[Cite as *State v. Powell*, 2011-Ohio-1100.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95314

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID POWELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521261

BEFORE: Rocco, J., Cooney, P.J., and Keough, J.

RELEASED AND JOURNALIZED: March 10, 2011

APPELLANT PRO SE

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KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant, David Powell ("appellant"), appeals the trial court's denial of his postsentence motion to withdraw his guilty plea. He argues that his trial counsel rendered ineffective assistance. He also asserts that the trial court failed to inform him of the maximum penalty involved prior to accepting his guilty plea pursuant to Crim.R. 11(C)(2)(a). Finding no merit to appellant's assertions, we affirm.

{¶ 2} On December 2, 2009, appellant and the state reached an agreement. Appellant agreed to plead guilty to one count of first-degree felony drug trafficking in violation of R.C. 2925.03(A)(2), a one-year firearm specification, and several forfeiture

specifications. In return, the state agreed to dismiss the major drug offender specification included with that count and the seven other drug related offenses contained in the indictment. Also included was an agreed upon six-year sentence.

{¶ 3} As a result of the agreement, the trial court engaged in a Crim.R. 11 plea colloquy with appellant. During this dialogue, the trial court informed appellant of his constitutional rights, the nature of the charges against him, assessed the defendant's understanding of these issues, and the voluntariness of his plea. Thereupon, the trial court accepted appellant's guilty plea.

{¶ 4} On January 14, 2010, the trial court sentenced appellant to a mandatory five years imprisonment for the drug trafficking conviction to be served consecutively to a one-year term for the firearm specification. Additionally, the court imposed five years of mandatory postrelease control.

{¶ 5} On May 19, 2010, appellant filed a motion to withdraw his guilty plea. The trial court denied this motion on May 27, 2010.

{¶ 6} Appellant now appeals and presents two assignments of error for our review:

I. "Defendant-appellant [sic] plea of guilty was not knowingly, intelligently and voluntarily entered when he entered the plea to drug trafficking only after his attorney falsely informed him in order to get him to enter the plea, that he would [sic] eligible for judicial release

after serving two and one half years, and thereby denied appellant effective assistance of counsel."

II. "Defendant-appellant Powell's guilty plea was involuntary because the court violated Crim.R. 11."

{¶ 7} First, appellant argues that the trial court erred in denying his postsentence motion to withdraw his guilty plea because his counsel rendered ineffective assistance of counsel. In his second assignment of error, he also asserts that his plea was involuntary because the trial court failed to inform him of the mandatory sentence of five years. We find each of appellant's arguments without merit.

{¶ 8} A trial court may grant a motion to withdraw a guilty plea after the imposition of sentence only to correct a "manifest injustice." Crim.R. 32.1; *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715; *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324; *State v. Peterseim* (1980), 68 Ohio App.2d 211, 213, 428 N.E.2d 863. We review the trial court's decision on the motion to determine whether the trial court abused its discretion. *State v. Bayles*, Cuyahoga App. No. 85910, 2005-Ohio-6233.

{¶ 9} In reviewing challenges of guilty pleas based on ineffective assistance of counsel, the defendant must establish that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart* (1985), 474 U.S. 52, 59, 106 S.Ct. 166, 88 L.E.2d 203.

{¶ 10} With regard to appellant's second assigned error, the supreme court has held that there must be "substantial compliance" with the nonconstitutional requirements of Crim.R. 11(C)(2)(a). This rule provides that before accepting a guilty plea, the trial court must address the defendant personally and determine whether he or she is entering the plea voluntarily and with an understanding of the "maximum penalty involved." *State v. Nero* (1990), 56 Ohio St.3d 106, 107-108, 564 N.E.2d 474. It defined the term "substantial compliance," as meaning "that under the totality of the circumstances the defendant subjectively understands the implications of his plea* * *." Id. at 108.

{¶ 11} The record in this case fails to support a conclusion that the trial court abused its discretion and created a manifest injustice in denying appellant's postsentence motion to withdraw his pleas. Indeed, the appellant, a seasoned criminal, bargained hard for an agreed, six-year sentence, thus avoiding the potential 36-year maximum sentence had he been convicted on all counts and specifications. Nevertheless, appellant presented the trial court with his own self-serving affidavit in which he claimed that he agreed to plead guilty to drug trafficking because his trial counsel lied to him about his sentence and promised him an early release after serving only the one-year prison term for the firearm specification. These claims are in direct contravention of his own words in the record.

{¶ 12} First, prior to the plea colloquy, the prosecutor stated in appellant's presence that "[w]e've reached — this is a felony of the first degree. Ordinarily they

range between three and ten years on the underlying offense; however, we've reached the agreement of five years, plus one year for the gun spec, for a total of six years incarceration." Additionally, the trial court stated at appellant's sentencing that it ordered "[t]he Defendant serve a mandatory stated term of five years in prison on the sole count of this case * * *." At the time of the hearing, the appellant neither protested the agreed length of the sentence nor its mandatory nature. In fact, appellant's attorney expressly concurred with the agreed upon sentencing terms. Instead, appellant waited several months to make these assertions.

{¶ 13} The appellant stated in his affidavit that trial counsel promised he would only serve one year in prison, his sister in the second affidavit presented to the trial court that trial counsel promised appellant early release after two and one-half years in prison. Under these circumstances, the trial court was in the best position to assess the credibility of the appellant's assertions, as well as his sister's. In so doing, the trial court found them incredible. See *State v. Smith*, supra at 264; *State v. Bell*, Cuyahoga App. No. 87727, 2007-Ohio-3276. The record demonstrates that appellant's trial counsel negotiated an advantageous plea agreement for his client. Counsel secured the dismissal of seven of the eight counts along with the dismissal of the major drug offender specification. The fact that appellant received a five-year mandatory sentence for the drug trafficking charge rather than a minimum sentence was due to appellant's extensive criminal record, not because of any deficiencies in his counsel's advocacy. See *State v.*

Longo (1982), 4 Ohio App.3d 136, 446 N.E.2d 1145. A manifest injustice did not occur. Appellant's first and second assignments of error are overruled.

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 issue out of this court directing the common pleas 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.

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KENNETH A. ROCCO, JUDGE

COLLEEN CONWAY COONEY, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR