

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 08CA0054-M

Appellee

v.

CLYDE D. RICE

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 04 CR 0444

Appellant

DECISION AND JOURNAL ENTRY

Dated: October 13, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Clyde D. Rice, appeals the order of the Medina County Court of Common Pleas that denied his motion to withdraw a guilty plea. This Court affirms.

I.

{¶2} A grand jury indicted Rice on a charge of possessing an amount of marijuana greater than 20,000 grams in violation of R.C. 2925.11(A)/(C)(3)(f), a second-degree felony. On July 26, 2006, Rice pled guilty to a reduced charge of attempted possession of marijuana, a third-degree felony. The trial court sentenced him to a four-year prison term, which was jointly recommended to the court by the State and Rice's trial counsel.

{¶3} On November 9, 2007, Rice moved to withdraw his guilty plea based on allegations that the State failed to adhere to the plea agreement. Rice filed several supplements to the motion. The trial court denied the motion on June 26, 2008. Rice timely appealed, raising

five assignments of error. We have addressed the assignments of error together because they are related.

II.

ASSIGNMENT OF ERROR I

“TRIAL COURT ABUSED IT’S [SIC] DISCRETION IN DENYING [RICE’S] MOTION TO WITHDRAW HIS GUILTY PLEA, WHERE SUCH SENTENCE WAS CONTRARY TO LAW AND THUS VOID DUE TO THE TRIAL COURT[’]S FAILURE TO IMPOSE THE MANDATORY FINE PURSUANT TO R.C. 2929.18(B)(1).”

ASSIGNMENT OF ERROR II

“APPELLANT WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; SECTION TEN, ARTICLE I OF THE OHIO CONSTITUTION; AND CRIMINAL RULE 11 WHEN THE COURT ACCEPTED HIS PLEA, ONE THAT WAS NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTERED INTO AND THEREFORE HE SHOULD HAVE BEEN ALLOWED TO WITHDRAW HIS PLEA.”

ASSIGNMENT OF ERROR III

“APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.”

ASSIGNMENT OF ERROR IV

“THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT RICE’S WITHDRAWAL OF HIS GUILTY PLEA FOR A GRAVE MIS-UNDERSTANDING [SIC] IN THAT IT WAS REPRESENTED TO RICE THAT HE WOULD RECEIVE 16 MONTHS FOR TIME SERVED IN FEDERAL CUSTODY TO THIS INSTANT CASE.”

ASSIGNMENT OF ERROR V

“THE TRIAL COURT ERRED WHEN IT DENIED RICE’S MOTION TO WITHDRAW HIS PLEA WITHOUT CONDUCTING AN EVIDENTIARY HEARING.”

{¶4} Rice argues, for reasons addressed below, that the trial court should have granted his motion to withdraw his guilty plea. We do not agree.

{¶5} Crim.R. 32.1 provides:

“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.”

{¶6} “Manifest injustice” relates to some fundamental flaw in the proceedings which results in a miscarriage of justice or is inconsistent with the demands of due process. *State v. Ruby*, 9th Dist. No. 23219, 2007-Ohio-244, at ¶ 11. “Manifest injustice” has been defined as a “clear or openly unjust act.” *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, 208. A postsentence motion to withdraw should be granted only in extraordinary cases. *State v. Smith* (1977), 49 Ohio St.2d 261, 264. The burden is on the individual seeking withdrawal of his plea to establish the existence of manifest injustice. *Id.* at paragraph one of the syllabus.

{¶7} “The decision to grant or deny a motion to withdraw a guilty plea lies within the sound discretion of the trial court.” *Id.* at 264. This Court reviews a motion to withdraw a guilty plea under the abuse of discretion standard. The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the trial court’s attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶8} Rice’s first assignment of error is based solely on an issue he raised in a pro se supplement to a motion to withdraw guilty plea filed by his counsel. Although criminal defendants have a right to act pro se or to have counsel, they have no right to “hybrid representation.” *State v. Thompson* (1987), 33 Ohio St.3d 1, 6-7. Because Rice was represented by counsel at the time he filed his pro se supplement, Rice’s pro se filing was not properly before the trial court and the trial court should not have considered it. *State v. Walters*, 9th Dist.No.

23795, 2008-Ohio-1466, ¶19; *State v. Brown*, 9th Dist.No. 23759, 2007-Ohio-7028, n.1; *State v. Harris* (June 9, 2000), 6th Dist.No. H-99-010, n.1. Because the trial court should not have considered this legal challenge in ruling on the motion filed properly by counsel, neither do we. The first assignment of error is overruled.

{¶9} In his second assignment of error, Rice claims the trial court failed to inform him about the mandatory fine he faced as a result of his plea and, therefore, he did not knowingly, voluntarily, and intelligently enter his plea. In his third assignment of error, Rice argues that he was denied the effective assistance of counsel. Rice did not raise either of these issues in his motion in the trial court. When reviewing arguments on appeal, this Court cannot consider issues that are raised for the first time on appeal. The Ohio Supreme Court has stated that, other than issues of subject matter jurisdiction, “reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.” *Goldberg v. Indus. Comm.* (1936), 131 Ohio St. 399, 404. See, e.g., *Harris v. Akron*, 9th Dist.No. 24499, 2009-Ohio-3865, ¶9. Accordingly, the second and third assignments of error are overruled.

{¶10} In his fourth assignment of error, Rice argues that he was informed he would receive credit for 16 months served in federal custody toward his sentence, but that the trial court failed to award him that jail time credit. The record does not support his position.

{¶11} In his brief on appeal and in his motion in the trial court, Rice argues that he believed he would receive credit for all time he spent in federal custody toward his four-year sentence. To support this contention, he points to the affidavit of his trial counsel as well as his own affidavit. Having reviewed his trial counsel’s affidavit, this Court concludes that there is no support in the affidavit for Rice’s argument. To the contrary, although Rice argues that he would not have pled guilty if he had known that he would not receive the jail time credit he thought he

would, his trial counsel's affidavit states that "Mr. Rice took the position from the start that he would not force the State to trial even though he faced a lengthy mandatory sentence." Trial counsel's affidavit does not even hint that Rice would receive credit for all of the time he spent in federal custody, despite the fact that Rice asserts that this was a critical reason he entered a guilty plea. Because the trial court has the discretion to resolve the credibility and weight of the movant's assertions in support of the motion, *Smith*, 49 Ohio St.2d at paragraph two of the syllabus, the trial court could reasonably conclude that Rice's assertions are not credible.

{¶12} This Court cannot conclude that the trial court abused its discretion in denying Rice's motion to withdraw his guilty plea on this basis. Accordingly, the fourth assignment of error is overruled.

{¶13} In his fifth assignment of error, Rice contends that the trial court should have held a hearing before deciding his motion. This Court has held that "[a]n evidentiary hearing on a post-sentence motion to withdraw a guilty plea is not required 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.'" *State v. McKinney*, 9th Dist.No. 06CA0031-M, 2006-Ohio-5364, ¶12 (citations omitted). This Court has also held that no hearing is required where the record, on its face, conclusively and irrefutably contradicts the allegations in support of withdrawal. *State v. Banks*, 9th Dist.No. 01CA007958, 2002-Ohio-4858, ¶11 (citations omitted).

{¶14} After reviewing the motion, supplement, and attachments, for the reasons set forth above, we conclude that the trial court did not abuse its discretion by denying Rice's motion without a hearing. The fifth assignment of error is overruled.

III.

{¶15} Rice's assignments of error are overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

CLYDE D. RICE, pro se, Appellant.

DEAN HOLMAN, Prosecuting Attorney, and RUSSELL HOPKINS, Assistant Prosecuting Attorney, for Appellee.