

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

STATE OF OHIO,	:	Case No. 17CA6
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
KENNETH CREMEANS,	:	
Defendant-Appellant.	:	RELEASED: 2/2/2018

APPEARANCES:

Kenneth J. Cremeans, Chillicothe Correctional Institution, Chillicothe, Ohio, pro se appellant.

James K. Stanley, Meigs County Prosecuting Attorney, Pomeroy, Ohio, for appellee.
Harsha, J.

{¶1} In December 2015, Kenneth J. Cremeans pled guilty to a charge of aggravated robbery and received a sentence of 10 years in prison. In June 2017, the trial court denied Cremeans's postsentence motion to withdraw his guilty plea, which was filed almost 18 months after his conviction and sentence. Cremeans asserts that the trial court abused its discretion by denying his postsentence motion to withdraw his guilty plea.

{¶2} Cremeans contests the validity of his plea based on his mental illness rendering him incompetent, his disabling withdrawal from opioids, and the coercion by his trial counsel to plead guilty. However, res judicata barred these claims, which he could have raised in a timely appeal from his conviction and sentence. Moreover, he did not meet his burden of establishing the existence of manifest injustice; the affidavits Cremeans filed in support of his motion did not create a genuine issue about his competency at the time he pleaded guilty and did not effectively assert coercion by his

trial counsel. Finally, the trial court did not err by failing to hold an evidentiary hearing on Cremeans's motion because the record clearly refuted his factual assertions. We overrule Cremeans's assignment of error and affirm the denial of his postsentence motion to withdraw his guilty plea.

I. FACTS

{¶3} In March 2015, the Meigs County Grand Jury returned an indictment charging Kenneth J. Cremeans with one count of aggravated robbery and one count of kidnapping with accompanying firearm specifications. The trial court appointed counsel for Cremeans, who entered a plea of not guilty by reason of insanity. Following an evaluation before he was bound over to the common pleas court, Cremeans was found competent to stand trial. Following a second evaluation a psychologist determined that Cremeans had a severe mental disease, but that it did not preclude him from knowing the wrongfulness of the acts charged in the indictment. In October 2015, Cremeans stipulated to his competency and withdrew his plea of not guilty by reason of insanity.

{¶4} In December 2015, Cremeans executed a written plea of guilty to the charge of aggravated robbery. In the form Cremeans represented that: (1) he was mentally competent to enter a guilty plea; (2) he was satisfied with his trial counsel's competence, advice, and counsel; (3) he was not under the influence of drugs or alcohol, and he was not under the duress of any threats; and (4) he entered his plea freely and voluntarily and of his own accord and with full understanding of all matters set forth in the indictment and the guilty plea form.

{¶5} At that change-of-plea hearing the trial court advised Cremeans of his rights and the possible penalties involved and found he made his guilty plea knowingly,

intelligently, and voluntarily, with full awareness of the possible consequences of his plea. The trial court accepted Cremeans's guilty plea, convicted him, and sentenced him to a 10-year prison sentence.

{¶16} Nearly 18 months later, in June 2017, Cremeans filed a pro se postsentence motion to withdraw his guilty plea. He claimed that his guilty plea was invalid because he did not make it knowingly, intelligently, and voluntarily in that he was incompetent and in withdrawal from opioid medications at the time he entered the plea. He also claimed that he was coerced by his trial counsel to enter the plea. In support of his motion he attached the affidavits of his grandfather, Larry Douglas, and his mother, Tammy Tinkham.

{¶17} In his affidavit Douglas stated that: (1) Cremeans had been prescribed painkillers; (2) when Cremeans stopped using painkillers, he did not act or behave normally; (3) Cremeans told him that he "may be" withdrawing from painkillers; and (4) this occurred during the period of time of his release from county jail and his court appearance for his plea agreement.

{¶18} In her affidavit Tinkham stated that: (1) Cremeans had been prescribed painkillers; (2) he was now going through withdrawal; (3) he had mental illness and diminished capacity; and (4) his trial counsel coerced him into entering a guilty plea by telling him that the state's offer was the final plea deal and that if he did not accept the plea that day, the case would proceed to trial.

{¶19} After the state filed a memorandum in opposition, the trial court denied Cremeans's postsentence motion to withdraw his guilty plea without conducting an evidentiary hearing.

II. ASSIGNMENTS OF ERROR

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

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION; WHEN IT FOUND NOT WELL-TAKEN AND DENIED DEFENDANT'S PROPERLY FILED VERIFIED MOTION TO WITHDRAW GUILTY PLEA PURSUANT TO CRIM.R. 32.1, WITH TWO (2) SUPPORTING AFFIDAVITS; ALLEGING THE EXISTENCE OF MANIFEST INJUSTICE, NAMELY, THAT AT THE TIME OF THE GUILTY PLEA HE WAS INCOMPETENT AND TAKING PSYCHOTROPIC MEDICATION AND HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE FORM OF COERCING HIM TO TAKE A PLEA THAT WAS LESS THAN KNOWING, INTELLIGENT OR VOLUNTARY IN NATURE. THIS DENIAL WAS ISSUED WITHOUT ANY REAL REVIEW, DESPITE FACTS ALLEGED AND SUBSTANTIATED BY INDEPENDENT AFFIDAVITS; IF ACCEPTED AS TRUE (WHICH THE RULE AND LAW PROVIDED), WOULD REQUIRE THE COURT TO PERMIT THE PLEA TO BE WITHDRAWN WITHOUT EVEN HOLDING A HEARING ON HIS POST-SENTENCE MOTION.

III. STANDARD OF REVIEW

{¶11} “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.

{¶12} The decision to grant or deny a Crim.R. 32.1 postsentence motion to withdraw a guilty plea is committed to the sound discretion of the trial court; thus appellate review of the denial of the motion is 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.

IV. LAW AND ANALYSIS

{¶13} In his assignment of error Cremeans asserts that the trial court erred by denying his Crim.R. 32.1 postsentence motion to withdraw his guilty plea without holding a hearing. He claims that his plea is invalid because it was not made knowingly, intelligently, and voluntarily—he was mentally incompetent and was withdrawing from opioid medications at the time he entered his guilty plea, and he was coerced by his trial counsel to plead guilty. When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of these points renders enforcement of the plea unconstitutional under both the United States and Ohio Constitutions. *See State v. Barker*, 129 Ohio St.3d 472, 2011-Ohio-4130, 953 N.E.2d 826, ¶ 9; *State v. Lamb*, 4th Dist. Highland No. 14CA3, 2014-Ohio-2960, ¶ 12.

{¶14} Cremeans did not file a praecipe ordering the reporter to prepare a copy of the transcript of the change-of-plea hearing for inclusion in the record on appeal. *See* Loc.App.R. 1. The absence of the transcript limits our review of the issues in this case

because we must presume the validity of the trial court's determination. See, e.g., *State v. Moore*, 4th Dist. Adams No. 13CA965, 2014-Ohio-3024, ¶ 18. Here, the trial court's sentencing entry stated that it "advised the Defendant of his rights and possible penalties under the law" and that the court found that "the Defendant's plea was knowingly, intelligently, and voluntarily made with a full awareness of the possible consequences of his plea." In the absence of a transcript of the change-of-plea hearing, we presume the validity of these findings.

{¶15} We reject the merits of Cremeans's assertion because " * * * '[u]nder the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, * * * or on an appeal from that judgment.' " *State v. Seal*, 4th Dist. Highland No. 13CA10, 2014-Ohio-4168, ¶ 12, quoting *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. Therefore, when a party fails to timely appeal a final order, matters that could have been reviewed on appeal become res judicata and cannot be reviewed in subsequent proceedings or appeals. See *State v. Swayne*, 4th Dist. Adams Nos. 12CA952, 12CA953, and 12CA954, 2013-Ohio-3747, ¶ 24.

{¶16} Res judicata bars defendants from raising claims in a Crim.R. 32.1 postsentence motion to withdraw that they either raised or could have raised in a direct appeal from their conviction; this rule applies to defendants who failed to file a direct appeal. See generally *State v. Mackey*, 4th Dist. Scioto No. 14CA3645, 2014-Ohio-5372, ¶ 15-16, and cases cited. The rule also applies to claims that the plea is invalid

because it was not knowingly, intelligently, and voluntarily made. *Id.* at ¶ 16, citing *State v. Jones*, 8th Dist. Cuyahoga No. 93478, 2010-Ohio-1985, ¶ 8 (“Because Jones could have raised the issues concerning the voluntariness of her plea * * * in a direct appeal, she is precluded by res judicata from raising the issues herein,” an appeal from the denial of her postsentence motion to withdraw her guilty plea), and *State v. Kitzler*, 3rd Dist. Wyandot No. 16-04-13, 2005-Ohio-425, ¶ 9 (“Kitzler could have raised the issue of the voluntariness of his guilty plea on direct appeal * * * [and] is barred by res judicata from raising the issue in this appeal” from the denial of his postsentence motion to withdraw his guilty plea); see Katz, Martin, Lipton, Giannelli, and Crocker, *Baldwin's Ohio Practice Criminal Law*, Section 80:20 (3d Ed.2017) (“A defendant can also appeal from the denial of a motion to withdraw a guilty plea under Criminal Rule 32.1, although issues that could have been raised on direct appeal from judgment of conviction are barred by the doctrine of res judicata”).

{¶17} Cremeans could have raised his claims that his guilty plea was invalid in a timely direct appeal, but he did not. Therefore, res judicata barred him from raising these claims in his belated postsentence motion to withdraw his guilty plea.

{¶18} Moreover, Cremeans did not meet his heavy burden of establishing a manifest injustice. He relied on the affidavits of his grandfather and mother to prove his contention that he was incompetent at the time he entered his guilty plea to the charge of aggravated robbery, but neither affidavit explicitly stated that he was incompetent at the time he entered his guilty plea. And the record disputed this claim—Cremeans was found competent to stand trial and sane, Cremeans stipulated to his competency about a month before he pleaded guilty to the charge, and Cremeans represented in writing

and in person in court that he was competent and entered his guilty plea knowingly, intelligently, and voluntarily.

{¶19} Nor did the affidavits establish that his trial counsel was ineffective based on any purported coercion. Cremeans's mother's affidavit merely cited his trial counsel's statements that the state's plea offer was final and that if he did not accept it, the case would proceed to trial. There is nothing in the record that indicates that these statements were either false or misleading. And Cremeans explicitly represented to the trial court that he was not threatened by anyone into pleading guilty and that he was satisfied with his trial counsel's representation of him.

{¶20} Finally, the trial court did not need to conduct an evidentiary hearing before denying Cremeans's motion to withdraw his guilty plea. "An evidentiary hearing is not required for deciding postsentence motions to withdraw a guilty plea where the record conclusively and irrefutably contradicts the allegations in the motion." *State v. Cassell*, 2017-Ohio-769, 79 N.E.3d 588, ¶ 27 (4th Dist.), citing *State v. Pasturzak*, 4th Dist. Scioto No. 08CA3252, 2009-Ohio-4222, ¶ 18. As detailed previously, the record conclusively and irrefutably contradicted Cremeans's contentions.

{¶21} The trial court properly exercised its broad discretion in determining that Cremeans did not satisfy his burden of establishing the extremely high standard of manifest injustice that would have warranted a withdrawal of his guilty plea. No clear and openly unjust act occurred; no fundamental flaw in the proceedings exists that resulted in a miscarriage of justice or a deprivation of due process. We overrule Cremeans's assignment of error.

V. CONCLUSION

{¶22} The trial court did not abuse its discretion by denying Cremeans's postsentence motion to withdraw his guilty plea without conducting a hearing. Having overruled his assignment of error, we affirm the judgment of the trial court.

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 Meigs 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 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.

Abele, 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.