

[Cite as *State v. Nieves*, 2010-Ohio-514.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92797

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARLOS NIEVES

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-497318

BEFORE: Stewart, J., Gallagher, A.J., and Sweeney, J.

RELEASED: February 18, 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).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Carlos Nieves, appeals from the judgment of the Cuyahoga County Court of Common Pleas denying his postsentence motion to withdraw his guilty plea. Finding no error, and for the reasons stated below, we affirm.

{¶ 2} Appellant was charged in a 22-count indictment with rape, kidnapping, and gross sexual imposition with sexually violent predator specifications for acts committed against his daughter and the daughter of his former girlfriend, both under the age of 13. These charges subjected appellant to the possibility of a life sentence. Following months of discovery and other pre-trial proceedings, appellant entered a plea of guilty to two counts of gross sexual imposition against his daughter and two counts of rape against his other victim. The trial court sentenced appellant to an agreed-upon sentence of 13 years imprisonment for the four offenses.

{¶ 3} Appellant filed a direct appeal of that judgment, but the appeal was dismissed by this court, pursuant to App.R. 18(C), after appellant failed to file a brief. The trial court subsequently denied appellant's postsentence motion to withdraw his plea. Appellant timely appealed, raising the following single assignment of error.

{¶ 4} “I. Carlos Nieves was deprived of due process of law when the trial court abused its discretion by failing to allow his withdrawl [sic] of guilty plea despite a showing of manifest injustice.”

{¶ 5} A motion to withdraw a guilty plea after the imposition of sentence should be granted by the trial court only in extraordinary cases to correct a “manifest injustice.” Crim.R. 32.1; *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715; *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324. The burden of establishing the existence of a manifest injustice is upon the individual seeking vacation of the plea. *Smith*, paragraph one of the syllabus.

{¶ 6} A motion made pursuant to Crim.R. 32.1, is addressed to the sound discretion of the trial court. *Id.* at paragraph two of the syllabus. Therefore, this court’s review of a trial court’s denial of a postsentence motion to withdraw a guilty plea is limited to a determination of whether the trial court abused its discretion. *State v. Peterseim* (1980), 68 Ohio App.2d 211, 428 N.E.2d 863; *State v. Zimmer*, 8th Dist. No. 90846, 2008-Ohio-6953, at ¶22.

“Absent an abuse of discretion on the part of the trial court in making the ruling, its decision must be affirmed.” *Xie*, 62 Ohio St.3d at 527. “The term ‘abuse of discretion’ connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable

* * *.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 7} Appellant contends that the trial court abused its discretion by denying his motion to vacate the guilty pleas because he received ineffective assistance of counsel. In determining whether there has been ineffective assistance of counsel upon entering a guilty plea, the Ohio Supreme Court has held: “First, the defendant must show that counsel’s performance was deficient. * * * Second, ‘the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty.’” *Xie*, 62 Ohio St.3d at 524, quoting *Hill v. Lockhart* (1985), 474 U.S. 52, 59.

{¶ 8} Appellant argues that he was denied the effective assistance of counsel because only one of his two defense attorneys appeared at the plea hearing and at sentencing. He argues that he was left in the hands of the less experienced of the two attorneys, and that he did not agree to have this attorney represent him alone. He claims it is clear from the record that he had serious misgivings about pleading guilty.

{¶ 9} The record reflects that appellant retained the legal services of two attorneys, brothers, to represent him as co-counsel. The docket demonstrates that throughout the proceedings it was usual for both attorneys to appear on appellant’s behalf. On those occasions when only one attorney appeared, appellant waived the appearance of co-counsel. At the plea

hearing, the trial court asked defense counsel about the absence of co-counsel and inquired whether he was waiving co-counsel's presence. After counsel said that he was, the court addressed appellant personally and explained to him that this meant they were going to proceed without co-counsel's presence.

The court asked appellant, "Is this okay with you?" — to which appellant replied, "Yes, sir."

{¶ 10} Also, while only one attorney was present at the hearing, it is obvious from the record that both attorneys had been involved in appellant's defense. At the plea hearing, defense counsel told the court, "We [appellant and I] have had numerous open discussions, and I've met with his family. I know my co-counsel, * * * , has met with our client as well. And we do believe, Your Honor, today he is making a knowing, intelligent, and voluntary change of plea." Appellant told the court he was satisfied with the services of his lawyers.

{¶ 11} Furthermore, appellant has failed to identify any deficiencies in counsel's performance at the plea hearing or to identify in the record examples of the alleged misgivings. When a defendant enters a guilty plea in a criminal case, the plea must be made "knowingly, intelligently, and voluntarily." *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450. A determination of whether a plea was knowing, intelligent, and voluntary is based upon a review of the record. *State v. Spates*, 64 Ohio

St.3d 269, 272, 1992-Ohio-130, 595 N.E.2d 351. After a review of the record, we find that appellant's plea was entered knowingly, intelligently, and voluntarily. The trial court conducted a thorough colloquy to ensure appellant was aware of the rights he was waiving and the consequences of his plea. The court identified and explained appellant's rights, one at a time, and after each one asked whether appellant understood. In the same way, with each count the court explained the charge and described the possible sentence it carried including any applicable fine. Throughout the colloquy appellant repeatedly responded that he understood the trial court's explanations.

{¶ 12} Additionally, we are not persuaded by appellant's assertion that because he speaks English as a second language he did not understand the proceedings. The transcript reflects that the trial court raised this issue with appellant, who assured the court that he spoke both Spanish and English. He told the court he learned English after moving from Puerto Rico to New York when he was five years old; he took classes in English since he was seven years old; he went to school through the twelfth grade; he was employed locally in the criminal justice system as a corrections officer; and, he has been in an English-speaking environment for 28 years.

{¶ 13} Appellant also complains that he was not afforded his right of allocution at the sentencing hearing. Crim.R. 32(A)(1) confers upon a

criminal defendant an absolute right of allocution by requiring that the trial court, at the time of imposing sentence, “address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.” *Id.* However, the remedy for a trial court’s failure to afford a defendant his Crim.R. 32(A)(1) right of allocution is to order resentencing. *State v. Campbell*, 90 Ohio St.3d 320, 2000-Ohio-183, 738 N.E.2d 1178, paragraph three of the syllabus. Therefore, even if appellant’s allegation that he was not afforded his full right of allocution was accepted as true, it would not provide a basis for the withdrawal of his guilty pleas. Additionally, since the trial court imposed a sentence previously agreed to by appellant, any error in limiting appellant’s comments on his own behalf or in mitigation at sentencing would be harmless.

{¶ 14} Finally, we find appellant’s reliance on *State v. Xie* for the proposition that the trial court was required to hold a hearing before ruling on his motion to be misplaced. *Xie* concerned a presentence motion to withdraw a plea. Under those circumstances, the court concluded, a trial court ordinarily must hold a hearing to determine whether there is a reasonable and legitimate basis to withdraw a guilty plea. Unlike the defendant in *Xie*, appellant filed his motion to withdraw his plea after sentencing. A trial court’s decision to deny a postsentence motion to

withdraw a plea without a hearing is given deference, especially in a case where the trial court took the plea and thus was familiar with the facts of the case. *State v. Atkinson*, 8th Dist. No. 85773, 2005-Oho-5348. In such circumstances, the trial court is in the best position to assess the credibility of the movant's assertions. *Id.*, citing *State v. Smith*, 49 Ohio St.2d at 264.

{¶ 15} In this case, the trial judge who denied the motion had taken appellant's plea and was familiar with the case. Therefore, it was within the trial court's discretion to assess the credibility of the evidentiary material submitted in support of appellant's motion. Based on the record before us, we are unable to conclude that the trial court abused its discretion by denying appellant's motion. Therefore, appellant's single assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, A.J., and
JAMES J. SWEENEY, J., CONCUR