

[Cite as *State v. Myers*, 2015-Ohio-2143.]

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

STATE OF OHIO, :
 :
Plaintiff-Appellee, : Case No. 14CA21
 :
vs. :
 :
JANE L. MYERS, : DECISION AND JUDGMENT ENTRY
 :
Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: Scott P. Wood, Dagger, Johnston, Miller, Ogilvie &
Hampson, L.L.P., 144 East Main Street, P.O. Box 667,
Lancaster, Ohio 43130¹
COUNSEL FOR APPELLEE: Laina Fetherolf, Hocking County Prosecuting Attorney, and
William L. Archer, Jr., Hocking County Assistant
Prosecuting Attorney, 88 South Market Street, Logan, Ohio
43138

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 5-27-15
ABELE, J.

{¶ 1} This is an appeal from a Hocking County Common Pleas Court judgment that denied a post-sentence motion to withdraw a guilty plea filed by Jane L. Myers, defendant below and appellant herein. Appellant assigns the following error for review:

“THE TRIAL COURT ERRED IN OVERRULING
APPELLANT’S POST-SENTENCE MOTION TO WITHDRAW

¹ Several different counsel represented appellant during the trial court proceedings.

GUILTY PLEA.”

{¶ 2} On September 20, 2013, the Hocking County Grand Jury returned an indictment that charged appellant with: (1) forgery in violation of R.C. 2913.31(A)(3), (2) theft in violation of R.C. 2913.02(A)(3), and (3) passing bad checks in violation of R.C. 2913.11(B). Appellant pled not guilty to all charges.

{¶ 3} Subsequently, appellant agreed to enter guilty pleas on two counts in exchange for the dismissal of the third count (passing bad checks). Additionally, the State agreed that it would not oppose her R.C. 2951.041 motion for treatment in lieu of conviction. After the trial court endeavored to ascertain if appellant understood the terms of the agreement, as well as her rights under the law, the trial court accepted appellant’s guilty pleas to the first and second counts.

{¶ 4} The matter was set for sentencing on March 25, 2014. After appellant failed to appear, the trial court issued a bench warrant for appellant's arrest. The record indicates, however, that appellant voluntarily appeared at the court without having been arrested. Three days later, appellant explained that she had marked down the wrong date for the original hearing. The trial court expressed that it was not “particularly sympathetic” to this excuse, and the State indicated that it would no longer accept her motion for treatment in lieu of conviction. Instead, the State indicated that it would not seek an indictment “for a failure to appear” that it would “normally” do in these circumstances. The State did agree, however, that it would recommend “community control” upon appellant’s conviction.

{¶ 5} Defense counsel indicated that appellant agreed with those terms and the trial court, which had previously held in abeyance a finding of guilt, found appellant guilty of the

offenses and further concluded that the two charges merged. After the State elected to proceed on the theft charge, the trial court sentenced appellant to serve twelve months in prison, but suspended that sentence and placed her on community control. Appellant did not appeal that judgment.

{¶ 6} On May 27, 2014, appellant filed a motion to withdraw her guilty plea.² The gist of her argument is that she suffered a manifest miscarriage of justice due to ineffective representation of counsel. In particular, appellant argued that trial counsel did not introduce evidence to show that medical reasons caused her to miss the hearing and did not consult with her as to the withdrawal of the “ILC” (presumably referring to the motion for treatment in lieu of conviction). Appellant continued that had she known she would be convicted of a felony, that could cause her to lose her nursing license, she would not have agreed to proceed with the new agreement. The State filed a memorandum contra.

{¶ 7} The matter came on for hearing and appellant testified extensively as to what she perceived as the inadequacies of prior counsel’s representation. The central issue, however, is whether appellant knew about the withdrawal of the treatment in lieu of conviction option. Appellant stated she did not. However, her attorney at the sentencing hearing testified that she had indeed discussed the matter with her.

{¶ 8} The trial court issued an extensive decision and judgment that overruled

² The memorandum that accompanied that motion indicates that appellant previously appeared in court, pro se, the same day that the final judgment was entered and made an oral motion to withdraw her pleas. On April 2, 2014, the trial court found appellant indigent and appointed (different) counsel to represent her during these proceedings. This new counsel later withdrew when appellant retained her present counsel.

appellant's motion. Not only did the court conclude that counsel was not constitutionally ineffective in her representation, but that appellant's claimed medical³ and memory problems⁴ are inconsistent with the fact that she was working as a nurse, administering medications, as well as following doctors' instructions in caring for patients. The court noted "[t]his sort of work would require [appellant] to remember her training and the instructions given." Of course, the obvious implication is that appellant should have been able to remember the date of her sentencing hearing. After hearing the evidence, the trial court concluded that appellant's motion is "based solely on her unhappiness with the sentence." This appeal followed.

{¶ 9} In her assignment of error, appellant asserts that the trial court erred by overruling her motion to withdraw her guilty plea. Generally, a post-sentence motion to withdraw guilty plea can be granted when it is necessary to correct a "manifest injustice." Crim.R. 32.1. The decision to grant or deny a Crim.R. 32.1 motion lies in the sound discretion of the trial court, thus its decision will not be reversed absent an abuse of that discretion. See *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 implies that a court's attitude is 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

³ Appellant testified that she has had two aneurysms that resulted in a "craniotomy with aneurism clipping," a carotid dissection and a stroke. She continued that she suffers from "major depression," fibromyalgia and "attention deficit."

⁴ Appellant testified she has "cognitive problems" as well as "focusing problems." She stated that she is "naive and gullible" as a result of her surgeries. In addition, appellant related that she gets confused and "can even get lost in a conversation."

(1990). Moreover, 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).

{¶ 10} First, before we address the trial court's reasoning, we point out that appellant could have appealed her conviction. As we have repeatedly held, 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 could have been raised in a first appeal of right. See e.g. *State v. Harper*, 4th Dist. Lawrence No. 14CA18, 2014-Ohio-5849, at ¶11; *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. One day after the trial court journalized appellant's judgment of conviction and sentence, appellant appeared in court and made a motion to withdraw her guilty plea. The trial court then appointed new counsel. Thus, appellant could have filed a Notice of Appeal from the judgment of conviction and sentence and appellant's claim of ineffective assistance of counsel could have been raised in a first appeal of right. However, no appeal was taken. Once again, an appeal from denial of a Crim.R. 32.1 post-sentence motion to withdraw guilty plea cannot be a vehicle to raise an ineffective assistance claim that could have been raised, but was not, in a first appeal of right. See *State v. Lofton*, 4th Dist. Pickaway No. 13CA10, 2014-Ohio-1021, at ¶12.

{¶ 11} Furthermore, even if in the case sub judice res judicata did not bar appellant's ineffective assistance claim, we find no error or abuse of discretion in the trial court's decision. "[W]hen reviewing a post-sentence motion to withdraw a plea, a trial court may assess the credibility of a movant's assertions [and] [a]n evidentiary hearing is not always required in order

to do so.” *Harper*, supra at ¶8; *State v. Layne*, 4th Dist. Highland No. 11CA17, 2012-Ohio-1627, at ¶5. Here, the trial court did hold an evidentiary hearing and concluded that appellant’s assertions are not credible. As the court aptly noted, appellant worked as a nurse, dispensed medications, carried out various orders of physicians, but yet claimed to have the cognition problems that she claimed to have at the July 29, 2014 hearing. Also, we also find no error in the trial court’s determination that appellant’s counsel provided constitutionally effective assistance. Criminal defendants have a right to counsel, which includes a right to the effective assistance from counsel. McCann v. Richardson (1970), 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763; State v. Lytle (Mar. 10, 1997), Ross App. No. 96CA2182. To establish constitutionally ineffective assistance of counsel, a defendant must show (1) counsel’s deficient performance, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. See Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; also see State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904.

{¶ 12} Appellant testified that she met with counsel five minutes before the change of plea hearing. However, counsel further explained that before the hearing she had no fewer than eight telephone conversations with appellant. We also note that counsel filed appellant’s motion to receive treatment in lieu of conviction more than a month prior to that hearing, thus directly calling into question appellant’s claim that her counsel all but ignored her prior to the hearing. Appellant also claims that counsel did not discuss any of the discovery, but counsel testified that she did. Moreover, appellant claims that counsel did not discuss the fact that the agreement involved the removal of the treatment in lieu of conviction option, but counsel testified they did, in fact, have that conversation. In short, appellant’s testimony and counsel’s testimony conflict

with one another.

{¶ 13} Witnesses credibility is an issue that the trier of fact must determine. See e.g. *State v. Frazier*, 115 Ohio St.3d 139, 873 N.E.2d 1263, 2007-Ohio-5048, at ¶106; *State v. Dye*, 82 Ohio St.3d 323, 329, 695 N.E.2d 763 (1998). Here, the trial court sat as the trier of fact and could opt to believe all, part or none of the testimony of any witness who appeared before it. See *State v. Mockbee*, 2013-Ohio-5504, 5 N.E.3d 50 (4th Dist.), at ¶13; *State v. Colquitt*, 188 Ohio App.3d 509, 2010- Ohio-2210, 936 N.E.2d 76, at ¶10, fn. 1 (4th Dist.). The underlying rationale for deferring to the trier of fact on credibility issues is that the trier of fact is best positioned to view the witnesses and to observe their demeanor, gestures and voice inflections and to use those observations to weigh witness credibility. See *Myers v. Garson*, 66 Ohio St.3d 610, 615, 614 N.E.2d 742 (1993); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶ 14} In the case sub judice, the trial court obviously found the testimony of prior counsel more credible than that of appellant. Moreover, as we note above, the court found appellant's explanation of events not credible. Consequently, appellant did not show that she suffered deficient performance on the part of counsel and, thus, did not establish constitutionally ineffective assistance.

{¶ 15} For all these reasons, we find no error in the trial court's decision to deny appellant's motion to withdraw her guilty plea. Accordingly, we hereby overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed, and appellee recover of appellant 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 Hocking 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.

Hoover, P.J. & McFarland, A.J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, 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.