

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-10-1195

Appellee

Trial Court No. CR0200902546

v.

Neal Harmon, III

**DECISION AND JUDGMENT**

Appellant

Decided: September 30, 2011

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Michael E. Narges, Assistant Prosecuting Attorney, for appellee.

Veronica M. Murphy, for appellant.

Neal Edward Harmon, III, pro se.

\* \* \* \* \*

SINGER, J.

{¶ 1} Appellant, Neal Edward Harmon III, appeals a judgment from the Lucas County Court of Common Pleas convicting him on one count of rape and three counts of gross sexual imposition.

{¶ 2} Appellant's appointed counsel has requested leave to withdraw in accordance with the procedure set forth in *Anders v. California* (1967), 386 U.S. 738.

{¶ 3} In *Anders*, the United States Supreme Court held that if counsel, after a conscientious examination of the appeal, determines it to be wholly frivolous he should so advise the court and request permission to withdraw. *Id.* at 744. The request shall include a brief identifying anything in the record that could arguably support an appeal. *Id.* Counsel shall also furnish his client with a copy of the request to withdraw and its accompanying brief, and allow the client sufficient time to raise any matters that he chooses. *Id.* The appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 4} Here, appointed counsel has met the requirements set forth in *Anders*. Counsel also informed appellant of his right to file his own, additional assignments of error and appellate brief. Appellant has filed an additional brief and assigned additional assignments of error. Accordingly, this court shall proceed examining the potential assignments of error set forth by counsel and appellant and the entire record below to determine whether this appeal lacks merit deeming it wholly frivolous.

{¶ 5} On August 17, 2009, appellant entered a guilty pleas, pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, to one count of rape, a violation of R.C.

2907.02(A)(1)(a) and (B), a felony of the first degree, and to three counts of gross sexual imposition, violations of R.C. 2907.05(A)(4) and (B), felonies of the third degree. He was found guilty and sentenced on August 17, 2009, to serve 11 years in prison. On May 5, 2010, appellant filed a motion to withdraw his guilty pleas, which was denied on June 16, 2010.

{¶ 6} In conformity with *Anders*, appellate counsel has set forth three potential assignments of error which she states she has considered and rejected as wholly frivolous:

{¶ 7} "I. Ineffective assistance of counsel.

{¶ 8} "II. Involuntary Plea.

{¶ 9} "III. Denial of Hearing."

{¶ 10} Counsel's potential assignments of error will be addressed out of order. In her third potential assignment of error, counsel contends that the court erred in denying appellant's motion to withdraw his guilty pleas without a hearing.

{¶ 11} A trial court's decision to grant or deny a Crim.R. 32.1 motion to withdraw guilty plea is reviewed under an abuse of discretion standard. *State v. Tunstall*, 2d Dist. No. 23730, 2010–Ohio–4926. Thus, an appellate court will only reverse a trial court's ruling on such a motion if it is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 12} A post-sentence motion to withdraw a guilty plea may only be granted to correct a "manifest injustice." Crim.R. 32.1. A defendant who seeks to withdraw a guilty

plea after the imposition of sentence carries the burden of establishing the existence of manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. A manifest injustice is defined as a "clear or openly unjust act." *State v. Odoms*, 10th Dist. No. 04AP-708, 709, 2005-Ohio-4926, ¶ 9, citing *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, 208. Manifest injustice is an extremely high standard, and a defendant may only withdraw his guilty plea in extraordinary cases. *State v. Tabor*, 10th Dist. No. 08AP-1066, 2009-Ohio-2657, ¶ 6, citing *State v. Price*, 4th Dist. No. 07CA47, 2008-Ohio-3583, ¶ 11.

{¶ 13} "A hearing on a post-sentence motion to withdraw a \* \* \* plea is not necessary if the facts alleged by the defendant, even if accepted as true, would not require the court to grant the motion[.]" *State v. Burkhart*, 2d Dist. No. App. No. 07-CA-26, 2008-Ohio-4387, at ¶ 12, citing *State v. Blatnik* (1984), 17 Ohio App.3d 201, 204. "To obtain a hearing, 'a movant must establish a reasonable likelihood that the withdrawal is necessary to correct a manifest injustice[.]'" *Tunstall*, supra ¶ 9; *State v. Kinsinger*, 2d Dist. No. 23966, 2011-Ohio-2826.

{¶ 14} In his motion to withdraw his guilty plea, appellant argued that his guilty pleas should be withdrawn because they were not entered knowingly, intelligently and voluntarily. First, appellant claimed that his counsel informed him that the maximum sentence he could receive would be ten years when in fact, he was sentenced to 11 years. Second, appellant claimed that his counsel misinformed him regarding the possible sentence he could receive if he had gone to trial on three pending arson charges. Third,

appellant contends he was of unsound mind when he entered his pleas because he was being medicated for severe depression. Finally, appellant contends he erroneously believed that *Alford* pleas could be withdrawn at will.

{¶ 15} Initially, we note that appellant's arguments are barred by res judicata. The doctrine of res judicata provides that "a final judgment bars a convicted defendant \* \* \* from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that the defendant raised or could have raised at trial or on appeal." *State v. Brown*, 167 Ohio App.3d 239, 2006–Ohio–3266, ¶ 7, citing *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 96. Specifically, a defendant cannot raise any issue in a post-sentence motion to withdraw a guilty plea that could have been raised at trial or on direct appeal. *Brown*, citing *State v. Reed*, 7th Dist. No. 04 MA 236, 2005–Ohio–2925, ¶ 11. In this case, appellant did not, but could have, filed a direct appeal arguing that his plea was involuntary and that his counsel was ineffective.

{¶ 16} In any event, counsel's arguments still fail on the merits and do not rise to the level of manifest injustice.

{¶ 17} "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of these points renders enforcement of the plea unconstitutional under both the United States Constitution and Ohio Constitution." (Citations omitted.) *State v. Engle* (1996), 74 Ohio St.3d 525, 526. Pursuant to Crim.R. 11(C)(2), a trial court cannot accept a guilty plea from a defendant in

a felony case without first addressing the defendant personally and informing him of the consequences of his plea.

{¶ 18} With regard to *Alford* pleas in particular, in *State v. Piacella* (1971), 27 Ohio St.2d 92, 96, the Supreme Court of Ohio held that "where the record affirmatively discloses that: (1) a guilty plea was not the result of coercion, deception or intimidation; (2) counsel was present at the time of the plea; (3) his advice was competent in light of the circumstances surrounding the plea; (4) the plea was made with the understanding of the nature of the charges; and (5) the plea was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both, the guilty plea has been voluntarily and intelligently made."

{¶ 19} The transcript of the plea hearing reflects that the trial court, pursuant to Crim.R. 11(C)(2), spoke to appellant, in open court before accepting the guilty pleas, inquired whether the guilty pleas were voluntarily made, and whether they were made with knowledge of the nature of the charges and maximum penalties involved. The court questioned appellant separately as to each charge as to whether he understood the nature of the charges against him and the range of penalties that could be imposed upon conviction, including classification as a sex offender and associated registration and notice requirements and postrelease control. The court also informed appellant that by pleading guilty he waived rights, including his right to a jury trial, the right to have the state of Ohio prove his guilt beyond a reasonable doubt, the right to confront and cross-examine witnesses, the right to call witnesses to testify on his behalf at trial, the right to

employ the power of the court to call witnesses to testify on his behalf, the right not to testify against himself, and, for practical purposes, the right to appeal. When asked if he understood that as part of his plea agreement, case Nos. 09-140, 09-2223 and 09-2137 would be dismissed, appellant stated he understood. Finally, when asked if he was coerced into entering the pleas, appellant stated that he was not.

{¶ 20} As to counsel's specific allegations, the record shows that appellant was informed that the maximum that he could serve for rape was ten years and that the maximum time that he could serve for each count of gross sexual imposition was five years. When asked if he understood that the sentences could be ordered served concurrently or consecutively, appellant stated on the record that he understood. When asked if he was under the influence of medication, appellant responded "no." At no time was appellant advised that he could withdraw his plea at will. To the contrary, the trial court very carefully conveyed the consequences of the plea and the rights he was waiving to appellant.

{¶ 21} Appellant also alleged that his plea was involuntary because he received incorrect information concerning three arson charges. There is nothing in the record before us, through indictment or otherwise, indicating appellant was charged with arson. Therefore, we need not address this argument.

{¶ 22} Based on the foregoing, counsel's third potential assignment of error is without merit.

{¶ 23} In her first potential assignment of error, counsel contends that trial counsel was ineffective in that he misrepresented to appellant the possible prison term he faced and he incorrectly advised him on three arson charges. In her second potential assignment of error, counsel contends that appellant's pleas were not entered knowingly, intelligently and voluntarily. For the reasons discussed above, counsel's first and second potential assignments of error are without merit.

{¶ 24} In his pro se brief, appellant asserts three assignments of error:

{¶ 25} "I. The trial court abused its discretion by denying defendant's request for an evidentiary hearing to allow him to develop the factual bases (sic) of his reasons for withdrawing his guilty plea, thereby denying defendant due process of law guaranteed by the fifth and fourteenth amendments to the US Constitution and similar provisions of the Ohio Constitution.

{¶ 26} "II. The trial court erred in accepting a plea of guilty that was not entered knowingly, voluntarily, and intelligently, thereby defendant due process of law guaranteed by the fifth and fourteenth amendments to the US Constitution and similar provisions of the Ohio Constitution.

{¶ 27} "III. The trial court erred in its definition of 'manifest injustice.'"

{¶ 28} Appellant's first two assignments of error have been addressed above and found to be without merit. Accordingly, appellant's first two assignments of error are found not well-taken.

{¶ 29} In his third assignment of error, appellant contends that the court erred in defining "manifest injustice" as an error that is direct, obvious and observable. In defining "manifest injustice," the trial court relied on Black's Law Dictionary. We do not find this definition to be much different from the one we have cited above. See *State ex rel. Schneider*, supra, (defining manifest injustice as a "clear or openly unjust act"). Appellant's third assignment of error is found not well-taken.

{¶ 30} Upon this record, we concur with appellate counsel that appellant's appeal is without merit. Moreover, upon our own independent review of the record, we find no other grounds for meritorious appeal. Accordingly, this appeal is found to be without merit, and wholly frivolous. Counsel's motion to withdraw is found well-taken and is, hereby, granted.

{¶ 31} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. The clerk is ordered to serve all parties, including the defendant if he or she has filed a brief, with notice of this decision.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.