, Greene App. No.2003-CA-28, 2004-Ohio-3574, at ¶6. To obtain a hearing, "a movant must establish a reasonable likelihood that the withdrawal is necessary to correct a manifest injustice." *State v. Pierce*, Montgomery App. No. 22440, 2008-Ohio-4930, at ¶12;

State v. Youngblood, Montgomery App. No. 21078, 2006-Ohio-4390, at ¶7. Although it is not clear that Harrington's allegations required a hearing, the court prudently held a hearing.

{¶ 10} We review a trial court's decision on a motion to withdraw a guilty plea for an abuse of discretion. *State v. Whitmore*, Clark App. No. 06-CA-50, 2008-Ohio-2226, at ¶38. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 11} To establish ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136. "In the context of a guilty plea, this test requires a defendant to demonstrate 'that counsel's performance was deficient and that, but for counsel's deficient performance, he would not have entered a guilty plea.'" *State v. Rednour*, Montgomery App. No. 20567, 2005-Ohio-2238, at ¶24, citing *State v. Bailey*, Montgomery App. No. 19736, 2004-Ohio-273, at ¶9. Harrington essentially argues that both his trial counsel and counsel at the hearing on the Motion to Withdraw his plea were ineffective.

{¶ 12} Harrington's Motion to Withdraw his plea was based, in part, on a letter from the prosecutor to his trial counsel during plea negotiations, which offered a sentence of seven years on Count I and community control on Count II, with other terms to be negotiated. The State subsequently withdrew this offer, and Harrington claims he was

never informed of it. The seven-year sentence was contrary to law because a mandatory ten-year sentence was required on the offense charged in Count I, pursuant to R.C. 2925.03(C)(4)(g) and R.C. 2929.14(A)(1). The existence of the letter and its content were undisputed. Harrington claims that trial counsel should have informed him of this offer and that his attorney on the Motion to Withdraw acted ineffectively in not providing more evidence at the hearing about the undisclosed offer. Harrington also suggests that the seven-year sentence mentioned in the letter might allude to the prosecution's willingness to reduce the charge and that trial counsel should have been called at the hearing to testify about this possibility.

{¶ 13} In overruling Harrington's Motion to Withdraw his plea, the trial court concluded that trial counsel "was not ineffective in light of there being no indication that the State offered to amend Defendant's case and said offer was withdrawn by the State shortly thereafter." Under the circumstances presented, the trial court did not abuse its discretion in concluding that trial counsel's failure to communicate the offer to Harrington did not fall below an objective standard of reasonableness and that there was no reasonable probability that the outcome would have been different if he had done so. Because the sentence proposed in the prosecutor's letter to defense counsel would have been contrary to law if he had pled guilty to Count I in the indictment, we must assume that the trial court would not have approved the agreement even if the offer had been communicated to Harrington and he had accepted it. Thus, there is no reasonable probability that the outcome of the case would have been different if Harrington had been informed of the offer. Trial counsel was not ineffective in

failing to inform Harrington of a plea offer that was contrary to law and had been withdrawn.

{¶ 14} Because the trial court properly found no ineffective assistance in the circumstances surrounding the initial plea negotiations, there was likewise no ineffective assistance at the hearing on the Motion to Withdraw the plea in that counsel failed to pursue the ineffective assistance claim (for the original plea) more vigorously. Moreover, even assuming, for the sake of argument, that trial counsel had been called to testify at the hearing and had testified that he and the prosecutor had discussed a plea to a lesser charge, there is no evidence that the prosecutor offered to enter into such an agreement. Such a conversation would not have provided a compelling basis for the withdrawal of Harrington's plea. There was no evidence of an offer to plea to a lesser charge, and he was fully informed of the consequences of the plea he did enter.

{¶ 15} Harrington also claims that he should have been allowed to call witnesses from the Miami Valley Regional Crime Lab and CTL Engineering to refute the weight of the drugs upon which his conviction was based. Harrington submitted the following evidence in support of his claim that the drugs did not actually weigh 1,000 grams: 1) his own affidavit, based on his review of "the lab report numbered BPD #05-403," which stated that the four bags of cocaine weighed 251.98 grams, 251.11 grams, 250.20[1] grams, and 248.95 grams, respectively, for a

[1]The lab report actually lists this amount as 250.30 grams, but the total weight referenced in Harrington's affidavit – 1,002.34 grams – matches the lab report.

total of 1,002.34 grams; 2) copies of three unidentified photographs which show four Ziploc bags of white powder, a scale on which the screen reads 1018.0g holding an unidentified number of bags of white powder, and an unidentifiable object (possibly the scale tray); 3) an affidavit from Harrington's wife, Danielle, stating that she purchased "Ziploc brand storage bags of varying sizes," which she sent to CTL Engineering to be measured and weighed; and 4) a report from CTL Engineering stating that it had weighed various empty Ziploc bags and had found them to weigh between five and thirteen grams each. Based on this evidence, Harrington concluded that the cocaine had weighed less than 1,000 grams when one accounted for the weight of the plastic bags. Harrington claims that the State should have been required to present testimony from someone at the Miami Valley Regional Crime Lab "which affirmed the drug weight accuracy" of the State's evidence and that the State offered "[n]o evidence whatsoever" to support its earlier claim that the drugs in Harrington's possession had weighed more than 1000 grams.

{¶ 16} Harrington's argument is flawed in two respects. First, by pleading guilty, Harrington admitted that the cocaine weighed the amount alleged in the indictment and thereby relieved the State of its burden to present evidence on that point. *State v. Hall*, Clark App. Nos. 06-CA-78 and 06-CA-95, 2007-Ohio-4203, at ¶18. Because Harrington bore the burden of proof on the Motion to Withdraw his plea, he incorrectly asserts that the State should have been compelled to present evidence proving the weight of the cocaine. Second, Harrington's "evidence" does not compel the conclusion that the cocaine weighed less than 1,000 grams. A

copy of the lab report on the contents of a brown bag labeled BPD #05-403 is contained in the record;[2] it states the "net weight" of each of four bags of cocaine and the total weight of 1,002.34 grams. Although Harrington assumes that the weights listed in the report include the weight of the bags, the report itself lends no support to this assumption. Harrington's evidence did not demonstrate that the cocaine weighed less than 1,000 grams or that his conviction was a manifest injustice.

{¶ 17} Harrington argues that his plea should be withdrawn because his counsel was ineffective for not challenging the weight of the drugs. In a motion to withdraw a post-sentence plea, the defendant bears the "heavy burden of presenting such a strong case of manifest injustice that the trial court had to be unreasonable, arbitrary or capricious in overruling his motion ***." *State v. Kessler* (Sept. 30, 1993), Montgomery App. No. 13870. Further, he bears the burden of demonstrating ineffective assistance of counsel. *State v. Brodbeck*, Franklin App. No. 08AP-134, 2008-Ohio-6961, at ¶60 (internal citations omitted).

{¶ 18} Because the "evidence" presented regarding the weight of the cocaine did not establish a "manifest injustice," there is no basis to conclude that counsel acted ineffectively at the hearing in failing to present additional evidence.

{¶ 19} The trial court did not abuse its discretion in denying Harrington's motion to withdraw his plea based on the ineffective assistance of counsel.

{¶ 20} The assignment of error is overruled.

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[2]It is unclear from the record who submitted the lab report.

IV

{¶ 21} The judgment of the trial court will be affirmed.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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Hon. Stephen A. Wolaver