

[Cite as *State v. Spencer*, 2010-Ohio-1667.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92992

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERMAINE SPENCER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-346501 and CR-347670

BEFORE: Celebrezze, J., Stewart, P.J., and Jones, J.

RELEASED: April 15, 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} This appeal stems from the circumstances surrounding appellant, Jermaine Spencer, entering guilty pleas to charges of murder with a three-year firearm specification, carrying a concealed weapon, possession of cocaine, having a weapon while under disability, and aggravated menacing.¹ Appellant now claims his pleas were not knowingly, intelligently, and voluntarily made. After a thorough review of the record, and for the following reasons, we uphold the decision of the trial court denying appellant's motion to withdraw his guilty pleas.

{¶ 2} On December 13, 1996, appellant's sister, Lashandra Spencer, came to him hysterically explaining that she had been sexually assaulted. Rather than call the police, appellant traveled to the scene of the alleged incident to confront the purported offender. His sister followed him to the scene. Appellant shot and killed 18-year-old Cornelius Haywood.

{¶ 3} Appellant and his sister were soon arrested and charged. Appellant was appointed two attorneys to represent him. After disagreements with one of the attorneys arose, appellant fired him and a new

¹ Appellant was charged in three separate cases so that he and his sister could be tried together on murder charges without prejudicing his sister. This appeal concerns only Case No. CR-346501, in which he was charged with aggravated murder with a three-year gun specification and having a weapon while under disability. He was additionally charged in Case Nos. CR-345349 (carrying a concealed weapon, possession of drugs, having a weapon under disability) and CR-346532 (felonious assault on a police officer), but neither of these cases are on appeal here. Although Case No. CR-347670 was included in appellant's Notice of Appeal, it pertains only to his sister and is not a part of this appeal.

attorney was appointed in his stead. Plea negotiations were ongoing throughout pretrials. The state refused to offer appellant's sister a plea agreement unless appellant also agreed to plead guilty. At a pretrial held on August 11, 1997, appellant rejected a plea deal, adamantly preferring to go to trial because he asserted he did not intend to kill anyone. Also discussed at this pretrial was the fact that appellant's sister would be charged and tried along with him for aggravated murder if he did not accept a plea deal. Appellant did not believe his sister should be charged with anything, which was another reason he refused to accept a plea deal.

{¶ 4} Trial was scheduled to commence on September 22, 1997. On that day, the trial court held a hearing on appellant's motion to suppress inculpatory statements he made to police. The trial court refused to grant appellant's motion, and plea negotiations began anew. After a recess where appellant discussed his chances of success at trial, his possible sentence under the terms of the plea agreement, and his sister's plea agreement should he plead guilty, appellant agreed to plead guilty. As part of the deal, appellant would plead guilty to one count of murder with a three-year firearm specification, carrying a concealed weapon, possession of drugs, having a weapon while under disability, and aggravated menacing, and the likely sentence would be 15 years to life for the murder charge with three additional years for the firearm specification. Appellant's sister would plead to

involuntary manslaughter with her likely sentence not including any prison time.

{¶ 5} After entering his pleas, appellant was sentenced to 18 months incarceration for carrying a concealed weapon; 18 months for possession of cocaine; one year for having a weapon while under disability; 15 years to life for murder, plus three years for the firearm specification; a \$10,000 fine for murder; and a \$500 fine for aggravated menacing. All terms of imprisonment were to be served concurrently except for the three-year firearm specification, which was to be served consecutively to the 15-year term for murder. Appellant's sister pleaded guilty to involuntary manslaughter and received two years of community control with one year of house arrest, as well as a monetary fine, which was later amended to several hundred hours of community service.

{¶ 6} Shortly after sentencing, on October 16, 1997, appellant filed a pro se motion to withdraw his guilty plea, which was denied. Appellant also filed a motion for postconviction relief in April 1998, which was also unsuccessful. Appellant, again pro se, appealed the denial of his motion for relief from judgment, but this court dismissed the appeal.

{¶ 7} On March 18, 2008, citing what he contends was newly discovered information, appellant filed another motion to withdraw his guilty plea. The

motion was denied on February 13, 2009. This appeal followed with appellant citing five assignments of error for our review.²

Law and Analysis

Standard of Review

{¶ 8} 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 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

² Appellant's assignments are included in appendix A of this opinion.

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.*

Undue Delay

{¶ 9} In appellant’s third assignment of error, he claims that the delay in bringing his motion to withdraw his guilty plea must be excused because the trial court informed him that there would be no appeal. While there is no time limit in which to bring a motion to withdraw a guilty plea, it should be noted that “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. U.S.* (C.A.8, 1966), 362 F.2d 74. Appellant previously filed a motion to withdraw his plea soon after sentencing, as well as an appeal from the trial court’s denial of his postconviction relief motion. This cuts against his argument that delay must be excused because of the misstatements of the trial court. Appellant did, in fact, appeal. Because there is no specific time limit for a motion to withdraw a guilty plea, appellant’s motion is not barred, but its credibility is negatively impacted by its tardiness of some 11 years.

Res Judicata

{¶ 10} In appellant's fourth assigned error, he argues that res judicata does not bar the claims made in his present motion to withdraw his guilty plea.

{¶ 11} The doctrine of res judicata bars successive litigation of issues and events that were or could have been raised in the prior proceedings. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226. In this case, "[t]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." *Id.* at 382, quoting *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62, 558 N.E.2d 1178.

{¶ 12} Appellant alleges issues that were or could have been raised in his prior motions. "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

{¶ 13} In appellant's October 1, 1997 motion to withdraw his guilty plea, he argued that his counsel was ineffective, that he was coerced into accepting a plea, and that the trial court was biased. In his April 9, 1998 postconviction relief motion, he raised issues involving the coercive nature of the state's

conditional offer to his sister, ineffective assistance of counsel, improprieties by the trial judge, and a conflict of interest with trial counsel. These same claims are the basis for much of the current motion before this court.

{¶ 14} Appellant's claims in his first assignment of error, which take issue with the trial court's actions and alleged bias as well as the voluntary nature of his plea, were or could have been brought in his earlier motions and are barred by res judicata.

{¶ 15} Appellant argues that the doctrine cannot apply because he filed these prior motions pro se, and the holding in *Perry* applies only to motions filed with representation. This court has ruled otherwise. In *State v. Adamson* (Mar. 23, 1995), Cuyahoga App. No. 67187, we held: "*Perry's* reference to representation concerns the criminal trial and appeal, not the postconviction proceeding. A petition for postconviction relief is a civil proceeding. * * * We find no reason to preclude the application of res judicata because a petitioner in a civil proceeding without the right to counsel acted pro se. This is especially true where, as here, the claims were actually raised in the earlier petition." (Internal citations omitted.) See, also, *State v. Jackson*, Cuyahoga App. No. 92013, 2009-Ohio-3293, at ¶21 (holding the "trial court's denial of appellant's first two [pro se] motions to withdraw his guilty plea was an adjudication on the merits of his claims and was based upon the same facts and sought the same relief as the instant motion, the trial

court's denial of these motions operated under res judicata to bar the successive motions").

{¶ 16} Therefore, res judicata bars the claims in appellant's first assignment of error as well as many of the claims in his second assignment of error.

Newly Discovered Evidence of Ineffective Assistance of Counsel

{¶ 17} In appellant's second assignment of error, he claims that newly discovered evidence of his trial counsel's ineffectiveness requires the withdrawal of his guilty plea.

{¶ 18} A claim of ineffective assistance of counsel is a valid reason to withdraw a guilty plea if it resulted in a manifest injustice. *State v. Turner*, 171 Ohio App.3d 82, 2007-Ohio-1346, 869 N.E.2d 708. Because appellant has previously raised issues of ineffective assistance of counsel, only those claims of ineffectiveness based on newly discovered evidence will be addressed; the rest are barred by res judicata as explained above.

{¶ 19} Appellant argues he only recently discovered that trial counsel informed him under the wrong probation statutes and that trial counsel misinformed him about the evidence the state had against him.

{¶ 20} Appellant supported his motion to withdraw with two affidavits, one from him and one from his co-defendant sister. In *State v. Kenney*,

Cuyahoga App. Nos. 81752 and 81879, 2003-Ohio-2046, this court recognized that “the courts have allowed an exception to res judicata when a petitioner presents new, competent, relevant and material evidence dehors the record. However, ‘[e]vidence presented outside the record must meet some threshold standard of cogency * * *.’ Equally important, as our court has emphasized, ‘the evidence dehors the record must not be evidence which was in existence and available for use at the time of trial and which could and should have been submitted at trial if the defendant wished to use it.’” (Internal citations omitted.) Id. at ¶45.

{¶ 21} “[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.” *Smith*, supra, at paragraph two of the syllabus. The trial court may properly discount the self-serving affidavits of the co-defendants in this case. 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, 2006-Ohio-3266, 854 N.E.2d 583, ¶13

(holding “[appellant’s] own self-serving declarations of coercion would not be enough to show manifest injustice”).

{¶ 22} The evidence submitted by appellant fails to meet this “threshold standard of cogency.” Even if appellant’s supporting affidavits are to be believed, parole is not guaranteed. See *Papp v. State Adult Parole Auth.*, Franklin App. No 01AP-892, 2002-Ohio-199. Also, “[e]rroneous advice of counsel as to the penalty which could be imposed does not, in and of itself, lead to manifest injustice.” *U. S. v. Scharf* (C.A.8, 1978), 568 F.2d 106, 108. Therefore, this alleged error by counsel does not evidence a manifest injustice and is not sufficient grounds to warrant a hearing on appellant’s present motion without more. *State v. Hutchings*, Stark App. No. 2003CA00343, 2004-Ohio-3532.

{¶ 23} In an effort to show the additional injustice required in the above cases, appellant also argues that the weapon seized from him when he was arrested did not ballistically match the murder weapon, contrary to what his attorney had informed him. He attached an unauthenticated report to his motion, which he purports shows that the ballistic tests did not match. Again, appellant fails to demonstrate that a manifest injustice has occurred, even if this document were what appellant purports it to be. There was ample evidence, including appellant’s own statements that he shot and killed

Cornelius Haywood. The evidence appellant claims is newly discovered does not necessitate the trial court to allow him to withdraw his pleas.

Evidentiary Hearing

{¶ 24} In appellant's final assigned error, he argues that the trial court abused its discretion when it failed to hold a hearing on his motion to withdraw his guilty pleas. For the reasons set forth above, the trial court did not abuse its discretion when it rejected appellant's motion without holding a hearing. What was not properly barred by res judicata was insufficient to demonstrate that a manifest injustice resulted from appellant's guilty pleas.

Conclusion

{¶ 25} Appellant's successive attempts to withdraw his guilty pleas mean that much of the current petition is properly barred by res judicata. While the oppressive nature of the conditional plea agreement troubles this court, that issue was previously addressed by the trial court and appealed to this court. Claims of ineffective assistance of counsel based on newly discovered evidence lack a showing of a manifest injustice sufficient to warrant a hearing on the issue. Appellant's statements to the police as well as other evidence showed that appellant shot and killed Cornelius Haywood. Appellant does not argue otherwise, but merely contends that counsel misinformed him regarding the ballistic evidence and the probation statutes. This does not

demonstrate a manifest injustice. Appellant's motion to withdraw his guilty pleas was properly denied by the trial court.

{¶ 26} Judgment affirmed.

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

MELODY J. STEWART, P.J., and
LARRY A. JONES, J., CONCUR

Appendix A

Appellant's Assignments of Error:

I. "The trial court erred in denying relief in appellant's 32.1 motion to withdraw the guilty plea where evidence on and off the record established that his guilty plea was not entered voluntarily; it was induced by promises and threats, not of his own free will in violation of Crim.R. 11(C)(2)(a)."

II. "Defendant's pleas were based on defense counsel's erroneous and incorrect legal advice; the pleas were not entered voluntarily, knowingly and understandingly, in violation of defendant's rights under the Fourteenth Amendment to the United States Constitution."

III. "As a matter of law, the delay in this case must be excused because the trial court instructed appellant Spencer that there was no appeal in this case;

forfeited [sic] his right to appeal. After discovering evidence counsel's [sic] incompetence is sufficient to find the delay not caused by appellant."

IV. "As a matter of law, appellant's claims are not barred by res judicata."

V. "As a matter of law, appellant's [sic] should have been afforded an evidentiary hearing."