

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
v.	:	Case No. 14CA3641
ANTHONY OWENS,	:	<u>DECISION AND</u>
Defendant-Appellant.	:	<u>JUDGMENT ENTRY</u>
		RELEASED 04/21/2015

APPEARANCES:

Anthony Owens, Chillicothe, Ohio, Appellant, Pro Se.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

Hoover, P.J.

{¶ 1} This is an appeal from the Scioto County Court of Common Pleas' denial of Anthony Owens' post-sentence motion to withdraw his guilty plea. On appeal, Owens contends that the trial court erred in denying his motion to withdraw his guilty plea. Owens alleges that the plea was not entered knowingly or intelligently due to the alleged ineffective assistance of counsel he received during the investigative and advisory stages of the proceedings. Specifically, Owens asserts that his trial counsel was ineffective for failing to file a motion to suppress evidence and for "trick[ing]" him into accepting a plea deal. Because we conclude that the arguments raised under Owens' sole assignment of error are barred by the doctrine of res judicata, we overrule the assignment of error. Accordingly, the decision of the trial court is affirmed.

I. FACTS

{¶ 2} Owens was indicted on March 15, 2013, on three counts: trafficking in drugs, a felony of the first degree; possession of drugs, a felony of the first degree; and tampering with evidence, a felony of the third degree. Initially, Owens entered pleas of not guilty and filed a demand for discovery, request for bill of particulars, and a motion to preserve evidence.

{¶ 3} Plaintiff-appellee, the State of Ohio (“the State”), filed the bill of particulars and provided discovery on April 3, 2013. Owens filed a response to the State’s request for reciprocal discovery on April 22, 2013, and the State provided supplemental discovery on June 21, 2013.

{¶ 4} On July 23, 2013, counsel for Owens filed a motion to withdraw as counsel, which was never ruled upon by the trial court. In his motion to withdraw, counsel for Owens asserted that Owens was not cooperating and communicating with counsel. Specifically, counsel alleged that Owens failed to appear for an appointment to discuss his defense on July 11, 2013, and that counsel had not heard from Owens since a pretrial conference held on July 3, 2013.

{¶ 5} A jury trial was scheduled for August 5, 2013; however, Owens failed to appear on August 5, 2013, and a bench warrant was issued for his arrest.

{¶ 6} On September 6, 2013, Owens entered into a negotiated plea deal with the State. Under the terms of the deal Owens agreed to plead guilty to one count of trafficking in oxycodone, in violation of R.C. 2925.03(A)(2).

{¶ 7} Owens was sentenced to seven (7) years in prison on the trafficking offense. Owens did not file a direct appeal of his conviction or sentence.

{¶ 8} On May 23, 2014, Owens filed a motion to withdraw his guilty plea on the grounds that his attorney provided him ineffective assistance of counsel by failing to properly investigate the case. Specifically, Owens argued that his trial counsel should have filed a motion to suppress

evidence that was allegedly seized in violation of Owens' fourth amendment rights. The trial court denied the motion to withdraw the guilty plea, without conducting a hearing, on June 13, 2014.

{¶ 9} It is from the judgment denying his motion to withdraw his guilty plea that Owens now appeals.

II. ASSIGNMENT OF ERROR

{¶ 10} Owens assigns the following error for our review:

Assignment of Error:

APPELLANT CONTENDS THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF HIS 6TH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTIONS [SIC] WHERE COUNSEL FAILED TO PROPERLY INVESTIGATE THE CASE PRIOR TO THE APPELLANT'S PLEA, WHICH MADE SAID PLEA VOID, AS SAID WAS NOT KNOWINGLY, INTELLIGENTLY ENTERED, AND THE TRIAL COURT THUS SHOULD HAVE ALLOWED APPELLANT TO WITHDRAW HIS GUILTY PLEA.

III. LAW AND ANALYSIS

{¶ 11} In his sole assignment of error, Owens asserts that the trial court erred when it overruled his post-sentence motion to withdraw his guilty plea. Crim.R. 32.1 provides that "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

{¶ 12} "A defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice." *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus; *State v. Ogle*, 4th Dist. Hocking No. 13CA18, 2014–Ohio–2251, ¶ 8. A manifest injustice is a clear and openly unjust act; it relates to a fundamental flaw in the proceedings resulting in a miscarriage of justice or a

deprivation of due process. *See State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998); *Ogle* at 8; *State v. Hall*, 10th Dist. Franklin No. 03AP-433, 2003-Ohio-6939, ¶ 12. “This is an ‘extremely high standard’ that permits a defendant to withdraw his plea ‘only in extraordinary cases.’ ” *State v. Walton*, 4th Dist. Washington No. 13CA9, 2014-Ohio-618, ¶ 10, quoting *State v. Darget*, 4th Dist. Scioto No. 12CA3487, 2013-Ohio-603, ¶ 21.

{¶ 13} The decision to grant or deny a Crim.R. 32.1 post-sentence motion to withdraw a guilty plea is committed to the sound discretion of the trial court; appellate review of the denial of the motion is thus limited to a determination of whether the trial court abused its discretion. *Walton* at ¶ 11; *see also Smith* at paragraph two of the syllabus (“A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court.”). “A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.” *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

{¶ 14} “[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.” *State v. Layne*, 4th Dist. Highland No. 11CA17, 2012-Ohio-1627, ¶ 5. Moreover, an evidentiary hearing is not required for deciding post-sentence motions to withdraw a guilty plea where the record conclusively and irrefutably contradicts the allegations in the post-sentence motion to withdraw. *State v. Pasturzak*, 4th Dist. Scioto No. 08CA3252, 2009-Ohio-4222, ¶ 18; *State v. Iaforaro*, 9th Dist. Lorain No. 01CA007967, 2002-Ohio-5550, ¶ 12; *see also State v. McCann*, 4th Dist. Lawrence No. 12CA18, 2013-Ohio-2992, ¶ 19, quoting *State v. Pemberton*, 4th Dist. Gallia No. 10CA4, 2011-Ohio-373, ¶ 26 (“[A] trial

court must only hold a hearing on a Crim.R. 32.1 motion if the ‘facts, as alleged by the defendant, indicate a manifest injustice would occur if the plea was allowed to stand.’ ”).

{¶ 15} In the case sub judice, Owens essentially contends that he should be permitted to withdraw his guilty plea because his trial counsel was ineffective for failing to file a motion to suppress evidence. Such an alleged impropriety is not properly before us. “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.” *State v. Harper*, 4th Dist. Lawrence No. 14CA18, 2014-Ohio-5849, ¶ 11, citing *State v. Ables*, 4th Dist. Pickaway No. 11CA22, 2012-Ohio-3377, ¶ 14, and *State v. LaPlante*, 4th Dist. Ross No. 11CA3215, 2011-Ohio-6675, ¶ 8. Here, the ineffective assistance of counsel issue could have been raised in a first appeal of right. *See State v. Lofton*, 4th Dist. Pickaway No. 12CA21, 2013-Ohio-1121, ¶ 8 (In appeal from denial of post-sentence motion to withdraw guilty plea, this Court noted that “the ineffective assistance from trial counsel issue and the speedy trial rights issue are matters that could have been raised in a first appeal of right. However, they were not raised and appellant is barred from raising them here by the doctrine of res judicata.”); *LaPlante* at ¶ 8 (“If appellant truly believed that trial counsel provided ineffective assistance, he could have raised that issue on direct appeal.”). Thus, under the doctrine of res judicata, Owens cannot raise the issue now, when he could have raised it in a first appeal of right.

IV. CONCLUSION

{¶ 16} For the foregoing reasons we overrule Owens’ assignment of error and affirm the trial court’s judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay 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 Scioto County Court of Common Pleas 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 the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest 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 the 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](#).

Harsha, J., and McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

By: _____
Marie Hoover, 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.