

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

KEITH A. WILSON

Defendant-Appellant

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C.A. CASE NO. 26354

T.C. NO. 11CR2703

(Criminal Appeal from
Common Pleas Court)

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OPINION

Rendered on the 24th day of April, 2015.

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FROELICH, P.J.

{¶ 1} Keith A. Wilson appeals from a judgment of the Montgomery County Court of Common Pleas, which overruled, without an evidentiary hearing, his post-sentence motions to withdraw his pleas. For the following reasons, the trial court's judgment will be affirmed.

{¶ 2} In August 2011, Wilson was indicted on two counts of murder and two counts of felonious assault, all with firearm specifications, in connection with the murder of his wife, Marny Wilson. While these charges were pending, the police were also investigating Wilson for the homicide of Elmer Bloodsaw, which had occurred in October 2000.

{¶ 3} Pursuant to a plea bargain, Wilson pled no contest on November 30, 2011, to all of the charges related to his wife's death. On December 2, 2011, Wilson also pled guilty to involuntary manslaughter with respect to Bloodsaw's death, which was charged (with Wilson's consent and waiver of notice requirements) by a bill of information.

{¶ 4} Wilson was sentenced on the charges on December 20, 2011. The charges concerning Wilson's wife were merged into a single murder charge, and the firearm specifications were merged. The trial court imposed a sentence of 15 years to life for the murder and three years for the firearm specification. The court also imposed an agreed sentence of five years for the involuntary manslaughter. The sentences were to be served consecutively, for an aggregate sentence of 23 years to life.

{¶ 5} On December 30, 2011, Wilson, pro se, appealed from his no contest pleas related to his wife's murder. *State v. Wilson*, 2d Dist. Montgomery No. 24975 (*Wilson I*). The same day, he also filed a motion to withdraw his pleas related to his wife's murder. The basis for the motion to withdraw his pleas was that the judge had stated at his November plea hearing that he could appeal his no contest pleas, whereas the judge allegedly indicated at sentencing that he could not appeal the no contest pleas.

{¶ 6} In February 2012, while the direct appeal of the murder conviction was pending, the trial court overruled Wilson's motion to withdraw his no contest pleas.

Wilson appealed the trial court's ruling, *State v. Wilson*, 2d Dist. Montgomery No. 25025 (*Wilson II*), but he voluntarily dismissed the appeal based on his conclusion that the trial court had lacked jurisdiction to issue its order.

{¶ 7} On August 3, 2012, while the direct appeal was still pending, Wilson (through new counsel) filed a motion to withdraw all of his pleas, claiming that he had received ineffective assistance of counsel. Wilson supported his motion with an affidavit, which indicated that he had taken medication that affected him on the night of his wife's murder and while "dealing with" his attorney, and that his attorney had failed to "check into these medications and their side-effects." He also stated that he was distrustful of his trial counsel and that he would not have entered his pleas had he been permitted to hire another attorney.

{¶ 8} On October 31, 2012, the trial court overruled the August 3 motion, noting that Wilson had been represented by competent counsel, that his pleas were entered knowingly, intelligently, and voluntarily, and that no manifest injustice occurred. Wilson appealed this ruling on November 16, 2012. *State v. Wilson*, 2d Dist. Montgomery No. 25482 (*Wilson III*).

{¶ 9} On March 22, 2013, we decided Wilson's direct appeal of his conviction related to his wife's murder (*Wilson I*). In that appeal, Wilson had claimed that his no contest pleas were not knowing and voluntary and that his trial counsel had rendered ineffective assistance. We found no support for Wilson's claims that his pleas were other than knowing and voluntary, and we stated that "[t]here is nothing to indicate that assigned counsel was less than diligent in representing Wilson." *State v. Wilson*, 2d Dist. Montgomery No. 24975, 2013-Ohio-1076, ¶ 31 (*Wilson I*). We affirmed the trial

court's judgment.

{¶ 10} On April 25, 2014, we addressed Wilson's appeal in *Wilson III*, concerning the denial of his motion to withdraw all of his pleas. With respect to the pleas concerning his wife's murder, we held that the trial court had lacked jurisdiction to address Wilson's motion, because his direct appeal from those pleas was pending when the trial court ruled. *State v. Wilson*, 2d Dist. Montgomery No. 25482, 2014-Ohio-1764, ¶ 26. We dismissed this portion of his appeal for lack of a final appealable order.

{¶ 11} Wilson had not challenged by direct appeal his plea concerning Bloodsaw's death, and we stated in *Wilson III* that "[t]he trial court would have had jurisdiction to consider the motion to withdraw, to the extent that it involved this plea." *Id.* at 28. However, we declined to address the merits of Wilson's motion regarding that plea. We reasoned that Wilson's motion "involved both pleas and did not factually separate issues pertaining to either set of pleas" and that resolution of that matter "would be better addressed by the trial court's consideration on remand." *Id.* at 29. We reversed the trial court's judgment, in part, and remanded for further proceedings.

{¶ 12} Upon remand, a brief hearing was held on July 15, 2014. At the beginning of the hearing, the trial court noted that the trial court and the parties "have had the opportunity to discuss this matter at some length in chambers," but the record does not include a transcript of those discussions. In open court, the State argued that the trial court had complied with Crim.R. 11 when the pleas were taken and that Wilson had failed to rebut the presumption that his pleas were voluntarily made. The State further argued that Wilson failed to demonstrate that his counsel had acted deficiently.

{¶ 13} In response, Wilson's counsel began by asking for an evidentiary hearing

on the motion. He stated that Wilson's affidavit was un rebutted and raised matters outside of the record concerning Wilson's medications and the events of the night of his wife's murder, which warranted a hearing on the motion. Defense counsel also argued that Wilson was entitled to a hearing regarding his understanding of his appellate rights.

{¶ 14} After hearing from counsel, the trial court overruled Wilson's motion without conducting an evidentiary hearing. The court stated:

Due to the nature of this case and the fact that we've dealt at some point with both of these motions in the past and considering the remand, the Court finds that a hearing is not necessary. The Court has been fully advised in the circumstances surrounding these cases and the Court finds as follows as to each of these motions to the extent that each are remanded here.

That there has been no manifest injustice resulting from [sic] the Defendant involved in either of the pleas. That the Court finds that the Defendant was adequately represented by counsel as to each of the pleas and that Defendant was adequately and fully advised of his appellate rights as to each of these pleas.

{¶ 15} Wilson appeals from the trial court's judgment. His sole assignment of error states: "**A plea made due to the ineffectiveness of counsel must be vacated.**"

{¶ 16} A trial court "may set aside a judgment of conviction and permit a defendant to withdraw a guilty plea after imposition of sentence only to correct a manifest injustice." *State v. Blatnik*, 17 Ohio App.3d 201, 202, 478 N.E.2d 1016 (6th Dist.1984); Crim.R. 32.1; *State v. Brooks*, 2d Dist. Montgomery No. 23385, 2010-Ohio-1682, ¶ 8. "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.” *Brooks* at ¶ 8, citing *State v. Hartzell*, 2d Dist. Montgomery No. 17499, 1999 WL 957746 (Aug. 20, 1999).

{¶ 17} Ineffective assistance of counsel can be a proper basis for seeking a post-sentence withdrawal of a guilty plea. *State v. Jordan*, 12th Dist. Warren No. CA2014-04-051, 2015-Ohio-575, ¶ 12. When the alleged error underlying a motion to withdraw a guilty plea is ineffective assistance of counsel, the defendant must show that (1) trial counsel’s performance was deficient; and (2) there is a reasonable probability that, but for counsel’s errors, the defendant would not have entered a plea. *Id.*; see *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 18} Withdrawal of a guilty plea after sentencing is permitted only in the most extraordinary cases. *State v. Jefferson*, 2d Dist. Montgomery No. 26022, 2014-Ohio-2555, ¶ 17, citing *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). The defendant bears the burden of establishing the existence of a manifest injustice, and whether that burden has been met is an issue within the sound discretion of the trial court. *Blatnik* at 202, citing *Smith* at 264.

{¶ 19} An evidentiary hearing is not required on every post-sentence motion to withdraw a plea. *State v. Grier*, 2d Dist. Greene No. 2006CA61, 2007-Ohio-2597, ¶ 6. The Supreme Court has stated that a trial court should hold a hearing on a motion to withdraw a plea “unless it is clear that denial of the motion is warranted.” *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 51, citing *State v.*

Xie, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992); see *State v. Taylor*, 2d Dist. Montgomery No. 26027, 2014-Ohio-5358, ¶ 17-18.

{¶ 20} On appeal, Wilson argues that he had “grave misgivings” about his trial attorney, that he wanted to obtain new counsel, and that the trial court would not allow him to substitute his attorney. Wilson primarily relies on the transcripts of the November 30 and December 2, 2011 plea hearings to demonstrate his unhappiness with his attorney, his confusion at the plea hearings, and the alleged denial of his right to hire new counsel. Wilson’s affidavit also includes statements that he mistrusted his attorney and wanted new counsel, and that he would not have entered his pleas had he been allowed new counsel.

{¶ 21} Wilson’s arguments about his unhappiness with his attorney and his confusion about various issues, such as his ineligibility for community control, were raised in his direct appeal from his murder conviction. In reviewing these issues on direct appeal, we reviewed the transcripts of both plea proceedings and the sentencing hearing, and “we [found] nothing therein to reflect that Wilson’s plea was other than knowing and voluntary.” *Wilson*, 2d Dist. Montgomery No. 24975, 2013-Ohio-1076, ¶ 28.

{¶ 22} The only evidence before the court outside of the record was Wilson’s affidavit. Specifically, he stated in his affidavit that he did not trust his trial attorney, that he told his trial attorney that he wanted new counsel, that he did not want to enter a plea and was rushed to do so, that he had hired another attorney but was not allowed to use her, that he felt that he “had to plead or go to trial without an attorney,” and that if he “could have had the attorney I hired I would not have pled.” These assertions concern matters that are apparent from the record and were addressed in Wilson’s direct appeal.

{¶ 23} With respect to Wilson's pleas regarding his wife's murder, res judicata bars Wilson from again raising in a motion to withdraw his plea the arguments that he was unhappy with his attorney and that he was not permitted to obtain new counsel. And, although Wilson did not challenge his plea to involuntary manslaughter on direct appeal, he could have raised those same issues, and they are similarly barred. Regardless, neither the record nor Wilson's affidavit demonstrates a manifest injustice warranting the withdrawal of Wilson's pleas on this basis.

{¶ 24} Wilson further states in his affidavit that his trial attorney rendered ineffective assistance by failing to investigate the medication he was taking (Klonopin, Celexa, and a sleep aid), which he claims caused him to have memory lapses and be "cloudy" and "disoriented" on the night of his wife's murder, when meeting with his trial attorney, and in court.

{¶ 25} The record belies Wilson's claim that he was under the influence of medication at the time he entered his pleas. At both plea hearings, Wilson was specifically asked whether he was under the influence of any drug, alcohol, or medication, and Wilson denied that he was. Wilson engaged in a conversation with the trial court, asking several questions about the terms of the pleas and their consequences. Wilson spoke intelligently and coherently. There was no indication that he was under the influence of any medication at either plea hearing.

{¶ 26} Even assuming that Wilson informed his attorney about his medication and memory lapses and that his attorney failed to investigate the medication and their side effects, Wilson has not demonstrated that his counsel's failure to do so constituted ineffective assistance. Wilson has not provided any information that the medication he

took could have affected him in such a way that he would not be culpable for killing his wife. And, there is no indication that Wilson was prejudiced by his attorney's conduct, i.e., he would not have entered his pleas had his trial attorney investigated his medication and their side effects. He states in his affidavit that he told his attorney that he was having memory lapses, had been drinking, and did "not remember the events about which I was accused and only remember driving apparently after this incident [his wife's murder]," but these statements do not indicate that Wilson's conviction for his wife's murder constitutes a manifest injustice. Finally, Wilson's counsel stated at the November 30, 2011 plea hearing that she had "done [her] preparation" and was ready to go to trial on Monday, December 5, the scheduled trial date. Wilson has not established that his counsel provided ineffective assistance and that a manifest injustice exists.

{¶ 27} Wilson's assignment of error is overruled.

{¶ 28} The trial court's judgment will be affirmed.

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FAIN, J. and WELBAUM, J., concur.

Copies mailed to:

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