[Cite as *State v. Owens*, 2010-Ohio-3881.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94152

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DARON OWENS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-493625 and CR-500925

BEFORE: Blackmon, J., Rocco, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: August 19, 2010

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant D'aron Owens appeals the trial court's decision denying his motion to withdraw his guilty plea and assigns the following errors for our review:

> **"I. The trial court did err by denying appellant's motion to withdraw his previously entered guilty plea."**
>
> **"II. The trial court did err by failing to conduct an evidentiary hearing on appellant's motion to withdraw his previously entered guilty plea."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On March 21, 2007, a Cuyahoga County Grand Jury indicted Owens on drug possession, drug trafficking, and possession of criminal tools. Owens pleaded not guilty at his arraignment, and subsequently filed a motion to suppress the evidence.

{¶ 4} While his motion to suppress was pending, on September 18, 2007, a grand jury indicted Owens on three counts of drug possession, three counts of drug trafficking, and possession of criminal tools. Owens again pleaded not guilty at his arraignment and several pretrials ensued.

{¶ 5} On November 18, 2008, pursuant to a plea agreement with the state, Owens pleaded guilty to one count of drug possession with the one-year firearm specification attached. The trial court sentenced Owens to one year for the firearm specification and eight years for drug possession to be served consecutively for a total of nine years in prison.

{¶ 6} On July 24, 2009, Owens filed a motion to withdraw his guilty pleas, which the trial court denied.

Postsentence Motion to Withdraw Guilty Plea

{¶ 7} In the first assigned error, Owens argues the trial court erred when it denied his motion to withdraw his guilty plea.

{¶ 8} Crim.R. 32.1 governs motions to withdraw guilty pleas and states:

> **"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 moves to withdraw a guilty plea after sentence has been imposed bears the additional burden of demonstrating manifest injustice. *State v. Jackson*, Cuyahoga App. No. 92013, 2009-Ohio-3293, citing *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324. Manifest injustice is "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. The Supreme Court has also defined manifest injustice as a clear or openly unjust act. See *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, 208, 1998-Ohio-271, 699 N.E.2d 83. This standard permits a defendant to withdraw his guilty plea only in extraordinary cases. *Smith* at 264.

{¶ 10} We review a trial court's denial of a postsentence motion to withdraw guilty plea for an abuse of discretion. *State v. Cochran*, Cuyahoga App. Nos. 91768, 91826, and 92171, 2009-Ohio-1693, citing *State v. Makupson*, Cuyahoga App. No. 89013, 2007-Ohio-5329. An abuse of

discretion connotes more than an error of law or judgment, but implies a decision that is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 11} At the outset, we note that when Owens filed his motion to withdraw his guilty plea, he did not provide the trial court with a transcript of the plea hearing, but on appeal, Owens has supplemented the record with the transcript of said proceeding. Generally, a reviewing court cannot add matter to the record before it that was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter. *State v. Hooks*, 92 Ohio St.3d 83, 2001-Ohio-150,748 N.E.2d 528. See, also, *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500. Nonetheless, we review the transcript because the record indicates that the same trial judge who denied Owens's motion to withdraw his plea, also presided over the plea hearing.

{¶ 12} In the instant case, Owens argues his motion to withdraw his guilty plea should have been granted because his defense attorney promised a six-year sentence, pressured him to plead guilty, and failed to file a motion to suppress. Our review indicates that Owens's claims are not supported by the record.

{¶ 13} The following exchange took place at the plea hearing:

"Ms. Naiman: * * * There's an agreed to term of a total of nine years in these two cases wherein whatever you decide to sentence him on in CR-493625 will be run concurrently to the eight years in the other case with the exception of the one-year gun spec, so there would be a total of nine mandatory and agreed to years of incarceration for Mr. Daron Owens. If there's indeed this change in plea forthcoming, the State of Ohio moves to dismiss all the remaining counts in the two cases against Mr. Daron Owens. * * * For the record we're here and we're ready to go to trial. I had about ten officers in the jury room and I think there's about eight officers left as well as all the evidence. Thank you.

The Court: Is that a correct statement of the plea arrange-ment across these two cases, Mr. Bruner?

Mr. Bruner: Yes, your Honor. I've had numerous discussions with Ms. Naiman as well as extensive discovery. I've had numerous discussion with my client, with him and his family about this plea, and at this time he wants to withdraw his formerly entered plea of not guilty to the charges as set forth by Ms. Naiman understanding there's essentially an agreed nine years between both cases; one year for the firearm spec, plus eight.

The Court: Well, very well Mr. Owens, is there any question about what the plea bargain involves?

The Defendant: No, ma'am." Tr. 12-13.

**"* * *

"The Court: And you understand, Mr. Owens, I'm not a part of this deal. Right?**

The Defendant: Uhm-hmm.

The Court: The State offered you something, you and your lawyer have been negotiating with them, you've arrived at a deal today. It involves you walking out of here with no more than nine years — walking out of here with nine years net

total sentence, and I'm fine with that, but you know that I wasn't in the deal making. Right?

The Defendant: Yes, your Honor.

The Court: * * * What you decide to do with this, Mr. Owens, is totally your business. You want a trial, let's have a trial. I got nothing else to do today. Okay?

Mr. Bruner: Do you understand?

The Defendant: Yes, ma'am.

The Court: And I know it's not an easy decision; I'm happy because you have a very competent, experienced lawyer with you. And it's just that I want you to be clear, don't do this for me. All right?

The Defendant: Yes, your Honor.

The Court: Because I don't care what you do. All right?

Mr. Bruner: Do you understand?

The Defendant: Yes.

The Court: I mean all the people talking about you serving nine years, it's just you serving the nine years. Right?

The Defendant: Yes, your Honor.

The Court: And we're not even going to come visit, right?

Mr. Bruner: Do you understand?

The Defendant: Yes, your Honor.

The Court: So it's not over until it's over, so let's just take the next step, assuming that you still want to entertain this plea bargain.

The Defendant: Yes, your Honor." Tr. 16-18.

{¶ 14} It is clear from the above excerpt and elsewhere in the record that, pursuant to a plea bargain with the state, Owens agreed to the sentence the trial court imposed. The trial court painstakingly discussed the agreed sentence and advised Owens that he did not have to plea, but could take the matter to trial. The trial court indicated that it was available to begin the trial that day and the prosecutor indicated that the eight to ten police officers were in the jury room ready for trial.

{¶ 15} In addition, defense counsel indicated in open court that he had discussed in detail the agreed upon nine-year sentence with Owens and his family. At no point did Owens ever indicate that the discussions being held in open court departed from the plea bargain. Instead, Owens repeatedly signaled his understanding and his willingness to move forward and plead guilty pursuant to the plea agreement with the state.

{¶ 16} Further, we have reviewed the trial court's journal entry regarding the plea hearing. The entry states in pertinent part as follows:

> **"Defendant in court with counsel Harvey Bruner. Prosecuting Attorney Deborah Naiman present. * * * Defendant fully advised in open court of his/her constitutional rights and penalties. Defendant retracts former plea of not guilty and enters a plea of guilty to drug possession 2925.11 - F2 with firearm specification - 1 Year (2941.141) as charged in Count(s) 1 of the indictment. Count(s) 2, 3, is/are nolled. Court accepts defendant's guilty plea. As a condition of plea bargain, defendant agrees to a mandatory prison sentence of 9 years. As a further condition of this plea bargain, defendant agrees to**

> **waive any and all appellate rights as to this court's denial of his suppression motion. Defendant waives the preparation of a PSI and elects to proceed to sentencing. * * * Defendant addresses the court, prosecutor addresses the court. The Court considered all required factors of the law. The Court finds that prison is consistent with the purpose of R.C. 2929.11. The Court imposes prison at the Lorain Correctional Institution of 9 year(s). 1 year mandatory and the firearm spec to be served prior to and consecutive with the agreed mandatory 8 years on the underlying F2 charge * * *."** Journal Entry of November 18, 2008.

{¶ 17} The journal entry clearly reflects the tenor of the plea hearing. The journal entry makes two separate references to the fact that Owens agreed to the sentence imposed. Consequently, even if trial counsel promised that he would get a total of six years, it is of no consequence because Owens agreed to the sentence.

{¶ 18} We also find that Owens's claim that trial counsel failed to file a motion to suppress is not borne out by the record. The record before us indicates that on May 22, 2007, trial counsel filed a motion to suppress. The trial court's journal entry quoted above indicates that as a condition of the plea agreement, Owens agreed to waive any and all appellate rights as to the trial court's denial of his motion to suppress.

{¶ 19} Finally, attached to Owens's motion to withdraw his guilty plea are affidavits from his uncle, the mother of Owens's child, and one from Owens himself. All three affiants claim that trial counsel promised a six-year sentence. However, as previously noted, Owens agreed to the

sentence. Thus, Owens's present assertions amount to a change of heart. A change of heart is not a legitimate basis for the withdrawal of a plea. *State v. Bradley*, 2nd Dist. No. 22542, 2008-Ohio-6033, citing *State v. Davis* (Jan. 5, 2001), 2nd Dist. No. 18172.

{¶ 20} After reviewing the record, we find no evidence that the trial court acted unreasonably or arbitrarily in overruling Owens's motion to withdraw his pleas. Accordingly, we overrule the first assigned error.

Hearing on a Crim.R. 32.1 Motion

{¶ 21} In the second assigned error, Owens argues the trial court erred by failing to conduct a hearing on his motion to withdraw his guilty plea.

{¶ 22} A trial court is not required to hold a hearing on the motion to withdraw a plea of guilt if the facts alleged by the defendant, and accepted as true by the court, would not require that the guilty plea be withdrawn. *State v. Woods*, Cuyahoga App. No. 82120, 2003-Ohio-2475, citing *State v. Nathan* (1995), 99 Ohio App.3d 722, 651 N.E.2d 1044. See, also, *State v. Blatnik* (1984), 17 Ohio App.3d 201, 478 N.E.2d 1016.

{¶ 23} Here, having no basis on which to even grant Owens's motion under Crim.R. 32.1, the trial court did not err in denying it without a hearing. Accordingly, we overrule the second assigned error.

Judgment affirmed.

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 be sent to said 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.

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

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
JAMES J. SWEENEY, J., CONCUR