[Cite as *State v. Roberts*, 2010-Ohio-1436.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93439 and 93440

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LESEAN (LESHAN) ROBERTS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-342752 and CR-295492

BEFORE: Celebrezze, J., Rocco, P.J., and Kilbane, J.

RELEASED: April 1, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} In these two consolidated appeals, appellant, Lesean Roberts, wishes to withdraw his guilty pleas after more than a decade and after his sentences in both cases have been served. After a review of the record, appellant's motions and affidavits, and the pertinent case law, we affirm the determination of the trial court denying appellant's motions without hearing.

{¶ 2} In 1993, appellant was arrested and indicted on charges of felonious assault, aggravated assault, and possession of criminal tools. On October 4, 1993, appellant, represented by counsel, pled guilty to one count of aggravated assault with a violence specification, for which he received one to one-and-one-half years in prison. Appellant was released from prison on February 23, 1995. This concluded Cuyahoga County Common Pleas Case No. CR-295492 (the "1993 Case").

{¶ 3} Then, in 1996, appellant was arrested and indicted on charges of possession of cocaine in an amount greater than one hundred grams and possession of criminal tools. On April 23, 1997, he pled guilty to one count of possession of cocaine in an amount greater than 25 grams but less than 100 grams. He was sentenced to seven years of incarceration. Appellant has since served the entirety of his prison sentence and has been released, concluding Cuyahoga County Common Pleas Case No. CR-342752 (the "1996 Case").

{¶ 4} On May 20, 2009, appellant submitted motions to the trial court in these two cases to withdraw his guilty pleas, some 16 and 12 years, respectively, after those pleas had been entered. Appellant attached poorly drafted affidavits to his petitions, claiming various violations of his rights that made his pleas unintelligent, unknowing, and involuntary. The trial courts rejected appellant's arguments and denied his request to withdraw his pleas without holding a hearing. Appellant then filed the instant appeals, claiming the same error occurred in each case; namely that "[t]he trial court erred when it denied appellant's motion to vacate his guilty plea and request for a hearing."

Law and Analysis

Postsentence Motion to Withdraw Guilty Plea

{¶ 5} After a defendant's sentence has been imposed, his guilty plea may be withdrawn only if he is able to show manifest injustice. Crim.R. 32.1; *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715; *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus. Whether a defendant has shown manifest injustice is within the sound discretion of the trial court. *Smith*, supra, paragraph two of the syllabus. Accordingly, an appellate court will review a trial court's denial of a motion to withdraw a guilty plea using an abuse of discretion standard. *State v. Nathan* (1995), 99 Ohio App.3d 722, 725, 651 N.E.2d 1044. To constitute an

abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. "'The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations.'" *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W.2d 810. In order to have an abuse of that choice, the result must be "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." Id.

{¶ 6} Crim.R. 32.1 governs motions to withdraw guilty pleas and states that "[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." Although "presentence motions to withdraw guilty pleas should be freely granted, a defendant 'does not have an absolute right to withdraw a plea prior to sentencing.'" *State v. McGregor*, Cuyahoga App. No. 86165, 2005-Ohio-5561, ¶3, quoting *Xie*, supra, at 527. "Instead, the trial court 'must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea.'" Id. However, "[a] trial court need not hold an evidentiary hearing on a postsentence motion to

withdraw a guilty plea if the record indicates the movant is not entitled to relief and the movant has failed to submit evidentiary documents sufficient to demonstrate a manifest injustice. *State v. Russ*, Cuyahoga App. No. 81580, * * * 2003-Ohio-1001, at ¶12." *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, 884 N.E.2d 607, ¶6. Additionally, "it has been held that an undue delay between the occurrence of the alleged cause for withdrawal and the filing of the motion is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *Smith* at 264, citing *Oksanen v. United States* (C.A. 8, 1966), 362 F.2d 74.

The 1993 Case

{¶ 7} In regard to appellant's 1993 Case, he claims in his affidavit attached to the motion that he did not want to take a plea deal and that his attorney failed to advise him of the rights he was giving up by pleading guilty.[1]

{¶ 8} "[T]he good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by [the trial] court."

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[1] This affidavit states in its entirety:

"AFFIDAVIT OF LESEAN ROBERTS[.]

"*Now comes the affiant's attorney in fact and being duly sworn, states the following:*

"1. That LeSean Roberts was [sic] did not want to take a plea in the CR 93 295492.

"2. That I was unfamiliar with the proceedings in criminal court.

"3. That my attorney advised me to take a plea but did not inform me of the constitutional rights that I would be giving up.

"Further the affiant's attorney in fact, sayeth naught."

This affidavit was signed by Tiffiney Cleveland-Roberts and notarized by appellant's counsel.

Smith, supra, at paragraph two of the syllabus. This court has held that "[a] trial court may discount self-serving affidavits from the petitioner or his family members. *State v. Moore* (1994), 99 Ohio App.3d 748, 651 N.E.2d 1319. Although a trial court should give deference to affidavits filed in support of a postconviction relief petition, it may exercise its discretion when assessing the credibility of the affidavits. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 714 N.E.2d 905, paragraph one of the syllabus." *State v. Stedman*, Cuyahoga App. No. 83531, 2004-Ohio-3298, ¶29. See, also, *State v. Brown*, 167 Ohio App.3d 239, 244, 2006-Ohio-3266, 854 N.E.2d 583 (holding "[appellant's] own self-serving declarations of coercion would not be enough to show manifest injustice").

{¶ 9} Appellant supports his motion to withdraw solely with his affidavit. This affidavit is troubling for its lack of clarity and is, frankly, poorly drafted. The affidavit purports to be that of appellant, but it is sworn to be that of appellant's attorney-in-fact. Also, it is signed by one Tiffiney Cleveland-Roberts without any explanation as to who this person is. Some parts of the affidavit are in the third-person perspective, naming appellant, while others are written in a first-person narrative, as if written by appellant himself.

{¶ 10} Even if we were to take this affidavit to be that of appellant, it does not show a manifest injustice occurred when the trial court accepted

appellant's guilty plea in the 1993 Case. Being unfamiliar with criminal proceedings is not grounds for withdrawing a guilty plea. Appellant also claims his attorney did not inform him of the rights he was giving up by pleading guilty. This also does not demonstrate such an injustice that would make appellant's plea unknowing or unintelligent, necessitating its withdrawal.

{¶ 11} Before accepting a plea of guilty or no contest, a trial court must satisfy itself that any accused person is aware of his constitutional rights and that by pleading guilty he is waiving a number of those rights. Crim.R.11(C)(2). When accepting appellant's plea, the trial court, through its docket, stated: "Now comes * * * the defendant, Leshan Roberts, in open court with his counsel present and was *fully advised of his constitutional rights*. * * * said defendant retracts his former plea of not guilty heretofore entered, and for plea to said indictment says he is guilty." (Emphasis added.) Because appellant has not provided this court with a transcript from this hearing, this court must assume that the trial court engaged appellant in a valid plea colloquy where those rights were discussed. *State v. Harris*, Cuyahoga App. No. 89911, 2008-Ohio-2044, ¶16, quoting *Bambek v. Catholic Diocese of Cleveland*, Cuyahoga App. No. 86894, 2006-Ohio-4883. See, also, *Middleburg Hts. v. Brown* (1986), 24 Ohio St.3d 66, 68, 493 N.E.2d 547.

{¶ 12} Appellant has not demonstrated any impropriety or other factor that would necessitate a trial court to allow him to withdraw his plea. The trial court acted properly in denying appellant's motion, filed some 16 years after his plea was entered, to withdraw his 1993 guilty plea without holding a hearing.

The 1996 Case

{¶ 13} With regard to appellant's 1996 guilty plea, the affidavit provided in support of his motion to withdraw his plea is similarly troubling. Again, although different in content from the affidavit in the 1993 Case, this affidavit purports to be from appellant, but made by appellant's attorney-in-fact. Again, it is signed by Tiffiney Cleveland-Roberts without specifying exactly who she is or what personal knowledge she has regarding appellant's guilty plea.

{¶ 14} Taking this affidavit to be that of appellant, it does not reflect that a manifest injustice occurred. Appellant claims in this affidavit that his attorney would not investigate witnesses, would not discuss trial strategy, and that the trial court improperly coerced him into pleading guilty by stating the court had no problem with sentencing appellant to 21 years if he refused to plead.

{¶ 15} As explained above, the trial court may properly discount the self-serving affidavit of a movant where it is not supported by any credible

evidence. *Moore*, supra. The statements made by the trial court that appellant claims were coercive in nature would be in the transcript of the pretrial hearings and would support appellant's claim; however, not being supplied with a transcript, we must assume regularity in the proceedings below. *Harris* at ¶16. Therefore, this assertion is unsupported and was properly discounted by the trial court. See *Mays* at ¶24 ("'Generally, a self-serving affidavit * * * is insufficient to demonstrate manifest injustice'").

{¶ 16} Appellant also claims that his counsel refused to discuss trial tactics and would not listen to him when he claimed there were mitigating circumstances. It is hard to see what mitigating circumstances would excuse appellant from possessing a large quantity of crack cocaine. However, if these claims were true, they were true at the time of appellant's plea. Appellant has made no effort to explain why there was a 12-year delay between entering a plea and its attempted withdrawal. As previously stated, such a long delay casts serious doubt on the veracity of appellant's claims. *Smith* at 264. This is especially true when the events appellant claims rendered his plea involuntary were known at the time the plea was entered without any new information coming to light in the intervening time. See *Smith* at 264, fn. 3.

{¶ 17} Appellant has failed to support his claims with any evidence outside of his own self-serving affidavit. He has failed to provide a record of

his plea hearing, which would allow this court to judge the veracity of some of those statements. The passage of over a decade also casts serious doubt on the claims appellant makes in his affidavit. The trial court did not abuse its discretion when it denied appellant's motion without holding a hearing. Without some evidence outside of appellant's own statements to demonstrate a manifest injustice, appellant is not entitled to a hearing on such a belated motion.

Conclusion

{¶ 18} Appellant has failed to show a manifest injustice that must be corrected by allowing him to withdraw his guilty pleas. Viewing the motions, supporting affidavits, and the sparse record supplied by appellant, the trial court did not err when it denied his motions without holding an evidentiary hearing. Therefore, appellant's assigned errors are overruled.

It is ordered that appellee recover from appellant 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 common pleas court 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.

FRANK D. CELEBREZZE, JR., JUDGE

KENNETH A. ROCCO, P.J., and
MARY EILEEN KILBANE, J., CONCUR