

[Cite as *State v. Harper*, 2014-Ohio-5849.]

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 14CA18
 :
 vs. :
 :
 STEVEN D. HARPER, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :
 :

APPEARANCES:

APPELLANT PRO SE: Steven D. Harper, #438-570, Chillicothe Correctional Institution,
P.O. Box 5500, Chillicothe, Ohio 45601

COUNSEL FOR APPELLEE: Brigham M. Anderson, Lawrence County Prosecuting
Attorney, and W. Mack Anderson, Lawrence County
Assistant Prosecuting Attorney, One Veteran's Square,
Ironton, Ohio, 45638

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-29-14

ABELE, P.J.

{¶ 1} This is an appeal from a Lawrence County Common Pleas Court judgment that denied a motion by Steven D. Harper, defendant below and appellant herein, to withdraw his guilty plea. Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COUNSEL ABUSED IT’S DISCRETION IN FAILING TO HOLD HOLD [sic] A HEARING ON APPELLANTS [sic], MOTION TO WITHDRA [sic] HIS GUILTY PLEA.”

SECOND ASSIGNMENT OF ERROR:

“APPELLANT CONTENDS THAT HIS GUILTY PLEAS WERE NOT KNOWINGLY AND INTELLIGENTLY MADE BECAUSE THE TRIAL COURT MISREPRESENTED HIS ELIGIBILITY FOR JUDICIAL RELEASE. [sic] SPECIFICALLY, APPELLANT ARGUES THAT THE TRIAL COURT, THE PROSECUTION, AND COUNSEL MISLEAD [sic] HIM BY REPRESENTING AT THE PLEA HEARING THAT HE WOULD BE ELIGIBLE FOR JUDICIAL RELEASE [sic] AFTER TEN YEARS AND THEN IMPOSED A SENTENCE THAT RENDERED HIM INELIGIBLE FOR JUDICIAL RELEASE DUE TO MANDATORY SENTENCING.”

THIRD ASSIGNMENT OF ERROR:

“THE TRIAL COURT DID NOT COMPLY WITH CRIM.R. 11 WHEN IT ENTERED INTO A NEGOTIATED PLEA AGREEMENT THAT WAS LEGALLY IMPOSSIBLE.”

FOURTH ASSIGNMENT OF ERROR:

“THE GUILTY PLEA IS VOID SINCE THE COUNSEL FOR THE APPELLANT FAILED TO INVESTIGATE THAT MANDATORY SENTENCING RENDERS HIM INELIGIBLE FOR JUDICIAL RELEASE, THEREFORE SENTENCES ARE BOTH CONTRARY TO LAW AND NOT AUTHORIZED BY LAW.”

{¶ 2} In 2001, the Lawrence County Grand Jury returned an indictment that charged appellant with (1) grand theft in violation of R.C. 2913.02(A)(1); (2) felonious assault in violation of R.C. 2903.11(A)(1); (3) two counts of rape in violation of R.C. 2907.02(A)(2); (4) tampering with evidence in violation of R.C. 2921.12(A)(1); and (5) kidnapping in violation of R.C. 2905.01(A)(4). Although appellant initially pled not guilty to all charges, he later agreed to plead guilty to all but one charge (a rape charge) that the State agreed to dismiss.

{¶ 3} On June 26, 2002, the trial court sentenced appellant to serve seventeen months for grand theft, six years for felonious assault, eight years for rape, four years for tampering with evidence and eight years for kidnapping, all to be served concurrently, but served consecutively to another rape sentence in a separate case. The remaining rape conviction was dismissed, nolle prosequi. No appeal was filed from those judgments.

{¶ 4} On July 23, 2010, appellant filed a pro se motion for “de novo sentencing.” The trial court denied that motion, as well as a motion for judicial release. No appeal was filed from those decisions.

{¶ 5} Appellant commenced the instant action on May 16, 2014 by filing a motion to withdraw his 2002 guilty plea. The gist of his motion appeared to be that the trial court failed to comply with the dictates of Crim.R. 11 and, therefore, he did not knowingly, intelligently and voluntarily enter his plea. The trial court overruled his motion and noted that appellant did not have the “right to litigate his claim indefinitely.” This appeal followed.

I

{¶ 6} In his first assignment of error, appellant asserts that the trial court erred by denying

his Crim.R. 32.1 motion to withdraw guilty plea without holding a hearing.

{¶ 7} A post-sentence motion to withdraw guilty plea may be granted when necessary to correct a “manifest injustice.” Crim.R. 32.1. The decision to grant or to deny a Crim.R. 32.1 motion lies in a trial court's sound discretion and its decision will not be reversed absent an abuse of that discretion. *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715, at paragraph two of the syllabus (1992); *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph two of the syllabus (1977). An abuse of discretion is generally more than an error of law or judgment; rather, it implies that a court's attitude was unreasonable, arbitrary or unconscionable. *State v. Clark*, 71 Ohio St.3d 466, 470, 644 N.E.2d 331 (1994); *State v. Moreland*, 50 Ohio St.3d 58, 61, 552 N.E.2d 894 (1990). In reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 732, 654 N.E.2d 1254 (1995); *In re Jane Doe 1*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991).

{¶ 8} In *State v. Layne*, 4th Dist. Highland No. 11CA17, 2012-Ohio-1627, we wrote:

“ When reviewing a post-sentence motion to withdraw a plea, a trial court may assess the credibility of a movant's assertions. An evidentiary hearing is not always required in order to do so. ‘[A]n undue delay between the occurrence of the alleged cause for withdrawal and the filing of the motion is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.’ *Smith* at paragraph three of the syllabus. Additionally, a hearing on a post-sentence motion to withdraw a guilty plea is not necessary if the facts alleged by the defendant, even if accepted as true, would not require the court to grant the motion to withdraw the guilty plea.” (Citations omitted.) *Id.* at ¶5.

{¶ 9} Several of our *Layne* observations are applicable here. First, regarding the credibility of appellant's assertions that his plea was not knowingly, intelligently and voluntarily made, we note that the record contains several denials for judicial release, as well as several of appellant's hand-written

letters, either to the court or to the prosecutor, that asked for release. Here, the trial court may well have concluded that appellant simply chose to pursue a new avenue to seek release. Also, although some delay is to be expected between a conviction on a guilty plea and a post-sentence Crim.R. 32.1 motion to withdraw that plea, a twelve year delay is problematic. Finally, as we discuss in our disposition of appellant's remaining assignments of error, even if all of the allegations are true, the trial court was not required to grant his motion.

{¶ 10} For these reasons, we hereby overrule appellant's first assignment of error.

II

{¶ 11} Appellant's remaining assignments of error involve alleged improprieties at the 2002 change of plea hearing. However, such alleged improprieties are not properly before us. Rather, the only issue before us is whether the trial court erred by denying appellant's motion. As this Court has consistently ruled, the doctrine of res judicata bars the raising of any issue in a post-sentence Crim.R. 32.1 motion to withdraw guilty plea that was raised, or could have been raised, in a first appeal of right. See *State v. Ables*, 4th Dist. Pickaway No. 11CA22, 2012-Ohio-3377, at ¶14; *State v. LaPlante*, 4th Dist. No. 11CA3215, 2011-Ohio-6675, at ¶8. Here, no appeal was taken from the 2002 judgment of conviction and sentence. The issues appellant now seeks to raise could have been raised in a first appeal of right. However, appellant failed to do so. Appellant cannot now raise the issues more than twelve years later.

{¶ 12} For these reasons, we hereby overrule appellant's second, third and fourth assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee to recover of appellant the costs herein taxed.

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, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____

Peter B. Abele
Presiding 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.