

[Cite as *State v. Moon*, 2015-Ohio-1648.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101930

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERNEST L. MOON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-11-553914-A

BEFORE: Stewart, J., E.T. Gallagher, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: April 30, 2015

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Ernest L. Moon, pro se, appeals the denial of his Crim.R. 32.1 motion to withdraw his guilty plea. Finding no merit to the appeal, we affirm.

{¶2} In December 2011, the Cuyahoga County Grand Jury indicted Moon in a multi-count indictment charging him with multiple counts of kidnapping, rape, and gross sexual imposition — each count carrying a sexually violent predator specification, and one count carrying a sexual motivation specification. The charges in the indictment stemmed from several sexual assaults that occurred between May 1, 1999 and August 31, 2000, whereby Moon lured a nine-year-old neighbor into the basement of his residence and proceeded to rape her. On February 11, 2013, Moon pleaded guilty to two counts of kidnapping, three counts of rape with a sexual violent predator specification, and three counts of gross sexual imposition (“GSI”). At sentencing, the court merged the GSI counts with the rape counts and ordered the maximum prison term on the rape and kidnapping counts. The court then ordered the counts to run consecutively, for an aggregate prison term of 60 years to life.

{¶3} Moon filed a direct appeal of his convictions arguing that the court did not make the necessary findings under R.C. 2929.14(C)(4) to impose consecutive sentences. Then on November 18, 2013, while his direct appeal was pending, Moon filed in the trial court a motion to withdraw his guilty plea under Crim.R. 32.1 arguing that at the time of his plea he did not understand the nature of the charges, the effect of the plea, or his rights in the proceedings, and that his counsel was ineffective. On December 4, 2013, the court denied the motion without a hearing on grounds that Moon was afforded a full plea colloquy, the court adhered to Crim.R. 11, and that many of the issues raised were barred as res judicata because they could have been raised on direct appeal. The court also indicated that the time for filing a motion for postconviction relief had expired and Moon offered no compelling reason to reopen the matter. On February 6, 2014, this court affirmed his consecutive sentences in *State v. Moon*, 8th Dist. Cuyahoga No. 99748, 2014-Ohio-384.

{¶4} Moon filed a response to the denial of the motion that the court considered as a motion for reconsideration. On January 8, 2014, the trial court denied the motion for reconsideration on the same grounds that it denied the original motion. Moon did not appeal this order.

{¶5} Then on July 16, 2014, Moon filed a second Crim.R. 32.1 motion to withdraw his guilty plea. In his brief in support of the motion Moon stated, “[t]his would be the second time that the Defendant has presented this motion to the Court. The reason for the second Motion is that the first one was treated as a post-conviction relief petition * * *.” According to his brief in support of the motion, Moon believed the court treated his first Crim.R. 32.1 motion as a petition for postconviction relief because it declared his first motion untimely, and stated that the issues should have been raised on direct appeal.¹

{¶6} In the second Crim.R. 32.1 motion to withdraw his guilty plea, Moon argued that his plea was not knowing and voluntary because he was told by the prosecutor and his counsel, that if he accepted the plea agreement, he would receive a sentence of three to five years. The trial court denied the second motion to withdraw his guilty plea. It is from this judgment that Moon now appeals, raising as his sole assignment of error that the trial court abused its discretion in denying his motion.

¹ Moon states: “This Court is under the impression that a Motion to withdraw a plea is governed by the time constraints of a post conviction petition. This is an incorrect assumption as the statute itself gives no time restraints.”

{¶7} From the outset, we note that Moon has filed two successive motions to withdraw his guilty plea. Generally, when an appellant files successive motions to withdraw a guilty plea under Crim.R. 32.1, and the issues raised in the second motion were, or could have been raised, in a previous Crim.R. 32.1 motion, res judicata applies and the second Crim.R. 32.1 motion will be denied. *State v. Brown*, 8th Dist. Cuyahoga No. 84322, 2004-Ohio-6421, ¶ 7. However, here we find that the court lacked jurisdiction to rule on Moon's first motion to withdraw his guilty plea because the court ruled on it during the pendency of Moon's direct appeal. *See State ex rel. Special Prosecutors v. Judges, Belmont Cty. Court of Common Pleas*, 55 Ohio St.2d 94, 97-98, 378 N.E.2d 162 (1978). Thus, the ruling on the first motion was a nullity, *see State v. Lauharn*, 2d Dist. Miami No. 2011 CA 10, 2012-Ohio-1572, ¶ 9-10, and the doctrine of res judicata does not bar the defendant from asserting a second motion to withdraw.

{¶8} A postconviction Crim.R. 32.1 motion to withdraw a guilty plea should be granted, only in extraordinary cases, to correct a manifest injustice. Crim.R. 32.1.; *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). Appellate courts review a trial court's decision on a Crim.R. 32.1 motion for an abuse of discretion. *State v. Caraballo*, 17 Ohio St.3d 66, 67, 477 N.E.2d 627 (1985).

{¶9} In his second motion to withdraw his guilty plea, Moon argues that the prosecutor promised him a plea deal where he would receive a fixed sentence of three to five years in prison. In support of his motion, Moon attached the affidavits of his mother, sister, and stepfather, each averring that Moon's trial counsel asked them to leave the room during the plea hearing because "[Moon] and I have a plea bargain agreement for 3 to 5 years in prison," and that there will be "[n]o trial today."

{¶10} We cannot conclude based on the above affidavits that Moon presented sufficient evidence of manifest injustice such that the trial court was obligated to hold a hearing on the issue. While the affidavits may support a finding that Moon's counsel was under the impression that Moon might receive a lower sentence, they do not support a claim that the prosecutor had in fact promised Moon such a plea deal. It is also notable that Moon does not attach his own affidavit averring that he was promised a lower sentence by the prosecutor.

{¶11} Moreover, the record completely belies Moon's claim that there was a sentencing agreement. The transcript of the plea hearing contains statements by the prosecutor relaying the terms of the plea agreement to the court. Tr. 5–9. The prosecutor never mentioned an agreed upon sentence, nor did defense counsel object to the terms as provided by the prosecutor. Most importantly, Moon himself agreed on the record that there was no agreement, and the trial court advised Moon that it was in its discretion to run his sentences consecutive to each other. The court's exact words were as follows:

The Court: There is no agreement, nor am I bound to run all these sentences concurrent to each other, which means I could issue these sentences consecutive to each other. Do you understand that?

Defendant: Yes.

The Court: I'm not saying I'm not going to. I have to make findings under House Bill 86 in order to do that, but I want to make sure you're aware that if I wanted to, I could run three to ten, three to ten, consecutive back to back. Do you understand that?

Defendant: Yes.

Tr. 24. The defendant answered in the affirmative indicating that he did understand the potential penalties involved and that the court could run his prison terms consecutively. Therefore, we cannot find that the court abused its discretion in denying Moon's motion to withdraw his guilty plea when Moon failed to show a manifest injustice.

{¶12} Judgment 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.

MELODY J. STEWART, JUDGE

EILEEN T. GALLAGHER, P.J., and
MARY J. BOYLE, J., CONCUR