

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TIMOTHY A. MOSS

Defendant-Appellant

: JUDGES:

: Hon. W. Scott Gwin, P.J.

: Hon. William B. Hoffman, J.

: Hon. Patricia A. Delaney, J.

: Case No. 15-CA-27

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Court
of Common Pleas, Case No. 2013 C
00301

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

October 13, 2015

APPEARANCES:

For Plaintiff-Appellee:

GREGG MARX
FAIRFIELD COUNTY PROSECUTOR

JOSHUA S. HORACEK, ASST. PROS.
AMANDA R. MORRIS, LEGAL INTERN
239 West Main St., Suite 101
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For Defendant-Appellant:

TIMOTHY A. MOSS, PRO SE
NCI 697-321
Noble Correctional Institution
15708 McConnelsville Road

Caldwell, OH 43724

Delaney, J.

{¶1} Defendant-Appellant Timothy A. Moss appeals the April 21, 2015 judgment entry of the Fairfield County Court of Common Pleas denying Moss's post-sentence Motion to Withdraw Plea.

FACTS AND PROCEDURAL HISTORY

{¶2} Moss was charged with engaging in a pattern of corrupt activity, in violation of R.C. 2923.32(A)(1) and (B)(1); trafficking in heroin, in violation of R.C. 2925.03(A)(2) and (C)(6)(d); possession of heroin, in violation of R.C. 2925.11(A) and (C)(6)(c); and having weapons under disability, in violation of R.C. 2925.03. The trafficking violation contained a forfeiture specification pursuant to R.C. 2941.1417 and a specification for proximity to a school.

{¶3} Upon searching Moss's residence, the officers found scales, plastic baggies, knives, a stun gun, a calculator, and a notebook with Moss's name on the front. The notebook contained names with differing dates and amounts. In the basement of Moss's home, officers found two shotguns, two rifles, and two handguns. The officers also found large amounts of marijuana, prescription pills, needles, over eight grams of heroin, and \$43,100.00 in currency. The currency included \$120 in marked money used by the Major Crimes Unit to purchase heroin in the controlled buy, which formed the basis for the trafficking charge. The buy money was placed in a recess over the basement doorway. The remainder of the money was divided into envelopes throughout the basement and hidden in the insulation. The basement was padlocked with a combination only known to Moss. Firearms and drugs were found in close proximity to the money. A coffee can contained \$20,000 in cash with a large amount of heroin. In

addition, a large stack of cash was found in the joists of the house with marijuana wrapped inside. The officers testified the area appeared to be a workstation for Moss.

{¶4} Moss entered a guilty plea to the charges. A plea hearing was held on September 17, 2013. Moss was represented by court appointed counsel at the hearing. The State dismissed Counts 1, 2, 3, 4, 6, 11, and the firearm specification to Count 5. Moss pled guilty to Count 5, trafficking in heroin and Counts 7, 8, 9, 10, and 12, having weapons under disability. After the plea colloquy, the trial court accepted Moss's plea of guilty to the charges by judgment entry on September 24, 2013. The sentencing hearing was scheduled for a later date.

{¶5} On October 24, 2013, Moss filed a pro se Motion to Withdraw Guilty Plea. Moss's court appointed counsel filed a Motion to Withdraw his representation on October 20, 2013. The trial court granted the Motion to Withdraw on November 1, 2013 and appointed new counsel on November 7, 2013.

{¶6} Moss withdrew his Motion to Withdraw Guilty Plea on December 27, 2013. Moss alleges the motion was withdrawn without his knowledge.

{¶7} The sentencing and forfeiture hearing was held on January 9 and 10, 2014. The trial court issued its sentencing entry on January 17, 2014. The trial court sentenced Moss to 8 years in prison and ordered him to forfeit \$43,100.00 and various weapons.

{¶8} Moss filed an appeal of his sentence with this Court in *State v. Moss*, 5th Dist. Fairfield No. 14-CA-3, 2014-Ohio-5411. On appeal, Moss raised one assignment of error to argue the forfeiture of his property was contrary to Ohio law and the State

and Federal Constitutions. We overruled Moss's assignment of error and affirmed the judgment of the trial court.

{¶9} On March 30, 2015, Moss filed a pro se Motion to Withdraw Plea Pursuant to Crim.R. 32.1. The State responded to the motion. The trial court denied the motion on April 21, 2015.

{¶10} It is from this judgment Moss now appeals.

ASSIGNMENTS OF ERROR

{¶11} Moss raises two Assignments of Error:

{¶12} "I. THE TRIAL COURT ERRORED [SIC] WHEN DENIED DEFENDANTS [SIC] MOTION TO WITHDRAW HIS PLEA.

{¶13} "II. INEFFECTIVE ASSISTANCE OF COUNSEL."

ANALYSIS

I. and II.

{¶14} Moss argues the trial court erred when it overruled his post-sentence motion to withdraw his guilty plea. We disagree.

{¶15} Pursuant to 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.

{¶16} 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.

{¶17} 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. *State v. Lovelace*, 5th Dist. Stark No. 2015 CA 00059, 2015-Ohio-3736, ¶ 16 citing *State v. Dalton*, 153 Ohio App.3d 286, 292, 2003–Ohio–3813, ¶ 18. 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.

{¶18} In the case sub judice, Moss claims he did not understand the possible sentence and that he felt pressure to enter a guilty plea based on the indictment. He further argues his trial counsel was ineffective because they did not support Moss's motion to withdraw his plea.

{¶19} During the plea hearing on September 17, 2013, the trial court reviewed the charges and the possible sentences for each charge. The trial court asked Moss if he understood the potential penalties for each of the offenses. Moss responded that he did. The trial court asked Moss if any person had put any pressure on him to encourage him or cause him to plead guilty. Moss said no. The trial court notified Moss he could be placed on community control. Moss stated he understood community control was a possibility in the case. The trial court also discussed the forfeiture. In addition to the weapons and cash, Moss was ordered to forfeit a 9,000 pound electric winch to the State. Moss asked what the winch had to do with anything and the trial court allowed Moss to discuss the matter with his attorney. This was the only question asked by Moss during the plea hearing.

{¶20} A review of the plea hearing shows that Moss was informed of the rights he was waiving and of the charges and potential penalties. He did not indicate at the time of the plea that he did not understand his rights or the charges and possible penalties.

{¶21} Moss argues his trial counsel was ineffective for their failure to support his Motion to Withdraw his guilty plea. Based on the record, we find Moss has failed to meet his burden to show that the decisions of his trial counsel were so incompetent that the result of the proceedings would have been different.

{¶22} Moss has failed to demonstrate manifest injustice occurred during the proceedings of this case. We find no abuse of discretion by the trial court to deny Moss's pro se motion to withdraw his guilty plea.

{¶23} Moss's two Assignments of Error are overruled.

CONCLUSION

{¶24} The judgment of the Fairfield County Court of Common Pleas is affirmed.

By: Delaney, J.,

Gwin, P.J. and

Hoffman, J., concur.