

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-11-1257

Appellee

Trial Court No. CR0201001329

v.

Henry O. Johnson, Jr.

DECISION AND JUDGMENT

Appellant

Decided: October 19, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

V. Robert Candiello, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals the judgment of the Lucas County Court of Common Pleas denying his post-sentencing motion to withdraw his no contest plea to aggravated robbery, felonious assault and attempted murder. Because we conclude that appellant's motion failed to establish manifest injustice, we affirm.

{¶ 2} On February 11, 2010, a young woman delivering pizza to what turned out to be a vacant east Toledo house was accosted by two men. The assailants took \$20 and the pizza. One of the men then held the delivery woman down while the other shot her twice with a rifle. They left her, seriously injured, on the floor.

{¶ 3} Police soon arrested Aaron McDonald and appellant, Henry O. Johnson, Jr., for the crime. Police recovered the rifle used in the shooting and obtained statements from both men, each accusing the other of perpetrating the shooting.

{¶ 4} On February 22, 2010, the Lucas County Grand Jury indicted appellant for aggravated robbery, kidnapping, attempted murder and two counts of felonious assault, all with firearm specifications. Appellant initially pled not guilty, but, after negotiations, agreed to a plea of no contest to aggravated robbery, felonious assault and attempted murder, all with firearm specifications. Following a plea colloquy, the trial court accepted the plea and found appellant guilty of those offenses. On June 22, 2010, the court sentenced appellant to serve eight-year terms of imprisonment for the aggravated robbery and felonious assault and nine years for the attempted murder. The terms for the attempted murder and felonious assault were to be served concurrently, but consecutive to the sentence for aggravated robbery and a three-year mandatory term for the firearm specification.

{¶ 5} Appellant appealed his conviction, but later withdrew the appeal.

{¶ 6} On September 8, 2011, appellant filed a motion to withdraw his no contest plea. In an affidavit accompanying a memorandum in support, appellant's father averred

that appellant's trial counsel had advised him that, if appellant were to plead no contest, served the mandatory three years for the firearm specification and one year on the principal charges, appellant would be eligible for judicial release. Appellant's father stated that he conveyed this information to appellant to convince him to accept the plea agreement. Appellant also submitted an affidavit in which he maintained that his decision to enter the plea was in reliance on this information. Appellant requested a hearing on the motion.

{¶ 7} On September 14, 2011, the trial court denied the motion without a hearing. In its findings accompanying the order, the court quoted at length from appellant's plea colloquy and concluded that appellant's plea was knowingly, intelligently and voluntarily entered, appellant was not promised any specific sentence, his motion was untimely and he had failed to establish that a manifest injustice occurred.

{¶ 8} From this judgment, appellant now brings this appeal, setting forth a single assignment of error:

The Trial Court abused its discretion and committed prejudicial error to the Appellant in its failure to hold a hearing on Appellant's Motion to withdraw his plea in order to properly determine if said plea was knowingly, voluntarily and intelligently made.

{¶ 9} Motions to withdraw a guilty plea are treated differently depending on whether the motion is interposed before or after sentencing. If the motion is submitted prior to sentencing, it should be "freely and liberally granted." *State v. Xie*, 62 Ohio

St.3d 521, 527, 584 N.E.2d 715 (1992). If a defendant moves to withdraw a plea after sentencing, the court should grant the motion only “to correct manifest injustice.”

Crim.R. 32.1. “A manifest injustice is defined as a ‘clear or openly unjust act.’ Manifest injustice is an extremely high standard, and a defendant may only withdraw his guilty plea in extraordinary cases.” (Citations omitted.) *State v. Harmon*, 6th Dist. No. L-10-1195, 2011-Ohio-5035, ¶ 12.

{¶ 10} In either circumstance, the decision to grant such a motion rests within the sound discretion of the court, *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph two of the syllabus, and will not be disturbed absent a showing that the court’s decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). A motion to withdraw a no contest plea is treated the same as a motion to withdraw a guilty plea. *State v. Spivey*, 81 Ohio St.3d 405, 415, 692 N.E.2d 151 (1997). No hearing is required on a post-sentence motion under Crim.R. 32.1, unless the facts as alleged by the appellant, taken as true, would require the trial court to permit withdrawal of the plea. *State v. Blatnik*, 17 Ohio App.3d 201, 204, 478 N.E.2d 1016 (6th Dist.1984).

{¶ 11} Neither in the written plea agreement nor in the transcript of the plea colloquy is there a promise of a specific sentence, nor is mention made of judicial release. The plea document expressly states that appellant may be subject to a maximum of 23 years of imprisonment, of which three years is mandatory. In the written agreement and in the plea colloquy appellant states that no other promises have been made to induce his

plea other than those contained in the agreement. Thus, appellant's own testimony in open court and in writing belies the assertions in his subsequent affidavit.

{¶ 12} Moreover, appellant's father's affidavit states that he asked trial counsel "what is the best [appellant] could expect under the given set of circumstances." To this, trial counsel outlined the possible sentences and the possibility of judicial release after four years. This information was accurate in the *best* circumstances, that is had the court imposed more lenient sentences on the basic offenses. *See* R.C. 2929.20(C).

{¶ 13} Appellant's assertion of reliance on a "promise" of judicial release is contradicted by his own trial testimony. The information on which appellant claims reliance, assuming the truth of appellant father's affidavit, was accurate as far as it went. Appellant failed to establish that the trial court would be required to permit him to withdraw his plea. Consequently, he was not entitled to a hearing on his motion. Appellant's sole assignment of error is not well-taken.

{¶ 14} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant shall pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
