

[Cite as *State v. Simmons*, 2010-Ohio-6188.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94982

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY SIMMONS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512632

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

RELEASED AND JOURNALIZED: December 16, 2010

FOR APPELLANT

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ATTORNEYS FOR APPELLEE

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Anthony Simmons (“Simmons”), appeals the March 23, 2010 decision of the trial court denying his motion to withdraw guilty pleas pursuant to Crim.R. 32.1. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the trial court’s order.

STATEMENT OF THE CASE AND FACTS

{¶ 2} On May 30, 2008, Simmons forced his father at gunpoint into his vehicle and forced him to withdraw \$1,700.00 in cash from his bank account. The offense occurred at 1330 West Boulevard in Cleveland, Ohio.

{¶ 3} Simmons was eventually indicted for aggravated robbery with one- and three-year gun specifications, kidnapping with one- and three-year gun specifications, and having a weapon under disability. Simmons faced a maximum sentence, if convicted at trial, of 28 years.

{¶ 4} On January 14, 2009, a jury was sworn and trial began. Simmons entered into a plea bargain after the state presented its case, but before the jury returned a verdict. Simmons agreed to plea to a charge of aggravated robbery with a one-year gun specification and to having a weapon under disability.

{¶ 5} The state reduced the aggravated robbery charge by deleting the three-year firearm specification and entered a nolle prosequi upon the kidnapping charge pursuant to the terms of the plea bargain. The trial court accepted Simmons's plea on January 16, 2009. At that time, Simmons had an opportunity to speak to the court about any complaints or problems he had with defense counsel or whether any promises or inducements had been made, he did not do so.

{¶ 6} On January 23, 2009, the trial court sentenced Simmons to serve an aggregate term of seven years. On June 2, 2009, an appeal was taken from the conviction and this court dismissed the appeal on July 13, 2009. On December 7, 2009, Simmons filed a motion to withdraw his guilty plea. The state filed its response in opposition to the motion on December 14, 2009. Simmons filed a

responsive pleading. The trial court denied the motion on March 23, 2010 and on April 14, 2010, Simmons appealed.

ASSIGNMENTS OF ERROR

{¶ 7} Simmons assigns two assignments of error on appeal:

{¶ 8} “[1.] The trial court committed reversible error in denying appellant’s motion to withdraw his guilty pleas where appellant clearly demonstrated a manifest injustice.

{¶ 9} “[2.] The trial court committed reversible error in denying appellant an evidentiary hearing on his motion to withdraw his guilty pleas.”

LEGAL ANALYSIS

{¶ 10} Simmons argues that the trial court erred in denying his motion to withdraw his guilty plea and in denying him a hearing. Due to the substantial interrelation between Simmons’s two assigned errors we shall address them together.

{¶ 11} Crim.R. 32.1 states that a “motion to withdraw a plea of guilty or no contest may be made only before a 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.” The defendant has the burden of proof, and post-sentence withdrawal of a guilty plea is only available in extraordinary cases to correct a manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, 264, 361 N.E.2d 1324; *State v. Sneed*, Cuyahoga App. No. 80902, 2002-Ohio-6502. We review the trial court’s decision under an abuse of discretion standard. *Smith*, supra.

{¶ 12} In the case at bar, Simmons argues that it was error for the court to deny his motion to withdraw his guilty plea, or, in the alternative, that the court should have held a hearing before ruling on his motion. In support of his argument, Simmons asserts that his lawyer never came to visit him in jail; he only talked to his lawyer a couple of times on the phone about money; and his trial counsel was inadequate.

{¶ 13} Simmons further argues that his attorney promised him a particular sentence. However, review of Simmons's motion to withdraw his guilty plea did not show that the trial court promised a particular sentence, nor did Simmons argue that the trial court failed to explain his rights to him on the record. Therefore, any promise made by counsel prior to the trial court's plea colloquy with Simons would be vitiated and cannot be used to support the claim that the plea would not have been made.

{¶ 14} In *State v. Blatnik* (1984), 17 Ohio App.3d 201, 203, 478 N.E.2d 1016, the court held that, "manifest injustice, as contemplated by the rule, does not, ipso facto, result from counsel's erroneous advice that a sentence will be imposed." In *Blatnik*, the court affirmed the denial of a motion to withdraw plea that was premised upon counsel's promises of sentence, stating, "this type of speculation by counsel does not result in manifest injustice so as to permit a defendant who has pled guilty to withdraw his guilty plea after sentence has been imposed." 17 Ohio App.3d 201, 203, 478 N.E.2d 1016. As previously stated, appellant failed to demonstrate that any particular promise of sentence was made by the trial court at the time the plea was entered.

{¶ 15} In addition to the previous claims, Simmons also argues that his attorney did not investigate the case. However, contrary to Simmons's claims, there is nothing in the record to demonstrate any deficiency on the part of defense counsel. In fact, appellant's counsel participated in numerous pretrials with the state, received discovery, and negotiated a plea bargain on defendant's behalf.

{¶ 16} We also find appellant's claims of ineffective assistance of counsel to be unfounded as well. In order to substantiate a claim of ineffective assistance of counsel, an appellant must demonstrate that 1) the performance of defense counsel was seriously flawed and deficient, and 2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 17} When Simmons argued that the trial court abused its discretion in denying the motion to withdraw his guilty plea without a hearing, he did not state the names of the witnesses that were allegedly not interviewed. Simmons did not provide the trial court with their expected testimony. Therefore, assuming arguendo, that Simmons's claim that counsel had not interviewed the potential witnesses and was unprepared was true, there was no way for the trial court, or this court, to find Simmons was prejudiced in any way.

{¶ 18} It is evident that without any proffer of evidence that could have been presented, further analysis of that evidence in relation to the state's evidence, there is no way to determine that counsel's alleged ineffectiveness resulted in any prejudice. Therefore, appellant's admission of guilt, made after knowing that he

would be found guilty, does not demonstrate ineffective assistance of counsel.

{¶ 19} In addition, further review of the record demonstrates that defendant failed to file a transcript of the plea hearing. We are therefore unable to review the Crim.R. 11 plea colloquy. “When the transcript, or portion thereof, necessary for the determination of an assigned error is omitted, a reviewing court must presume the validity of the proceedings below.” *State v. Banks*, Cuyahoga App. No. 83783, 2004-Ohio-4478, at ¶15 (citing *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 7, 615 N.E.2d 617); App.R. 9(B). See, also, *State v. Pringle*, Auglaize App. No 2-03-12, 2003-Ohio-4235 (holding that by failing to file a transcript of the plea hearing, the defendant also failed to demonstrate his claimed error in denying his motion to withdraw plea).

{¶ 20} Accordingly, we conclude that Simmons did not meet his burden of proof to show that a manifest injustice occurred, and we cannot find that the court abused its discretion in denying Simmons’s motion to withdraw his guilty plea without holding a hearing. Simmons’s two assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover of 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. 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.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR