

[Cite as *State v. Kiss*, 2009-Ohio-739.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 91353 and 91354

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LASZLO KISS

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-72731 and CR-72879

BEFORE: McMonagle, P.J., Boyle, J., and Celebrezze, J.

RELEASED: February 19, 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).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Laszlo Kiss, appeals the trial court's judgments denying his motions to withdraw his guilty pleas and vacate his convictions. We reverse and remand for a hearing.

{¶ 2} In June 1960, Kiss¹ pleaded guilty to several crimes set forth in case numbers CR-72731 and CR-72879. Kiss was sentenced to concurrent prison terms.

{¶ 3} On January 25, 2008, Kiss filed a motion to vacate his conviction with "*Oral Hearing Requested*" in case number CR-72879. Before the State even responded, on February 1, 2008, the trial court denied the motion without findings or comment.

{¶ 4} On January 31, 2008, Kiss filed a motion to withdraw his plea, again, with "*Oral Hearing Requested*," in case number CR-72731. Four days later, the State filed an opposition (attacking the timeliness of the motion), and eight days thereafter, the court denied the motion, again without findings or comment.

{¶ 5} Kiss raises three assignments of error for our review. We find the second assignment of error dispositive. It reads:

¹The record indicates that Kiss is a native of Hungary and came to the United States as a political refugee.

{¶ 6} “The trial court erred by failing to hold an evidentiary hearing on appellant’s motion to withdraw his guilty plea and vacate his conviction pursuant to Ohio Criminal Rule 32.1 despite Appellant’s clear and unequivocal request.”

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

{¶ 8} “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.”

{¶ 9} 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, 361 N.E.2d 1324. 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.” (Citations omitted.) *State v. Sneed*, Cuyahoga App. No. 80902, 2002-Ohio-6502, ¶13.

{¶ 10} “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*, supra at paragraph two of the syllabus. 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.*

{¶ 11} The trial court need not hold an evidentiary hearing on a postsentence 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 demonstrate a manifest injustice.” (Citations omitted.) *State v. Russ*, Cuyahoga App. No. 81580, 2003-Ohio-1001.

{¶ 12} Kiss submitted his affidavit in support of his motions to withdraw his pleas. In his affidavit, he averred that at the time of his pleas, he barely spoke English, he did not have a translator, and he did not understand the proceedings. Kiss also averred as to problems he had with immigration officials and his efforts to apply for citizenship after he had served his prison term.

{¶ 13} In *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, the Ohio Supreme Court, after acknowledging that the timeliness of a motion to withdraw a plea is one factor for a court to consider, went on to state that:

{¶ 14} “However, at the same time, we also do *not* accept the court of appeals’ determination that, as a matter of law, untimeliness here was a sufficient factor in and of itself to justify the trial court’s decision to deny the motion. In light of the strong policy expressed within R.C. 2943.031(D), we *reject* the court of appeals’ approach in this regard, particularly when the trial court, which did not explain its ruling, never found that appellant’s delay in moving to withdraw the plea was unreasonable. It is too great a leap on this meager record to conclude, with no further inquiry, that

appellant's delay in filing the motion was unreasonable as a matter of law.” (Emphasis added.) Id. at ¶41.

{¶ 15} The Court further stated that a motion's timeliness depends upon the particular facts of each case: “[I]n some cases, even a considerable delay in filing the motion to withdraw will not be a factor supporting denial of the motion, *such as when the immigration-related consequences of the plea and resulting conviction did not become evident for some time after the plea was entered.*” (Emphasis added.) Id. at ¶42. This court has followed this precedent, holding most recently in *State v. Schlaf*, Cuyahoga App. No. 90825, 2008-Ohio-6151, that an 11-year delay was adequately explained by appellant's lack of knowledge of the immigration-related consequences of his plea.²

{¶ 16} The dissent cites the timeliness of Kiss's motion and the portion of *Francis* dealing with timeliness as the sole reason in support of its argument that the trial court should be affirmed. That reason, however, ignores the holding in *Francis*.

{¶ 17} The dissent also relies on *State v. Tabbaa*, 151 Ohio App.3d 353, 2003-Ohio-299, 784 N.E.2d 143. Insofar as *Francis* emanated from the Ohio Supreme Court in 2004, *Tabbaa* from this court in 2003, *Francis* controls, and to the extent that *Tabbaa* is inconsistent with *Francis*, *Tabbaa* is overruled.

{¶ 18} Kiss's affidavit establishes the possibility of a manifest injustice. Because there was no hearing, as was requested, the record is silent as to the

²It is notable that in the *Schlaf* case, the trial court conducted an oral hearing, and based upon what it heard at that hearing, ruled the motion timely.

reason for the “extreme delay.” Thus, this panel is asked to review the finding of the trial court for abuse of discretion where it does not have for review any findings or rationale for the court’s ruling, and, due to the lack of oral hearing, no evidence whatsoever from a transcript to evaluate whether the delay was “reasonable” under the circumstances of Kiss’s case.³

{¶ 19} Accordingly, the trial court’s judgments in both cases are reversed, and this case remanded to the trial court for an oral hearing.

It is ordered that appellant recover from appellee 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. Case remanded to the trial court for further proceedings consistent with this opinion.

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

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

MARY J. BOYLE, J., CONCURS

FRANK D. CELEBREZZE, JR., J., DISSENTS

FRANK D. CELEBREZZE, JR., J., DISSENTING:

³This court is aware from oral argument of the circumstances surrounding the delay; however, insofar as the explanation is absent from the record, we cannot utilize it here in

{¶ 20} Respectfully, I dissent.

{¶ 21} I would find that the trial court did not abuse its discretion when it failed to hold a hearing. A hearing on a postsentence motion to withdraw a plea is not required if the facts, “as alleged by the defendant and accepted as true by the court, would not require that the guilty plea be withdrawn. Generally, a self-serving affidavit *** is insufficient to demonstrate a manifest injustice.” *State v. Wilkey*, Muskingum App. No. CT2005-0050, 2006-Ohio-3276, at ¶26.

{¶ 22} It is clear that the denial of appellant’s motions was warranted, not only because they were they extremely untimely, but appellant did not offer any explanation for the delay or a scintilla of evidence in support of his motions. An unreasonable delay between the entering of a plea and the filing of a motion to withdraw the plea militates against granting the motion. See *State v. Tabbaa*, 151 Ohio App.3d 353, 357, 2003-Ohio-299, 784 N.E.2d 143 (holding that the protracted delay in Tabbaa's Crim.R. 32.1 motion, for which he did not offer any explanation or justification, adversely affected his credibility and militated against the granting of his motion.). In *Tabbaa*, this court upheld the trial court’s denial of a defendant’s motion to withdraw his plea after he waited eleven years to file the motion.

{¶ 23} Here, the facts alleged by appellant did not require the guilty plea to be withdrawn. Appellant pleaded guilty in 1960, but did not institute any action

order to analyze whether the court abused its discretion in denying the motion.

upon the case until 2008. Such an unreasonable delay makes it nearly impossible for the state to retry appellant so many years after the alleged crime took place. In *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, at ¶40, the Ohio Supreme Court stated: “[T]he more time that passes between the defendant’s plea and the filing of the motion to withdraw it, the more probable it is that evidence will become stale and that witnesses will be unavailable.”

{¶ 24} In *Tabbaa*, the court stated that, “although the court failed to [inform the defendant that he could be deported] as required by the statute, we nonetheless conclude the court acted properly when it denied Tabbaa’s motion to withdraw his plea. We base this determination on the eleven and one-half year delay between his plea and his application seeking to vacate his plea.” *Tabbaa*, supra, at 356.

{¶ 25} Appellant did not file a direct appeal with this court, nor did he file a motion to withdraw at any time in the last 48 years. Further, other than his own affidavit, appellant presented no evidence to support his assertion that he was denied an interpreter. I take particular issue with the fact that appellant has not provided any reason for his delay. Even if the trial court erred in not providing appellant a translator at his plea hearing in 1960, I find that, in February 2008, the trial court appropriately denied appellant’s motions to vacate his pleas.

{¶ 26} In the case before us, appellant’s delay was significant. I am aware of the Court’s holding in *Francis*, supra, that “[i]n some cases even a considerable

delay in filing the motion to withdraw will not be a factor supporting denial of the motion, such as when the immigration-related consequences of the plea and resulting conviction did not become evident for some time after the plea was entered.” Here, appellant failed to provide the court with a reason for his delay. We cannot presume what his reasons may be, and there is no evidence in the record that any “immigration-related consequences” have resulted from appellant’s 1960 plea. Because it is clear that a denial of the motions was warranted, no hearing was necessary, and appellant’s second assignment of error should be overruled.