

[Cite as *State v. Miley*, 2004-Ohio-641.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83152

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	
-VS-	:	AND
	:	
BEN MILEY	:	OPINION
	:	
Defendant-Appellant	:	

Date of Announcement of Decision:	FEBRUARY 12, 2004
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Character of Proceeding:	Criminal appeal from Court of Common Pleas Case No. CR-386154
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Judgment:	Affirmed
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Date of Journalization:

Appearances:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor GEORGE A. JENKINS, JR., Asst. Prosecuting Attorney 1200 Ontario Street Cleveland, Ohio 44113
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For Defendant-Appellant:	BEN R. MILEY, PRO SE Inmate No. 387980 Lake Erie Correctional Inst. P.O. Box 8000 Conneaut, Ohio 44030
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JAMES J. SWEENEY, J.

{¶1} Defendant-appellant Ben Miley appeals pro se from the trial court's order that denied his post-sentence motion to withdraw his guilty plea. For the reasons that follow, we affirm.

{¶2} Defendant pled guilty to attempted felonious assault (count one) and disrupting public service (count two) on March 23, 2000. In May of 2000, the trial court sentenced defendant to four years incarceration on count one, to be served concurrent with a one year term on count two. Defendant did not file a direct appeal of his convictions or sentence.

{¶3} On January 30, 2001, the court granted defendant's motion for judicial release. On March 6, 2001, the court found that defendant had violated the terms of judicial release but did not return defendant to prison. On December 14, 2001, the court found that defendant had again violated the terms of judicial release and ordered defendant to complete his sentence in prison.

{¶4} Defendant's motion for leave to file a delayed appeal was denied on February 24, 2003. On May 15, 2003, defendant filed a motion to withdraw his guilty plea, which the State opposed and the trial court denied on June 26, 2003. Defendant then filed a notice of appeal of the June 26, 2003 order, which is the subject of this appeal.

{¶5} Defendant raises several errors concerning his legal representation and sentence that took place in 2000, namely

Assignments of Error I-VI, which are attached as Appendix A. However, defendant did not directly appeal from his conviction and sentence and his motion to file a delayed appeal in December 2002 was denied. The appellate rules preclude defendant from utilizing a subsequent order to indirectly and untimely appeal a prior order (which was never directly appealed). App.R. 4(A); *State v. Gray* (May 24, 2001), Cuyahoga App. No. 78467; *State v. Douglas* (May 17, 2001), Cuyahoga App. No. 78692; *State v. Kavlich* (June 15, 2000), Cuyahoga App. No. 77217 (effectiveness of counsel at plea hearing should have been raised in direct appeal and not on appeal of denial of post-sentence motion to withdraw guilty plea); *Shaker Hts. v. Elder* (July 1, 1999), Cuyahoga App. No. 74243 ("appellant may not use the court's denial of his motion to withdraw his plea to reopen prior proceedings"); *State v. Church* (Nov. 2, 1995), Cuyahoga App. No. 68590 (holding that "any error dealing with the competency of counsel should have been raised by direct appeal" and not through an order issued subsequent to sentencing). This Court lacks jurisdiction to consider these errors and therefore dismisses them.

{¶6} In his sole remaining error, defendant maintains as follows:

{¶7} "VII. The trial court abused its discretion in denying the defendant's motion to withdraw his guilty plea without conducting an evidentiary hearing."

{¶8} Mr. Miley contends that his guilty plea should be invalidated, claiming it was not knowingly, voluntarily, or intelligently made because he claims that he received ineffective assistance of counsel. Defendant asserts, inter alia, that his attorney failed to investigate his case, told him that he would receive probation, and failed to object to the trial court's imposition of more than the minimum prison term. Defendant further claims that the trial court erred by not conducting an evidentiary hearing on his motion.

{¶9} A motion to withdraw a guilty plea is governed by the standards set forth in Crim.R. 32.1, which state:

{¶10} "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."

{¶11} Accordingly, a defendant who attempts to withdraw a guilty plea after sentence has been imposed bears the burden of demonstrating a manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261. This Court has stated that "[a] manifest injustice is defined as a 'clear or openly unjust act.' \*\*\* 'an extraordinary and fundamental flaw in the plea proceeding.' Again, '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 another form of application

reasonably available to him or her.” *State v. Sneed*, Cuyahoga App. No. 80902, 2002-Ohio-6502, ¶13.

{¶12} “A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant’s assertions in support of the motion are matters to be resolved by that court.” *Id.* at paragraph 2 of the syllabus.<sup>1</sup> Our review is limited such that we cannot reverse the trial court’s denial of the motion unless we find that the ruling was an abuse of discretion. *Id.*

{¶13} While Crim.R. 32.1 does not prescribe a time limitation for bringing a motion under its provisions, the Ohio Supreme Court has directed that “an undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.” *State v. Bush*, 96 Ohio St.3d 235, 239, 2002-Ohio-3993, ¶14, quoting *Smith*, 49 Ohio St.2d 261.

{¶14} The trial court need not hold an evidentiary hearing on the post-sentence motion to withdraw a guilty plea if the “record indicates that the movant is not entitled to relief and the movant has failed to submit evidentiary documents sufficient to

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<sup>1</sup>“The logic behind this precept is to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe.” *State v. Caraballo* (1985), 17 Ohio St.3d 66, 67, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 213, quoting *Kadwell v. United States* (C.A.9, 1963), 315 F.2d 667.

demonstrate a manifest injustice." *State v. Russ*, Cuyahoga App. No. 81580, 2003-Ohio-1001, ¶12 [citations omitted].

{¶15} With the above principles in mind, we find that the defendant failed to demonstrate a manifest injustice in this case.

Defendant did not provided any evidentiary documents to support his motion. Instead, defendant simply submits his own recollection of conversations, which are neither sworn to nor substantiated by the record. Defendant inexplicably waited for over two years after his plea and sentencing to raise this issue despite filing a successful motion for judicial release and appearing before the court two additional times on judicial release violations in that time frame. Under the law, the trial court could properly have considered this delay as a factor adversely affecting the credibility of the movant and militating against the granting of the motion. Ibid. Consequently, we find that the trial court's denial of defendant's post-sentence motion to withdraw guilty plea without a hearing was a proper exercise of its discretion.

{¶16} Assignment of Error VII is overruled.

{¶17} The judgment is affirmed.

Judgment affirmed.

ANN DYKE, P.J., and SEAN C. GALLAGHER, J., CONCUR.

#### APPENDIX A

"I. Defense counsel violated defendant's constitutional rights as guaranteed by the Sixth Amendment to the Constitution for failing to provide assistance to the defendant.

"II. Defense counsel was ineffective for failing to interview witnesses and make investigations that would prove bias on the part of the accuser.

"III. Defense counsel violated defendant's constitutional right to due process because defendant did not intelligently and voluntarily enter into his plea of guilty.

"IV. Defense counsel was ineffective for failing to object to trial court's sentence when counsel knew or should have known that the Ohio sentencing statute calls for the minimum sentence for first prison terms.

"V. The trial court erred in accepting the defendant's guilty plea without first affirming that it was knowingly, intelligently and voluntarily made.

"VI. The trial court abused its discretion in sentencing the defendant to a prison term greater than the minimum when it had full knowledge that it was defendant's first prison term."

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas 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.

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. 112, Section 2(A)(1).