

[Cite as *State v. Moorer*, 2009-Ohio-6469.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93155

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

CORNELIUS MOORER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-497196

BEFORE: Kilbane, P.J., Stewart, J., and Boyle, J.

RELEASED: December 10, 2009

JOURNALIZED:

APPELLANT

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ATTORNEYS FOR APPELLEE

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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).

MARY EILEEN KILBANE, P.J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Appellant, Cornelius Moorer (“Moorer”), appeals the trial court’s denial of his postsentence motion to withdraw his guilty plea. After a review of the record and pertinent law, we affirm.

{¶ 2} On June 15, 2007, a six-count indictment was issued against Moorer and his codefendant, Jason Lawrence (“Lawrence”). Counts 1 and 2 charged both Moorer and Lawrence with drug trafficking; to wit: crack cocaine, in violation of R.C. 2925.03(A)(2) and R.C. 2925.03(A)(1), respectively, with a major drug offender specification and a juvenile specification attached to both counts. Count 3 charged Moorer and Lawrence with possession of drugs, in violation of 2925.11(A), and included a major drug offender specification. Count 4 charged Moorer and Lawrence with possessing criminal tools, in violation of R.C. 2923.24(A). Counts 5 and 6 pertained only to Lawrence.

{¶ 3} On June 27, 2007, Moorer was arraigned and entered a plea of not guilty; the trial court found him to be indigent and appointed counsel. On July 11, 2007, Moorer’s initial counsel withdrew, and Moorer was appointed a second attorney.

{¶ 4} On January 23, 2008, the State amended Count 2, drug trafficking, by reducing the amount of crack cocaine involved to be between 25 and 100 grams, as opposed to an amount greater than 100 grams, and removed both the major drug offender and juvenile specifications. Counts 1, 3, and 4 were nolle. Moorer then entered a plea of guilty to Count 2 as amended. As part of the plea agreement, the trial court, the State, and Moorer had agreed upon an eight-year prison sentence, and five years of mandatory postrelease control. Moorer was then referred to the probation department for a presentence investigation report.

{¶ 5} On March 5, 2008, Moorer filed a pro se motion to disqualify his counsel. As the basis for this motion, Moorer argued that his counsel failed to assert defenses Moorer wanted to raise before the trial court. The trial court did not issue a ruling on Moorer's motion.

{¶ 6} Before Moorer was sentenced, on March 17, 2008, he made an oral motion to withdraw his guilty plea, which was denied. Moorer was then sentenced to the agreed mandatory eight years in prison and five years of mandatory postrelease control. Moorer did not file a direct appeal.

{¶ 7} More than six months later, on October 28, 2008, Moorer filed a pro se motion with the trial court to withdraw his guilty plea pursuant to Crim.R. 32.1. Moorer argued that the trial court erred when it failed to hold a hearing on his oral motion to withdraw his plea, and further, Moorer

maintained that he did not knowingly change his plea. The State responded on November 4, 2008, by filing a motion for summary judgment. The State argued that the trial court was without jurisdiction to rule on Moorer's motion to withdraw his plea because his motion raised issues that should have been raised on direct appeal. On December 1, 2008, Moorer filed a motion to strike the State's motion for summary judgment arguing that the State should have filed a brief in opposition to Moorer's motion to withdraw his guilty plea and not a motion for summary judgment. On March 18, 2009, the trial court denied Moorer's motion to withdraw his guilty plea. The trial court did not rule on the State's motion for summary judgment or Moorer's motion to strike.

{¶ 8} Appellant appeals the trial court's denial of his written motion to withdraw his guilty plea, asserting two assignments of error.

{¶ 9} ASSIGNMENT OF ERROR NUMBER ONE

“THE TRIAL COURT PREJUDICIALLY ERRED WHEN IT REFUSED TO HOLD A HEARING CONCERNING THE APPELLANTS [SIC] REQUEST TO WITHDRAW HIS PLEA OF GUILTY.”

{¶ 10} Moorer contends that the trial court erred by denying his written motion to withdraw his guilty plea because the trial court failed to conduct an evidentiary hearing. We disagree.

{¶ 11} Crim.R. 32.1 allows a defendant to file a motion to withdraw his plea after sentencing to correct a manifest injustice. A trial court's decision on a motion to withdraw a plea will not be reversed absent an abuse of discretion. *State v. Boswell*, Cuyahoga App. Nos. 88292 and 88293, 2007-Ohio-5718, at ¶4, citing *State v. Woods*, Cuyahoga App. No. 84993, 2005-Ohio-3425. An 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.

{¶ 12} A manifest injustice has previously been defined as "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. Woods*, Cuyahoga App. No. 82120, 2003-Ohio-2475, at ¶16, citing *State v. Wheeler*, Montgomery App. No. 18717, 2002-Ohio-284. While a trial court is required to hold a hearing if the motion to withdraw a plea is made prior to sentencing, a trial court is not required to hold a hearing on motions made after sentencing. *State v. McDaniel*, Cuyahoga App. No. 89001, 2007-Ohio-5441, at ¶11, quoting, *State v. Xie* (1992), 62 Ohio St.3d 521, 525, 584 N.E.2d 715. A trial court is not required to hold an evidentiary hearing where the

defendant has failed to attach sufficient evidence to his motion to withdraw his plea that would entitle him to relief. *State v. Sadowsky*, Cuyahoga App. Nos. 90696 and 91796, 2009-Ohio-341, at ¶29-30.

{¶ 13} On March 17, 2008, at the sentencing hearing, when Moorer made an oral motion to withdraw his plea, the trial court held a hearing pursuant to Crim.R. 32.1. At the hearing, Moorer argued that he was unaware of the consequences of changing his plea. Moorer also informed the trial court of the difficulties he had with his counsel.

{¶ 14} After allowing Moorer to raise all of his concerns, the trial court denied the oral motion specifically stating,

“I told you what the consequences would be on that day you entered the plea * * *. It’s reflected in the transcript that you were fully aware, that you were agreeing to eight years * * *.” (Tr. 8.)

{¶ 15} Moorer’s contention that this hearing was insufficient lacks merit because the trial court allowed him to raise all of his issues prior to sentencing. Further, Moorer failed to file a direct appeal on this issue and, therefore, that issue is no longer properly before this court.

{¶ 16} In his subsequent written motion to withdraw his guilty plea, the only evidence Moorer presented was his own self-serving affidavit. This court has previously held that a trial court does not abuse its discretion when it fails to hold a hearing on a motion supported solely by interested parties,

such as the defendant or his family. *Id.*, citing *State v. Woolfolk* (Mar. 22, 2001), Cuyahoga App. No. 76671; *State v. Moore* (1994), 99 Ohio App.3d 748, 651 N.E.2d 1319. Moorer waited over six months before filing his motion to withdraw his plea. A delay in filing such a motion is a factor that diminishes its credibility. *State v. Bush*, 96 Ohio St.3d 235, 238, 2002-Ohio-3993, 773 N.E.2d 522. Further, the main contention outlined in Moorer's motion is that he received erroneous advice from his attorney. This court has previously held erroneous advice from counsel is not grounds for a defendant to withdraw his plea. *State v. Mitchell* (Mar. 18, 1993), Cuyahoga App. No. 64231; *State v. Yearby* (Jan. 24, 2002), Cuyahoga App. No. 79000.

{¶ 17} In light of the fact that Moorer already had a full hearing pursuant to Crim.R. 32.1, his attempt to raise the same issues in his written motion six months later is barred by the doctrine of res judicata. "The principles of res judicata may be applied to bar the further litigation in a criminal case of issues which were raised or could have been raised previously in an appeal." *State v. Craddock*, Cuyahoga App. No. 89484, 2008-Ohio-448. Moorer had raised these identical issues at his sentencing hearing. He could have appealed the trial court's denial of his oral motion to withdraw his guilty plea, but he failed to do so.

{¶ 18} Finding both that Moorner has not presented a basis for relief as well as the fact that his arguments are barred by the doctrine of res judicata, we overrule this assignment of error.

{¶ 19} ASSIGNMENT OF ERROR NUMBER TWO

“THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANTS [SIC] MOTION TO WITHDRAW HIS GUILTY PLEA BY ADOPTING CIVIL RULE 56 WHICH FAILED TO COMPLY WITH THE MANDATES OF CIVIL RULE 12(B) AND NO OPPOSITION WAS FILED TO PROPERLY OPPOSE THE MOTION.”

{¶ 20} Moorner argues that the trial court should not have relied on the State’s motion for summary judgment pursuant to Civ.R. 56, because it was the improper motion to file. A review of the record yields no evidence that the trial court relied on the State’s motion.

{¶ 21} Moorner maintains that the State was not entitled to file a motion for summary judgment in response to his motion to withdraw his plea pursuant to Crim.R. 32.1. The statute governing motions for postconviction relief, R.C. 2953.21(D), specifically provides that “[w]ithin twenty days from the date the issues are raised, either party may move for summary judgment.” It appears from a review of the record that the State mistakenly construed Moorner’s motion to withdraw his plea as a motion for postconviction relief and filed a motion for summary judgment pursuant to statute. However, there is no evidence that the motion for summary judgment was

ever considered by the trial court, as the trial court never issued a ruling on the motion.

{¶ 22} Moorer's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
MARY J. BOYLE, J., CONCUR