[Cite as *State v. Tate*, 2011-Ohio-3293.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-L-090**
- vs -	:	
RONALD E. TATE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 09 CR 000748.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Ronald E. Tate appeals from a judgment of the Lake County Common Pleas Court denying his post-sentence motion to withdraw his guilty plea. He claims his counsel was ineffective; he was coerced into pleading guilty after the trial court denied his request to substitute counsel; and his counsel's ineffectiveness rendered his plea unknowing and involuntary. Our review of the record does not support his assertions, and therefore we affirm the judgment.

{¶2} **Substantive and Procedural History**

{¶3} Mr. Tate was indicted on one count each of aggravated robbery, complicity to aggravated robbery, theft, complicity to theft, and having weapons while under disability. The former four counts were each accompanied with a firearm specification and forfeiture specifications.

{¶4} These charges stemmed from Mr. Tate's involvement in a robbery in Willowick. The state alleged he drove his vehicle, with a co-defendant as passenger, to the victim's house to sell him $1,200 worth of Oxycodone. When Mr. Tate arrived, he instructed the victim to get into the back seat of his vehicle to complete the transaction. As Mr. Tate backed the car out of the victim's driveway, his co-defendant pulled a handgun on the victim and robbed the victim of money, an iPhone, and a container with some pills.

{¶5} Mr. Tate waived his right to be present at the arraignment and a "not guilty" plea was entered on his behalf. His appointed counsel then filed a motion to suppress. On the day of the suppression hearing, Mr. Tate asked to discharge his appointed counsel and retain private counsel. The court granted the request and set a pre-trial hearing. Mr. Tate failed to appear at the scheduled hearing and a warrant was issued for his arrest. The suppression hearing was then continued upon his request. He appeared at the suppression hearing but withdrew his motion to suppress. The case was then set for trial.

{¶6} On the day of trial, immediately before the jury was to be empanelled, Mr. Tate asked the court to discharge his privately-retained counsel. He reported to the court that he did not feel his attorney would represent him to the fullest of his capability, due to compensation issues. He stated to the court:

{¶7} "Mr. Morgan made it pretty clear to me that he was not going to represent to [sic] me to the fullest of his capability, because I didn't have any money for him. I only – I only paid a little bit of money. I owe way – way more."

{¶8} His attorney, however, indicated to the court he was prepared and ready to go to trial, stating:

{¶9} "Your Honor, I've never laid down in Court in my 20 some years. The issue of compensation is an issue between Mr. Tate and myself, not between the Court and myself. Despite whatever that may have occurred, I've always assured him that I'm going to fight for him in the Courtroom."

{¶10} Mr. Tate also complained to the court that his attorney was not prepared. In response, his attorney stated: "Your Honor, I'm prepared. I've been out to visit him in jail four or five times. I had the file, reviewed the file, gone over it with him."

{¶11} After the reassurance from counsel, the court stated: "[A]ll I need to know, and I've heard it, is Mr. Morgan is prepared and ready to go. I've always known him to be. Money's not going to stand in the way of his giving effective representation. That's just not what somebody puts their reputation on the line to do."

{¶12} Mr. Tate then claimed that his attorney lied to his family about a statement allegedly having been made against him and that his attorney tried to get him to "cop out." The court stated in response:

{¶13} "Well, trying to get you to cop out is, quite frankly, in some respects part of a lawyer's job, to be honest, to show candor, and be candid with you. He may have his beliefs that you should take a plea bargain. You don't have to. Obviously, you have not and it certainly is your choice, but it's the attorney's obligation to at least lay it all out for his client, and to make sure the client fully understands and appreciates what he's up

against. That's his job. Now, whether you accept his advice and recommendations, whether you take a plea that might be offered, that's your decision. And you have exercised your right to make that decision. But you can't hold it against your attorney for using his knowledge and information and making a recommendation to you. That's not a good reason [for substituting counsel]."

{¶14} After stating "Mr. Morgan is here, he's prepared, he's ready to go forward," the court denied Mr. Tate's request for a change of counsel. It made the following finding:

{¶15} "The Court specifically finds that there has not been a complete breakdown in the representation that would render Mr. Morgan's continued representation ineffective assistance of counsel. Any personal conflicts that exist appear not to have [affected] the preparation and the ability of Mr. Morgan to proceed with the defense of Mr. Tate. It appears Mr. Morgan has given some honest appraisals and opinions to his client. The client may have disagreed, but that in itself is not the complete breakdown that is contemplated by the Supreme Court rulings in terms of when an attorney should be replaced. And he's privately hired, he's been hired by you, not appointed by the Court. So, the request and motion to replace counsel at this time is denied."

{¶16} The transcript reflects after the court denied Mr. Tate's motion to replace counsel, a recess was taken. After the recess, Mr. Tate's counsel represented to the court his client wished to plead guilty to all the counts in the indictment, with the firearm and forfeiture specifications removed from all but the aggravated robbery count. The parties also made a joint recommendation for a minimum sentence: three years on

aggravated robbery and three years on the accompanying gun specification, with concurrent sentences on the remaining counts, for a total of six years of imprisonment.

{¶17} The court then conducted a lengthy and extensive plea colloquy. Mr. Tate waived a presentence investigative report, and the court imposed a prison term in accordance with the jointly recommended sentence.

{¶18} A week later, Mr. Tate wrote a one-paragraph letter to the trial court, expressing his desire to withdraw the guilty plea because "I felt that I had insufficient counsel and that I was not represented in the proper manner. I also feel I was pressured into making the plea without fully understanding my options." He did not attach any affidavit or other evidentiary materials to the letter/motion. The trial court, without an oral hearing, denied his request to withdraw his guilty plea.

{¶19} Mr. Tate now appeals, assigning the following error for our review:

{¶20} "The trial court erred to the prejudice of the Defendant-Appellant by denying his post-sentence motion to withdraw his plea in violation of his due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article 1 of the Ohio Constitution."

{¶21} **Standard of Review**

{¶22} An appellate court reviews a trial court's decision on a motion to withdraw a plea under an abuse-of-discretion standard. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶32. A Crim.R. 32.1 motion is addressed to the sound discretion of a trial court. *State v. Madeline* (Mar. 22, 2002), 11th Dist. No. 2000-T-0156, 2002-Ohio-1332, 2002 Ohio App. LEXIS 1348, *8, citing *State v. Xie* (1992), 62 Ohio St.3d 521, paragraph two of the syllabus. "The good faith, credibility, and weight of a defendant's assertions in support of his motion are to be resolved by a trial court." *Madeline* at *8,

citing *State v. Gibbs* (June 9, 2000), 11th Dist. No. 98-T-0190, 2000 Ohio App. LEXIS 2526, *6.

{¶23} **Post-Sentence Motion to Withdraw Plea**

{¶24} "Pursuant to Crim.R. 32.1, to withdraw a guilty plea after the imposition of sentence, a defendant bears the burden of demonstrating that such a withdrawal is necessary to correct a manifest injustice." *Madeline* at *7, citing *State v. Kerns* (July 14, 2000), 11th Dist. No. 99-T-0106, 2000 Ohio App. LEXIS 3202. "A post-sentence Crim.R. 32.1 motion to withdraw a guilty plea is granted only in extraordinary cases to correct a manifest injustice." *Madeline* at *7-8, citing *State v. Smith* (1977), 49 Ohio St.2d 261, 264. A manifest injustice is a "'clear or openly unjust act.'" *State v. Walling*, 3d Dist. No. 17-04-12, 2005-Ohio-428, ¶6 quoting *State ex rel*. *Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, 208. "The burden of establishing the existence of a manifest injustice is upon the defendant asking the court to vacate his plea." *State v. Whiteman*, 11th Dist. No. 2001-P-0096, 2003-Ohio-2229, ¶17, citing *Gibbs,* supra.

{¶25} As to whether a hearing is required on a motion to withdraw a guilty plea, although "a trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of a guilty plea if the request is made before sentencing, the same is not true when the request is made after the trial court has already sentenced the defendant." *Whiteman* at ¶19 (internal citations omitted). "In those situations where the trial court must consider a post-sentence motion to withdraw a guilty plea, a hearing is only required if the facts alleged by the defendant and accepted as true would require the trial court to permit withdrawal of the plea." Id. See, also, *State v. Hudach*, 11th Dist. No. 2003-T-0110, 2004-Ohio-6949. "'[I]f the defendant fails to submit evidence containing sufficient operative facts to demonstrate that his plea

was not entered into knowingly and voluntarily, and the record indicates that the defendant is not entitled to relief, the trial court may dismiss the motion without a hearing.'" *Whiteman* at ¶20, quoting *Kerns*, supra, at *6. "Moreover, a defendant's own self-serving allegations are insufficient to rebut a record demonstrating that the plea was properly made." Id., citing *State v. Young* (Oct. 22, 1999), 11th Dist. No. 98-T-0128, 1999 Ohio App. LEXIS 4978.

{¶26} **Lack of Hearing Transcript**

{¶27} As an initial matter, we note Mr. Tate failed to submit the transcript of the change of plea hearing to the trial court in support of his motion to withdraw the guilty plea. The trial court stated in its decision that, without a transcript of the hearing, it must presume the regularity of the hearing. A presumption of regularity includes the presumption that Mr. Tate's plea was entered voluntarily and intelligently. The trial court also cited its docket, which indicated on the morning of his scheduled trial Mr. Tate asked to discharge the attorney he had retained himself, after discharging his court-appointed attorney months earlier. In addition, the trial court referenced his signed written waiver. Based on the record before it, the court concluded Mr. Tate failed to submit evidence containing sufficient operative facts to demonstrate manifest injustice and thus denied his motion.

{¶28} Mr. Tate complains on appeal that the trial court did not review the transcript of the change of plea hearing. He claims that a review of the transcript, now submitted as part of the appellate record, will show he was coerced into pleading guilty after attempting without success to replace his counsel, who he believed had not been prepared for trial. Mr. Tate maintains his plea was not voluntary, because, after the court denied his request for new counsel, he "had no choice" but to plead guilty.

{¶29} At the outset, we note "[g]enerally, a reviewing court cannot add matter to the record before it that was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Owens*, 8th Dist. No. 94152, 2010-Ohio-3881, ¶11, citing *State v. Hooks*, 92 Ohio St.3d 83 and *State v. Ishmail* (1978), 54 Ohio St.2d 402. In *Owens*, appellant also failed to provide the trial court with a transcript of the plea hearing in his motion to withdraw the guilty plea. Nonetheless, the Eighth District reviewed the transcript of the proceeding on appeal, on the grounds that the record indicated the same trial judge who denied appellant's motion to withdraw his plea also presided over the plea hearing. Id. The trial judge, having conducted the hearing himself, presumably had sufficient memory and knowledge of the proceeding, such that a transcript of the proceeding would not constitute a "new matter" precluding a review by the appellate court. In Mr. Tate's case, similarly, the same trial judge who presided over the change of plea hearing also entertained his motion to withdraw the guilty plea. Thus, we will take the same approach taken by the Eighth District to a review of the hearing transcript in this case.

{¶30} **Was the Plea Knowingly, Intelligently, and Voluntarily Made?**

{¶31} Under Crim.R. 11(C)(2), "the trial judge may not accept a plea of guilty or no contest without addressing the defendant personally and (1) '[d]etermining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing,' (2) informing the defendant of the effect of the specific plea and that the court may proceed with judgment and sentencing after accepting it, and ensuring that the defendant understands these facts, and (3) informing the defendant

that entering a plea of guilty or no contest waives the constitutional rights to a jury trial, to confrontation, to compulsory process, and to require proof of guilt beyond a reasonable doubt and determining that the defendant understands that fact." *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶27, citing Crim.R. 11(C)(2)(a) through (c).

{¶32} "Generally, a guilty plea is deemed voluntary if the record demonstrates the trial court advised the defendant of (1) the nature of the charge and the maximum penalty involved, (2) the effect of entering a guilty plea, and (3) that the defendant will be waiving his constitutional rights by entering the plea." *State v. Dudas*, 11th Dist. Nos. 2008-L-081 and 2008-L-082, 2008-Ohio-7043, ¶30, citing *Madeline,* supra*.* In determining whether a guilty plea is knowingly, intelligently, and voluntarily entered, the reviewing court must look to the totality of the circumstances. *State v. Carter* (1979), 60 Ohio St.2d 34, 38.

{¶33} Here, Mr. Tate had previously discharged court-appointed counsel and retained the private counsel on his own. On the day of trial, immediately before the jury was to be empanelled, Mr. Tate asked the court to discharge his private attorney and to be appointed a public defender. The court investigated the matter, engaging in a lengthy discussion with Mr. Tate and his attorney. Mr. Tate stated: "[Attorney] Morgan made it pretty clear to me that he was not going to represent to [sic] me to the fullest of his capability because I didn't have any more money for him." He also claimed they never went over the case together and his attorney "hasn't researched it or anything."

{¶34} In response, his attorney represented to the court that he was prepared and ready to go to trial, stating: "Your Honor, I've never laid down in Court in my 20 some years. The issue of compensation is an issue between Mr. Tate and myself, not between the Court and myself. Despite whatever that may have occurred, I've always

assured him that I'm going to fight for him in the Courtroom." Regarding his preparation for the trial, the attorney represented to the court that he had visited Mr. Tate in jail four or five times; had reviewed the file; and had gone over the file with him.

{¶35} Mr. Tate also expressed his doubt that his attorney would represent him to the fullest of his ability because he had advised him to "cop out." The court reminded Mr. Tate he had expressed a similar lack of confidence in his prior court-appointed counsel. It explained to him it was his counsel's obligation to candidly appraise the merit of the case and to recommend a plea bargain when appropriate. The court emphasized it would be up to him, however, to decide whether to take the recommendation. After satisfying itself with Mr. Tate's attorney's preparedness for trial, the court denied Mr. Tate's request to change counsel.

{¶36} After Mr. Tate opted to change his plea and take the plea bargain offered by the state, the trial court engaged in an extensive colloquy with him to ensure that he understood the charges against him; that he was making the plea voluntarily; and that he was aware he was giving up the rights of a jury trial, confrontation, and a proof of guilt beyond a reasonable doubt.

{¶37} On appeal, Mr. Tate does not dispute the thoroughness of the plea colloquy conducted by the court before accepting his guilty plea. Rather, his claim is that he was essentially coerced into pleading guilty after the trial court refused to replace his counsel, who he believed to be ineffective.

{¶38} The transcript of the change of plea hearing shows the trial court fully investigated Mr. Tate's allegation and satisfied itself with his attorney's preparedness before denying his request to substitute counsel. Mr. Tate did not allege any facts for his claim of coercion other than stating broadly that he "felt" he was "pressured into

making the plea without fully understanding [his] options." The trial court must hold a hearing on a post-sentence motion only if "the facts alleged by the defendant and accepted as true would require the trial court to permit withdrawal of the plea." *Whiteman,* supra*.* Mr. Tate's one-paragraph letter, devoid of specific factual allegations and unsupported by any evidentiary materials, fell short of meeting a defendant's burden in a post-sentence motion to withdraw the guilty plea. Therefore, the trial court did not abuse its discretion in denying the motion.

{¶39} Mr. Tate cites *State v. Hamed* (1989), 63 Ohio App.3d 5, to support his claim. In that case, the defendant pled no contest and the trial court accepted the plea. After sentencing, the defendant moved to withdraw his guilty plea, claiming he had been denied the effective assistance of counsel when entering his plea. He submitted an affidavit in support his motion, alleging that (1) prior to advising the defendant to enter his no contest plea, his counsel failed to discuss the facts of the case with him or interview potential witnesses; (2) his counsel disregarded information he produced which identified the true offender for the crime charged; (3) his attorney told him that he would be found guilty whether he had committed the crime or not; and (4) his attorney advised him to plead no contest in order to resolve the case without offending the trial judge.

{¶40} The Eighth District concluded the trial court should have conducted a hearing to determine the truth of the defendant's allegations regarding counsel's ineffective assistance before ruling on his motion to withdraw his plea. The court emphasized the defendant had "specifically enumerated fundamental duties which his trial counsel failed to perform."

{¶41} In the instant case, Mr. Tate made broad, vague allegations in his motion to withdraw that he "had insufficient counsel"; he "was not represented in the proper manner"; and he "was pressured into making the plea without fully understanding [his] options." Unlike in *Hamed*, Mr. Tate did not articulate any particular duties his trial counsel failed to perform, and no affidavits or other evidentiary materials were submitted to support his claims. Thus, Mr. Tate's reliance on *Hamed* is misplaced.

{¶42} The assignment of error is without merit.

{¶43} The judgment of the Lake County Common Pleas Court is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.