

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
PREBLE COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-04-012
 :
 - vs - : OPINION
 : 11/23/2009
 :
 SERGIO RESENDIZ, :
 :
 Defendant-Appellant. :

APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 05CR9421

Martin P. Votel, Preble County Prosecuting Attorney, Kathryn M. Worthington, 101 East Main Street, 1st Floor, Eaton, Ohio 45320, for plaintiff-appellee

George A. Katchmer, 28 North Wilkinson Street, Dayton, Ohio 45401, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Sergio Resendiz, appeals a decision of the Preble County Court of Common Pleas denying a post-sentence motion to withdraw his guilty pleas. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} On September 16, 2005, Trooper Shaun Smart of the Ohio State Highway Patrol observed an SUV following a semi-truck too closely on U.S. Interstate 70. After observing additional lane violations, Tpr. Smart initiated a traffic stop. The trooper

noticed that the driver, appellant, and the passenger, appellant's wife, were both extremely nervous. When questioned, appellant and his wife offered inconsistent explanations for the purpose of their trip from Oklahoma to Ohio. Tpr. Smart then walked a drug-sniffing dog around the vehicle. The dog alerted to the presence of drugs, prompting a search.

{¶13} During the search, Tpr. Smart discovered an electronically-controlled hidden compartment housed in the dashboard area. This compartment contained approximately 2,000 grams of a substance later determined to be cocaine and 2 grams of a substance later determined to be methamphetamine. The compartment also contained \$5,600 in U.S. currency, a .380 semi-automatic handgun, and five rounds of ammunition.

{¶14} Appellant was indicted on one count of possession of cocaine in violation of R.C. 2925.11(A)(C)(4)(f), a first-degree felony, with three specifications; one count of possession of methamphetamine in violation of R.C. 2925.11(A)(C)(1)(a), a fifth-degree felony; one count of possessing criminal tools in violation of R.C. 2923.24(A), a fifth-degree felony; one count of carrying concealed weapons in violation of R.C. 2923.12(A)(2), a fourth-degree felony; and one count of having weapons while under disability in violation of R.C. 2923.13(A)(3), a third-degree felony.

{¶15} Pursuant to a plea agreement, appellant pled guilty to the charge of possession of cocaine and two specifications, as well as the charge of having weapons while under disability. The remaining charges were dismissed. In August 2008, the trial court sentenced appellant to an agreed four-year term of incarceration.

{¶16} In February 2009, appellant moved to withdraw his guilty pleas pursuant to Crim.R. 32.1 on the grounds that he was unable to understand the court interpreter and was denied effective assistance of counsel. The motion was accompanied by an

affidavit in which appellant attested that defense counsel never discussed trial strategy with him, failed to file a motion to suppress, and never discussed the option of a motion to suppress with him. Appellant also averred that he could not understand the court interpreter, and that he cooperated with anything his attorney said even though he did not understand what he was doing or why.

{¶7} The trial court considered appellant's motion to withdraw his pleas on written memoranda in lieu of holding a hearing. In a decision rendered March 27, 2009, the court denied the motion. Appellant timely appeals, raising two assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} "A PLEA THAT IS NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED MUST BE VACATED."

{¶10} On appeal, appellant revisits the arguments propounded in his motion to withdraw his guilty pleas. Appellant maintains that defense counsel never discussed trial strategy with him, failed to file a motion to suppress the evidence obtained from the traffic stop, and never discussed the option of a motion to suppress with him. Appellant, whose native language is Spanish, also insists that he was unable to understand the interpreter provided during court proceedings. As a result of these issues, appellant concludes that his plea was not made knowingly, intelligently, and voluntarily.

{¶11} Due process requires that a guilty plea be made knowingly, intelligently, and voluntarily. *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179. Under Crim.R. 32.1, a defendant contending that his plea ran afoul of this constitutional safeguard bears the burden to show that the post-sentence withdrawal of his plea is necessary to remedy "manifest injustice." *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. This standard requires a showing of extraordinary circumstances. *Id.* at 264. In general, manifest injustice relates to a fundamental flaw in the proceedings that

either results in a miscarriage of justice or offends due process. *State v. Taylor*, Madison App. No. CA2007-12-037, 2009-Ohio-924, ¶12, quoting *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266, ¶5.

{¶12} Typically, a self-serving affidavit offered by the movant in support of a motion to withdraw a plea is insufficient to demonstrate manifest injustice. *State v. Heath*, Warren App. No. CA2006-03-036, 2006-Ohio-7045, ¶9. The good faith, credibility, and weight of the movant's assertions attending the motion are matters to be resolved by the trial court. *Id.*, quoting *Smith* at 264.

{¶13} The decision to grant or deny a post-sentence motion to withdraw a guilty plea is within the sound discretion of the trial court. *Id.* Therefore, an appellate court will not reverse the trial court's decision absent an abuse of discretion. *State v. Xie* (1992), 62 Ohio St.3d 521, 526. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is arbitrary, unreasonable, or unconscionable. *Id.* at 527, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶14} First we address appellant's contention that his plea was not made knowingly, intelligently, or voluntarily because defense counsel failed to file a motion to suppress and did not discuss such a motion with him. Appellant insists that a motion to suppress should have been filed because it was unreasonable for Tpr. Smart to detain him longer than necessary to issue a traffic citation. Appellant reasons that the trooper did not have a reasonably articulable suspicion of illegal activity beyond the traffic violations which would have justified his continued detention.

{¶15} After reviewing the record, we find appellant's argument that the stop was unlawfully prolonged to be without merit. The record indicates that appellant was stopped for following too closely, a valid traffic infraction. Approximately nine minutes elapsed between the initial stop of the vehicle and the alert by the drug dog. This period

of time was well within that which was necessary to effectuate the purpose of the stop, which was to investigate the valid traffic infraction. *State v. Cahill*, Shelby App. No. 17-01-19, 2002-Ohio-4459, ¶21-25. See, also, *State v. Bolden*, Preble App. No. CA2003-03-007, 2004-Ohio-184, ¶25.

{¶16} Furthermore, we find that Tpr. Smart encountered facts during his investigation into the traffic infraction which gave rise to a reasonably articulable suspicion that appellant was engaged in criminal activity. As stated, Tpr. Smart questioned appellant and his wife upon initiating the stop. The trooper observed that appellant and his wife were both extremely nervous. Appellant advised Tpr. Smart that he and his wife were en route from Oklahoma to visit his parents in Columbus, Ohio. This was contradicted by his wife's assertions that they were traveling to visit friends and were not traveling to visit family. These inconsistent explanations further aroused Tpr. Smart's suspicions. When viewed in conjunction with the extreme nervousness of appellant and his wife and Tpr. Smart's extensive experience in drug interdiction, it was reasonable for the trooper to infer that appellant may have been engaged in criminal activity. See, e.g., *State v. Hernandez*, Preble App. No. CA2006-10-022, 2007-Ohio-5190, ¶19. Furthermore, a lawfully detained vehicle may be subjected to a canine sniff of the vehicle's exterior even in the absence of a reasonable suspicion of drug-related activity. *Bolden* at ¶18.

{¶17} In view of the facts and circumstances of this case, we find that appellant did not carry his burden to show that the post-sentence withdrawal of his plea was necessary to correct manifest injustice resulting from defense counsel's failure to file a suppression motion. *Smith*, 49 Ohio St.2d at paragraph one of the syllabus. Such an omission did not amount to a fundamental flaw in the proceedings that resulted in a miscarriage of justice or offended due process. *Taylor*, 2009-Ohio-924 at ¶12.

{¶18} Next we address appellant's argument that his plea was not made knowingly, intelligently, or voluntarily because he was unable to comprehend the court interpreter and therefore did not subjectively understand the proceedings. This assertion was memorialized in the affidavit accompanying appellant's motion to withdraw his guilty pleas.

{¶19} "Where a criminal defendant does not speak English, constitutional guarantees of due process and equal protection require that the criminal defendant hears the proceedings in a language that he understands." *State v. Boshko* (2000), 139 Ohio App.3d 827, 833. Crim.R. 11(C) prescribes the procedure that a trial court must follow prior to accepting a plea of guilty or no contest in felony cases. In accordance with subsection (2), the court must engage the defendant in an oral dialogue to make certain that the defendant is able to understand the consequences of his plea to ensure the validity thereof. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶26.

{¶20} The trial court must substantially comply with Crim.R. 11 when giving the nonconstitutional notifications required by Crim.R. 11(C)(2)(a) and (b).¹ *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶14. Substantial compliance is met where the record indicates that, under the totality of the circumstances, the defendant "subjectively understands the implications of his plea and the rights he is waiving." *Id.* at ¶15, quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶21} A review of the transcript for the plea hearing reveals that the trial court substantially complied with the requirements of Crim.R. 11(C) during the plea colloquy. Appellant's argument that he did not subjectively understand the proceedings loses

1. These nonconstitutional notifications consist of the following: Under Crim.R. 11(C)(2)(a), the trial court must determine that the defendant's plea is made voluntarily and that the defendant comprehends the crimes charged, maximum penalties, and ineligibility for probation or community control sanctions, if applicable. Under Crim.R. 11(C)(2)(b), the court must make certain that the defendant understands the

credibility upon a reading of the transcript. During the hearing, appellant only spoke through the court interpreter once. The rest of the time appellant answered the court directly, with no assistance from the interpreter or his attorney. At no time during the hearing did appellant indicate that he did not comprehend the English language or that he did not understand the proceedings. He posited no questions to the interpreter, his counsel, or to the court itself. Moreover, the transcript indicates that appellant did not answer a single question incorrectly.

{¶22} The passage of time is another factor which weakens appellant's argument. "An 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." *Smith*, 49 Ohio St.2d at paragraph three of the syllabus. The original plea hearing took place in August 2008, whereas appellant filed his motion to withdraw in February 2009. Six months after the plea hearing, appellant claims he did not understand the proceeding. In view of the surrounding circumstances, this assertion appears disingenuous.

{¶23} As a result of the foregoing analysis, we find that appellant did not carry his burden to show that the post-sentence withdrawal of his plea was necessary to correct manifest injustice resulting from his alleged inability to understand the court interpreter. *Id.* at paragraph one of the syllabus.

{¶24} Having disposed of appellant's arguments, we conclude that the trial court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea. Appellant's first assignment of error is overruled.

effect of the guilty or no contest plea, and that the court may enter judgment and impose sentence upon acceptance of the plea.

{¶25} Assignment of Error No. 2:

{¶26} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW PLEA SINCE HE WOULD NOT HAVE ENTERED THIS PLEA BUT FOR THE INEFFECTIVENESS OF COUNSEL."

{¶27} Appellant contends that he suffered ineffective assistance of counsel due to defense counsel's failure to file a motion to suppress or to discuss this option with him. This omission, according to appellant, resulted in his plea being less than knowing and voluntary and prejudiced him to the extent that he was unable to exercise his right to challenge the evidence against him.

{¶28} This court has recognized that ineffective assistance of counsel is a proper basis for seeking post-sentence withdrawal of a guilty plea. *State v. Degaro*, Butler App. No. CA2008-09-227, 2009-Ohio-2966, ¶12. To determine whether counsel's performance constitutes ineffective assistance, the movant must show that (1) his counsel's actions fell below an objective standard of reasonableness, and (2) he was prejudiced as a result. *Heath*, 2006-Ohio-7045 at ¶8.

{¶29} As stated, appellant bases his ineffective assistance claim on defense counsel's failure to file a motion to suppress. We note that such an omission does not constitute per se ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448. Rather, the failure to file a motion to suppress amounts to ineffective assistance only when the record demonstrates that the motion would have been successful if made. *State v. Brown*, Warren App. No. CA2002-03-026, 2002-Ohio-5455, ¶11. Even where there is some evidence in the record to support a motion to suppress, we presume that trial counsel was effective if counsel could have reasonably decided that filing a suppression motion would have been a futile act. *Id.*

{¶30} In addressing appellant's first assignment of error, we concluded that the

stop and investigation performed by Tpr. Smart was lawful. Appellant and his wife's extreme nervousness, their multi-state road trip, their inconsistent explanations for the trip, combined with Tpr. Smart's extensive drug interdiction experience, supported the suspicion that appellant was engaged in criminal activity. When considering the totality of the evidence contained in the record, it was reasonable for defense counsel to conclude that a motion to suppress would have been futile under the circumstances. *Id.*

{¶31} During discovery, the state disclosed its intent to use a copy of the video from Tpr. Smart's dashboard camera which depicted the entire traffic stop. The state's discovery response provided that the video could be viewed by contacting the prosecutor's office. Appellant and his counsel also had access to witness statements, police reports, and a lab analysis of the drugs. With this evidence at its disposal, and considering the facts of the case, defense counsel would have been able to ascertain that the record did not favor filing a motion to suppress.

{¶32} Defense counsel's decision not to file a suppression motion is further bolstered by the effect such a motion would have had on the negotiated plea. The Preble County Prosecutor's Office has a policy which provides that all settlement offers are revoked if a suppression motion is pursued. While we do not necessarily condone this policy, defense counsel's decision to forego a motion to suppress in view of this policy can reasonably be presumed to be a strategic act. *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995-Ohio-171.

{¶33} Finally, we observe that appellant was facing a mandatory ten-year sentence if convicted as charged. Pursuant to the plea agreement, he was sentenced to an agreed term of four years instead. In view of the facts of the case, appellant's avoidance of six years in prison can hardly be deemed prejudicial.

{¶34} We conclude that appellant's contention that he suffered ineffective assistance of counsel is unfounded. Accordingly, appellant's second assignment of error is overruled.

{¶35} Judgment affirmed.

YOUNG, P.J., and RINGLAND, J., concur.