[Cite as *State v. Vihtelic*, 2017-Ohio-5818.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105381

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GARY VIHTELIC

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-07-495818-A

BEFORE: E.A. Gallagher, P.J., Kilbane, J., and Jones, J.

RELEASED AND JOURNALIZED: July 13, 2017

APPELLANT

Gary Vihtelic, pro se
Inmate No. A543-366
Grafton Correctional Institution
2500 South Avon Belden Road
Grafton, Ohio 44044

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
BY: Christopher D. Schroeder
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

EILEEN A. GALLAGHER, P.J.:

{¶1} Defendant-appellant Gary Vihtelic, pro se, appeals the trial court's denial of his postsentence motion to withdraw his guilty plea. For the reasons that follow, we affirm the trial court's judgment.

Factual and Procedural Background

{¶2} On May 9, 2007, a Cuyahoga County Grand Jury indicted Vihtelic on one count of aggravated murder, one count of felony murder and three counts of felonious assault. Each of the counts also included one-year and three-year firearm specifications. The charges arose out of the fatal shooting of Vihtelic's half-brother, Ronald Mogar, during an argument at their home on East 213th Street in Euclid, Ohio. The indictment specifically alleged that each count occurred "in the County of Cuyahoga" but did not identify the exact location where the offenses were committed.

{¶3} Eight days later, defense counsel filed a motion for a bill of particulars, a motion for appointment of an investigator and a motion for discovery. In June 2007, the trial court granted defense counsel's motion for an investigator and appointed an investigator to assist with Vihtelic's defense.

{¶4} In February 2008, the state filed a bill of particulars identifying the specific location where the offenses alleged in the indictment were committed and indicating that it would prove the following:

> That on or about the 26th day of January, 2007, at approximately 3:00 to 4:00 p.m., and at the location of 580 East 213th Street, in the City of Euclid,

Ohio, the Defendant, Gary Vihtelic unlawfully purposely and with prior calculation and design, caused the death of another, to-wit: Ronald J. Mogar.

{¶5} The state also filed discovery responses, identifying its intended witnesses and evidence and producing copies of various documents, including the coroner's report and autopsy results, photographs, a supplemental police report containing Vihtelic's oral statements to police, a signed witness statement from Vihtelic's mother[1] and a victim impact statement.

{¶6} Vihtelic and the state reached a plea agreement. On March 11, 2008, Vihtelic pled guilty to an amended count of murder in violation of R.C. 2903.02(A) with a three-year firearm specification and the remaining counts were nolled. The trial court accepted his guilty plea and sentenced Vihtelic to 18 years to life in prison — three years on the firearm specification and 15 years to life on the underlying murder charge.

{¶7} In December 2016 — more than eight years after his sentencing — Vihtelic filed, pro se, a postsentence motion to withdraw his guilty plea. Vihtelic claimed that the indictment was defective because it did not identify the specific location within Cuyahoga County where Vihtelic committed the alleged offense. He claimed that without this

[1]The copy of the supplemental police report that includes Vihtelic's oral statements to police has a handwritten notation that is signed by defense counsel, indicating that it was "[r]ead to [defense counsel] in full" on June 26, 2007. The copy of the witness statement from Vihtelic's mother likewise has a handwritten notation that is signed by defense counsel, indicating that it was "[r]ead to [defense counsel] in full for *Brady v. Maryland purpose*" on June 26, 2007.

information his trial counsel "was unable to conduct any investigation of the offense, or prepare for trial, before advising the defendant to accept, or enter into, a plea agreement" and that he, therefore, received ineffective assistance of counsel and did not enter his guilty plea knowingly, intelligently and voluntarily. He also claimed that the trial court lacked subject matter jurisdiction due to the omission of the specific location of the offense in the indictment. The state opposed the motion. The trial court summarily denied the motion without a hearing.

{¶8} Vihtelic appealed the trial court's decision, raising the following assignment of error for review:

> The trial court committed prejudicial error and/or abused its discretion when denying appellant's motion to withdraw guilty plea (post sentencing) without conducting an evidentiary hearing on the following:
> (a) ineffective assistance of counsel
> (b) the indictment is fatally defective
> (c) the trial court violated Crim.R. 1(B)
> (d) the trial court violated appellant's constitutional right to disinterested tribunal
> (e) the trial court committed obvious error affecting appellant's constitutional due process right to the ''assistance of counsel" to perform crime scene investigation, because the indictment provided no notice of the crime scene to enable trial counsel to investigate.

Law and Analysis

{¶9} A defendant who enters a guilty plea has no right to withdraw it. Under Crim.R. 32.1, a trial court "may set aside the judgment of conviction and permit the defendant to withdraw his or her plea" after sentencing only "to correct manifest injustice." Manifest injustice is a "clear or openly unjust act," *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998), that is evidenced by "'an

extraordinary and fundamental flaw in the plea proceeding,'" *State v. McElroy*, 8th Dist. Cuyahoga Nos. 104639, 104640 and 104641, 2017-Ohio-1049, ¶ 30, quoting *State v. Hamilton*, 8th Dist. Cuyahoga No. 90141, 2008-Ohio-455, ¶ 8; *see also State v. Vinson*, 8th Dist. Cuyahoga No. 103329, 2016-Ohio-7604, ¶ 41; *State v. Stovall*, 8th Dist. Cuyahoga No. 104787, 2017-Ohio-2661, ¶ 17 ("'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.'"), quoting *State v. Williams*, 10th Dist. Franklin No. 03AP-1214, 2004-Ohio-6123, ¶ 5. A postsentence withdrawal of a guilty plea is permitted "only in extraordinary cases." *State v. Rodriguez*, 8th Dist. Cuyahoga No. 103640, 2016-Ohio-5239, ¶ 22.

{¶10} A defendant who seeks to withdraw his or her guilty plea after sentencing bears the burden of demonstrating manifest injustice. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus. The determination of whether the defendant has demonstrated manifest injustice is within the sound discretion of the trial court. *Vinson* at ¶ 42, citing *Smith* at paragraph two of the syllabus. A reviewing court will not reverse a trial court's decision to deny a defendant's postsentence motion to withdraw a guilty plea absent an abuse of that discretion. *Vinson* at *id*. An abuse of discretion occurs where the trial court's decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶11} A trial court is not automatically required to hold a hearing on every postsentence motion to withdraw a guilty plea. *State v. Chandler*, 10th Dist. Franklin No. 13AP-452, 2013-Ohio-4671, ¶ 7. A hearing is required only if the facts alleged by the defendant, accepted as true, would require that the defendant be allowed to withdraw the plea. *Id.*; *Rodriguez* at ¶ 23. A trial court's decision whether to hold a hearing on a postsentence motion to withdraw a guilty plea is likewise reviewed for abuse of discretion. *See, e.g., State v. Rice*, 2d Dist. Montgomery No. 27045, 2017-Ohio-122, ¶ 10; *State v. Bruce*, 10th Dist. Franklin No. 2016-Ohio-7132, ¶ 7-8.

{¶12} In this case, Vihtelic argues that he should have been permitted to withdraw his guilty plea because the indictment did not identify the specific location within Cuyahoga County — i.e., the particular city or street address — where the offense to which he pled guilty — i.e., the murder of his half-brother — was committed. He contends that this omission (1) violated R.C. 2941.03(D), Crim.R. 7(B) and constitutional "fair notice" requirements and (2) deprived the trial court of subject matter jurisdiction over the case. He further contends that the defect in the indictment denied him effective assistance of counsel and precluded him from entering his guilty plea knowingly, intelligently and voluntarily, resulting in manifest injustice. Vihtelic's arguments are meritless.

{¶13} Ineffective assistance of counsel can, under certain circumstances, constitute manifest injustice warranting a withdrawal of a guilty plea. *See, e.g., State v. Montgomery*, 8th Dist. Cuyahoga No. 103398, 2016-Ohio-2943. To prevail on a claim

of ineffective assistance of counsel, a defendant must demonstrate: (1) deficient performance by counsel, i.e., that counsel's performance fell below an objective standard of reasonable representation, and (2) that counsel's errors prejudiced the defendant, i.e., a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. "Reasonable probability" is "probability sufficient to undermine confidence in the outcome." *Strickland* at 694. Neither of these requirements have been met in this case.

{¶14} By pleading guilty, Vihtelic waived any error arising from a defect in the indictment or the right to claim ineffective assistance of counsel, except to the extent that the defect or ineffective assistance caused his guilty plea to be less than knowing, intelligent and voluntary. *See, e.g., State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, 844 N.E.2d 307, ¶ 73; *State v. Martin*, 8th Dist. Cuyahoga No. 95281, 2011-Ohio-222, ¶ 20; *Vinson*, 8th Dist. Cuyahoga No. 103329, 2016-Ohio-7604, at ¶ 30; *State v. Williams*, 8th Dist. Cuyahoga No. 100459, 2014-Ohio-3415, ¶ 11. As the Ohio Supreme Court explained in *State v. Spates*, 64 Ohio St.3d 269, 595 N.E.2d 351 (1992):

> "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea * * *."

Spates at 271-272, quoting *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *see also State v. Patterson*, 5th Dist. Muskingum No. CT2012-0029, 2012-Ohio-5600, ¶ 19 (indicating that where a defendant enters a guilty plea, "[t]he defendant's only recourse, with regard to non-jurisdictional defects, is to raise an issue with the voluntary and intelligent character of the guilty plea or with the effectiveness of his trial counsel for rendering advice pertaining to the plea").

{¶15} Recognizing the hurdle presented by his guilty plea, Vihtelic argues that, because the indictment omitted the specific location of the offense, his trial counsel was unable to investigate the crime scene before advising Vihtelic with respect to his guilty plea, thus providing ineffective assistance of counsel. Vihtelic further argues that because trial counsel could not have properly advised him with respect to his plea without investigating the crime scene, his guilty plea was not entered knowingly, intelligently and voluntarily, resulting in manifest injustice.

{¶16} Vihtelic has not shown that there was any defect in the indictment, much less any defect in the indictment that caused (1) his trial counsel to provide ineffective assistance or (2) his guilty plea to be less than knowingly, intelligently and voluntarily entered.

{¶17} The purposes of an indictment are (1) to "give an accused adequate notice of the charge" and (2) to "enable an accused to protect himself or herself from any future prosecutions for the same incident." *State v. Buehner*, 110 Ohio St.3d 403,

2006-Ohio-4707, 853 N.E.2d 1162, ¶ 7. As the Ohio Supreme Court explained in *State v. Childs*, 88 Ohio St.3d 194, 724 N.E.2d 781 (2000):

> A criminal indictment serves several purposes. First, by identifying and defining the offenses of which the individual is accused, the indictment serves to protect the individual from future prosecutions for the same offense. *State v. Sellards*, 17 Ohio St.3d 169, 170, 478 N.E.2d 781, 783-784 (1985). In addition, the indictment compels the government to aver all material facts constituting the essential elements of an offense, thus affording the accused adequate notice and an opportunity to defend. *Id.* at 170, 478 N.E.2d at 783.

Childs at 198.

> **{¶18}** R.C. 2941.03 provides:
>
> An indictment or information is sufficient if it can be understood therefrom:
> (A) That it is entitled in a court having authority to receive it, though the name of the court is not stated;
> (B) If it is an indictment, that it was found by a grand jury of the county in which the court was held, or if it is an information, that it was subscribed and presented to the court by the prosecuting attorney of the county in which the court was held;
> (C) That the defendant is named, or, if his name cannot be discovered, that he is described by a fictitious name, with a statement that his true name is unknown to the jury or prosecuting attorney, but no name shall be stated in addition to one necessary to identify the accused;
> (D) *That an offense was committed at some place within the jurisdiction of the court*, except where the act, though done without the local jurisdiction of the county, is triable therein;
> (E) That the offense was committed at some time prior to the time of finding of the indictment or filing of the information.

(Emphasis added.)

> Crim.R. 7(B) provides, in relevant part:
>
> The statement [that the defendant has committed a public offense] may be made in ordinary and concise language without technical averments or

> allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged.

{¶19} Vihtelic pled guilty to an amended count of murder in violation of R.C. 2903.02(A), along with an associated firearm specification. The specific location where the murder occurred was not an element of that offense. Accordingly, the specific location where the murder occurred did not need to be alleged in the indictment. *See White v. Maxwell*, 174 Ohio St. 186, 188, 187 N.E.2d 878 (1963) ("[T]he time and place and type of weapon used in commission of the crime" are not "essential elements in an indictment, and if petitioner required such information it was available to him by means of a bill of particulars."); *State v. White*, 8th Dist. Cuyahoga No. 95066, 2011-Ohio-4089, ¶ 15 ("Generally, the indictment need only state in general terms that the court has jurisdiction over the subject matter and that the offense was committed in the territory encompassed by the court."), citing *State v. Bragg*, 8th Dist. Cuyahoga No. 70461, 1996 Ohio App. LEXIS 3853 (Sept. 5, 1996). It was sufficient that the indictment alleged that the offense was committed at some place within the court's jurisdiction, i.e., "in the County of Cuyahoga." *See, e.g.*,

State v. Morgan, 8th Dist. Cuyahoga No. 70407, 1996 Ohio App. LEXIS 3855, *3-4 (Sept. 5, 1996) ("in the County of Cuyahoga" language in the indictment "sufficiently met the requirements of R.C. 2941.03").

{¶20} In support of his contention that the indictment was defective because it "failed to specify the 'place' within the county of Cuyahoga [where] the offense was committed" and that the trial court, therefore, lacked subject matter jurisdiction over the case, Vihtelic cites *State v. Luna*, 96 Ohio App.3d 207, 644 N.E.2d 1056 (6th Dist.1994). That case is, however, inapposite.

{¶21} In *Luna*, the defendant challenged the sufficiency of an indictment on a count of theft by deception. She claimed that the indictment was defective because it failed to include allegations of facts establishing the essential element of deception and failed to allege that the offense "was committed at some place within the jurisdiction of the court" as required under R.C. 2941.03(D). *Id.* at 209-210. She first raised the issue at her arraignment and thereafter filed motions to dismiss or quash the indictment on sufficiency grounds. *Id.* at 208. The defendant pled no contest to the theft by deception count. *Id.* The trial court— the Huron County Court of Common Pleas — accepted the defendant's no contest plea and, after sentencing, the defendant appealed. *Id.* at 208-209. The count of the indictment to which the defendant pled stated:

> The Grand Jurors, upon their oath, further find that on or about the 1st day of September, 1991, [the defendant], did unlawfully, with purpose to deprive the owner of property or services, knowingly obtain or exert control over either property or services is [sic] three-hundred dollars or more and is less than five-thousand dollars, in violation of Section 2913.02(A)(3) of the Revised Code, 'Theft', (a felony of the fourth degree), contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio.

Id. at 210.

{¶22} The Sixth District agreed that the indictment was "faulty" and that the trial court had erred when it denied her motion to dismiss the indictment. As such, the Sixth District held that her conviction for theft by deception was "void." *Id.* In this case, by contrast, the indictment specifically alleged that the offense was committed at a location within the trial court's jurisdiction, i.e., "in the County of Cuyahoga."

{¶23} Contrary to Vihtelic's assertion, the jurisdiction of a court of common pleas in a criminal case in Ohio does not depend upon the precise location within the county where an offense is committed. *See, e.g., State v. Malone*, 8th Dist. Cuyahoga No. 71094, 1997 Ohio App. LEXIS 306, *3-4 (Jan. 30, 1997) (where indictment stated that offense occurred in Cuyahoga County, the indictment was sufficient "[a]s the location of the alleged offense was within the jurisdiction of the trial court," and the trial court had subject matter jurisdiction to determine the case); *State v. Munici*, 8th Dist. Cuyahoga No. 70405, 1996 Ohio App. LEXIS 3544, *3 (Aug. 22, 1996) (where indictment stated that the murder was committed "in the County of Cuyahoga," the indictment was sufficient under R.C. 2941.03(D) and was not void for lack of subject matter jurisdiction because "[t]his designation of place in the indictment is within the jurisdiction of the Cuyahoga County Court of Common Pleas").

{¶24} Courts of common pleas have statewide jurisdiction. *See* Ohio Constitution Article IV, Section 4(A); *State v. Wyley*, 8th Dist. Cuyahoga No. 102889, 2016-Ohio-1118, ¶ 11; *Wiegand v. Deutsche Bank Natl. Trust*, 8th Dist. Cuyahoga No. 97424, 2012-Ohio-933, ¶ 4 ("The Ohio Constitution created the several courts of common

pleas and granted them statewide jurisdiction."). The courts of common pleas have "original jurisdiction of all crimes and offenses, except * * * minor offenses[.]" R.C. 2931.03. Further, R.C. 2901.11 provides that "[a] person is subject to criminal prosecution and punishment in this state if * * * [t]he person commits an offense under the laws of this state, any element of which takes place in this state." Thus, the trial court did not lack subject matter jurisdiction simply because the indictment did not specify the exact location where the murder occurred.

{¶25} In *State v. Bragg*, 8th Dist. Cuyahoga No. 70461, 1996 Ohio App. LEXIS 3853 (Sept. 5, 1996), this court rejected a similar argument. In *Bragg*, the defendant, acting pro se, filed a motion for relief from judgment pursuant to Civ.R. 60(B) in which he claimed the trial court lacked subject matter jurisdiction because the indictment failed to specify the place of the offense. *Id.* at *1-2. In affirming the trial court's denial of the motion, this court distinguished *Luna*, stating as follows:

> [*Luna*] is not on point. *Luna* restates accepted law that the indictment must contain words which are sufficient to give the accused notice of all the elements of the offense charged. *Id.* at 210. Because venue is not an element of the offense, the indictment need only state in general terms that the court has jurisdiction of the subject matter and that the offense was committed in the territory encompassed by the court. * * *
>
> Although precise times and dates are not ordinarily essential elements of an offense, a defendant may seek this information by filing a motion for a bill of particulars. R.C. 2941.07; *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985). The bill of particulars does not serve as a substitute for discovery, but the state does have the obligation to supply specific times and dates of offenses where it possesses such information. *Id.* at syllabus.

> Defendant filed just such a motion for a bill of particulars. In response, the state claimed the offense occurred "on or about the 11th day of March, 1989, at approximately 5:00 a.m., in the vicinity of East 65 [sic] Street and Sidaway Avenue, in the City of Cleveland, Ohio * * *." This information more than satisfied the state's obligation to inform defendant of the time and place of the offense.

Id. at *2-4.

{¶26} In this case, defense counsel "filed just such a motion for a bill of particulars," *Id.* at *4, and, in response, the state claimed that the offense occurred "on or about the 26th day of January, 2007, at approximately 3:00 to 4:00 p.m., and at the location of 580 East 213th Street, in the City of Euclid, Ohio." Indeed, the record reflects that the specific location of the offense — the kitchen of Vihtelic's mother's home, where Vihtelic lived with his mother and Mogar — was disclosed to defense counsel several times during the pendency of the case, including in the bill of particulars, through a reading of his mother's witness statement and Vihtelic's oral statements to police (in which he described how and where he shot Mogar) and in documents produced in response to Vihtelic's discovery requests. There is nothing in the record to indicate that defense counsel was precluded from investigating the allegations against Vihtelic, or that defense counsel, in fact, failed to investigate the allegations against Vihtelic. To the contrary, the record reflects that, within a week after defense counsel was appointed in May 2007, he filed a motion for appointment of an investigator. Defense counsel's

motion was granted and the trial court promptly appointed an investigator to assist with Vihtelic's defense in June 2007.

{¶27} Nor has Vihtelic alleged any facts that would support his claims that the trial court "violated Crim.R. 1(B)" or "violated appellant's constitutional right to disinterested tribunal."

{¶28} Although Vihtelic argues that the trial court should have conducted an evidentiary hearing so that testimony could have been elicited from defense counsel to determine how defense counsel was "able to conduct an investigation of the unknown," this was unnecessary because, as discussed above, the record reflects that the location of the crime was, in fact, disclosed to defense counsel through the information provided in the bill of particulars and discovery.

{¶29} Vihtelic has not alleged any facts that could reasonably support the conclusion that withdrawal of his guilty plea was necessary to correct a manifest injustice. Accordingly, the trial court did not abuse its discretion in denying Vihtelic's motion to withdraw his guilty plea without a hearing. Vihtelic's assignment of error is overruled.

{¶30} Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____
EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
LARRY A. JONES, SR., J., CONCUR