

[Cite as *State v. Pugh*, 2009-Ohio-4374.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92633

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WALLACE PUGH

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-358233

BEFORE: Cooney, A.J., McMonagle, J., and Boyle, J.

RELEASED: August 27, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendant-appellant, Wallace Pugh (“Pugh”), appeals the trial court’s denial of his second motion to withdraw his guilty plea. Finding no merit to the appeal, we affirm.

{¶ 2} In December 1997, Pugh was charged with seven counts of rape and seven counts of gross sexual imposition.¹ The charges involved his daughter, N.P., who was under 13 years of age at the time the incidents occurred. Pursuant to a plea agreement, he pled guilty to four counts of rape. All remaining charges, including the sexually violent predator specifications, were dismissed. In June 1998, the trial court sentenced him to an agreed sentence of 15 years in prison and classified him as a sexual predator.²

{¶ 3} Since then, Pugh has pursued multiple attacks on his guilty plea, including a motion to withdraw his guilty plea, a petition for postconviction relief, two motions for relief from judgment, and a second motion to withdraw his guilty plea.³ He filed his second motion to withdraw his guilty plea in

¹Each count carried a sexually violent predator specification.

²The parties state it was an agreed sentence, although the court’s journal entry does not mention this fact.

³In March 2000, Pugh filed a motion for delayed appeal from the trial court’s denial of his first motion to withdraw his guilty plea. This court denied his request in *State v. Pugh*, Cuyahoga App. No. 77746. Then in August 2003, Pugh filed a motion for delayed appeal from his guilty plea. This court denied that request as well in *State v. Pugh*, Cuyahoga App. No. 83358.

November 2008, more than ten years after he entered his plea. Pugh argued that newly discovered evidence demonstrates that the allegations against him were false. He included affidavits from N.P. and his ex-wife, Laura Pugh (“Laura”). Laura stated that she was never aware of any sexual activity between their daughter, N.P., and Pugh and that she allowed her feelings about the sexual abuse she experienced by her father to convince her that the same abuse had occurred between Pugh and N.P. She also stated that she allowed police to believe that an old diary she wrote about her father’s abuse was written about the abuse between Pugh and N.P.

{¶ 4} N.P. stated in her affidavit that she was 13 years old at the time Pugh was arrested. She claimed that Pugh never abused her or had sex with her. The trial court denied Pugh’s second motion in December 2008.

{¶ 5} Pugh now appeals, raising two assignments of error for our review. In the first assignment of error, he argues that the trial court abused its discretion by denying his second motion to withdraw his guilty plea without conducting an evidentiary hearing. In the second assignment of error, he argues that the trial court abused its discretion in failing to find a manifest injustice when newly discovered evidence demonstrates that he is innocent. We will discuss these assignments of error together, as they both involve the same facts and standard of review.

{¶ 6} Crim.R. 32.1 governs the withdrawal of guilty pleas, and provides that:

“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.”

{¶ 7} A defendant moving for a post-sentence withdrawal of a guilty plea has the burden of establishing the existence of manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus. 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.’ * * * ‘[M]anifest 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.

{¶ 8} 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. *Smith*, paragraph two of the syllabus. Consequently, an appellate court’s review of a trial court’s denial of a post-sentence motion to withdraw a guilty plea is limited to a determination of whether the trial court

abused its discretion. *State v. Blatnik* (1984), 17 Ohio App.3d 201, 202, 478 N.E.2d 1016; *State v. Xie* (1992), 62 Ohio St.3d 527, 584 N.E.2d 715. The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 9} Pugh essentially argues that, in light of the newly discovered evidence he supplied, the trial court’s decision to deny his second motion to withdraw his guilty plea without a hearing constituted an abuse of discretion.

He claims that the new evidence demonstrates a manifest injustice because he is innocent and his plea was involuntary.⁴

{¶ 10} However, Pugh cannot now claim his innocence, because “[a] plea of guilty is a complete admission of guilt.” *State v. Stumph* (1987), 32 Ohio St.3d 95, 104, 512 N.E.2d 598; Crim.R. 11(B)(1). See, also, *State v. Woodley*, Cuyahoga App. No. 83104, 2005-Ohio-4810, ¶13. “By entering a plea of guilty, the accused is not simply stating that he did the discrete acts

⁴Pugh relies primarily on *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, and *State v. Kiss*, Cuyahoga App. Nos. 91353 and 91354, 2009-Ohio-739. But these cases are distinguishable. In both cases, the defendants were entitled to a hearing on their motions to withdraw the guilty plea because the trial court failed to advise of possible immigration-related consequences of the plea as required by R.C. 2943.031. The record reflects that Pugh is a United States citizen; thus, any consequences related to immigration are not at issue in the instant case.

described in the indictment; he is admitting guilt of a substantive crime.” *State v. Gaston*, Cuyahoga App. No. 92242, 2009-Ohio-3080, quoting *State v. Kitzler*, Wyandot App. No. 16-02-06, 2002-Ohio-5253, ¶12. Therefore, “[a] criminal defendant who pleads guilty is limited on appeal; he may only attack the voluntary, knowing, and intelligent nature of the plea * * *.” *Gaston*, quoting *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130, 595 N.E.2d 351.

{¶ 11} Crim.R. 11(C) governs the process that a trial court must use before accepting a felony plea of guilty and provides in pertinent part:

“(2) In felony cases the court may refuse to accept a plea of guilty * * *, and shall not accept a plea of guilty * * * without first addressing the defendant personally and doing all of the following:

“(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

“(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty * * *, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

“(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant’s favor, and to require the state to prove the defendant’s guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.”

{¶ 12} Pugh does not argue that the trial court failed to properly apprise him of the constitutional implications of his guilty pleas pursuant to Crim.R. 11. Rather, he claims that his guilty plea was involuntary because defense counsel was ineffective for leading him to believe that N.P. was going to testify against him at trial, even though he was innocent.

{¶ 13} We note that with respect to nonconstitutional notifications, a guilty plea will be considered knowing, intelligent, and voluntary if, before accepting the plea, the trial court, at the very least, substantially complied with the procedures set forth in Crim.R. 11. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. “Substantial compliance means that, under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving.” *Id.*

{¶ 14} In the instant case, a review of the record reveals that the trial court informed Pugh of his constitutional rights, the charged offenses, the maximum penalties involved, and that he would be subject to postrelease control for a period of five years following his release from prison. Pugh stated that he understood the rights he was waiving and that he was satisfied with defense counsel’s representation. When asked by the trial court how he pled to each charge, he stated “guilty.” The court also asked him if was “in fact guilty of [the] offenses * * *” and Pugh responded, “Yes, ma’am.”

{¶ 15} Furthermore, Pugh raised the same arguments of his claimed innocence and ineffectiveness of counsel in his first motion to withdraw his guilty plea. In denying this motion, the trial court noted that Pugh retained counsel of his choice, and at the plea hearing, made no assertions of confusion nor any promise or threat being made.

{¶ 16} Thus, we conclude that his plea was taken in compliance with Crim.R. 11 and the trial court did not abuse its discretion by denying his second post-sentence motion to withdraw his guilty plea.

{¶ 17} We also conclude that the trial court did not err by denying Pugh's motion without a hearing. The trial court "need not hold an evidentiary hearing in a motion to withdraw a plea if the only evidence provided consists of affidavits from interested parties which conflict with the facts elicited at the plea hearing." *State v. Yearby* (Jan. 24, 2002), Cuyahoga App. No. 79000. Deference is given to the trial court in cases in which the record demonstrates the court conducted the original plea and was familiar with the facts of the case. "In such circumstances, the trial court is in the best position to assess the credibility of the movant's assertions." (Citations omitted.) *State v. Atkinson*, Cuyahoga App. No. 85773, 2005-Ohio 5348.

{¶ 18} Moreover, a post-sentence motion to withdraw a guilty plea is subject to denial without a hearing "when the record indicates that the movant is not entitled to relief and the movant has failed to submit

evidentiary documents sufficient to demonstrate a manifest injustice.” (Citations omitted.) *State v. Russ*, Cuyahoga App. No. 81580, 2003-Ohio-1001; see, also, *State v. Markupson*, Cuyahoga App. No. 89013, 2007-Ohio-5329. A trial court may, in the exercise of its discretion, judge the credibility of affidavits in determining whether to accept the affidavits as true statements of fact. *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, ¶14, citing *State v. Robinson*, 11th Dist. No. 2003-A-0125, 2005-Ohio-5287, at ¶28.

{¶ 19} In the instant case, Pugh claims that the manifest injustice occurred when he pled guilty in the face of false testimony and his “new evidence” demonstrates that the allegations against him were false. His daughter’s statement, however, is not “new evidence.” She claims he never abused her, and she had no knowledge why he went to prison. Moreover, the affidavits on which he relies, are sworn by interested parties—himself, his ex-wife, and his daughter. Thus, the trial court could properly find these affidavits lacked sufficient credibility to require a hearing because of the nature of the evidence provided in these affidavits and the relationship between the affiants and Pugh. In addition, “[w]hen a petitioner submits a claim that his guilty plea was involuntary, a ‘record reflecting compliance with Crim.R. 11 has greater probative value’ than a petitioner’s self-serving affidavit.” *Yearby*, quoting *State v. Brehm* (July 18, 1997), Seneca App. No. 13-97-05.

{¶ 20} Therefore, we find that the court did not abuse its discretion by denying Pugh's second motion to withdraw his guilty plea without a hearing.

{¶ 21} Accordingly, the first and second assignments of error are overruled.

{¶ 22} Judgment is affirmed.

It is ordered that appellee recover of appellant 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 common pleas court to carry this judgment into execution.

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

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

CHRISTINE T. McMONAGLE, J., and
MARY J. BOYLE, J., CONCUR