

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
 Plaintiff-Appellee : C.A. CASE NO. 23385
 vs. : T.C. CASE NO. 08CR4604/1
 KEITH A. BROOKS :
 Defendant-Appellant :

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O P I N I O N

Rendered on the 16th day of April, 2010.

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GRADY, J.:

{¶ 1} Defendant, Keith Brooks, appeals from a judgment denying his Crim.R. 32.1 motion to withdraw his guilty pleas.

{¶ 2} Defendant was indicted on one count of felonious assault, R.C. 2903.11(A)(2), with a firearm specification, R.C. 2941.145, one count of intimidation of a crime victim, R.C.

2921.04(B), one count of assault, R.C. 2903.13(A), another count of felonious assault, R.C. 2903.11(A)(1), with a firearm and repeat violent offender specification, R.C. 2941.149, and one count of having weapons while under a disability, R.C. 2923.13(A)(2).

{¶ 3} Pursuant to a negotiated plea agreement, Defendant entered pleas of guilty to both felonious assault charges with the firearm and repeat violent offender specifications, and the having weapons while under a disability charge. In exchange, the State dismissed the intimidation of a crime victim and assault charges. The parties jointly agreed to and recommended an aggregate fifteen year prison sentence, which the trial court imposed immediately following entry and acceptance of Defendant's pleas.

{¶ 4} One week after being sentenced, and now represented by different counsel, Defendant filed a motion to withdraw his guilty pleas. The trial court denied Defendant's motion to withdraw his guilty pleas, following a hearing. Defendant timely appealed to this court from the trial court's decision denying his motion to withdraw his guilty pleas.

FIRST ASSIGNMENT OF ERROR

{¶ 5} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA."

{¶ 6} Crim.R. 32.1 states:

{¶ 7} "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.”

{¶8} The distinction between presentence and post-sentence motions to withdraw pleas of guilty or no contest indulges a presumption that post-sentence motions may be motivated by a desire to obtain relief from a sentence the movant believes is unduly harsh and was unexpected. The presumption is nevertheless rebuttable by showing of a manifest injustice affecting the plea. “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. The movant has the burden to demonstrate that a manifest injustice occurred. *State v. Smith* (1977), 49 Ohio St.2d 261.

{¶9} Motions filed pursuant to Crim.R. 32.1 before a sentence is imposed should instead be freely and liberally granted. *State v. Xie* (1992), 62 Ohio St.3d 521. Defendant Brooks argues that the merits of his post-sentence motion should be determined on the standard applicable to presentence motions to withdraw, rather than the manifest injustice standard, for two reasons. First, Brooks had recommended the sentences the court imposed, which

avoids any implication that his purpose was to avoid an unduly harsh and unexpected sentence when he filed his Crim.R. 32.1 motion. Second, there was no time interval between the court's acceptance of Brooks' guilty pleas and sentencing during which Brooks could have filed a presentence motion, because the court proceeded without ordering a presentence investigation report.

{¶ 10} The court may not impose community control sanctions or probation for a felony offense without first ordering a presentence investigation and report. Crim.R. 32.2; R.C. 2951.03(A). The presentence report serves to inform the sentencing court of the relevant aspects of the defendant's history, so that the court will sentence the defendant in an informed, responsible, and fair manner. *Machibroda v. United States* (N.D. Ohio, 1973), 360 F.Supp. 780.

{¶ 11} Brooks can't complain that he was denied an opportunity to file a presentence motion to withdraw because no presentence investigation report was ordered. Brooks had no right to the investigation and report, though a defendant can request the court to order one. Brooks made no such request. Indeed, when

{¶ 12} Brooks entered his guilty pleas he acknowledged the fact that the court would proceed to impose his sentences immediately upon accepting his pleas. (T. 16). Brooks therefore forfeited the right to now complain that he lacked an opportunity to file

a presentence motion. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23.

{¶ 13} Even though Brooks agreed to the sentences the court imposed, we are not convinced that the more lenient standard applicable to presentence motions ought to apply. Brooks' agreement was part of a plea bargain in which he obtained the State's promise to dismiss certain charges. The full gravity of the sentences to which he agreed may have become more apparent to Brooks after those sentences were imposed. The implication that he was motivated by the burden the sentences imposed on him is not wholly avoided, therefore. The trial court properly applied the manifest injustice standard to determine the merits of Brooks' Crim.R. 32.1 motion to withdraw his guilty pleas.

{¶ 14} Defendant argues that, for a combination of reasons, he satisfied the manifest injustice standard for post-sentence plea withdrawal, and that the trial court therefore abused its discretion in denying his motion to withdraw his guilty pleas.

{¶ 15} First, Defendant claims that his guilty pleas were not entered knowingly, intelligently and voluntarily because he mistakenly believed he would face federal weapons charges that might result in a life sentence if he did not plead guilty in this case. During the plea hearing, both defense counsel and the prosecutor indicated to the trial court that they had been in touch

with a federal prosecutor, that potential federal charges existed, and that the position of the federal prosecutor was that he or she would not pursue federal charges if Defendant received a sentence of at least fifteen years in this case. When the trial court then asked Defendant if he understood that the court had no influence over what the federal prosecutor might do, Defendant replied, "Yes."

{¶ 16} Crim.R. 11(C) is structured to insure that a defendant understands the maximum penalty that may be imposed by the court for an offense to which he pleads guilty. If a defendant is misinformed by the court in that respect, his guilty plea is less than knowing, intelligent, and voluntary. Whether a defendant is motivated to plead guilty in order to avoid other charges is not a matter about which the court must inquire. In any event, on this record, we cannot know what federal charges Defendant faced or whether his belief concerning federal penalties that might result from those charges was mistaken. The trial court fulfilled its duty in that connection when it determined that Defendant understood that the court had no control over whether federal charges would be filed.

{¶ 17} Additionally, Defendant claims that he should have been permitted to withdraw his guilty pleas because of confusion during the plea hearing and because he was medicated. The record refutes

these claims. Defendant told the trial court that he was not under the influence of drugs, alcohol or any medications, and that he did not have any physical or mental problem that would prevent him from understanding the proceedings. The nature of the charges and specifications were read by the prosecutor and Defendant told the trial court that he understood them. Defendant also indicated that he understood the possible penalties, the five year period of post release control, and that the agreed sentence would be fifteen years. Defendant also indicated he understood the rights he waived by pleading guilty. When the court asked Defendant if he had any questions, Defendant responded, "No." Furthermore, the record shows that Defendant was mentally alert during the plea hearing, and that he vigorously challenged the State when it neglected to dismiss the assault charge as part of the plea agreement. This record demonstrates that Defendant's guilty pleas were entered knowingly, intelligently and voluntarily.

{¶ 18} Next, Defendant argues that the trial court abused its discretion in denying his motion to withdraw his guilty pleas because he had a viable defense to the charges; that is, alibi witnesses and a recantation from Charlotte Booker, one of the two victims in the case. Defendant relies upon this court's decision in *State v. Noland* (Nov. 8, 1996), Montgomery App. No. 15579.

{¶ 19} In *Noland*, the defendant was charged with sex offenses

against his stepdaughter. She recanted her accusations against Noland after he entered pleas to some of the charges. Prior to being sentenced, Noland moved to withdraw his pleas, but the trial court denied that relief. This court held that the trial court abused its discretion because Noland's request to withdraw his pleas was not motivated by a mere change of heart, but rather by a change in his mental calculus concerning his chances of acquittal following the victim's recantation.

{¶ 20} Unlike *Noland*, Defendant was aware prior to entering his pleas that Booker would recant her accusations against him. Defendant's counsel argued that the recantation was the very reason Defendant refused to plead guilty to the assault charge involving Booker. Under those circumstances, Booker's recantation could not alter or affect Defendant's calculus regarding his chances of acquittal in this case. Furthermore, given Defendant's knowing and voluntary plea, the court could reasonably conclude that the recantation was unreliable. *State v. Youngblood*, Montgomery App.No. 21078, 2006-Ohio-4390. In any event, the charges concerning Booker were dismissed as part of the plea agreement in this case. As for the alibi witnesses, Defendant was likewise aware of them before he entered his guilty pleas. Therefore, he cannot claim that his motion to withdraw his guilty pleas was predicated upon his discovery of the alibi witnesses.

{¶ 21} Lastly, Defendant claims that he should have been allowed to withdraw his guilty pleas because he had a poor relationship with his trial counsel. A poor relationship between client and attorney is not prejudicial unless it denies the client effective representation by the attorney. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must demonstrate that were it not for counsel's errors, the result of the trial would have been different. *Id.*; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 22} Defendant concedes in his appellate brief that an argument that he was not effectively represented by counsel was not put before the trial court, and that the exact nature of their disputes was not put on the record. Although Defendant's trial counsel had filed a motion to withdraw from the case, counsel later retracted that motion, and Defendant affirmed for the trial court that he wanted counsel to continue to represent him. As a result of defense counsel's efforts in plea negotiations, two charges were dismissed by the State and Defendant received a sentence of fifteen

years, which is much less prison time than Defendant formerly faced. Deficient performance by counsel has not been demonstrated, much less resulting prejudice

{¶ 23} Manifest injustice has not been demonstrated in this case, and the trial court did not abuse its discretion in overruling Defendant's post-sentence motion to withdraw his guilty pleas.

{¶ 24} Defendant's assignment of error is overruled. The judgment of the trial court will be affirmed.

FROELICH, J., concurs.

FAIN, J., concurring:

I concur in both the holdings set forth in the opinion of Judge Grady for the court and in the judgment. I write separately merely to note that this appeal persuades me that the better way to apply Crim. R. 32.1 is to apply it as written, and eschew a metaphysical inquiry into what may have been the reasons for the Rule.

Brooks moved to withdraw his plea after he was sentenced. Therefore, the less liberal standard for the exercise of the trial court's discretion applies. Notwithstanding a suggestion to the contrary in *State v. Long* (May 13, 1993), Montgomery App. No. 13285, I would hold that a pre-sentence motion to withdraw a plea is entitled to application of the more liberal standard for the exercise of the trial court's discretion, regardless of the

defendant's knowledge, or lack of knowledge, at the time of his motion, of what sentence is likely going to be imposed. That is what the Rule says, and attempts to reach a different result by divining the reasons for the Rule just place us on the treacherous ground of attempting to read the mind of a defendant, as in this case.

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