[Cite as *State v. Askew*, 2009-Ohio-5293.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009CA00020
SERO DUVALL ASKEW	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas Case No. 2004-CR-0449

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 28, 2009

APPEARANCES:

For Plaintiff-Appellee:

JOHN D. FERRERO 0018590
Stark County Prosecuting Attorney
110 Central Plaza, South, Ste. 510
Canton, Ohio 44702

RONALD MARK CALDWELL 0030663
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

SERO D. ASKEW pro se
Inmate No. 471-494
Richland Correctional Institution
P.O. Box 8107
Mansfield, Ohio 44901

Delaney, J.

{¶1} Defendant-Appellant, Sero Askew, appeals the judgment of the Stark County Court of Common Pleas, denying his motion to withdraw his no contest plea. The State of Ohio is Plaintiff-Appellee

{¶2} On April 26, 2004, the Stark County Grand Jury indicted Appellant on two counts of trafficking in cocaine, in violation of R.C. 2925.03(A)(2)(C)(4)(f); one count of trafficking in cocaine, in violation of R.C. 2925.03(A)(2)(C)(4)(g), with a major drug offender specification; two counts of possession of cocaine, in violation of R.C. 2925.11(A)(C)(4)(e); and one count of possession of cocaine, in violation of R.C. 2925.11(A)(C)(4)(f), with a major drug offender specification. Appellant entered a plea of not guilty to the indictment at his arraignment on April 30, 2004. During pre-trial proceedings, Appellant filed a motion to suppress evidence and motion to suppress statements. The trial court conducted a hearing on the motions on June 4, 2004, and June, 11, 2004.

{¶3} At the suppression hearing, the trial court heard arguments from Appellant regarding multiple issues. Based upon the evidence presented at the suppression hearings, the trial court found that Appellant's girlfriend's consent to the search of the premises was knowingly, voluntarily and thoughtfully given. The court further found that Appellant's waiver of his rights was not unlawfully obtained. The trial court memorialized its decision via Judgment Entry filed June 28, 2004.

{¶4} Thereafter, on August 4, 2004, Appellant, pursuant to a negotiated plea agreement, appeared before the trial court and entered a plea of no contest to the indictment. The trial court found Appellant guilty of all the charges contained in the indictment and proceeded to sentencing. The trial court imposed an aggregate term of imprisonment of fifteen years, suspended Appellant's driver's license for five years, and fined him $10,000.

{¶5} Appellant appealed his conviction in *State v. Askew*, 5th Dist. No. 2004CA00275, 2005-Ohio-3194, and raised five assignments of error, four of which challenged the trial court's ruling as to the evidence seized by the police and one challenging the court's ruling on Appellant's statements to the police. His convictions were affirmed by this Court on June 20, 2005.

{¶6} On September 6, 2005, Appellant filed an application to reopen his appeal pursuant to App.R. 26(B).

{¶7} On November 1, 2005, this Court denied said application.

{¶8} On August 4, 2005, Appellant filed an appeal with Ohio Supreme which was denied as not involving any substantial question.

{¶9} On November 18, 2005, Appellant filed a Petition for Post-Conviction Relief.

{¶10} The State filed a response to said petition requesting that same be dismissed on timeliness grounds.

{¶11} By judgment entry dated January 20, 2006, the trial court granted the State's motion and dismissed Appellant's Petition.

{¶12} In *State v. Askew*, 5th Dist. No. 2006CA00041, 2006-Ohio-4526, this Court affirmed the trial court’s ruling, finding that Appellant’s petition was not timely filed.

{¶13} Appellant has also pursued federal habeas corpus relief. See *Askew v. Eberlin* (N.D. Ohio, 2008), unreported, 2008 WL 440445.

{¶14} On November 26, 2008, Appellant filed a motion to withdraw his no contest plea, claiming that his plea was not knowing, voluntary or intelligent. The trial court, in denying his motion, noted that Appellant must demonstrate a manifest injustice when filing a motion to withdraw a guilty plea after sentencing. The court reasoned that no manifest injustice was demonstrated in Appellant's case:

{¶15} "In the present action an attorney with years of experience represented the defendant. The defendant's attorney filed several motions on his behalf including discovery motions and several motions to suppress. The defendant filed the subject motion over four years after he entered his no contest plea and after he had been denied post-conviction relief. The Court finds that in viewing the totality of the circumstances it is clearly demonstrated that the defendant's plea was knowingly, intelligently, and voluntarily entered in compliance with Criminal Rule 11.

{¶16} "Upon review of Ohio law as well as the pleadings in the present matter, this Court finds that there has been no manifest injustice and the facts alleged by the defendant do not require a withdrawal of the defendant's no contest plea."

{¶17} Appellant raises three Assignments of Error:

{¶18} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED WITHOUT A HEARING MR. ASKEW'S CRIM. R. 32.1 MOTION TO WITHDRAW PLEAS, THEREBY DENYING HIM DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 2 AND 16 OF THE OHIO CONSTITUTION.

{¶19} "II. THE TRIAL COURT ERRED IN VIOLATION FO THE DUE PROCESS AND DOUBLE JEOPARDY CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10, AND 16 OF THE OHIO CONSTITUTION WHEN IT FAILED TO INFORM MR. ASKEW OF THE MAXIMUM PENALTY INVOLVED, BY IMPROPERLY INFORMING HIM THAT HE COULD BE CONVICTED AND SENTENCED FOR BOTH POSSESSION IN COCAINE UNDER R.C. 2925.11(A) AND TRAFFICKING IN COCAINE UNDER R.C. 2925.03(A)(2), THEREBY EFFECTING THE KNOWING, INTELLIGENT, AND VOLUNTARINESS OF HIS PLEAS.

{¶20} "III. MR. ASKEW WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT [SIC] TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

I.

{¶21} In his first assignment of error, Appellant argues that the trial court erred in denying his motion to withdraw his no contest plea without a hearing. We disagree.

{¶22} Crim. R. 32.1 governs the withdrawal of guilty pleas. Specifically, Crim.R. 32.1 states, "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."

{¶23} If a defendant seeks to withdraw his guilty plea after sentence has been imposed, he must establish the existence of manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus. "The logic behind this precept is to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe." *State v. Caraballo* (1985), 17 Ohio St.3d 66, 67, 477 N.E.2d 627, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 213, 428 N.E.2d 863.

{¶24} Manifest injustice has been defined as a "fundamental flaw in the proceedings which results in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Brown* (2006), 167 Ohio App.3d 239, 854 N.E.2d 583. The burden of proving manifest injustice rests on the defendant and must be supported with specific facts either from the record or affidavits in support of the motion. *Smith*, supra.

{¶25} The credibility and weight of the movant's assertions in a motion to withdraw a guilty plea are to be resolved at the discretion of the trial court. *Smith*, supra, at paragraph 2 of the syllabus. Thus, an abuse of discretion standard applies when reviewing a trial court's determination as to a motion to withdraw a guilty plea. An abuse of discretion is more than an error of law or judgment; it is the trial court acting in an unreasonable, arbitrary, or capricious manner. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶26} In this case, Appellant asserts that he should have been allowed to withdraw his guilty plea because he did not raise the issue of the voluntariness of his plea in either of his prior appeals.

{¶27} Appellant alleges, on these grounds, that he should be allowed to withdraw his guilty plea because the trial court failed to comply with Crim. R. 11 in advising him as to the penalties his crimes. After reviewing the record, we find such a claim to be without merit, as the trial court did comply with the rule and did engage Appellant in full colloquy of his rights. As this court has previously stated, "when a petitioner submits a claim that his guilty plea was involuntary, a record reflecting compliance with Crim. R. 11 has greater probative value than a petitioner's self-serving affidavit." *State v. Surface*, 5th Dist. No. 2008-CA-00184, 2009-Ohio-950.

{¶28} We concur with the trial court's assessment, as set forth earlier, and find that Appellant failed to demonstrate a manifest injustice that would warrant a withdrawal of his no contest plea.

{¶29} Appellant's first assignment of error is overruled.

II & III

{¶30} In his second assignment of error, Appellant argues that the trial court erred by failing to inform him of the maximum penalty involved at his sentencing and that the court improperly informed him that he could be convicted and sentenced on both possession of cocaine and trafficking in cocaine. In his third assignment of error, Appellant argues that trial counsel was ineffective for failing to advise him of the maximum penalty involved at his sentencing and improperly informed him that he could be convicted and sentenced on both possession of cocaine and trafficking in cocaine.

{¶31} Appellant's arguments regarding these issues were available to him on direct appeal and were also available in a timely post-conviction petition. Therefore, Appellant's arguments are barred under the doctrine of res judicata. As stated by the Supreme Court of Ohio in *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104: "Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant 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 which resulted in that judgment of conviction or on an appeal from that judgment." Id. at 180-181.

{¶32} Moreover, this Court has held that the doctrine of res judicata applies to motions to withdraw guilty pleas as well. *State v. Corradetti*, 5th Dist. No. 2008-CA-00194, 2009-Ohio-1347. As such, Appellant's claims are now barred.

{¶33} Appellant's second and third assignments of error are overruled.

{¶34} For the foregoing reasons, Appellant's assignments of error are overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE

[Cite as *State v. Askew*, 2009-Ohio-5293.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
SERO DUVALL ASKEW	:	
Defendant-Appellant	:	Case No. 2009CA00020

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE