

[Cite as *State v. Blaylock*, 2009-Ohio-3514.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22761
vs.	:	T.C. CASE NO. 05CR289
SCOTT A. BLAYLOCK	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 17th day of July, 2009.

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GRADY, J.:

{¶ 1} Defendant, Scott Blaylock, appeals from a final judgment of the Montgomery County Court of Common Pleas denying his Crim.R. 32.1 motion to withdraw his guilty plea.

{¶ 2} In January 2005, Defendant was arrested on a complaint filed in Kettering Municipal Court charging him with

one count of forcible rape, a first degree felony, and two counts of unlawful sexual conduct with a minor, third degree felonies. Prior to any indictment being issued, Defendant's counsel, Steve Pierson, engaged in successful plea negotiations with the State which resulted in a plea agreement, whereby Defendant agreed to plead guilty to a bill of information charging a single count of unlawful sexual conduct with a minor in violation of R.C. 2907.04(A), a felony of the third degree. There were no agreements or promises as to Defendant's sentence or his sexual offender classification.

On February 11, 2005, the trial court accepted Defendant's guilty plea to one count of unlawful sexual conduct with a minor. On April 15, 2005, the trial court sentenced Defendant to the minimum prison term, one year, and classified him as a sexually oriented offender.

{¶} Defendant completed his one year sentence and was released from prison on or about January 15, 2006. On November 26, 2007, Defendant filed a motion to withdraw his guilty plea. As grounds for his motion, Defendant alleged that he received ineffective assistance of counsel in entering his guilty plea, and that a conflict of interest existed on the part of the judge who accepted his plea and imposed a sentence, the Honorable Dennis Langer, who had personal

knowledge about Defendant's previous conviction for telephone harassment and improperly used that information and the prior conviction as an aggravating factor in sentencing Defendant in this case. Following an evidentiary hearing, on April 21, 2008, the trial court overruled Defendant's motion to withdraw his guilty plea. The trial court concluded that Defendant had been represented by a highly experienced, competent counsel, that Defendant knowingly, intelligently and voluntarily entered his guilty plea, and that Defendant failed to demonstrate any conflict of interest on the part of Judge Langer.

{¶ 4} Defendant appealed to this court. He challenges only the trial court's decision overruling his motion to withdraw his guilty plea.

ASSIGNMENT OF ERROR

{¶ 5} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO WITHDRAW PLEA AS DEFENDANT HAD A CONFLICT OF INTEREST WITH THE TRIAL COURT JUDGE AND WAS NOT ADEQUATELY REPRESENTED DURING PLEA AND SENTENCING."

{¶ 6} In *State v. McComb*, Montgomery App. Nos. 22570 and 22571, 2008-Ohio-295, this court stated:

{¶ 7} "{¶ 6} The Rules of Criminal Procedure permit a defendant to withdraw a guilty plea. '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.' Crim.R. 32.1. The rule distinguishes motions to withdraw based on timing-those filed before sentence and those filed after sentence. This is so principally for policy reasons. 'This distinction rests upon practical considerations important to the proper administration of justice. Before sentencing, the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. But if a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe.'

{¶ 8} *Kadwell v. U.S.* (C.A.9, 1963), 315 F.2d 667, 670; see, also, *State v. Long* (May 13, 1993), Montgomery App. No. 13285, 1993 WL 155662, at *17.

{¶ 9} ** * *

{¶ 10} "{¶ 8} Withdrawal of a guilty plea after sentencing is permitted only in 'extraordinary cases.' *State v. Smith* (1977), 49 Ohio St.2d 261, 264, 361 N.E.2d 1324. The standard

used to evaluate post-sentence motions for withdrawal asks whether a manifest injustice will afflict the defendant if the plea is not withdrawn. See Crim.R. 32.1. 'Manifest injustice' eludes a single definition. The concept is flexible, and whether it exists depends on the facts and circumstances in each case. See *Smith*."

{¶ 11} Defendant has the burden of establishing a manifest injustice. *State v. Smith, supra*. The decision whether to grant a post-sentence motion to withdraw a guilty plea is a matter within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. *McComb, supra*. An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 12} Two years and nine months after entering his guilty plea, and one year and ten months after completing his sentence and his release from prison, Defendant filed his motion to withdraw his guilty plea. Defendant claims that he should be allowed to withdraw his guilty plea for various reasons, the first of which is that he received ineffective assistance of counsel.

{¶ 13} Counsel's performance will not be deemed ineffective

unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must demonstrate that were it not for counsel's errors, the result of the trial would have been different. *Id.*; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 14} Defendant claims that his trial counsel performed deficiently because he failed to fully investigate Defendant's case, was too quick to cut a plea deal, told Defendant that he would probably receive probation, and failed to bring to the attention of the trial court judge the judge's potential conflict of interest that Defendant had brought to counsel's attention. The record in this case affirmatively refutes all of Defendant's claims.

{¶ 15} We agree with the trial court that Defendant's counsel, Steve Pierson, is a very experienced criminal defense attorney. At the hearing on Defendant's motion to withdraw his plea, Mr. Pierson testified that he discussed the strengths and weaknesses of this case and possible defenses to the charges with Defendant. The original charges were rape, a

first degree felony carrying three to ten years imprisonment, plus two counts of unlawful sexual conduct with a minor, both third degree felonies each carrying a one to five year sentence. As a result of defense counsel's successful negotiation, Defendant was offered a favorable deal to plead guilty to just one count of unlawful sexual conduct with a minor, rather than face indictment on the original greater charges. Mr. Pierson testified that Defendant desired to pursue a plea to offenses less serious than rape.

{¶ 16} Neither defense counsel nor the trial court ever promised Defendant probation. Rather, counsel told Defendant that based upon his prior misdemeanor record and his plea in this case to a lesser offense, he probably would receive either probation or a lower end sentence. Mr. Pierson could not remember exactly when during the course of these proceedings Defendant revealed that he had previously worked as a runner for the Montgomery County Prosecutor's Office when Judge Langer was first assistant prosecutor in that office, and that while so employed Defendant was convicted in 1988 of telephone harassment and, as a disciplinary matter, Defendant had to discuss that case with First Assistant Langer. Nevertheless, Pierson testified that during the plea hearing Defendant never indicated that he was uncomfortable with

having Judge Langer preside over his case and Defendant never asked Pierson to talk to Judge Langer about his personal knowledge of Defendant's 1988 conviction.

{¶ 17} During his own testimony at the hearing on his motion to withdraw his plea, Defendant acknowledged that he discussed the plea agreement with his counsel, that Judge Langer went over the plea form with him, which Defendant said he read and understood, that Judge Langer told Defendant that he faced one to five years, and that probation was possible, that Judge Langer advised Defendant of his rights, and neither the court nor defense counsel ever promised Defendant any specific sentence. Rather, counsel gave Defendant his best estimate of what might happen. In that regard this court stated in *McComb, supra*, at ¶ 9:

{¶ 18} “. . . A manifest injustice generally does not result when a defendant holds (as he discovers) a mistaken belief that his sentence would be significantly lighter than the one actually imposed. See *State v. Lambros* (1988), 44 Ohio App.3d 102, 541 N.E.2d 632. The reason for the belief is key. If defense counsel caused the belief, what counsel exactly said must be examined. A manifest injustice does not necessarily arise merely because counsel is wrong about the sentence that is actually imposed. Only if counsel promised

the defendant that a guilty plea will result in a lower sentence than is actually imposed would a manifest injustice potentially result. See *State v. Blatnik* (1984), 17 Ohio App.3d 725, 478 N.E.2d 1016. If counsel simply made a prediction, there would be no manifest injustice. *Id.* In other words, counsel's erroneous advice and incorrect speculation regarding the sentence that is likely to be imposed potentially results in a manifest injustice only if counsel said that a guilty plea *will* result in a particular sentence, but not if counsel said that it *probably* will result."

{¶ 19} Defendant has failed to demonstrate any deficient performance by his counsel, much less any resulting prejudice. Manifest injustice has not been demonstrated by Defendant.

{¶ 20} Defendant also claims that he should be allowed to withdraw his guilty plea because Judge Langer had a conflict of interest in presiding over Defendant's case. This claim is based upon Judge Langer's personal knowledge of Defendant's 1988 conviction for telephone harassment, and his alleged improper use of that personal information as an aggravating factor in deciding to sentence Defendant to a minimum one year prison term rather than community control in this case.

{¶ 21} The record in this case affirmatively demonstrates that Judge Langer did not improperly consider or take into

account any personal knowledge regarding Defendant's 1988 conviction in sentencing Defendant in this case. Judge Langer testified at the hearing on Defendant's motion to withdraw his plea that at the time of the plea and sentencing in this case he did not recognize Defendant or recall the 1988 charges against Defendant, and he was not aware of Defendant's previous relationship with the prosecutor's office. Had Judge Langer been aware of those facts, or that information had been brought to his attention, he would have immediately recused himself from this case. Judge Langer testified that what jogged his memory about all of this was Defendant's motion to withdraw his plea.

{¶ 22} Judge Langer further testified that he did not rely upon his personal knowledge about Defendant's prior conviction as a factor in sentencing, but rather relied upon the presentence investigation report, which indicated that Defendant had previous misdemeanor convictions in 1988 for telephone harassment and in 1990 for menacing. While Judge Langer acknowledged that he considered Defendant's prior misdemeanor convictions and the fact that he was not a first time offender in terms of whether to impose a minimum prison term or probation, Judge Langer testified that, even absent the two prior misdemeanor convictions, he would have probably

imposed the same one year sentence based upon the nature of this offense and its impact upon the victim, a fourteen year old male who had oral sex with the forty-four year old Defendant.

{¶ 23} Accordingly, Defendant has failed to demonstrate any conflict of interest or impropriety on Judge Langer's part, or that Defendant's previous employment in the prosecutor's office had any impact on his sentence in this case. Manifest injustice has not been demonstrated and the trial court did not abuse its discretion in overruling Defendant's post-sentence motion to withdraw his guilty plea.

{¶ 24} Defendant's assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J. And FAIN, J., concur.

Copies mailed to:

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