

[Cite as *State v. Harden*, 2010-Ohio-5282.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23742
vs.	:	T.C. CASE NO. 95-CR-2190
CHARLES HARDEN	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 29th day of October, 2010.

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GRADY, J.:

{¶1} Defendant, Charles Harden, appeals from a final order of the court of common pleas that overruled Harden’s Crim.R. 32.1 motion to withdraw his guilty plea.

{¶2} Harden entered a plea of guilty to the offense of aggravated arson, R.C. 2909.02(A)(2), on December 14, 1995. He

was subsequently convicted and sentenced to serve a prison term of from five to twenty-five years.

{¶ 3} In the years following his conviction, Harden filed two motions to withdraw his guilty plea and a petition for post-conviction relief, challenging the assistance his counsel provided. Those applications were overruled. We twice affirmed the trial court in appeals that Harden took.

{¶ 4} Harden filed another Crim.R. 32.1 motion on October 23, 2009. Harden contended that "I did not have a defense counsel by my side when I entered a guilty plea and (was) sentenced by the trial court. My counsel was totally absent and I did not waive my right to counsel." (Dkt. 11). Attached to Harden's motion were statements of two persons, Inez Moore and Tommy Coles. Both represented that "Charles Harden did not have (an) attorney present to represent him at his Plea and Sentencing."

{¶ 5} The trial court overruled Harden's motion to vacate his sentence on November 3, 2009, finding that "[t]here is no merit to Defendant's request." (Dkt. 12). Harden filed a notice of appeal from that final order.

FIRST ASSIGNMENT OF ERROR

{¶ 6} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DENYING MY CRIM.R. 32.1 MOTION TO WITHDRAW GUILTY PLEA WITHOUT A HEARING WHERE THE EVIDENCE OF EYE WITNESSES SWORN STATEMENTS

HAS DEMONSTRATED A MANIFEST INJUSTICE OF A COMPLETE DENIAL OF COUNSEL WARRANTING A CONSIDERATION OF THE EVIDENCE ATTACHED TO THE MOTION."

SECOND ASSIGNMENT OF ERROR

{¶ 7} "I WAS DEPRIVED OF THE DUE PROCESS AND A FAIR APPELLATE REVIEW OF MY MOTION TO WITHDRAW GUILTY PLEA, WHEN THE TRIAL COURT ISSUED A DECISION THAT RELIEVED OR REDUCED THE 'BURDEN OF PROOF' STANDARD FOR MY UNCOUNSELED PLEA CLAIM."

THIRD ASSIGNMENT OF ERROR

{¶ 8} "THE TRIAL COURT'S DECISION TO OVERRULE MY MOTION TO WITHDRAW GUILTY PLEA IS A CLEAR ERROR OF LAW, CONTRARY TO THE UNITED STATES SUPREME COURT PRECEDENT."

{¶ 9} Defendant presents three related assignments of error, all of which are based upon the same claim: that his guilty plea was uncounseled because his counsel was not present at the plea proceeding.

{¶ 10} Harden attaches copies of the statements by Moore and Cole to his brief on appeal. He also attaches a copy of an Entry and Order of the Court of Common Pleas, dated December 14, 1995, accepting Harden's guilty plea to the aggravated arson offense.

The Entry and Order states that Harden's plea was taken "in open Court."

{¶ 11} Crim.R. 22 provides that "[i]n serious offense cases

all proceedings shall be recorded." The offense of aggravated arson is a serious offense, being a first or second degree felony.

Harden was entitled to obtain a transcript of the record that was made. R.C. 2901.02. He did not do that, and instead relied on the statements from Moore and Coles.

{¶ 12} App.R. 9(B) provides: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of all evidence relevant to a finding or conclusion."

{¶ 13} To support the error he assigns on appeal, Harden must demonstrate that the trial court erred or abused its discretion when it overruled his motion to vacate his guilty plea on a claim that it was uncounseled. A transcript of the plea proceeding is necessary to demonstrate that his counsel was not then present. Harden filed no transcript.

{¶ 14} In an earlier motion filed in the trial court, on January 28, 2009, Harden complained that his plea proceeding was not recorded. (Dkt.3). Harden asked for a new trial on that account. The trial court overruled his motion. (Dkt.4).

{¶ 15} If Harden's plea proceeding was not recorded, his remedy is to obtain a statement of proceedings pursuant to App.R. 9(C) or (D). The record does not reflect that Harden attempted to do

that. Instead, as he did in the trial court, in support of his motion, Harden relies on the statements by Moore and Coles.

{¶ 16} The written statements of Moore and Coles are each captioned an "Affidavit." The statements, signed by each, recite that the speaker "declare(s) under Penalty of Perjury that my statements are true and correct to the best of my knowledge." Affidavits must be authenticated before a person authorized to administer oaths. R.C. 2319.04. Neither "affidavit" is thus authenticated.

{¶ 17} The trial court was not required to credit the statements of Moore and Coles in ruling on Defendant Harden's motion to vacate his plea. On this record, and applying the presumption of regularity, the trial court could reasonably conclude that Harden's 1995 plea was not entered without his attorney being present. Likewise lacking a transcript, we have no record on which to review the error assigned, and in that circumstance must presume the regularity and validity of the trial court's proceedings and affirm. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197.

{¶ 18} A post-sentence motion to withdraw a guilty plea is allowed only to correct a manifest injustice. Crim.R. 32.1; *State v. Wright, supra*. The burden to establish a manifest injustice is on the party seeking to withdraw the plea. *Wright*. An undue delay between the occurrence of the alleged cause of a withdrawal

of a guilty plea and the filing of a Crim.R. 32 motion is a factor adversely affecting the credibility of the movant and militating against the granting of the motion. *State v. Smith* (1972), 49 Ohio St.2d 261; *State v. Harden*, Montgomery App. No. 22839, 2009-Ohio-3431. In this case Defendant waited almost fourteen years after entering his guilty plea before moving to withdraw that plea on the ground that it was uncounseled, a fact that obviously was apparent at the time Defendant's plea was entered.

{¶ 19} Defendant has failed to demonstrate that his guilty plea was uncounseled, that a manifest injustice exists in this case, or that the trial court abused its discretion in denying his motion to withdraw his plea without a hearing. Defendant's assignments of error are overruled. The judgment of the trial court will be affirmed.

BROGAN, J. And CANNON, J., concur.

(Hon. Timothy P. Cannon, Eleventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

Copies mailed to:

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