

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO : Case No. 08CA10
Plaintiff-Appellee, :
vs. : DECISION AND JUDGMENT ENTRY
MICHAEL N. LEWIS, a.k.a. :
MARCELL WOODS, : **Released 9/18/08**
Defendant-Appellant. :

APPEARANCES:

Michael N. Lewis, Glenville, West Virginia, Appellant pro se.

J.B. Collier, Jr., Lawrence County Prosecuting Attorney, and Robert C. Anderson, Assistant Lawrence County Prosecuting Attorney, Ironton, Ohio, for Appellee.

Harsha, J.

{¶1} Michael Lewis pled guilty to four felony counts of drug trafficking and drug possession. More than three years later, Lewis moved to withdraw his guilty pleas on the grounds that his pleas were not knowing and voluntary, that the State breached the plea agreement, and that he was actually innocent. The trial court denied his motion without an evidentiary hearing.

{¶2} First, Lewis argues that the trial court abused its discretion in denying his motion to withdraw his guilty pleas because his pleas were not knowing and voluntary. However, all Lewis puts forward in support of this argument is his own unsubstantiated assertion that his attorneys coerced him into pleading guilty. The record contradicts this assertion because Lewis and his attorney represented to the court at the sentencing hearing that he understood the consequences of pleading guilty and that his pleas were

voluntary. Thus, Lewis's unsupported assertion that he was coerced into pleading guilty did not merit a hearing.

{¶3} Next, Lewis argues that the State's failure to object to the trial court's decision to impose permissive fines breached the State's promise to recommend to the trial court that it not impose permissive fines. However, the record shows that the plea agreement required the State to recommend to the trial court that it not impose permissive fines, and the State made this recommendation at the hearing. Thus, the State did not breach the plea agreement.

{¶4} Finally, Lewis argues that the trial court abused its discretion in denying his motion without an evidentiary hearing despite his claim that he is actually innocent of the crimes for which he was convicted. However, nothing in the record before the trial court substantiated his claim that he is actually innocent, and the trial court could reasonably discredit Lewis's allegations given his significant delay in moving to withdraw his guilty pleas.

{¶5} Accordingly, the trial court did not abuse its discretion in denying Lewis's motion to withdraw his guilty pleas without holding an evidentiary hearing, and we affirm its judgment.

I. Facts

{¶6} The Lawrence County Grand Jury indicted Michael Lewis on one count of possession of crack cocaine, a violation of R.C. 2925.11(A), one count of possession of cocaine, a violation of R.C. 2925.11(A), one count of trafficking in cocaine, a violation of R.C. 2925.03(A)(2), and one count of trafficking in crack cocaine, a violation of R.C. 2925.03(A)(2).

{¶17} On October 25, 2004, Lewis pled guilty to all four counts of the indictment. Before accepting Lewis's pleas, the trial court asked Lewis and his attorney whether the answers Lewis supplied on his "Proceeding on Plea of Guilty" form were correct. Lewis stated that his answers were correct and that he had signed it. He provided answers on the form stating that there were no promises, threats, or inducements other than the plea agreement made to persuade him to plead guilty. On the form, Lewis stated that no one had promised him release from prison on a certain date. Lewis also answered that his pleas were the result of his own free, knowing, and voluntary act and that there was a factual basis supporting his guilty pleas. The trial court then addressed Lewis and explained the potential sentences and fines that he could receive, and the court asked Lewis if he understood that he was waiving his right to a jury trial, his right to confront the witnesses against him, his right to compulsory process, his right against self-incrimination, and his right to have the State prove him guilty beyond a reasonable doubt. Lewis said he understood.

{¶18} The trial court accepted Lewis's guilty pleas. Pursuant to a plea agreement reached with Lewis, the State recommended that Lewis serve four years in prison and pay mandatory fines, and the prosecutor stated that it would dismiss the charges against Lewis contained in a separate indictment. In addition, the State recommended that the court not impose any permissive fines and that Lewis receive judicial release after one year if he had paid \$10,000 of the mandatory fines. Lewis gave a statement apologizing and saying "basically, I just was at the wrong place at the wrong time." The trial court sentenced Lewis to four four-year terms of imprisonment, served concurrently, and imposed \$30,000 in mandatory fines and \$60,000 in

permissive fines. The court indicated that it would look favorably on judicial release after Lewis served one year in prison if he paid \$10,000 of his fines, and it granted him thirty days furlough to get his affairs in order. The court allowed Lewis to begin his sentence on November 29, 2004.

{¶9} Lewis never appeared to begin serving his sentence. According to his brief, West Virginia authorities arrested Lewis on federal charges on October 12, 2005, and he “has been in custody ever since.” However, neither the record nor Lewis’s brief detail where Lewis was between his sentencing hearing on October 25, 2004, and his subsequent arrest in West Virginia on October 12, 2005. Lewis is now incarcerated in a federal prison in West Virginia.

{¶10} Lewis filed his first motion to withdraw his guilty pleas on March 5, 2007. However, because Lewis seemed to be at large and had failed to provide an address, the trial court concluded that Lewis’s motion was not properly before the court, and it summarily denied it. Lewis filed his second motion to withdraw his guilty pleas on February 20, 2008. In this motion, Lewis asserted that one of the co-defendants in his case, Jerry Totts, had pled guilty to the crimes that the State charged Lewis with and that Totts had agreed to testify on Lewis’s behalf at his trial. According to Lewis, Totts was going to testify that all of the drugs found by police belonged to him and that Lewis was not involved. Lewis also asserted that his attorneys told him that they would not take his case to trial if Lewis did not pay \$7,000 for the representation. In his motion, he also “aver[red] that he was falsely told that he had to plead guilty in order not to go to jail and would be able to withdraw his guilty plea and proceed to trial if he paid the attorney \$10,000.” Lewis explained that he only “indicated guilt because he was informed that

this would be the only way to avoid a jail term for up to 30-days in order to pay the attorney \$10,000 and withdraw his guilty plea.” In his appellant’s brief, Lewis explains that his attorneys told him that if he pled guilty, they would get him a 30-day furlough so that he could come up with the \$7,000 it would cost to take the case to trial. Lewis asserts that his attorneys represented to him that, if he could come up with the \$7,000, they would “get his guilty plea withdraw and he can proceed to trial.”

{¶11} According to his appellant’s brief, Lewis failed to raise the money, and on November 15, 2004, he retained a new attorney in order to “withdraw his guilty plea due to his innocence.” However, because of this attorney’s long lasting illness, Lewis did not move to withdraw his guilty plea until he took it upon himself to do so. The trial court denied his motion to withdraw his guilty plea, and Lewis filed this appeal.

II. Assignments of Error

{¶12} Lewis presents three assignments of error:

1. “The Appellant’s plea agreement was invalid and the trial court abused its discretion in not allowing him to withdraw his plea of guilty.”
2. “The State breached its plea agreement by allowing the trial court to prescribe permissive fines after it negotiated that it wasn’t asking for permissive fines.”
3. “The trial court abused its discretion by not allowing co-defendant Jerry Totts to give testimony who admitted that the drugs found were his.”

III. Post-sentencing Withdrawal of Guilty Pleas

{¶13} Crim. R. 32.1 governs the withdrawal of guilty pleas and provides:

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

A defendant seeking to withdraw a plea of guilty after sentence has the burden of establishing that a manifest injustice will occur if the plea stands. *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus; *State v. Haught*, Pickaway App. No. 06CA30, 2007-Ohio-5736, at ¶10. Ohio courts have defined a manifest injustice to mean “a clear or openly unjust act.” *State v. Dotson*, Washington App. No. 03CA53, 2004-Ohio-2768, at ¶5, citing *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 1998-Ohio-271, 699 N.E.2d 83. Courts find the existence of a manifest injustice in only extraordinary cases. *State v. Allison*, Pickaway App. No. 06CA9, 2007-Ohio-789, at ¶7, citing *Smith*, 49 Ohio St.2d at 264.

{¶14} The decision to grant or deny a Crim. R. 32.1 motion is committed to the sound discretion of the trial court, and appellate review of the denial of a motion to withdraw a guilty plea is therefore limited to a determination of whether the trial court abused its discretion. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 325, at ¶32; *State v. Smith* (1977), 49 Ohio St.2d 261, 264, 361 N.E.2d 1324; *State v. Zinn*, Jackson App. No. 04CA1, 2005-Ohio-525, at ¶14. An abuse of discretion involves more than an error in judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144; *Zinn* at ¶14. When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *Allison* at ¶8, citing *In re Jane Doe I* (1990), 57 Ohio St.3d 135, 138, 566 N.E.2d 1181.

{¶15} The trial court did not hold a hearing on Lewis’s motion to dismiss. However, “[t]rial courts need only conduct an evidentiary hearing where the facts, as

alleged by the defendant, indicate a manifest injustice would occur if the plea was allowed to stand. Moreover, an evidentiary hearing is not required if the defendant's allegations are 'conclusively and irrefutably contradicted by the record.'" *Dotson* at ¶6, quoting *State v. Moore*, Pike App. No. 01CA674, 2002-Ohio-5748, at ¶¶17-18. When reviewing a post-sentence motion to withdraw a plea, a trial court may assess the credibility of a movant's assertions, and an evidentiary hearing is not always necessary to make this assessment. *Allison* at ¶9, citing *Smith*, 49 Ohio St.2d at 264, and *State v. Yost*, Meigs App. No. 03CA13, 2004-Ohio-4687, at ¶8.

{¶16} First, Lewis argues that the trial court should have allowed him to withdraw his guilty pleas because "[t]he plea agreement in this case was invalid because the trial judge failed to determine that the appellant Lewis was entering his plea knowing[ly] and voluntarily." In particular, Lewis argues that the trial court's failure to orally ask at the plea hearing whether his guilty pleas were induced by any promises, threats, or coercion created a manifest injustice. However, Lewis stated that he knowingly and voluntarily entered the guilty pleas on the "Proceeding on Plea of Guilty" form, and the trial court confirmed that Lewis's answers on the form were correct. Thus, the record shows that the trial court inquired into whether Lewis's pleas were knowing, voluntary, and the product of his own free will, and it specifically addressed the constitution rights Lewis would waive by pleading guilty

{¶17} The crux of Lewis's argument is that his guilty pleas were involuntary because his attorneys threatened to withdraw if he could not pay them \$7,000 and because they falsely represented that he could plead guilty, be released on furlough, and withdraw his guilty pleas after raising the money for their fees. However, nothing in

the record, including Lewis's own affidavit, substantiates his allegation that trial counsel coerced him into pleading guilty. And Lewis represented to the trial court at the plea hearing that his guilty pleas were the product of his own free will and voluntary act. "Where nothing in the record supports a defendant's claim that his plea was not knowingly and voluntarily made other than his own self-serving affidavit or statement, the record is insufficient to overcome the presumption that the plea was voluntary." *State v. Honaker*, Franklin App. 04AP-146, 2004-Ohio-6256, at ¶18, quoting *State v. Laster*, Montgomery App. No.19387, 2003-Ohio-1564, at ¶8; see, also *State v. Plemons*, Montgomery App. No. 21039, 2006-Ohio-1608, at ¶15 ("[I]t should be noted that a defendant's own self-serving declarations or affidavits are insufficient to rebut the record on review which shows that his plea was voluntary." (citing *State v. Kapper* (1983), 5 Ohio St.3d 36, 448 N.E.2d 823)); *State v. Elko*, Cuyahoga App. No. 84602, 2005-Ohio-110, at ¶11 ("[E]vidence out of the record in the form of petitioner's own self-serving affidavit alleging a constitutional deprivation will not compel a hearing." (quoting *State v. Combs* (1994), 100 Ohio App.3d 90, 98, 652 N.E.2d 205)).

{¶18} Moreover, when a trial court considers a post-sentence motion to withdraw guilty pleas, the court must assess the credibility of the movant's assertions. *Haught* at ¶16; *Yost* at ¶8. "[A]n 'undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim. R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.'" *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, at ¶14, quoting *Smith*, supra, at paragraph three of the syllabus. Here, Lewis waited over three years to file his current Crim. R. 32.1 motion. Although Lewis attempts to blame this

delay on his imprisonment in West Virginia and the illness of his attorney, he has not explained why he never appeared to serve his sentence or what he did between the time the court released him on bond on October 25, 2004, and his arrest in West Virginia on October 12, 2005. Thus, the trial court could have reasonably questioned the credibility of his unsubstantiated assertions given Lewis's failure to challenge his guilty pleas sooner. See *Haught* at ¶16 ("Although the month between appellant's conviction in the case at bar and the filing of her motion to withdraw guilty plea is not excessive, the trial court may have also questioned why appellant did not file her motion sooner if the alleged injustices were so 'manifest' and 'obvious.'").

{¶19} Next, Lewis argues that the trial court should have allowed him to withdraw his guilty pleas on the grounds that the prosecution breached the plea agreement. In particular, Lewis suggests that the State should have objected to the trial court's decision to impose permissive fines. The record does not contain a written copy of the plea agreement. However, the prosecution stated on the record that the plea agreement required the State to recommend a four-year sentence, mandatory fines, judicial release after one year served if Lewis paid \$10,000 of the fines, and a 30-day furlough. The State also explained that, pursuant to the plea agreement, it would not be recommending permissive fines. The trial court disregarded the State's recommendation regarding the permissive fines.

{¶20} In his affidavit supporting his Crim. R. 32.1 motion, Lewis avers that the State "insisted that the Court would not impose permissive fines upon me. * * * The bargain recites that there will be no permissive fines." However, neither Lewis nor his attorney raised any issue with the prosecution's statement of the terms of the plea

agreement, and the record contradicts Lewis's allegations in his affidavit that the State breached the plea agreement. To the extent that Lewis did not understand that the trial court was not obligated to accept the terms of the plea agreement, "a defendant's mistaken belief as to the consequences of pleading guilty does not require a trial court to allow a defendant to withdraw a guilty plea." *State v. Wolfson*, Lawrence App. No. 02CA28, 2003-Ohio-4440, at ¶18. Given his failure to raise any issue with his sentence at the plea hearing after the State recited the terms of the plea agreement, his failure to appeal, and his long delay in seeking to withdraw his guilty pleas, the trial court could reasonably conclude that Lewis's allegations regarding the State's promises were not credible despite being supported by his own affidavit.

{¶21} Finally, Lewis argues that the trial court abused its discretion in failing to hold a hearing in order to allow Jerry Totts to testify regarding Lewis's claim that he was innocent of any crime. However, the affidavit attached to his appellant's brief, which purports to be an affidavit from Totts accepting full responsibility for the drugs that the State charged Lewis with possessing and trafficking, does not appear in the record. Nothing in the record suggests that the trial court considered this affidavit, and attaching the affidavit to his appellant's brief does not put it properly before this Court for our consideration. See *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶13 ("A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." (quoting *State v. Ishmail* (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500, paragraph one of the syllabus)); *State v. Jacobson*, Adams App. No. 01CA730, 2003-Ohio-1201, at ¶14 (explaining that in a direct appeal, "we are confined

to testimony and evidence that the parties presented to the trial court”). We cannot hold the trial court in error based on an affidavit that the record indicates Lewis never presented to it.

{¶22} Lewis contends that his pleas were invalid because the State concealed from him the fact that Totts had taken responsibility for the drugs. However, the trial court’s September 20, 2004, entry denying Lewis’s motion to sever his trial from that of his co-defendants Totts and Patrick King shows that Totts and King entered guilty pleas on September 15, 2004, and the certificate of service shows that the court sent the entry to Lewis’s attorney. Furthermore, Lewis represented to the trial court at the plea hearing that a factual basis supported his guilty pleas, and he did not raise his actual innocence at that time. Thus, Lewis’s allegations are contradicted by the record before the trial court. Finally, the trial court could reasonably conclude that the significant delay in seeking to withdraw his guilty pleas adversely affected the credibility of his allegations that a manifest injustice would occur if his pleas were allowed to stand.

{¶23} Accordingly, the trial court did not abuse its discretion in denying Lewis’s motion to withdraw his guilty pleas. Finding no reversible error below, we affirm.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.