[Cite as *State v. Taylor*, 2015-Ohio-1845.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102010

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ARTHUR TAYLOR

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-10-539334-B

BEFORE: Celebrezze, A.J., Keough, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: May 14, 2015

FOR APPELLANT

Arthur Taylor, pro se
#602-351
P.O. Box 8107
Richland Correctional Institution
Mansfield, Ohio 44901

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Mary McGrath
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

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

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Appellant, Arthur Taylor, appeals the denial of his pro se motion to withdraw his guilty pleas in a case that resulted in his conviction of two counts of drug trafficking and an 11-year prison sentence. He claims that the trial court abused its discretion in denying his motion without a hearing because he demonstrated that trial counsel was ineffective and that he was innocent of one of the charges against him. After a thorough review of the record and law, we affirm the decision of the trial court.

I. Factual and Procedural History

{¶2} In 2010, appellant made several sales of drugs to a confidential informant. These transactions were memorialized in both audio and video recordings. During the transactions, the informant indicated that appellant would receive powder cocaine from a supplier and then cook it or "rock it up" into crack cocaine in front of the informant. The informant would then leave the premises with crack cocaine.

{¶3} Appellant was charged in a 20-count indictment with numerous counts of drug trafficking on July 28, 2010. He was also charged with five more counts spread over two additional criminal cases. Appellant's appointed attorney timely filed motions for a bill of particulars and for discovery. However, appellant discharged this attorney and retained counsel. A notice of appearance was filed on March 4, 2011, by new counsel, which also sought a continuance to give counsel time to prepare for trial. This

request for a continuance was granted on March 17, 2011, and a trial date of May 17, 2011, was set. On May 17, 2011, appellant changed his pleas to guilty to amended charges. Specifically, appellant pled guilty to drug trafficking with one-year firearm, major drug offender, forfeiture, and juvenile specifications as charged in Count 1, and drug trafficking with a major drug offender specification as charged in Count 15 of the indictment. The other counts were dismissed. The court proceeded to sentencing after accepting appellant's pleas. The court imposed an aggregate 11-year prison sentence: Ten years on Count 1 served consecutive to the one-year firearm specification and concurrent to a ten-year sentence on Count 15.

{¶4} Appellant sought leave from this court to file a delayed appeal, which was granted on January 11, 2012. Assigned appellate counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), on June 14, 2012, claiming no prejudicial error occurred below. Appellant filed a pro se brief assigning two errors that were addressed by this court in a decision issued November 1, 2012. *State v. Taylor*, 8th Dist. Cuyahoga No. 97798, 2012-Ohio-5065 ("*Taylor I*").

{¶5} There, appellant raised allegations of ineffective assistance of counsel for trial counsel's failure to properly investigate or prepare a defense. Under this assigned error, appellant argued that the confidential informant altered the drugs that were used in the prosecution after appellant had sold them. Appellant claimed the informant took cocaine that appellant sold and transformed it through cooking into crack cocaine. According to *Taylor I*, this court set forth appellant's arguments that counsel was

ineffective because he failed to: "(1) properly evaluate, and inform him of the evidence; (2) challenge a *Brady* violation; and (3) challenge a chain of custody violation." *Id*. at ¶ 9. This court found that appellant's plea was not invalid as a result of these alleged errors made by trial counsel. To the contrary, this court found

> [t]he record demonstrates that counsel zealously advocated for Taylor. In total, 29 crimes, with numerous specifications, were charged against Taylor in these three cases. As a result of his attorney's negotiations with the state, Taylor pleaded guilty to four of the 29 crimes. Further, his attorney advocated for, and Taylor received, the minimum sentence of 11 years.

Id. at ¶ 15. The court did, however, agree with appellant that costs and fines were improperly waived and the case was remanded for resentencing as to costs and fines only. *Id*. at ¶ 26.

{¶6} After the case was remanded to the trial court, appellant filed a motion to withdraw his guilty plea on May 8, 2013. The court held a resentencing hearing on May 8, 2013. The court waived the mandatory fine, but imposed costs as indicated by a May 10, 2013 journal entry. The record does not contain a ruling on the motion to withdraw.

{¶7} On April 17, 2014, appellant filed a motion styled, "motion directing the prosecuting attorney to provide a complete certified copy of discoverable materials/records of the criminal investigation and prosecution." The state filed a brief in opposition. The trial court denied appellant's attempt at postconviction discovery on April 24, 2014. On August 27, 2014, appellant filed a motion to withdraw his guilty pleas, or in the alternative, for postconviction relief. Appellant argued that his attorney failed to share with him what the state turned over in discovery. Appellant further

claimed his attorney and the state pressured him into pleading guilty to crimes he did not commit. Specifically, he averred in an attached affidavit that he did not sell a confidential informant crack cocaine; he sold the informant powder cocaine. The state filed a brief in opposition. The court denied the motion without hearing on September 10, 2014. Appellant then filed the instant appeal assigning three errors for review:

> I. The trial court erred and abused its discretion when it refused to correct a manifest injustice by denying appellant's motion to withdraw guilty pleas where said plea was made in reliance on defense counsel's erroneous/incorrect legal advise [sic] informing appellant that he could not assert the affirmative defense of entrapment regarding count 15 in the indictment.
>
> II. The trial court erred and abused its discretion when it refused to grant appellant's motion to withdraw guilty plea where the evidence indicates that appellant is actually innocent of Count 15 in the indictment charging Trafficking in crack-cocaine where appellant did not sell or offer to sell crack-cocaine.
>
> III. The trial court erred and abused its discretion when it denied appellant's motion to withdraw guilty plea where the evidence submitted supporting the motion to withdraw clearly shows that appellant's guilty pleas was entered as a result of being coerced by defense counsel and prosecutor, thereby causing the plea to not be knowing, intelligent and voluntary given [sic].

II. Law and Analysis

{¶8} Appellant pled guilty in this case and waived argument about errors that occurred prior to sentencing except to the extent that such errors made his plea involuntary, unknowing, or unintelligent. *Taylor I*, 8th Dist. Cuyahoga No. 97798,

2012-Ohio-5065, ¶ 11. Appellant claims that trial counsel was ineffective, making his plea involuntary. His specific arguments are that counsel incorrectly advised him that an entrapment defense was not applicable to his case,[1] counsel failed to share information and evidence with appellant obtained in discovery, and counsel and the state coerced appellant into accepting a plea by threatening to charge his wife with drug trafficking.

{¶9} Crim.R. 32.1 governs the withdrawal of guilty pleas. It 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." While presentence motions should be freely granted, motions made postsentence require a movant to show that withdrawal is necessary to correct a manifest injustice. *State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992).

{¶10} A "[m]anifest injustice relates to some fundamental flaw in the proceedings [that] results in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Ruby*, 9th Dist. Summit No. 23219, 2007-Ohio-244, ¶ 11. Such motions should only be granted in extraordinary cases. *State v. Montgomery*, 2013-Ohio-4193, 997 N.E.2d 579, ¶ 61 (8th Dist.). A trial court's decision will be affirmed on appeal absent an abuse of the court's discretion. *State v. Peterseim*, 68 Ohio App.2d 211, 428 N.E.2d 863 (8th Dist.1980).

---

[1] Appellant freely admits that he offered for sale powder cocaine, but claims an entrapment defense applies in this case because he had no predisposition to sell crack cocaine.

A. Ineffective Assistance of Counsel

{¶11} Appellant's arguments about ineffective assistance of counsel do not establish a manifest injustice. "In order to prove a claim of ineffective assistance of counsel with a guilty plea, an appellant must demonstrate that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial." *State v. Hunter*, 8th Dist. Cuyahoga No. 99472, 2013-Ohio-5022, ¶ 27.

{¶12} Appellant first claims that counsel improperly advised him that an entrapment defense would not succeed.

{¶13} Entrapment "is established where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute." *State v. Doran*, 5 Ohio St.3d 187, 449 N.E.2d 1295 (1983), paragraph one of the syllabus. Entrapment is an affirmative defense that must be proved by the defendant in a criminal proceeding. *State v. Marquand*, 8th Dist. Cuyahoga No. 99869, 2014-Ohio-698, ¶ 20.

{¶14} Appellant claims he was not predisposed to sell crack cocaine. The Ohio Supreme Court has developed a suggested list of factors useful for determining predisposition:

> (1) The accused's previous involvement in criminal activity of the nature charged, (2) the accused's ready acquiescence to the inducements offered

> by the police, (3) the accused's expert knowledge in the area of the criminal activity charged, (4) the accused's ready access to contraband, and (5) the accused's willingness to [become involved] in criminal activity.

Doran at 192.

{¶15} Applying these factors to the present case, appellant readily admitted his involvement in the distribution of narcotics. He had expertise in cooking powder cocaine into crack cocaine. He had ready access to the ingredients necessary for the chemical conversion. Finally, he freely admits that he was willingly to sell narcotics. Therefore, trial counsel did not render inappropriate advice about the availability of such a defense. Trial counsel properly advised him that such a defense would not prevail at trial.

{¶16} Appellant also argues that counsel coerced him into accepting a very favorable plea deal that would dismiss 23 of 25 charges against him in exchange for pleading guilty to two counts of drug trafficking, for which he received a minimum 11-year sentence.

{¶17} As this court has already stated, "[i]n total, 29 crimes, with numerous specifications, were charged against Taylor in these three cases. As a result of his attorney's negotiations with the state, Taylor pleaded guilty to four of the 29 crimes. Further, his attorney advocated for, and Taylor received, the minimum sentence of 11 years." *Taylor I,* 8th Dist. Cuyahoga No. 97798, 2012-Ohio-5065, ¶ 15. Appellant's complaint that trial counsel failed to share with him information obtained in discovery is

unsupported and unavailing. Appellant has not demonstrated a reasonable probability that he would have gone to trial if the significant evidence against him was shown to him by his attorney.

{¶18} Timeliness is an additional factor that weighs against appellant in this case. "The timeliness of a motion to withdraw is a factor courts consider when exercising their discretion under Crim.R. 32.1." *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph three of the syllabus ("[a]n undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.").

{¶19} Appellant knew of the complained errors soon after sentencing. He understood that police had recorded the drug transactions he engaged in and the pressure he alleges was exerted against him by his attorney. Appellant waited until 2014 to file a motion to withdraw his plea without any explanation for the delay.

{¶20} Therefore, appellant's trial counsel was not ineffective such that appellant's plea was not knowing, intelligent, and voluntary.

B. Actual Innocence

{¶21} Appellant also argues he was innocent of the charges because he sold powder cocaine rather than crack cocaine. This, he argues, resulted in a manifest injustice.

{¶22} R.C. 2925.03(A)(1) provides that "[n]o person shall knowingly * * * [s]ell or offer to sell a controlled substance * * *." Appellant readily admits he is guilty of this crime.[2] He submitted an affidavit where he averred that he only sold powder cocaine to a confidential informant. This informant then cooked the cocaine into crack cocaine. This self-serving affidavit is contradicted by police officer narratives of the surveilled drug transactions contained in police reports turned over in discovery during the pendency of appellant's case. These were also attached to appellant's motion to withdraw. These documents indicate that the drug transactions were recorded and appellant is heard agreeing to cook the powder cocaine into crack cocaine. The trial court was free to discount appellant's self-serving affidavit and reject its conclusions especially in light of the fact that it was contradicted by appellant's own submissions in support of his motion. *Richmond Hts. v. McEllen*, 8th Dist. Cuyahoga No. 99281, 2013-Ohio-3151, ¶ 14. Appellant's arguments do not demonstrate a manifest injustice has occurred.

C. Failure to Hold a Hearing

{¶23} The above holdings demonstrate that the trial court did not err in denying appellant's motion. The court did not need to hold a hearing to arrive at this conclusion either. "A hearing on a postsentence Crim.R. 32.1 motion is not required when the record, on its face, conclusively and irrefutably contradicts the allegations in support of the motion." *State v. Knox*, 8th Dist. Cuyahoga No. 101732, 2015-Ohio-424, ¶ 11,

[2] The felony degree of the offense would differ regarding the sale of cocaine and crack cocaine. *See* former R.C. 2925.03(C)(4)(e) and (g) in place in 2010.

citing *State v. Yearby*, 8th Dist. Cuyahoga No. 79000, 2002 Ohio App. LEXIS 199, *5 (Jan. 24, 2002). That is the case here. Appellant's own submissions conflict with his affidavit and demonstrates that the court did not err in denying appellant's motion without holding a hearing.

III. Conclusion

{¶24} Appellant's claims of ineffective assistance of counsel did not render his plea invalid. Some of the claims of ineffectiveness were previously discussed and ruled on by this court in *Taylor I*. Other aspects of these claims are belied by appellant's own submissions to the trial court. Therefore, the court did not err in denying appellant's motion to withdraw his guilty pleas without holding a hearing.

{¶25} 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 issue out of this court directing the common pleas court to carry this judgment into execution. 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.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

KATHLEEN ANN KEOUGH, J., and
EILEEN T. GALLAGHER, J., CONCUR