[Cite as *State v. DeVaughn*, 2004-Ohio-154.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82843

STATE OF OHIO,	:	ACCELERATED
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
vs.	:	AND
	:	OPINION
DENNIS DEVAUGHN,	:	
	:	
Defendant-Appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	JANUARY 15, 2004
CHARACTER OF PROCEEDING:	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-408794
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellee: William D. Mason, Esq.
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BY: Eleanore E. Hilow, Esq.
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MICHAEL J. CORRIGAN, P.J.

{¶1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the record from the Cuyahoga County Court of Common Pleas and the briefs of counsel. Defendant Dennis DeVaughn sought to withdraw guilty pleas he entered on charges of trafficking, possession of crack cocaine, and criminal gang activity on grounds that he had been in jail on unrelated charges at the time the police made arrests on the indicted offenses. The court denied the motion without opinion. DeVaughn's primary arguments are that the court erred by denying his motion to withdraw the pleas, that it erred by accepting his guilty plea, and that he was denied the effective assistance of counsel.

I

{¶2} The court did not abuse its discretion by failing to conduct a hearing on the motion, as the motion itself did not contain sufficient grounds to merit that kind of consideration. *State v. Blatnik* (1984), 17 Ohio App.3d 201, 204. Likewise, the court did not abuse its discretion by denying DeVaughn's post-sentence motion to withdraw his guilty pleas because DeVaughn failed to show a manifest injustice as required by Crim.R.

32.1. See *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. At the heart of DeVaughn's argument is his contention that he had been jailed on other charges at the time the police executed a search warrant that lead to his indictment. Assuming for the sake of argument that this fact is true, it does nothing to create a manifest injustice. Possession can be actual or constructive, and is entirely possible that the drugs seized during the execution of the search warrant belonged to DeVaughn, regardless whether he was actually present at the premises during the search. DeVaughn pleaded guilty to criminal gang activity, so his association with a criminal gang may well have provided the facts leading to the possession and trafficking charges. Because DeVaughn's association may have led to his involvement, the court did not abuse its discretion by denying the motion without a hearing.

II

{¶3} DeVaughn did not establish the existence of a manifest injustice by way of ineffective assistance of counsel sufficient to merit the post-sentence withdrawal of his guilty plea. It is true that DeVaughn's attorney had his license to practice law suspended, but that suspension occurred after DeVaughn entered his guilty plea. Hence, at the time of the plea, DeVaughn's attorney was licensed and presumed competent. See *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299. And while it may also be true that DeVaughn's attorney counseled him to plead guilty, we cannot say that the advice was so erroneous as to

constitute a violation of the attorney's essential duties to DeVaughn. As we explained earlier, DeVaughn's confinement in jail at the time the police executed the search warrant which led to his indictment does not, standing alone, warrant a finding that he could not have been guilty. Hence, DeVaughn's guilty pleas to reduced charges may well have been practical under the circumstances and, at the very least, would not support a finding that DeVaughn had been denied the effective assistance of counsel.

III

{¶4} Finally, our review of the plea proceedings convinces us that the court fully complied with all relevant aspects of Crim.R. 11 when taking DeVaughn's guilty plea. In particular, we find no error with the court's decision to take the pleas of DeVaughn and the two co-defendants at the same time. We are unaware of any authority that would prohibit group guilty pleas, and note that such pleas have been the practice in the court of common pleas. Nevertheless, a plea colloquy requires the court to address the accused individually. The transcript of the plea hearing shows that the court individually addressed DeVaughn as it sought to determine whether DeVaughn knowingly and voluntarily waived his right to trial. The record further shows full compliance in all respects with Crim.R. 11.

{¶5} The judgment is affirmed.

Judgment affirmed.

DIANE KARPINSKI, J., CONCURS.

ANNE L. KILBANE, J., CONCURS IN JUDGMENT ONLY WITH SEPARATE CONCURRING OPINION.

ANNE L. KILBANE, J., CONCURRING IN JUDGMENT ONLY.

{¶6} On this appeal from an order of Judge Eileen A. Gallagher, I concur in judgment only because, although I agree that DeVaughn's motion failed to allege facts that would show manifest injustice, I believe that plea agreements contingent on the cooperation and receipt of pleas from several defendants require particular scrutiny to ensure fairness. Our system of justice does not allow one individual to accept punishment for another's actions and, therefore, I suggest that group plea agreements such as the one here, if used at all, require the judge to determine that a factual basis for finding guilt exists for all defendants before accepting such pleas.[1]

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[1]See, e.g., *North Carolina v. Alford* (1970), 400 U.S. 25, 38, 91 S.Ct. 160, 27

{¶7} Even if a judge is not required to determine that a factual basis exists before accepting a guilty plea, a defendant who can show he pleaded guilty even though the evidence against him would not support a conviction is substantially likely to be able to show manifest injustice in a motion to withdraw the plea. Nevertheless, I agree that DeVaughn failed to allege facts showing the lack of a sufficient factual basis for his plea, or that he received ineffective assistance of counsel. Even though he was absent from the premises at the time the search warrant was executed, there was other evidence linking him to the premises and the people in it. The circumstances were such that the judge reasonably could have believed the other persons involved would implicate DeVaughn in criminal conduct, and DeVaughn reasonably could have pleaded guilty to avoid the possibility that others would testify against him. While I question the majority's use of DeVaughn's guilty plea to criminal gang activity[2] as an indication

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L.Ed.2d 162 (guilty plea accompanied by claim of innocence is constitutionally acceptable if a factual basis supports finding of guilt).

[2]R.C. 2923.42.

of his constructive possession of the drugs,[3] I nonetheless believe the record shows sufficient involvement in criminal activity and that his motion to withdraw does not adequately allege facts showing his lack of involvement in that activity. Therefore, I concur in the judgment only.

{¶8} It is ordered that appellee recover of appellant its costs herein taxed.

{¶9} The court finds there were reasonable grounds for this appeal.

{¶10} It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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[3]Although DeVaughn's motion did not specifically address this charge, he sought to withdraw his entire guilty plea, thereby suggesting that the criminal gang activity charge could not stand if the evidence was insufficient to support the possession and trafficking charges. Therefore, his silence on the criminal gang activity charge should not be used to support a finding of constructive possession for the drug charges.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).