[Cite as *State v. Nickelson*, 2009-Ohio-7006.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 09CA8
vs.	:	
LeSHAWN R. NICKELSON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Michael A. Davenport, Lambert & McWhorter, 215 South Fourth Street, Ironton, Ohio 45638

LeShawn R. Nickelson, #598-117, C.C.I.
P.O. Box 5500, Chillicothe, Ohio 45601,
Pro Se

COUNSEL FOR APPELLEE: J.B. Collier, Jr., Lawrence County Prosecuting Attorney, and Brigham M. Anderson, Lawrence County Assistant Prosecuting Attorney, Lawrence County Courthouse, 1 Veteran's Square, Ironton Ohio 45638

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-15-09

ABELE, J.

{¶ 1} This is an appeal from a Lawrence County Common Pleas Court judgment of conviction and sentence. LeShawn R. Nickelson, defendant below and appellant herein, pled guilty to (1) one count of trafficking in crack cocaine in violation of R.C. 2925.03(A) (1) & (C)(4)(d); and (2) one count of trafficking in crack cocaine in

violation of R.C. 2925.03(A)(2) & (C)(4)(e).

{¶ 2} Appellant's counsel advised this Court that he has reviewed the record and can discern mo meritorious claim on appeal. Thus, pursuant to Anders v. California (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, counsel requests, and we hereby grant, leave to withdraw. Although appellate counsel assigns no potential errors for review, appellant's pro se brief and supplemental pro se brief set forth the following assignments of error:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE DEFENDANT, APPELLANT MR[.] NICKELSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "THE COURT OF COMMON PLEAS, LAWRENCE COUNTY, OHIO, COMMITTED REVERSIBLE ERROR BY ALLOWING ILLEGAL EVIDENCE SUBMITTED THAT SHOULD HAVE BEEN SUPPRESSED."
>
> THIRD ASSIGNMENT OF ERROR:
>
> "THE DELAY BETWEEN THE PLEA BARGAIN AND THE SENTENCING WAS UNREASONABLE [AND] ATTRIBUTABLE SOLELY TO THE PROSECUTION, WARRANTING VACATION OF THE SENTENCE."
>
> FOURTH ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S CRIMINAL PROCEDURE RULE 32.1 MOTION TO WITHDRAW HIS GUILTY PLEA WITHOUT FIRST CONDUCTING A HEARING."
>
> FIFTH ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED WHEN THE PROSECUTOR FAILED TO COMPLY WITH THE PLEA AGREEMENT BY NOT ALLOWING THE DEFENDANT TO WITHDRAW HIS

PLEA."

SIXTH ASSIGNMENT OF ERROR:

"[THE] TRIAL COURT ABUSED ITS DISCRETION IN DENYING MOTION TO WITHDRAW GUILTY PLEA AS UNTIMELY."

{¶ 3} On August 24, 2005, the Lawrence County Grand Jury returned an indictment charging appellant with nine counts of trafficking and one count of possession of criminal tools. Appellant agreed to plead guilty to two counts of the indictment in exchange for the dismissal of eight counts. At the October 25, 2005 hearing the trial court accepted and scheduled the sentencing hearing for November 9, 2005. Appellant, however, did not appear for sentencing.[1]

{¶ 4} Several years later, appellant was finally apprehended. On January 28, 2009, he filed a pro se motion and sought to withdraw his guilty pleas from three years earlier. The trial court overruled his motion and sentenced appellant to serve seven years imprisonment on one count and eight years on the other, with the sentences to be served consecutively. This appeal followed.

I

{¶ 5} Appellant asserts in his first assignment of error that he received constitutionally ineffective assistance from his trial counsel. Our analysis of this argument begins with the premise that defendants have a right to counsel, including a right to the effective assistance from counsel. McCann v. Richardson (1970), 397 U.S.

[1] The record reveals that appellant was indicted for the failure to appear for sentencing in this case. That case (No. 05-CR-255) was later dismissed nolle prosequi.

759, 770, 25 L.Ed.2d 763, 90 S.Ct. 1441; State v. Lytle (Mar. 10, 1997), Ross App. No. 96CA2182; State v. Doles (Sep. 18, 1991), Ross App. No. 1660. To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient, and (2) such performance prejudiced the defense and deprived him of a fair trial. See Strickland v. Washington (1984), 466 U.S. 668, 687, 80 L.Ed .2d 674, 104 S.Ct. 2052; also see State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904; State v. Goff (1998), 82 Ohio St.3d 123, 139, 694 N.E.2d 916.

{¶ 6} Appellant claims that counsel was constitutionally ineffective because he advised him to accept a plea agreement rather than challenge what appellant claims is a defective indictment and a weak case for the prosecution. We are not persuaded.

{¶ 7} First, the fact that counsel negotiated a plea agreement that resulted in the dismissal of eight of ten counts contained in the indictment hardly lends itself to a deficient performance claim. Second, we find no merit to the assertion that the indictment was defective. Finally, any evaluation concerning the strengths or weaknesses of the prosecution's case is a question of trial strategy or tactics, and such matters are not generally reviewed for ineffective assistance claims. See State v. Burkhart, Washington App. No. 08CA22, 2009-Ohio-1847, at ¶27; State v. Lytle, Ross App. No. 06CA2916, 2007-Ohio-3545, at ¶5.

{¶ 8} For all these reasons, we hereby overrule appellant's first assignment of error.

II

{¶ 9} Appellant asserts in his second assignment of error that the trial court erred by "allowing illegal evidence . . . that should have been suppressed." This is

obviously without merit. First, as there was no actual trial, the court did not "allow" any evidence – illegal or otherwise. Second, we find no motion to suppress evidence and, consequently, nothing appears in the record to support the assertion that "evidence" should have been suppressed. Finally, even if certain evidence should have been suppressed, and the trial court failed to do so, appellant's guilty pleas constitute a complete admission of guilt and waiver of his right to challenge evidence that arguably should have been suppressed. See Crim.R. 11(B)(1); State v. Jackson, Belmont App. No. 07BE7, 2008-Ohio-3341, at ¶12; State v. Truax, Belmont App. No. 06BE66, 2007-Ohio-4993, at ¶3.

{¶ 10} For all these reasons, we hereby overrule appellant's second assignment of error.

III

{¶ 11} Appellant asserts in his third assignment of error that his sentence should be vacated because "40 months elapsed" between entry of his guilty plea and his sentencing. Although we find no clear explanation in the record as to what caused this delay, the fact that appellant was indicted for the failure to appear seems to suggest the delay was caused, at least in part, by appellant's flight from Lawrence County. A defendant cannot avoid sentencing merely by fleeing the jurisdiction for three years. Moreover, appellant cites no authority to support his argument that the court somehow lost jurisdiction over his case.

{¶ 12} For these reasons, we hereby overrule appellant's third assignment of error.

IV

{¶ 13} We jointly consider the three remaining assignments of error that assert, for various reasons, that the trial court erred by overruling his pro se motion to withdraw his previous guilty pleas. For the following reasons, we find that none of those arguments are persuasive.

{¶ 14} Appellant contends that the trial court erred by not conducting a hearing on his pre-sentence motion to withdraw his guilty pleas. He is correct, as an abstract proposition of law, that such a hearing must be held. State v. Xie (1992), 62 Ohio St.3d 521, 584 N.E.2d 715, at paragraph two of the syllabus. However, nothing in either Xie or Crim.R. 32.1 describe the extent of the required hearing. The only definitive guidance the Ohio Supreme Court has given is that the hearing must be sufficient to determine whether there exists a "reasonable and legitimate basis for the withdrawal of the plea." Id. at 527.

{¶ 15} In this case, the trial court reviewed the merits of appellant's pro se motion during the sentencing hearing. We believe that in the case at bar, that was sufficient to comply with the Ohio Supreme Court's mandate.

{¶ 16} First, nothing in Ohio law requires a separate evidentiary hearing in every case when a defendant seeks to withdraw a guilty plea. State v. Brewer (Feb. 16, 2001), Erie App. No. E-00-3; State v. Mosby (Sep. 18, 2000), Butler App. No. CA2000-04-59. The scope of a hearing on a Crim.R. 32.1 motion need only reflect the substantive merits of the motion. State v. McDaniel, Cuyahoga App. No. 89001, 2007-Ohio-5441, at ¶12.

{¶ 17} Here, appellant's motion is not a model of clarity but, from our review, he appears to advance two reasons why the trial court should have permitted him to

withdraw his pleas. First, in August, 2005 the "Lawrence County Drug Task Force" had him released from jail "for 45 minutes to 2 hours each day" to help authorities arrange "drug deals" with other traffickers. Appellant claims that a drug task force attorney informed him that he "would receive drug rehabilitation and some probation do [sic] to his cooperation."

{¶ 18} However, in a filing titled "Proceeding on Plea of Guilty," appellant answered affirmatively to questions that he understood that he could be sentenced to a penal institution and that he was promised that he would be released from a penal institution at a certain date in the future. This last representation, in particular, belies his claim that he thought he would not be imprisoned. A transcript of the October 26, 2005 change of plea hearing also reveals that appellant acknowledged that he could receive maximum prison terms for the two offenses for which he pled guilty.

{¶ 19} Appellant's second argument for the withdrawal of his pleas is that he was "rush[ed] through the court proceeding" without counsel even so much as filing a "motion to suppress, a motion for bill of particulars, a motion for discovery, a motion in limine, a motion for summary judgment, a motion for literacy or competency." However, (1) nothing appears in the record to indicate a motion to suppress was warranted; (2) demands for discovery and bill of particulars were filed on September 2, 2005; (3) a motion in limine is directed at trial proceedings and, thus, would not have been filed at this stage of the case; (4) motions for summary judgment apply to civil proceedings, not criminal; and, (5) finally the fact that appellant filed his own pro se motion to withdrawal his guilty plea leads to the conclusion that no basis exists for a motion to determine either literacy or competency.

{¶ 20} In view of the meritless bases asserted to support the withdrawal of the plea, we believe that the nature of the trial court's hearing was entirely appropriate. We further note that the court also engaged in an extended colloquy with appellant on the motion and asked if appellant wanted to add more or elaborate on his arguments. In an analogous case, our colleagues in the Eleventh District found that a trial court conducted an "adequate" hearing for purposes of Crim.R. 32.1 when, during a sentencing hearing, the judge engaged in a discussion with the defendant on the merits of his pro se motion, even asking the defendant if he wanted to add anything further. State v. Curd, Lake App. No. 2003-L-030, 2004-Ohio-7222, at ¶¶123-124. We find that reasoning persuasive and likewise conclude that the trial court complied with the Xie hearing requirements.

{¶ 21} Appellant also claims the trial court should have allowed him to withdraw his guilty plea because the appellee failed to comply with its end of the bargain (i.e. recommended a ten year sentence rather than the four year sentence originally agreed upon). Again, we find no merit to this claim.

{¶ 22} First, the transcript of the October 26, 2005 change of plea hearing clearly reveals that the trial court informed appellant that, if he did not return in two weeks for sentencing, the terms of the agreement were no longer binding. The fact remains that appellant breached the terms of the plea agreement by failing to appear for sentencing.

{¶ 23} Appellant also argues that the trial court erred by overruling his Crim.R. 32.1 motion on the merits. We disagree. As noted above, the record refuted the grounds set forth in appellant's pro se motion. Further, as the trial court aptly noted, the issues raised in the motion all occurred before he entered into the plea agreement.

Appellant failed to raise them then and cannot be heard to complain about them more than three years later.

{¶ 24} It is also well-settled that the decision to grant, or deny, a Crim.R. 32.1 motion is committed to the trial court's sound discretion and will not be reversed absent an abuse of that discretion. Xie, supra at paragraph two of the syllabus; State v. Smith (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph two of the syllabus. An abuse of discretion is more than either an error of law or judgment; rather, it implies the trial court's attitude was unreasonable, arbitrary or unconscionable. State v. Clark (1994), 71 Ohio St.3d 466, 470, 644 N.E.2d 331, 335; State v. Moreland (1990), 50 Ohio St.3d 58, 61, 552 N.E.2d 894, 898.

{¶ 25} In reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. State ex rel. Duncan v. Chippewa Twp. Trustees (1995), 73 Ohio St.3d 728, 732, 654 N.E.2d 1254; In re Jane Doe 1 (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181. To establish an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will, but perversity of will; not the exercise of judgment, but defiance of judgment; and not the exercise of reason, but, instead, passion or bias. Vaught v. Cleveland Clinic Found., 98 Ohio St.3d 485, 787 N.E.2d 631, 2003-Ohio-2181, ¶13; Nakoff v. Fairview Gen. Hosp. (1996), 75 Ohio St.3d 254, 256, 662 N.E.2d 1.

{¶ 26} We readily agree with the trial court that the issues set forth in appellant's motion to withdraw his guilty pleas should have been raised prior to his change of plea. Raising them three years later, after he absconded from the area, and without any

evidence to support his allegations, make them appear contrived solely for the purpose of trying to escape the effects of his guilty plea. In any event, we find no error, let alone an abuse of discretion, in the trial court's decision to deny appellant's Crim.R. 32.1 motion. For all these reasons, we overrule appellant's fourth, fifth and sixth assignments of error.

{¶ 27} Having reviewed the record for potential errors, as well as the errors appellant assigned and argued in his pro se brief, and in light of appellate counsel having found no meritorious argument on appeal, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee recover of appellant the 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 Lawrence County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.