[Cite as *State v. Shiflett,* 2010-Ohio-3587.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- VERNON W. SHIFLETT Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. 09 CA 134 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case Nos. 03 CR 476 & 04 CR 640
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 3, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH OSWALT PROSECUTING ATTORNEY 20 South Second Street Newark, Ohio 43055	VERNON W. SHIFLETT PRO SE 7998 Hickory Ridge Court Lewis Center, Ohio 43035

Wise, J.

{¶1} Appellant Vernon W. Shiflett appeals the denial of his pro se motion to withdraw plea pertaining to his 2005 conviction, in the Licking County Court of Common Pleas, on multiple counts related to the sale of unregistered securities. The relevant facts leading to this appeal are as follows.

{¶2} On October 30, 2003, the Licking County Grand Jury handed down a multi-count indictment against appellant on 107 charges, including securities violations, receiving stolen property, and engaging in a pattern of corrupt activity. The charges stemmed from appellant's involvement in two different schemes, one involving the sale of promissory notes and the other based on the sale of interests in partnerships.

{¶3} The trial court, subsequent to appellant's arraignment, severed the counts into two case numbers, 03CR00476 and 04CR00640.

{¶4} On February 16, 2005, in case 03CR00476, appellant pled guilty to twenty-six counts of selling unregistered securities (R.C. 1707.44(C)(1)), twelve counts of securities fraud (R.C. 1707.44(G)), twelve counts of false representation in the sale of securities (R.C. 1707.44(B)(4)), twelve counts of receiving stolen property (R.C. 2913.51), and one count of engaging in a pattern of corrupt activities ("EPCA") (R.C. 2923.32(A)).

{¶5} Also on February 16, 2005, in case 04CR00640, appellant pled no contest to nineteen counts of selling unregistered securities (R.C. 1707.44(C)(1)), eight counts of securities fraud (R.C. 1707.44(G)), eight counts of false representation in the sale of securities (R.C. 1707.44(B)(4)), eight counts of receiving stolen property (R.C. 2913.51), and one count of engaging in a pattern of corrupt activities ("EPCA") (R.C. 2923.32(A)).

{¶6} Appellant was thereupon sentenced to a total of eight years in prison and ordered, inter alia, to pay restitution of $19,124,551.00. A nunc pro tunc sentencing entry was issued on February 28, 2005.

{¶7} On September 28, 2009, appellant filed a pro se motion to withdraw pleas, pursuant to Crim.R. 32.1. The State filed a memorandum in response on October 12, 2009. Appellant filed a reply memorandum on October 27, 2009. The trial court issued a six-page decision denying appellant's motion on November 2, 2009.

{¶8} Appellant timely filed a notice of appeal and herein raises the following two Assignments of Error:

{¶9} "I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY AND NO CONTEST PLEAS BECAUSE COUNSEL FAILED TO ACCURATELY EXPLAIN TO APPELLANT THE ELEMENTS OF THE OFFENSE AND POSSIBLE LEGAL DEFENSES AVAILABLE TO HIM AT THE TIME APPELLANT WAS PERSUADED TO ENTER HIS PLEAS, AND BECAUSE COUNSEL MISINFORMED APPELLANT THAT HE HAD NO LEGAL DEFENSE WHEN APPELLANT DID IN FACT HAVE A VIABLE LEGAL DEFENSE WHICH COULD POSSIBLY HAVE PERSUADED A JURY TO RETURN VERDICTS OF NOT GUILTY.

{¶10} "II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW HIS PLEAS OF GUILTY AND NO CONTEST WHEN IT CONSTRUED APPELLANT'S MOTION AS A PETITION FOR POST CONVICTION RELIEF AND HELD THAT THE STATUTES, RULES AND PROCEDURES FOR A PETITION FOR POST CONVICTION RELIEF APPLIED TO A MOTION TO WITHDRAW PLEA, WHEN APPELLANT'S MOTION WAS CLEARLY CAPTIONED 'MOTION TO WITHDRAW

PLEA PURSUANT TO CRIMINAL RULE 32.1,' APPELLANT'S ARGUMENTS AND CASE CITATIONS WERE BASED UPON THE RULES, PROCEDURES AND PRECEDENTS WHICH APPLY TO MOTIONS TO WITHDRAW PLEA, AND IT HAS BEEN CLEARLY ESTABLISHED THAT MOTIONS TO WITHDRAW PLEAS ARE NOT POST CONVICTION PETITIONS AND ARE NOT SUBJECT TO THE STATUTES, RULES AND PROCEDURES OF POST CONVICTION PETITIONS."

I.

{¶11} In his First Assignment of Error, appellant contends the trial court erred in denying his motion to withdraw guilty and no contest pleas. We disagree.

{¶12} Crim.R. 32.1 reads as follows: "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."

{¶13} Thus, the standard upon which the trial court is to review a request for a change of plea after sentence is whether there is a need to correct a manifest injustice. *State v. Marafa*, Stark App.Nos. 2002CA00099, 2002CA00259, 2003-Ohio-257, ¶ 8. Ineffective assistance of counsel can form the basis for a claim of manifest injustice to support withdrawal of a guilty plea pursuant to Crim.R. 32.1. See *State v. Dalton*, 153 Ohio App.3d 286, 292, 793 N.E.2d 509, 2003-Ohio-3813. However, our review of the trial court's decision under Crim.R. 32.1 is limited to a determination of whether the trial court abused its discretion. See *State v. Caraballo* (1985), 17 Ohio St.3d 66, 477 N.E.2d 627. Furthermore, under the manifest injustice standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. *State v. Aleshire*, Licking

App.No. 09-CA-132, 2010-Ohio-2566, ¶ 60, citing *State v. Smith* (1977), 49 Ohio St.2d 261, 264, 361 N.E.2d 1324.

{¶14} Appellant first directs us to R.C. 1707.44(C)(1), which, at the time of the offenses, stated: "No person shall knowingly and intentionally sell, cause to be sold, offer for sale, or cause to be offered for sale, any security which *** [i]s not exempt under section 1707.02 of the Revised Code, nor the subject matter of one of the transactions exempted in section 1707.03, 1707.04, and 1707.34 of the Revised Code, has not been registered by description, coordination, or qualification, and is not the subject matter of a transaction that has been registered by description."

{¶15} The crux of appellant's argument for plea withdrawal is apparently based on his claim that his trial counsel failed to advise him to assert as a defense that appellant had relied on purported earlier consultations with other attorneys, prior to selling the promissory notes, that said notes were not required to be registered as securities. Thus, appellant argues, his trial attorneys failed to advise him to utilize a "reliance on advice of counsel" defense to challenge the allegation that he "knowingly and intentionally" sold unregistered securities in violation of former R.C. 1707.44(C)(1). We note appellant's affidavit attached to his motion to withdraw plea includes, inter alia, the following averment:

{¶16} " *** I never had an intention to steal money or to defraud anyone, and had went [sic] to great expense to determine if I was in compliance with Ohio and Federal law. I relied upon legal advice I was given and believed I was not violating any Ohio securities law. I really did not want to plead guilty. [Trial Counsel] Attorney Mooney told me that it was irrelevant that I had neither knowingly nor intentionally violated any law,

because the way the law read all that was necessary to prove for a conviction was that one sold unregistered securities, regardless of knowledge or intent. Mooney stated that because of this I had no legal defense. ***."

{¶17} Affidavit of Appellant, August 6, 2009, at paragraph 8.

{¶18} Our research has revealed scant discussion of "advice of counsel" defenses in Ohio criminal securities prosecutions. In a related vein, the Tenth District Court of Appeals, in *Chiles v. M.C. Capital Corp*. (1994), 95 Ohio App.3d 485, 642 N.E.2d 1115, held as follows: " *** [A] person violates R.C. 1707.44(C)(1) if the person sells unregistered securities which the person knows, or through the exercise of reasonable diligence should know, are unregistered. *** Further, even after the state has presented evidence of knowledge, it may be rebutted by evidence that a defendant in fact exercised reasonable diligence in attempting to ascertain the nature of the securities to be sold." Id. at 497, citations omitted.

{¶19} Nonetheless, generally, a self-serving affidavit or statement is insufficient to demonstrate manifest injustice. See *State v. Patterson,* Stark App. No. 2003CA00135, 2004-Ohio-1569, ¶ 20, citing *State v. Laster,* Montgomery App. No. 19387, 2003-Ohio-1564. We find the only other relevant documents attached to appellant's motion to withdraw are copies of transcripts from his plea hearing and copies of five brief letters to appellant from Attorney Jeffrey Catri, dated April, July and November 2000. In these letters, Catri opines that appellant's "DMR," "MDR," "RDM 12" and "Verndor 12" limited liability partnerships did not require registration under federal and Ohio law. While these letters might carry some weight in a potential advice-of-counsel defense concerning the partnership-based counts, they fall far short of the

"extraordinary case" hurdle for a post-sentence withdrawal of a plea (see *Smith*, supra), even in conjunction with appellant's affidavit.[1]

{¶20} Furthermore, we are mindful in the case sub judice that although appellant was indicted in 2003, nearly all the events surrounding the unregistered securities offenses stem from 1999 and 2000, approximately ten years prior to appellant's filing of his Crim.R. 32.1 motion. "The more time that passes between the defendant's plea and the filing of the motion to withdraw it, the more probable it is that evidence will become stale and that witnesses will be unavailable. The state has an interest in maintaining the finality of a conviction that has been considered a closed case for a long period of time. It is certainly reasonable to require a criminal defendant who seeks to withdraw a plea to do so in a timely fashion rather than delaying for an unreasonable length of time." *Xenia v. Jones*, Greene App.No. 07-CA-104, 2008-Ohio-4733, ¶ 9, quoting *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶ 40. In a case such as that before us, involving multiple-count securities violations, we surmise that a full jury trial would rely heavily on the details of large numbers of business and government documents, the location and reconstruction of which will certainly be hampered a decade or more after the fact.

{¶21} Accordingly, upon review, we find the trial court acted within its discretion in concluding that appellant had failed to meet his burden of demonstrating a manifest injustice warranting withdrawal of his 2005 pleas. We therefore find no reversible error

---

[1] We additionally note that appellant subsequently filed a "supplemental response" with the trial court on October 28, 2009, attaching therewith an affidavit from his appointed trial attorney, William Mooney. In pertinent part, Mooney averred that at the time of the indictments, he believed that appellant "had no viable defense." Mooney Affidavit at para. 3. The additional averments do not sway our decision in the present appeal.

in the trial court's denial of appellant's Crim.R. 32.1 motion and its denial of an evidentiary hearing thereon.

{¶22} Appellant's First Assignment of Error is overruled.

II.

{¶23} In his Second Assignment of Error, appellant argues the trial court erred in construing his motion to withdraw plea as a petition for post-conviction relief.

{¶24} Appellant correctly points out that in *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, the Supreme Court of Ohio held that the specific time limits of R.C. 2953.21 and R.C. 2953.23, pertaining to petitions for post-conviction relief, do not control post-sentence Crim.R. 32.1 motions. Thus, in the case sub judice, the trial court mistakenly relied on our pre-*Bush* decision in *State v. Walters* (2000), 138 Ohio App.3d 715, in classifying appellant's Crim.R. 32.1 motion as untimely. However, we hold the trial court's finding of untimeliness was essentially dicta, as the court spent five other pages in its judgment entry thoroughly addressing the merits of appellant's motion and reaching the conclusion that appellant had failed to demonstrate manifest injustice. As such, we hold appellant has failed to demonstrate prejudicial error on appeal. See App.R. 12(B).

{¶25} Appellant's Second Assignment of Error is therefore overruled.

{¶26} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Licking County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES

JWW/d 714

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
VERNON W. SHIFLETT	:	
Defendant-Appellant	:	Case No. 09 CA 134

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES