

[Cite as *State v. Contech*, 2009-Ohio-6780.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-490
v.	:	(C.P.C. No. 07CR10-7747)
	:	
Amusa Conteh,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 22, 2009

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

DiFranco Law Office, LLC, and *Brian C. DiFranco*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Amusa Conteh, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion to withdraw guilty plea. For the following reasons, we affirm that judgment.

{¶2} Appellant is a native and citizen of Sierra Leone who entered the United States in 2004 as a refugee. He subsequently became a lawful permanent resident. On October 25, 2007, a Franklin County Grand Jury indicted appellant with one count of trafficking in marijuana in violation of R.C. 2925.03. Appellant entered a not guilty plea to that charge. Appellant subsequently withdrew his not guilty plea and entered a guilty plea

to one count of trafficking in marijuana. The trial court accepted appellant's guilty plea and found him guilty. On March 24, 2008, the trial court sentenced appellant to nine months in prison.

{¶3} On April 8, 2008, the United States Immigration and Customs Enforcement initiated proceedings to have appellant removed from the country because of his drug conviction pursuant to section 237(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1227. Almost one year later, on February 20, 2009, appellant filed a motion to withdraw his guilty plea pursuant to Crim.R. 32.1.¹ In that motion, appellant alleged that his attorney advised him that his guilty plea would not result in his removal from the United States. He also alleged that at the time he entered his guilty plea, he did not understand the concept of a jury trial. The trial court denied appellant's motion.

{¶4} Appellant appeals and assigns the following errors:

I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO SUBSTANTIALLY COMPLY WITH THE CRIM.R. 11 REQUIREMENTS TO ADVISE DEFENDANT OF HIS RIGHTS.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT DEFENDANT WAS NOT PREJUDICED BY HIS FORMER COUNSEL'S INEFFECTIVE ASSISTANCE.

{¶5} Appellant contends in his first assignment of error that the trial court did not properly advise him of his rights when it accepted his guilty plea, in violation of Crim.R. 11. Specifically, he contends the trial court failed to advise him that a guilty plea was a complete admission of guilt and failed to inquire into his understanding of a jury.

{¶6} Res judicata bars a party from raising an issue in a Crim.R. 32.1 post-sentence motion to withdraw a guilty plea when the party raised or could have raised

the issue on direct appeal. *State v. Oluoch*, 10th Dist. No. 07AP-45, 2007-Ohio-5560, ¶28 (citing *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266, ¶7). Appellant claims that the trial court violated Crim.R. 11 when it accepted his guilty plea. However, appellant could have raised this claim on direct appeal. *Id.* Appellant did not file an appeal from his conviction.

{¶7} Because appellant could have but did not raise these claims in a direct appeal from his conviction, *res judicata* bars him from raising them in his Crim.R. 32.1 motion to withdraw. *Id.* at ¶29.

{¶8} Even if we were to consider appellant's claims, they still fail on the merits. Crim.R. 11 requires a trial court to explain a number of constitutional and nonconstitutional rights to a defendant before entering a guilty plea. Appellant first claims that the trial court did not inform him that a guilty plea is a complete admission of guilt. The right to be informed that a guilty plea is a complete admission of guilt is nonconstitutional and subject to review under a standard of substantial compliance. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶12. The failure to inform a defendant of a nonconstitutional right will not invalidate a plea unless the defendant is prejudiced. *Id.*

{¶9} The trial court did not tell appellant that a guilty plea is a complete admission of guilt. However, "[a] defendant who has entered a guilty plea without asserting actual innocence is presumed to understand that he has completely admitted his guilt. In such circumstances, a court's failure to inform the defendant of the effect of his guilty plea as required by Crim.R. 11 is presumed not to be prejudicial." *Id.* at ¶19.

¹ Appellant's motion was not based on R.C. 2943.031, which allows for the withdrawal of a plea if the trial court does not advise a non-citizen defendant of possible consequences of a guilty plea.

Appellant did not assert his innocence in his plea proceedings and has not rebutted the presumption that the trial court's failure was not prejudicial.

{¶10} Second, appellant claims that he did not understand the concept of a jury trial, a constitutional right a trial court must explain to comply with Crim.R. 11. Contrary to appellant's suggestion, the record supports a finding that he understood the right to a jury trial. First, appellant signed an "Entry of Guilty Plea" form in which he acknowledged that his guilty plea waived his right to a jury trial. More importantly, the trial court strictly complied with the requirements of Crim.R. 11 and informed appellant that a guilty plea waived his right to a jury trial and the accompanying rights to cross-examine witnesses, present evidence on his behalf, compulsory process, and to appeal. Appellant told the trial court that he understood his right to a trial by jury and that he was relinquishing that right. (Tr. 5.) At the beginning of appellant's plea hearing, he told the trial court that he spoke and understood English. Appellant never expressed any confusion or uncertainty over language or what a jury trial encompassed during the plea hearing. Under these circumstances, the trial court strictly complied with Crim.R. 11.

{¶11} We overrule appellant's first assignment of error.

{¶12} Appellant claims in his second assignment of error that the trial court erred in denying his motion to withdraw because his guilty plea was the result of ineffective assistance of counsel. Specifically, he contends that his trial counsel erroneously advised him he would not be removed from the country if he entered a guilty plea.

{¶13} Crim.R. 32.1 permits a motion to withdraw a guilty plea "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." Because appellant's motion to withdraw his guilty plea was filed after sentence was

imposed, he must demonstrate manifest injustice. "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶5.

{¶14} Ineffective assistance of counsel can constitute manifest injustice sufficient to allow the post-sentence withdrawal of a guilty plea. *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813, ¶18 (citing *State v. Lake* (Mar. 28, 1996), Franklin App. No. 95APA07-847. A defendant seeking to withdraw a guilty plea post-sentence bears the burden of establishing manifest injustice based on specific facts either contained in the record or supplied through affidavits attached to the motion. *State v. Orris*, 10th Dist. No. 07AP-390, 2007-Ohio-6499, ¶8; *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus.

{¶15} The good faith, credibility, and weight to be given to assertions made by a defendant in support of a motion to withdraw a guilty plea are matters to be resolved by the trial court. *Id.* at 264; *State v. Smith*, 10th Dist. No. 07AP-985, 2008-Ohio-2802, ¶10. Generally, a self-serving affidavit made by the moving party is not sufficient to demonstrate manifest injustice. *Id.*; *State v. Moncrief*, 10th Dist. No. 08AP-153, 2008-Ohio-4594, ¶13. In addition, "[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." *State v. Smith*, 49 Ohio St.2d at paragraph three of the syllabus.

{¶16} A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court. *Id.* at paragraph two of the syllabus. Therefore, this court's review of a trial court's denial of a post-sentence motion to withdraw a guilty plea is limited

to a determination of whether the trial court abused its discretion. *State v. Peterseim* (1980), 68 Ohio App.2d 211. "Absent an abuse of discretion on the part of the trial court in making the ruling, its decision must be affirmed." *State v. Xie* (1992), 62 Ohio St.3d 521, 527. An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Widder*, 146 Ohio App.3d 445, 2001-Ohio-1521, ¶6.

{¶17} Appellant contends his trial counsel advised him that he would not be removed from the country if he pled guilty. The only evidence in support of that claim is appellant's own affidavit. In fact, appellant submitted affidavits from family members that contradict his own claim. Appellant's brother and sister each stated in an affidavit that trial counsel "never spoke with my brother about the affect his guilty plea would have on his immigration status." In light of appellant's self-serving affidavit, his family members' contrary affidavits, and appellant's delay between the federal government's initiation of deportation proceedings and the filing of his motion to withdraw, appellant failed to demonstrate manifest injustice.

{¶18} Additionally, appellant acknowledged in his signed "Entry of Guilty Plea" form that his conviction "may have the consequences of deportation, exclusion from admission to the United States, and/or denial of naturalization pursuant to the laws of the United States." He also acknowledged in that form that "no person has threatened me, promised me leniency, or in any other way coerced or induced me to plead 'Guilty.' " Further, during his plea hearing, the trial court twice warned appellant of the consequences his conviction could have on his immigration status before it accepted his guilty plea. (Tr. 3-4.) Appellant stated that he understood the warnings and never expressed a contrary understanding of the effect his plea could have on his immigration status. Further, he specifically told the trial court that he was able to speak and

understand the English language and did not express any confusion over the language. (Tr. 2.) It is clear that appellant understood that removal from the country was a possible consequence of his conviction. See *State v. Yun*, 10th Dist. No. 04AP-494, 2005-Ohio-1523, ¶14 (reversing manifest injustice finding because defendant understood possibility of removal as a consequence of guilty plea); *State v. Hamilton*, 8th Dist. No. 90141, 2008-Ohio-455, ¶15 (finding no manifest injustice where defendant was aware of removal as possible consequence of guilty plea).

{¶19} For these reasons, appellant failed to demonstrate a manifest injustice to warrant withdraw of his guilty plea. Accordingly, the trial court did not abuse its discretion by denying appellant's motion to withdraw his guilty plea. We overrule appellant's second assignment of error.

{¶20} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, P.J., and McGRATH, J., concur.
