

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

ROMAN O. BROWN

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

: Case No. 14-CA-64

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Court
of Common Pleas, Case No. 2010 CR
00470

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

May 26, 2015

APPEARANCES:

For Plaintiff-Appellee:

GREGG MARX
FAIRFIELD CO. PROSECUTOR
239 West Main St.
Lancaster, OH 43130

For Defendant-Appellant:

ROMAN O. BROWN, pro se
No. 677-221
P.O. Box 5500
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Delaney, J.

{¶1} Appellant Roman O. Brown appeals from the "Journal Entry--Motion to Withdraw Guilty Plea Pursuant to Criminal Rule 32.1" of November 4, 2014 of the Fairfield County Court of Common Pleas. Appellee is the state of Ohio and has not filed a brief or otherwise appeared in this appeal.¹

FACTS AND PROCEDURAL HISTORY

{¶2} A statement of the facts underlying appellant's criminal conviction is not necessary to our disposition of this appeal.

{¶3} The following procedural history is taken in part from our decision in *State v. Brown*, 5th Dist. Fairfield No. 13-CA-24, 2013-Ohio-3896, in which we affirmed appellant's conviction upon one count of attempted gross sexual imposition in violation of R.C. 2923.02, a felony of the fifth degree:

On November 10, 2010, the Fairfield County Grand Jury indicted Appellant on one count of unlawful sexual contact with a minor, a violation of R.C. 2907.04(A) and (B)(3), a felony of the third degree. At the time of the indictment, Appellant was in the Fairfield County Jail, being held on an unrelated charge. Appellant was later extradited to Pennsylvania to serve a prison sentence in an unrelated driving conviction.

While incarcerated in Pennsylvania, Appellant sent a letter to the Fairfield County Clerk of Court dated November 15, 2011, inquiring as to a detainer or warrant was pending against him. The

¹ On May 4, 2015, appellant filed a "Motion to Strike Appellee Brief Pursuant to App.R. 18(C)," however, appellee has not filed a brief and the motion is therefore overruled.

Clerk responded with a letter to Appellant stating nothing was on file relating to a detainer or warrant pending against Appellant.

Appellant again wrote to the Clerk of Courts on March 26, 2012, requesting information relative to a detainer or warrant against him. No response was received from the Clerk's office relative to Appellant's March 26, 2012 letter.

Upon release from incarceration in Pennsylvania, Appellant returned to Fairfield County, and was arraigned on the indictment on July 13, 2012. Appellant entered a plea of not guilty.

On November 21, 2012, Appellant filed a motion to dismiss the charge. The trial court overruled the motion.

On January 23, 2013, Appellant entered a plea of no contest to a lesser charge of attempted gross sexual imposition, in violation of R.C. 2923.02, a fifth degree felony. The trial court sentenced Appellant to a nine month term of imprisonment, and credited Appellant with 204 days spent in the Fairfield County Jail.

State v. Brown, 5th Dist. Fairfield No. 13-CA-24, 2013-Ohio-3896, ¶¶ 2-7, appeal not allowed, 140 Ohio St.3d 1498, 2014-Ohio-4845.²

{¶4} Appellant's first direct appeal from his conviction and sentence raised one assignment of error: "The trial court erred and abused its discretion in finding that the

² Appellant filed an application to reopen his direct appeal on grounds of ineffective assistance of appellate counsel on June 19, 2014. We denied his application to reopen on July 16, 2014.

defendant did not substantially comply with the requirements of R.C. 2941.401 as it applies to the rights of the defendant for a speedy trial." We disagreed, finding appellant failed to accomplish each of the following: 1) deliver written notice of his place of imprisonment to the prosecuting attorney and to the appropriate court; 2) request a final disposition of the matter; and 3) proffer a certificate of the warden or superintendent of the prison in which he was in custody stating the terms of his commitment, the time of his parole eligibility, or any decision with regard to the adult parole authority. *Brown*, supra, 2013-Ohio-3896 at ¶ 14.

{¶5} On October 21, 2014, appellant filed a "Motion to Withdraw Guilty Plea Pursuawnt (*sic*) to Criminal R. 32.1" arguing trial counsel was ineffective in failing to move to dismiss the indictment on the grounds appellant was denied his right to a speedy trial and because counsel allowed him to plead no contest despite the expiration of the speedy-trial time limit.

{¶6} The trial court overruled the motion by judgment entry filed November 4, 2014.

{¶7} Appellant now appeals from the trial court's decision overruling his Motion to Withdraw Guilty Plea and raises one assignment of error:

ASSIGNMENT OF ERROR

{¶8} "I. TRIAL COURT ERRED WHEN IT DENIED APPELLANT MOTION TO WITHDRAW THE PREVIOUSLY ENTERED PLEA OF NO CONTEST." (*sic*)

ANALYSIS

{¶9} Appellant argues the trial court erred in overruling his motion to withdraw his plea. We disagree.

{¶10} Pursuant to Ohio Crim.R. 32.1, “[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.” The defendant bears the burden of proving “manifest injustice.” *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. Whether the defendant has sustained that burden is within the sound discretion of the trial court and we review the trial court’s decision for an abuse of discretion. *Id.* at paragraph two of the syllabus.

{¶11} Under the manifest injustice standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. *State v. Williams*, 5th Dist. Tuscarawas No.2013 AP 04 0020, 2014–Ohio–5727, ¶ 13, citing *State v. Aleshire*, 5th Dist. Licking No. 09–CA–132, 2010–Ohio–2566, ¶ 60. A manifest injustice has been defined as a “clear or openly unjust act.” *State v. Congrove*, 5th Dist. Delaware No. 09CA090080, 2010–Ohio–2933, ¶ 30, quoting *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 2983 (1998). “A manifest injustice comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through any form of application reasonably available to him.” *State v. Williams*, 5th Dist. Tuscarawas No.2013 AP 04 0020, 2014–Ohio–5727, ¶ 13, citing *State v. Shupp*, 2nd Dist. Clark No. 06CA62, 2007–Ohio–4896, at ¶ 6.

{¶12} Appellant's claim of manifest injustice is ineffective assistance of counsel, specifically: “* * * trial counsel's refusal to file the correct motions in conjunction to the Appellee's not utilizing reasonable diligence in bring Appellant to trial after being informed of Appellant's location in another correctional institution in a party state

pursuant to the Interstate Agreement on Detainers Act" (*sic* throughout). We note the November 21, 2012 motion to dismiss referenced in the case history was filed by trial counsel and based upon the pro se action taken by appellant to resolve any detainer or warrant against him. We addressed appellant's failure to substantially or sufficiently comply with the statutory requirements of R.C. 2941.401 in his first direct appeal. *Id.*

{¶13} Appellant otherwise makes the same arguments raised in his first direct appeal, now asserting trial counsel was ineffective in failing to remedy appellant's pro se noncompliance with the statute. Appellant does not specify what more trial counsel should have done beyond filing a motion to dismiss for speedy trial, a motion which was properly overruled in light of our prior decision.

{¶14} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. See, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955). Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

{¶15} Appellant has failed to demonstrate ineffective assistance of counsel. Appellant's failure to comply with the statute left counsel with no grounds in support of a dismissal.

{¶16} In the context of appellant's latest, instant appeal, he has thus failed to demonstrate a manifest injustice warranting withdrawal of his no-contest plea and the trial court did not abuse its discretion in denying his motion.

CONCLUSION

{¶17} Appellant's sole assignment of error is overruled and the judgment of the Fairfield County Court of Common Pleas is affirmed.

By: Delaney, J. and

Farmer, P.J.

Wise, J., concur.