

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

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| STATE OF OHIO | : | |
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| Plaintiff-Appellee | : | C.A. CASE NO. 26226 |
| | : | |
| v. | : | T.C. NO. 2006-CR-1013 |
| | : | |
| DAVID S. HOPPER | : | (Criminal appeal from |
| | : | Common Pleas Court) |
| Defendant-Appellant | : | |
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OPINION

Rendered on the 19th day of June, 2015.

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Defendant-Appellant

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DONOVAN, J.

{¶ 1} Defendant-Appellant, David Hopper, appeals from the trial court's denial of
his post-sentencing motion to withdraw his guilty plea. Hopper claims that he was

erroneously promised that his sentence would run concurrently with a sentence he received in federal court, when federal law required that his federal sentence be served consecutively to other sentences.

{¶ 2} On June 8, 2006, Hopper was indicted on three counts of rape (by force or threat of force), one count of aggravated robbery, and one count of kidnapping (for purposes of sexual activity), all first-degree felonies. Each count included a firearm specification. In April 2008, Hopper was re-indicted for aggravated robbery with a firearm specification, and the State subsequently dismissed the aggravated robbery charge and the accompanying firearm specification from the original indictment.

{¶ 3} While the case against Hopper was pending, unrelated charges were being pursued against him in the United States District Court for the Eastern District of Kentucky, in Warren County, Franklin County, and Hamilton County, Ohio, and in Dearborn County, Indiana. According to the presentence investigation report, Hopper pled guilty in 2007 to two weapons offenses in federal court, and he was sentenced to 32 years in prison. On June 17, 2008, Hopper was found guilty in Warren County Court of Common Pleas of possession of criminal tools, rape, aggravated burglary, two counts of aggravated robbery, and four counts of kidnapping in Case No. 2008-CR-25107. The Warren County court sentenced him to 40 years in prison.

{¶ 4} On June 16, 2009, Hopper pled guilty to the three counts of rape, the counts of aggravated robbery and kidnapping, and the accompanying firearm specifications in this case. During the plea hearing, the State informed the court that there was an agreed sentence. The agreed sentence provided that Hopper would receive an aggregate 46-year sentence, 40 years of which would be served concurrently with a sentence

Hopper had previously received in Warren County and 6 years of which would be served consecutively. The plea form did not indicate that any promises had been made in exchange for the guilty pleas, and the plea form did not address how Hopper would be sentenced.

{¶ 5} A sentencing hearing was held on July 6, 2009, during which the agreed sentence was imposed. On July 6, 2009, the trial court filed a termination entry, which sentenced Hopper to ten years each for the three rapes and the aggravated robbery, stating that “[e]ach of these counts are to be served CONSECUTIVELY to each other for a term of FORTY (40) years *and CONCURRENTLY with the previously imposed sentence from Warren County.*” (Emphasis added.) The court sentenced Hopper to three years for kidnapping. The court merged the firearm specifications into a single specification and imposed three years of actual incarceration, to be served consecutively to and prior to the definite term of imprisonment. The court further ordered that the firearm specification and the kidnapping sentence be served consecutively to each other (for an aggregate of six years) and consecutively to the sentences for the rapes and aggravated robbery. Hopper was also ordered to pay restitution of \$200 and court costs. He was designated a Tier III sex offender.

{¶ 6} Hopper did not appeal from his conviction and sentence.

{¶ 7} Almost four years later, in March 2013, Hopper filed a motion to withdraw his guilty plea, pursuant to Crim.R. 32.1. In his motion, Hopper indicated that he had been convicted and sentenced in eight different jurisdictions related to a crime spree occurring over 14 years. The convictions occurred in state courts in two different Kentucky counties, four different Ohio counties, and an Indiana county and in the United States

District Court for the Eastern District of Kentucky. Hopper stated that the federal court had informed him at his federal sentencing that the judges in other jurisdictions would determine whether their state sentences would run concurrently or consecutively to the federal sentence. Hopper asserted that each state court, including the Montgomery County Court of Common Pleas, had agreed to run its sentence concurrently with the 384-month sentence imposed by the federal court.

{¶ 8} Hopper further stated in his motion that, in December 2012, he learned from another inmate that his federal court sentence would run consecutively to his state sentences, as allegedly required by 18 U.S.C. § 924(c).¹ Hopper wrote to the Federal Bureau of Prisons to inquire whether his federal sentence was being served consecutively or concurrently to his state sentences; the Federal Bureau of Prisons responded that the federal sentence would be served consecutively and that he would begin serving his federal sentence after completing his state sentences.

{¶ 9} Hopper asked to withdraw his guilty pleas in this case, arguing that his sentence is contrary to law. Hopper explained that the sentence imposed by the federal court was contrary to law, because the federal court erroneously indicated that the state courts had the option to impose their sentences concurrently with the federal sentence,

¹ 18 U.S.C § 924(c)(1)(D) provides:

Notwithstanding any other provision of law –

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) *no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.*

(Emphasis added.)

when 18 U.S.C. § 924(c) required the federal sentence to be served consecutively to other sentences. Hopper asserted that the sentence in this case was also contrary to law, because “the sentence imposed could not run concurrently with [Hopper’s] Federal sentence as the Court so advised and ordered at the final sentencing hearing.”

{¶ 10} The State did not respond to Hopper’s motion to withdraw his plea. On June 18, 2013, Hopper moved for a “default judgment” on his motion.

{¶ 11} On June 19, 2013, the State filed a memorandum opposing Hopper’s motion to withdraw his plea. The State emphasized that Hopper waited nearly four years since his sentencing to file his motion, and it argued that Hopper’s “gripe” is not with the Montgomery County Court of Common Pleas, but with the federal court, which allegedly told Hopper erroneous information regarding the effect of 18 U.S.C. § 924(c) at Hopper’s plea hearing in federal court. The State further asked the trial court to strike the motion for default judgment, on the ground that Civ.R. 55 did not apply in a criminal case.

{¶ 12} On April 29, 2014, the trial court overruled Hopper’s motions to withdraw his plea and for default judgment. The court reasoned, in pertinent part:

In the case at bar, Defendant argues that he should be allowed to withdraw his plea because the Federal Court incorrectly stated that the three hundred eighty-four month sentence it imposed could be run concurrent with sentences imposed in other jurisdictions. A review of the record shows that this Court properly informed Defendant of his rights, penalties, and the effects of giving up his rights in the case before it. This Court properly informed Defendant that the forty-six year sentence it imposed would run concurrent to the previously imposed sentences. It

was the Federal Court that allegedly incorrectly informed Defendant that the three hundred eighty-four month sentence it imposed would run concurrent with any other sentences imposed. This Court respectfully suggests that Defendant's issue more properly appears to be with the Federal Court rather than this Court.

Under these facts presented, Defendant has failed to demonstrate a manifest injustice under the totality of the circumstances, and that his plea was not knowingly and voluntarily made.

{¶ 13} Hopper appealed from the trial court's denial of his motion to withdraw his plea. His appellate counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), stating that she found no arguable issues for appellate review. Counsel raised one potential assignment of error, namely whether the trial court erred by failing to allow Hopper to withdraw his guilty plea.

{¶ 14} By entry, we informed Hopper that his attorney had filed an *Anders* brief on his behalf and granted him 60 days from that date to file a pro se brief. Hopper filed a pro se brief, raising one assignment of error, which states:

Appellant has been denied his right to due process of law, as granted him by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and by the Constitution of the State of Ohio, when the trial court abused its discretion by denying his motion to withdraw guilty plea that was based on his credible and record-supported claim that the plea agreement reached between he and the State had been breached by the State of Ohio.

{¶ 15} On appeal, Hopper claims that the State induced his guilty plea “on an unfulfilled promise of concurrent sentences with all of his previously received state and federal sentences.” He further contends that the trial court erred in concluding that the federal court, not the trial court, was responsible for any misrepresentation as to whether his federal sentence could be served concurrently with his state sentences.

{¶ 16} Crim.R. 32.1 provides: “A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.” As this Court has previously noted:

* * * The manifest injustice standard demands a showing of extraordinary circumstances. *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324. Further, the defendant has the burden to prove the existence of manifest injustice. *Id.*

The term *injustice* is defined as “the withholding or denial of justice. In law, the term is almost invariably applied to the act, fault, or omission of a court, as distinguished from that of an individual.” Black’s Law Dictionary, 5th Ed. 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, 2d Dist. Montgomery No. 17499, 1999 WL 957746, *2 (Aug. 20, 1999).

{¶ 17} We review a trial court’s decision on a post-sentence motion to withdraw guilty plea for an abuse of discretion. *State v. McCommons*, 2d Dist. Montgomery No.

26372, 2015-Ohio-1583, ¶ 6. “The lynchpin of abuse-of-discretion review is the determination whether the trial court’s decision is reasonable.” *State v. Chase*, 2d Dist. Montgomery No. 26238, 2015-Ohio-545, ¶ 17, citing *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶ 18} The agreement between Hopper and the State was articulated by the prosecutor at Hopper’s plea hearing on June 16, 2009. The prosecutor stated:

* * * It’s the State’s understanding that the defendant will be withdrawing his former pleas of not guilty and entering pleas of guilty to the following counts, specifically, three counts of rape, all felonies of the first degree, all attached with three-year firearm specifications; one count of aggravated robbery, also a felony of the first degree with an attached three-year firearm specification; and one count of kidnapping, also a felony of the first degree and it also has a three-year firearm specification.

It’s the State’s understanding that we’ve also entered into an agreed sentence on this matter and specifically the State and the defense have agreed to a total term of 46 years in prison, 40 of those years to run concurrent with the defendant’s sentence that has already been passed in Warren County and six of those years to run consecutively to that sentence for a total of 46 years.

The trial court asked defense counsel and Hopper if that was also their understanding of the plea agreement. Both responded affirmatively. When asked if he wished to enter a plea to those terms, Hopper responded, “Yes.”

{¶ 19} The trial court proceeded to conduct a plea hearing in accordance with Crim.R. 11. The trial court inquired whether Hopper was under the influence of drugs, alcohol, or medication or had any other physical issues that would prevent him from entering his plea; Hopper responded, “No.” Hopper indicated that he was represented by counsel and was satisfied with his counsel’s representation. Hopper stated that he was entering his plea voluntarily and that no one had threatened or forced him to enter a plea. The court then asked:

THE COURT: Have any promises been made to you other than what has been stated on the record that you will plead, as charged, to all of the counts and that you will received a 46-year sentence, 40 of which will be concurrent with Warren County and six years will be consecutive or extra. Other than that, have any other promises been, or any promises been made to you that have not been stated on the record and in open court?

THE DEFENDANT: No.

{¶ 20} The trial court continued with the plea hearing by asking the prosecutor to recite the charges and specifications to which Hopper was pleading. Hopper indicated that he understood the nature of the charges against him. The trial court informed Hopper of the maximum sentence for the first-degree felonies, including that he faced a mandatory prison sentence, and stated that he was not eligible for community control or judicial release. The trial court properly notified Hopper regarding post-release control and the penalties if he violated it. The court explained Hopper’s constitutional rights and Hopper indicated that he understood that he was waiving those rights by entering his plea. The court also told Hopper that he would be designated a Tier III sex offender,

which would require him to register every 90 days at the sheriff's office for life. Hopper entered a guilty plea to each of the five offenses.

{¶ 21} The court's sentence was consistent with the plea agreement. The court orally announced at the sentencing hearing and stated in its written judgment entry that the ten-year sentences for rape and aggravated robbery were to be served consecutively to each other but concurrently with the Warren County sentence in *State v. Hopper*, Warren C.P. No. 2008 CR 25107. The three-year sentence for kidnapping was to be served consecutively to the three-year sentence for the firearm specification, and those six years were to be served consecutively to the aggregate 40-year sentence, for a total of 46 years.

{¶ 22} Hopper claims that his plea agreement with the State included that his sentence would run concurrently with the sentences previously imposed on him by all other jurisdictions, including the federal court. The record does not support this claim. Hopper expressly agreed at the plea hearing that 40 years of his sentence would be served concurrently with the sentence imposed by Warren County, Ohio; the remaining six years were to be served consecutively to the 40-year sentence. No other jurisdiction was mentioned, although the trial court was aware of his federal conviction from the presentence investigation, and we find nothing in the record to support Hopper's belief that the State promised Hopper that his sentence would be served concurrently with the federal sentence or the sentence of any jurisdiction other than Warren County. And, because the trial court imposed the agreed sentence, we find no basis to conclude that the trial court's sentence was ordered to be served concurrently with Hopper's federal sentence and was thereby contrary to law. Hopper does not raise an arguable claim that

a manifest injustice has occurred.

{¶ 23} Having conducted an independent review of the entire record on appeal, we find no arguably meritorious claim that the trial court erred in denying Hopper's post-sentence motion to withdraw his plea. Accordingly, the trial court's judgment is Affirmed.

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FROELICH, P.J. and FAIN, J., concur.

Copies mailed to:

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David S. Hopper
Hon. Richard Skelton
(successor to Judge Frances E. McGee)