

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 24831

Appellee

v.

SAMUEL BROWN

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE Nos. CR2007-08-2571
 CR2007-03-0724

Appellant

DECISION AND JOURNAL ENTRY

Dated: May 26, 2010

MOORE, Judge.

{¶1} Appellant, Samuel Brown, acting pro se, appeals from the judgment of the Summit County Court of Common Pleas denying his post-sentence motion to withdraw his guilty pleas. This Court affirms.

I.

{¶2} This appeal involves two separate cases that were disposed of together at the trial court. In case number CR-2007-08-2571, Brown was indicted on charges of possession of cocaine in violation of R.C. 2925.11(A), a felony of the first degree, with a major drug offender specification, trafficking in cocaine in violation of R.C. 2925.03(A)(2), a felony of the first degree, with a major drug offender specification, trafficking in cocaine in violation of R.C. 2925.03(A)(2), a felony of the second degree, and possession of cocaine in violation of R.C. 2925.11(A), a felony of the second degree. A supplemental indictment added forfeiture specifications to the first degree felony possession of cocaine and first degree felony trafficking

in cocaine charges. In case number CR-2007-03-0724, Brown was indicted on charges of possession of cocaine in violation of R.C. 2925.11(A), a felony of the fifth degree, and possession of an open container in violation of R.C. 4301.62, a minor misdemeanor.

{¶3} On December 3, 2007, Brown appeared in the trial court represented by counsel. In case number CR-2007-08-2571, pursuant to a plea agreement, Brown entered a plea of guilty to first-degree felony possession of cocaine, as well as the criminal forfeiture specification to that charge. In case number CR-2007-03-0724, Brown entered a plea of guilty to fifth-degree felony possession of cocaine. All of the remaining charges were dismissed pursuant to the plea agreement. Brown received a six-year-prison sentence in case number CR-2007-08-2571 and a six-month-prison sentence in case number CR-2007-03-0724. The trial court ordered that the sentences run concurrently, for a total of six years of imprisonment.

{¶4} On May 11, 2009, Brown filed a motion to withdraw his guilty pleas. The trial court denied the motion.

{¶5} Brown timely filed a notice of appeal, raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ADVISE [] BROWN DURING HIS PLEA COLLOQUY THAT HIS SENTENCE WOULD INCLUDE A MANDATORY TERM OF POST RELEASE CONTROL. IN CONTRAVENTION TO *STATE V. GILLESPIE* [.]”

{¶6} In his first assignment of error, Brown contends that the trial court committed reversible error when it failed to notify him during the plea colloquy that his sentence would include a mandatory term of postrelease control. We disagree.

{¶7} In this case, Brown does not appeal from the original judgment in which the trial court accepted his guilty plea and entered the sentence. Instead, Brown appeals from the denial of his post-sentence motion to withdraw his guilty plea.

{¶8} “One who enters a guilty plea has no right to withdraw it.” *State v. Xie* (1992), 62 Ohio St.3d 521, 526, quoting *Barker v. United States* (C.A. 10, 1978), 579 F.2d 1219, 1223. The decision whether to allow a defendant to withdraw a guilty plea lies within the discretion of the trial court. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph two of the syllabus. Under this standard, we must determine whether the trial court’s decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶9} Pursuant to Crim.R. 32.1, “[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.” In a post-sentence motion, “the burden of establishing the existence of a manifest injustice is upon the individual seeking to withdraw the plea.” *State v. Ruby*, 9th Dist. No. 23219, 2007-Ohio-244, at ¶10, citing *Smith*, 49 Ohio St.2d at paragraph one of the syllabus. A 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. Under the manifest injustice standard, a post-sentence “withdrawal motion is allowable only in extraordinary cases.” *Smith*, 49 Ohio St.2d at 264.

{¶10} On May 11, 2009, Brown filed a motion to withdraw his guilty pleas in both cases alleging they were not made in compliance with Crim.R. 32.1. In this motion, Brown contended that he did not enter his guilty pleas knowingly and intelligently because the trial court failed to

notify him during the plea colloquy that part of his sentence would include a mandatory period of postrelease control. In support of this contention, Brown cited *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509. *Sarkozy* held that such a failure of notification constituted a complete failure to comply with Crim.R. 11(C)(2)(a) thus vitiating the knowing, intelligent and voluntary nature of Sarkozy's plea. *Id.* at ¶25. As a result, the Supreme Court of Ohio vacated the plea. *Id.*

{¶11} In an effort to satisfy his burden, Brown attached to his motion pages five through nine of the transcript from his plea and sentencing hearing. In its memorandum in opposition, the State noted that the excerpt Brown attached did not have a cover page identifying its contents, was not the complete transcript and did not bear any certification of its authenticity. The trial court overruled Brown's motion to withdraw his guilty plea. This ruling constituted a final judgment. After the trial court issued its ruling, Brown filed a document captioned "Urgent Motion for Reconsideration," to which he attached a complete, certified copy of the transcript from his plea and sentencing hearing. "[T]here is no rule that allows a party to move a trial court for reconsideration of a final judgment." *State v. Harbert*, 9th Dist. No. 20955, 2002-Ohio-6114, ¶24, citing *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 380. Therefore, "'a motion for reconsideration from a final judgment is a nullity[.]'" *State v. Keith*, 9th Dist. No. 08CA009362, 2009-Ohio-76, at ¶8, quoting *Harbert* at ¶24. A complete, certified copy of the hearing transcript was also included as part of the record on appeal. On appeal we consider, however, only that material properly placed before the trial court at the time it ruled upon the motion. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, at ¶13.

{¶12} An incomplete, uncertified transcript is insufficient to demonstrate manifest injustice. See *State v. Rogers* (Feb. 17, 2000), 8th Dist. Nos. 76627, 76628, at *3. Without a proper transcript, Brown's motion to withdraw his guilty plea was unsupported. If the movant

fails to submit evidentiary documents sufficient to demonstrate manifest injustice he is not entitled to withdraw his guilty plea. See *State v. McKinney*, 9th Dist. No. 06CA0031-M, 2006-Ohio-5364, at ¶12, quoting *State v. Buck*, 9th Dist. No. 04CA008516, 2005-Ohio-2810, at ¶14 (holding that when a defendant fails to submit sufficient evidentiary documents the trial court need not even schedule a hearing on the motion). Brown failed to submit sufficient evidentiary documents to demonstrate manifest injustice. Accordingly, the trial court did not abuse its discretion in denying Brown’s post-sentence motion to withdraw his guilty plea. *Blakemore*, 5 Ohio St.3d at 219.

{¶13} Brown’s first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT FURTHER WAS WITHOUT AUTHORITY TO ACCEPT [] BROWN’S GUILTY PLEA WHEN AT THE TIME OF HIS PLEA, HE WAS NOT INFORMED THAT UPON ENTERING HIS GUILTY PLEA, HE WOULD ALSO BE WAIVING HIS RIGHT TO TRIAL BY JUDGE.”

{¶14} In his second assignment of error, Brown contends that he did not enter his guilty plea knowingly, intelligently and voluntarily because the trial court failed to notify him that he would be waiving his constitutional right to a trial to the court as required by Crim.R. 11(C)(2)(c). We disagree.

{¶15} In his motion to withdraw his guilty plea, Brown argued to the trial court that it failed to notify him that if he pleaded guilty he would waive his constitutional right to trial by a judge. In support of this contention, he misquoted Criminal Rule 11 as follows:

“Criminal Rule 11(C)(2)(C) [sic] in pertinent part states:

“‘In criminal cases, a trial court **may not** accept a guilty plea unless it has informed the defendant that he is waiving his right to trial by a jury or a **judge**.’”
(Emphasis in original.)

{¶16} The rule says no such thing. Instead, Crim.R. 11(C)(2)(c), reproduced here in its entirety, requires that before accepting a guilty plea to a felony a trial court must

“[i]nform[] the defendant and determin[e] that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant’s favor, and to require the state to prove the defendant’s guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.”

{¶17} Brown concedes that he was advised that he was waiving his right to a jury trial. Nothing in the rule requires the trial judge to advise that a plea waives the defendant’s right to a bench trial. Accordingly, Brown has failed to demonstrate manifest injustice and the trial court did not abuse its discretion in denying his motion to withdraw his guilty plea. *Blakemore*, 5 Ohio St.3d at 219.

III.

{¶18} Brown’s assignments of error are overruled. The judgment of the Summit County Court of Common Pleas 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 Summit, 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

DICKINSON, P. J.
CARR, J.
CONCUR

APPEARANCES:

SAMUEL BROWN, pro se, Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.