

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2004-P-0040
TIMOTHY A. COMBS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2002 CR 0483.

Judgment: Affirmed.

Victor V. Viglucci, Portage County Prosecutor and *Pamela J. Holder*, Assistant Prosecutor, 466 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Erik M. Jones, One Cascade Plaza, Suite 1445, Akron, OH 44308 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} The instant appeal has been taken from a final judgment of the Portage County Court of Common Pleas. Appellant, Timothy A. Combs, seeks the reversal of the trial court's decision to deny his motion to withdraw the guilty plea which he had previously entered in the underlying criminal proceeding.

{¶2} In December 2002, appellant was secretly indicted on four counts of rape under R.C. 2907.02(A)(1)(b). Each count of the indictment stated that appellant had engaged in sexual conduct with an individual who was not his spouse and was under the age of thirteen at the time of the offense. The charges were primarily based upon a

confession appellant had given to the police.

{¶3} Initially, appellant entered a plea of not guilty to all four counts of rape. However, in February 2003, his original trial counsel was able to negotiate a plea agreement with appellee, the State of Ohio. Pursuant to this agreement, appellant was willing to plead guilty to the first count of the indictment; in exchange, appellee agreed to dismiss the remaining charges. Consistent with these basic terms, appellant not only executed a written plea of guilty, but also orally waived his various rights and entered the new plea during a separate hearing before the trial court.

{¶4} Upon accepting the guilty plea, the trial court ordered an expedited investigation into appellant's background for purposes of sentencing and a possible "sexual predator" determination. Upon the completion of the investigation, a separate sentencing hearing was conducted in March 2003. As part of this proceeding, the trial court discussed the relevant statutory factors and then ordered appellant to serve a term of nine years in a state penitentiary on the sole count of rape. The court further determined that appellant should be designated as a sexually oriented offender. Following the hearing, the court issued two judgments setting forth the foregoing decisions.

{¶5} After serving approximately six months of his sentence, appellant filed a petition to set aside his conviction. As the primary basis for this pro se pleading, he argued that his constitutional rights had been violated when he had confessed the underlying crime to a member of the Portage County Sheriff's Department. Two days following the filing of the petition, the trial court rendered a new judgment overruling the request for relief.

{¶6} In February 2004, appellant mailed to the trial judge a personal letter

which was later filed as a docket entry in the underlying case. In this letter, appellant stated that he had never committed the crimes alleged in the indictment, and that he had been forced to accept the plea bargain by his original trial counsel. After reviewing appellant's new assertions, the trial judge first ordered that he be transferred back from the state prison to the Portage County Jail. The trial judge then conducted a new hearing to determine whether appellant was indigent. Upon holding the new proceeding, the trial judge found that he was entitled to the appointment of new trial counsel for the purpose of submitting any pertinent post-conviction motion.

{¶7} In May 2004, the new counsel filed a motion to withdraw the guilty plea in behalf of appellant. As the grounds for this motion, counsel first argued that the plea had not been made knowingly because appellant's original trial counsel had improperly told him that, once he executed the written guilty plea, there would be "no going back." Second, the motion asserted that the plea had not been made knowingly because, after the plea had already been accepted, the original trial counsel informed appellant that there had been no statements from the victim concerning the rapes.

{¶8} On the same day the motion to withdraw was submitted, the trial court conducted a new hearing at which appellant and his new counsel were present. Three days after this hearing, the trial court rendered a new judgment in which the motion to withdraw the guilty plea was expressly overruled. This judgment did not contain any discussion as to the merits of the motion.

{¶9} In now appealing the foregoing judgment to this court, appellant has assigned the following as error:

{¶10} "The trial court abused its discretion by denying appellant's motion to withdraw his guilty plea."

{¶11} Under this assignment, appellant argues that his motion to withdraw should have been granted because he was denied his constitutional right to effective assistance of trial counsel at the time he decided to accept the plea agreement and enter a guilty plea to the first charge. As he did in his motion before the trial court, appellant submits that, immediately before he signed the written plea of guilty, his original trial counsel told him that he would not be permitted to change his mind once he had signed that document. Appellant now contends that counsel's statement was legally incorrect because, under Crim.R. 32.1, it would have been permissible for him to withdraw the guilty plea at any time prior to his sentencing. He further contends that, if he had been aware of his "right" to withdraw the plea prior to sentencing, he would have exercised that "right" because he actually believed that he had never committed the charged offenses.

{¶12} Under Ohio law, a criminal defendant's ability to withdraw a prior plea of guilty is governed by Crim.R. 32.1. This rule states, in its entirety: "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."

{¶13} In interpreting this rule, the courts of this state have indicated that the standard of review a trial court must apply in determining the merits of a motion to withdraw will vary in accordance to when the defendant files the motion. If the motion to withdraw is filed before the trial court has imposed a sentence in the action, the withdrawal of the plea should be allowed when the defendant can establish a reasonable and legitimate basis for the request. *State v. Alford* (Sept. 3, 1999), 11th Dist. No. 98-L-043, 1999 Ohio App. LEXIS 4123, 6, citing *State v. Xie* (1992), 62 Ohio

St.3d 521. Even though it is true that a motion to withdraw should be granted liberally under this standard, the defendant does not have an absolute right to withdraw his plea in all instances; instead, he still has the burden of demonstrating a proper basis for the motion. *State v. Glavic* (2001), 143 Ohio App.3d 583, 587.

{¶14} If a defendant does not submit his motion to withdraw until after his sentence has been imposed, the burden he must carry in order to be entitled to relief becomes much more difficult. As expressly stated in Crim.R. 32.1, a post-sentence motion to withdraw a guilty plea should only be granted when a “manifest injustice” is shown to have taken place. Under this higher standard, a defendant is entitled to prevail on the motion only if the existence of extraordinary circumstances has been established. *State v. Goist*, 11th Dist. No. 2003-T-0135, 2004-Ohio-3926, ¶5, quoting *State v. Smith* (1977), 49 Ohio St.2d 261. This standard is intended to prohibit a defendant from accepting a plea bargain in order to see what sentence will be imposed, and then seeking to withdraw the new plea when the sentence is considered too harsh. *Id.*

{¶15} As the moving party in a “withdrawal” exercise, the burden of proof regarding the “manifest injustice” is entirely on the defendant. *State v. Eshbaugh*, 11th Dist. No. 97-T-0109, 2001-Ohio-8832, 2001 Ohio App. LEXIS 5844, 4. In deciding whether that burden has been met, the trial court is given considerable discretion in determining the amount of credibility and weight to be accorded to the defendant’s factual statements in support of his post-sentence motion. *State v. Hudach*, 11th Dist. No. 2003-T-0110, 2004-Ohio-6949, ¶29. Similarly, the ultimate decision to grant or deny a post-sentence motion to withdraw lies with the trial court’s sound discretion, and thus cannot be reversed on appeal unless it is shown that the trial court acted in an

arbitrary, unconscionable or unreasonable manner. Id.

{¶16} In applying the foregoing precedent to the instant appeal, this court would initially note that the trial court did not state the underlying logic for its holding in the appealed judgment. Thus, it is feasible that the trial court based its decision upon the conclusion that appellant had failed to prove that his original trial counsel actually said to him that, once he executed the written plea, he would not be able to retract that new plea. As to this point, a review of the trial record shows that appellant did not attach any evidentiary materials, such as an affidavit, to his motion to withdraw. Furthermore, even though an oral hearing was held on the motion, the record before us does not contain a transcript of that proceeding; under such circumstances, it must be presumed that any evidence presented during the hearing supported the trial court's ultimate decision. *Eshbaugh*, supra at 3, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197. As a result, the record in this appeal is simply void of any evidence showing that the original trial counsel actually made the disputed statement.

{¶17} Even though the trial court's judgment could be upheld on the foregoing grounds alone, this court would further indicate that, even if we assume for sake of this analysis that appellant was told that he could not change his mind after he has signed the written guilty plea, such a statement would not have affected the validity of the guilty plea. As a general proposition, the propriety of a guilty plea will turn upon whether the defendant is making a knowing and voluntary waiver of his rights. In order to ascertain the nature of the defendant's waiver, the trial court has a duty under Crim.R. 11(C) to speak directly to him about the matter on the record. As part of this colloquy, the trial court must: (1) inform the defendant of the nature of the underlying charges and the maximum penalty possible; (2) inform him of the exact effect of entering a guilty plea;

(3) inform him of the various constitutional rights he will be waiving by making the plea; and (4) determine if he is acting voluntarily at that time. *Eshbaugh*, supra at 5.

{¶18} In regard to the trial court's third obligation, Crim.R. 11(C) sets forth a specific list of constitutional rights that must be explained to the defendant. In interpreting this rule, the courts of this state have concluded that the list of rights in the rule is exclusive; as a result, a trial court is not required to inform a defendant of his limited ability to withdraw his guilty plea under Crim.R. 32.1. See, *State v. Pierce* (Jan. 27, 1994), 8th Dist. Nos. 64170 & 64171, 1994 Ohio App. LEXIS 284, 15. Based upon this, it has likewise been held that there is no requirement for a trial court to inquire concerning whether trial counsel has informed the defendant of the provisions of Crim.R. 32.1, and trial counsel does not render ineffective assistance by failing to tell the defendant that the guilty plea could be withdrawn under certain circumstances. *Id.*; *State v. Artiaga*, 6th Dist. No. OT-02-001, 2002-Ohio-5903, ¶25.

{¶19} Unlike *Pierce* and *Artiaga*, the instant case does not involve a situation in which trial counsel made no reference to the basic ability to withdraw the guilty plea before the defendant made his final decision on the plea offer. Instead, according to appellant, his original trial counsel made an incorrect reference to the ability to withdraw immediately before he executed the written plea agreement. In light of the fact that an exaggerated statement of the ability to withdraw under Crim.R. 32.1 could influence the defendant's decision to accept a guilty plea, this court would agree that there could be instances in which incorrect advice concerning this point could affect the validity of a guilty plea. For example, if trial counsel told the defendant that the ability to withdraw a guilty plea had no restrictions, it is feasible that such advice could form the basis for allowing a criminal defendant to retract the guilty plea.

{¶20} In this instance, though, appellant asserts that his original trial counsel informed him that the ability to withdraw a guilty plea was restricted. Logic would dictate that this form of advice would not influence a defendant to accept the plea agreement, but would instead influence him to reject the agreement if he still thought that there was a chance he could prevail at trial. Thus, while it may technically be logical to infer that the alleged statement of appellant's original trial counsel could have had the effect of stopping him from moving to withdraw the guilty plea between the date of the plea hearing and the date of sentencing, it is simply illogical that, upon receiving such advice, he would still agree to the plea agreement notwithstanding any other doubts. In turn, this would lend credence to the position that appellant is using the alleged statement as a vehicle for vacating an agreement he no longer views as beneficial.

{¶21} Nevertheless, even if this court were to accept appellant's assertion that his final decision to plead guilty was influenced by counsel's alleged statement, we would further indicate that such influence would not have been improper because the statement was correct under the applicable law. As was previously stated, even if a defendant moves to withdraw his guilty plea prior to the imposition of his sentence, he still must assert a reasonable and legitimate reason for such relief. *Alford*, supra, 1999 Ohio App. LEXIS 4123, at 6-7. In applying this standard, this court has concluded that a mere change of heart by the defendant does not constitute a legitimate reason which would warrant the granting of a motion under Crim.R. 32.1.

{¶22} According to appellant, his original trial counsel stated to him that, once he had agreed to enter the new plea, there was "no going back." In making this allegation in his motion to withdraw, appellant did not contend that counsel had made this statement in response to a specific question as to the type of circumstances under

which a guilty plea could be withdrawn. Instead, counsel was simply providing general information for appellant to consider in deciding whether to accept the plea agreement.

{¶23} When considered in this context, counsel's alleged statement can be subject to only one reasonable interpretation; i.e., counsel was informing appellant that, once he had entered the new plea, he could not simply change his mind for any reason and retract the plea. To this extent, the alleged statement of appellant's original trial counsel was consistent with the prior case law of this court.

{¶24} Pursuant to the foregoing analysis, this court holds that appellant was not denied effective assistance of trial counsel prior to the acceptance of his guilty plea to the first count of rape. In light of this holding, it follows that, in regard to his motion to withdraw under Crim.R. 32.1, appellant was unable to demonstrate that a manifest injustice took place when his guilty plea was accepted. Under such circumstances, the trial court did not abuse its discretion in overruling the motion to withdraw the guilty plea.

{¶25} Since appellant has failed to show any error in relation to the trial court's ruling on the motion to withdraw, his sole assignment of error is without merit. It is the judgment of this court that the judgment of the trial court is affirmed.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only.