[Cite as *State v. Vultee*, 2009-Ohio-7053.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22602
v.	:	T.C. NO. 1991-CR-0769
KARL RAY VULTEE	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 30th day of December, 2009.

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Defendant-Appellant

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FROELICH, J.

{¶ 1} Appellant, Karl Ray Vultee, withdrew his pleas of not guilty and not guilty by

reason of insanity and pled guilty to and was convicted of aggravated murder, three counts of felonious assault, failure to comply, criminal damaging, and firearm specifications in 1992. Having been indicted with death penalty specifications, the defendant waived a jury trial regarding sentencing. In July 1992, after hearing from lay witnesses and experts, both for the defense and the State, a three-judge panel unanimously concluded that the aggravating circumstance did not outweigh the mitigating circumstances beyond a reasonable doubt. The court imposed a life sentence with sixty-nine years to be served before the defendant would be eligible for parole. On June 3, 1994, we affirmed the conviction, although that part of the judgment of the trial court on the second of two three-year sentences of actual incarceration for a firearm specification was reversed. *State v. Vultee* (June 3, 1994), Montgomery App. No. 13584, discretionary appeal not allowed, *State v. Vultee* (1994), 71 Ohio St.3d 1413.

{¶ 2} On November 8, 2007, Vultee filed a motion to vacate his guilty plea pursuant to Crim.R. 32.1. The trial court overruled the motion. *State v. Vultee* (Jan. 7, 2008), Montgomery CP 91-CR-769.

{¶ 3} The defendant filed a notice of appeal and a pro se brief to which the State responded. We subsequently appointed counsel for the defendant who filed a brief and, again, the State responded. Appellant's counsel filed a brief pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, L.Ed.2d 493, advising the court that she believes the appeal to be without merit and furnishing the court with a brief elaborating her reasoning. The State filed a responsive brief requesting an opportunity to respond should the court determine that an appealable issue may exist. The appellant was advised that he

was granted time to file a pro se brief, which he did, to which the State responded.

{¶ 4} Vultee's original assignment of error alleges that the court erred "when it denied Defendant's Motion to Withdraw Guilty Pleas based upon the fact that Defendant did not make a Voluntarily, and Intelligently [sic] Plea."

{¶ 5} The second assignment alleges that the court erred "when it denied Defendant's motion to withdraw his guilty plea based upon the fact that no competency hearing was held after defendant entered a plea of Not Guilty by Reason of Insanity, and then accepted a plea of guilty without conducting a hearing to determine whether Defendant was competent to enter pleas of guilty to the state charges in violation of Defendant's due process rights."

{¶ 6} His first assignment of error in response to his counsel's *Anders* brief alleges that the court "erred when it denied defendant's motion to withdraw guilty pleas based upon the fact no compatency [sic] hearing was held again later in court proceedings when another doctor testified defendant was incompatent [sic] and prosecution expert stated defendant had a mental disease."

{¶ 7} We will consider these assignments together.

{¶ 8} In Vultee's direct appeal of his conviction, his second assignment of error was that the finding of the trial court that he "was competent to stand trial and competent to enter a voluntary guilty plea was against the manifest weight of the evidence." We held that "the finding of the trial court that appellant was competent to stand trial and was competent to intelligently enter a voluntary guilty plea was supported by competent, credible evidence," and found that there was no error. *State v. Vultee* (June 3, 1994), Montgomery App. No.

13584.

{¶ 9} The State argues that Vultee's current motion to withdraw his guilty plea is barred by res judicata.

{¶ 10} Crim.R.32.1 provides that 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." 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, at paragraph 1 of the syllabus; *State v. Milbrandt*, Champaign App. No. 2007-CA-3, 2008-Ohio-761 at paragraph 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 paragraph 6. "[A] 'manifest injustice' comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him or her." *State v. Hartzell* (Aug. 20, 1999), Montgomery App. No. 17499.

{¶ 11} The decision whether to grant a post-sentence motion to withdraw a plea is a matter within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of discretion. *State v. Blaylock*, Montgomery App. No. 22761, 2009-Ohio-3514, ¶ 11 (citations omitted). An abuse of discretion is more than a mere error of law or an error of judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 12} We have recently discussed our perhaps inconsistent semantics having to do with whether or not res judicata applies to appeals from post-sentence motions to withdraw a plea when the voluntariness of the plea had been previously raised in the direct appeal. See *State v. Minkner*, Champaign App. No. 2009-CA-16, 2009-Ohio-5625, citations omitted. The lack of precision in this area centers around the fact that Crim.R. 32.1 requires a "manifest injustice" whereas a direct appeal has a different standard, depending on the assignment.

{¶ 13} While it is beyond dispute that if a defendant is incompetent to enter a plea, but the court accepts the plea nonetheless, there has been a manifest injustice, this simply begs the question as to whether a defendant was incompetent.

{¶ 14} The doctrine of res judicata involves both claim preclusion, which historically has been called estoppel by judgment, and issue preclusion, which traditionally has been referred to as collateral estoppel. See, for example, *State v. Robinson*, Cuyahoga App. No. 85266, 2005-Ohio-4154, at ¶ 7, citing *Grava v. Parkman Township*, 73 Ohio St.3d 379, 381, 1995-0hio-331. Issue preclusion, or collateral estoppel, precludes re-litigation of an issue that has been "actually and necessarily litigated and determined in a prior action." Supra, citing *Krahan v. Kinney* (1989), 43 Ohio St.3d 103, 107.

{¶ 15} Although the general principle of res judicata may not bar the appellant's claim since the legal standard is different on direct appeal than on a post sentence motion to withdraw a plea, the doctrine of collateral estoppel bars the appellant from re-litigating an issue which has already been denied, to-wit: his competency at the time of his plea.

{¶ 16} The defendant's assignments of error are denied.

{¶ 17} In his brief in response to our *Anders*' order, the defendant also alleges that the court "erred when it denied defendant's motion to withdraw guilty plea when it was clear defendant's counsel was ineffective based upon the fact defendant was found incompetent and not responsible for his actions by the court thereby not being competent to state a plea."

{¶ 18} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: (1) the performance of defense counsel is seriously flawed and deficient; and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144. In reviewing a claim of ineffective assistance of counsel, it must be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98. To show that a defendant has been prejudiced by counsel's deficient performance, even if such deficient performance were found, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 19} The defendant argues that since Dr. Phyllis Kuehnl stated at the November 1991 competency hearing that the defendant was incompetent, but restorable in a year with medication, that his counsel was incompetent for letting him (the defendant) plead guilty. The issue of competency was heard at a hearing prior to the plea; the defendant had been examined by Dr. Kuehnl, together with other doctors, and the reports had been submitted and testimony was taken from all three psychologists; the court found the defendant

competent and, as stated above, this finding was affirmed by this court on the direct appeal.

{¶ 20} Appellant failed to meet the burden of demonstrating that he was denied effective assistance of counsel and failed to demonstrate any reasonable probability that the result of the proceedings would have been different. The trial court did not err in denying the defendant's motion to withdraw his plea.

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

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DONOVAN, P.J. and BROGAN, J., concur.

Copies mailed to:

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