[Cite as *State v. Harris*, 2020-Ohio-4736.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DANIEL HARRIS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0052

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 15-CR-1177

BEFORE:
David A. D'Apolito, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Edward Czopur, DeGenova & Yarwood, Ltd., 42 North Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: September 24, 2020

D'Apolito, J.

{¶1} Appellant Daniel Harris appeals the judgment entry of the Mahoning County Court of Common Pleas overruling his pro se post-sentence motion to withdraw his guilty pleas. Appellant, who is represented by counsel in this appeal, contends that the trial court abused its discretion when it failed to appoint counsel, despite his indigent status, and, when it overruled the motion without a hearing, despite Appellant's assertion of actual innocence. For the following reasons, the judgment entry of the trial court is affirmed.

FACTS AND PROCEDURAL HISTORY

{¶2} Appellant was indicted on November 25, 2015, for one count of aggravated murder, in violation of R.C. 2903.01(A)(F), an unclassified felony, with a firearms specification pursuant to R.C. 2941.145(A); four counts of attempted murder, in violation of R.C. 2903.02(A)(D), felonies of the first degree, with firearms specifications pursuant to R.C. 2941.145(A); four counts of felonious assault, in violation of R.C. 2903.11(A)(2)(D), felonies of the second degree, with firearms specifications pursuant to R.C. 2941.145(A); one count of having a weapon under disability, in violation of R.C. 2923.13(A)(3)(B), a felony of the third degree; one count of obstructing justice, in violation of R.C. 2921.32(A)(2)(C)(1)(4), a felony of the third degree; and one count of obstructing justice, in violation of R.C. 2921.32(A)(4)(C)(1)(4), a felony of the third degree.

{¶3} In the eighteen months that followed, defense counsel filed several requests for discovery and a bill of particulars, motions for disclosure of due process materials, as well as motions to require the state to disclose information pursuant to Crim. R 12(E)(2). On October 6, 2016, defense counsel filed a motion to suppress two items: Appellant's confession, which was taken while he was hospitalized and his clothing, which was seized by the Youngstown Police Department from the hospital without a warrant. On April 7, 2017, following a hearing on the motion and the submission of post-hearing briefs, the trial court overruled the motion with respect to Appellant's confession, but sustained the motion with respect to his clothing.

{¶4} According to the April 7th judgment entry, YPD Detective Rick Spotleson was informed that six people had been shot at the Southern Tavern, in Youngstown, Ohio on November 15, 2015. He was further informed that one of the shooting victims was dead, and another was being transported to St. Elizabeth's Hospital.

{¶5} When he arrived at the hospital, Detective Spotleson and Appellant recognized each other from a previous encounter, and began discussing the events leading to the shootings. Because Detective Spotleson believed Appellant to be a victim, he did not advise Appellant of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

{¶6} At some point during the conversation, Appellant informed Detective Spotleson that he "returned fire" at the Southern Tavern. Detective Spotleson immediately terminated their conversation and advised Appellant of his *Miranda* rights. Although Appellant declined to sign a written waiver, he waived his right to remain silent and continued his conversation with Detective Spotleson regarding the events that occurred at the Southern Tavern.

{¶7} The trial was set for May 23, 2017. In the interim, defense counsel filed a motion for relief from prejudicial joinder seeking to sever the weapon under disability from the remaining counts, and a motion in limine to prohibit the state from introducing evidence of Appellant's prior convictions.

{¶8} On May 23, 2017, the day that the trial was scheduled to commence, Appellant entered guilty pleas to an amended count of murder, in violation of R.C. 2903.02(A)(D), with an accompanying firearm specification pursuant to R.C. 2941.145(A); four counts of felonious assault, in violation of R.C. 2903.11(A)(2)(D), felonies of the second degree, with accompanying firearms specifications, and one count of having a weapon under disability, in violation of R.C. 2923.13(A)(3)(B), a felony of the third degree. At the sentencing hearing, held two days later on May 25, 2017, the trial court imposed an agreed sentence of twenty years to life.

{¶9} On December 6, 2018, Appellant filed the pro se motion to withdraw his guilty pleas at issue in this appeal. Appellant's counsel alleges in his brief that the motion was filed "within a few months of the plea." (Appellant's Brf., p. 3.) The argument is based on a typographical error in the brief, which reads that the plea hearing took place in May

of 2018, rather than May of 2017. In fact, almost twenty months elapsed between the plea and the pro se motion to withdraw.

{¶10} The motion itself can best be described as a typed uppercase form motion. It contains blank lines, where the movant is supposed to insert his name and certain relevant dates. For instance, the motion reads, "AFTER DEEP INTROSPECTION AND DECIDING THAT I WAS TRICKED INTO GIVING INTO MY COURT APPOINTED ATTORNEY'S WHIM AND DESIRE OF PLEADING OUT IN THIS CRIMINAL MATTER CITED AS BEING, STATE OF OHIO V. _____."

{¶11} The form motion can be interpreted to seek appointment of counsel. The request for counsel is not explicitly stated, however, the motion begins with a quotation from *Ake v. Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985):

> WE RECOGNIZED LONG AGO THAT MERE ACCESS TO THE COURTHOUSE DOORS DOES NOT BY ITSELF ASSURE A PROPER FUNCTIONING OF THE ADVERSARY PROCESS, AND THAT A CRIMINAL TRIAL IS FUNDAMENTALLY UNFAIR IF THE STATE PROCEEDS AGAINST AN INDIGENT DEFENDANT WITHOUT MAKING CERTAIN THAT HE HAS ACCESS TO THE RAW MATERIALS INTEGRAL TO THE BUILDING OF AN EFFECTIVE DEFENSE.

In addition, an affidavit of indigence is attached to the motion to withdraw.

{¶12} The form motion asserts that it was "SEEMINGLY IGNORED OR IN THE LEAST UNANSWERED." The form motion continues, "SO I WROTE AND SENT A COLLOQUY TO THE CLERK OF COURTS INQUIRERING [SIC] AS TO THE STATUS OF THAT INITIAL MOTION TO WITHDRAW A GUILTY PLEA, AND ONCE AGAIN, I * * *IN THIS VERY SERIOUS CRIMINAL MATTER WAS IGNORED, OR IN THE VERY LEAST, MY COLLOQUY WENT UNANSWERED AND MY PRO-SE MOTION STILL NOT RULED UPON OR ACKNOWLEDGED." This portion of the form motion misstates its procedural history, insofar as it was overruled fourteen days after it was filed. Next, the motion states that Appellant requested a copy of the docket, and when he received it, the motion was not on the docket. This also misstates the procedural history of the motion.

{¶13} The substantive portion of the form motion reads:

> I ADAMENTLY [SIC] TOLD MY COURT APPOINTED COUNSEL THAT IT WAS MY ADRENT [SIC] DESIRE TO ADVANCE IN TAKING THIS CRIMINAL MATTER TO TRIAL BY A JURY OF MY OWN PEERS. I COULD SENSE THAT COURT APPOINTED COUNSEL WAS NOT ABOUT TO FIGHT FOR ME IF I REBELLED AGAINST THE PREARRANGED AGREEMENT THAT HE AND THE STATE PROSECUTOR HAD MADE. SO IN A VERY REAL SENSE I WAS EARNESTLY FORCED INTO SIGNING THAT INITIAL PLEA AGREEMENT AGAINST MY OF [SIC] INSTROSPECTIVE DESIRES AND BETEER [SIC] JUDGMENT. AS I TOLD MY STATE APPOINTED COUNSEL, I AM INNOCENT AND I STILL ATTEST TO THAT PLEA OF INNOCENCE.

There is no certificate of service. No opposition brief was filed. The motion was overruled on December 19, 2018.

{¶14} On January 30, and February 2, 2019, Appellant filed motions for findings of fact and conclusions of law relating to the denial of his motion to withdraw his guilty pleas. Both motions were summarily denied. The appeal in this matter was filed on May 3, 2019. This Court granted Appellant's motion for a delayed appeal on September 5, 2019, and appointed counsel based on Appellant's indigent status.

ANALYSIS

{¶15} Appellant advances two assignments of error. Appellant does not contend that he has demonstrated manifest injustice, but, instead, that he was prohibited from making such a showing because the trial court did not appoint counsel to represent him or conduct a hearing on the motion. Because the appointment of counsel and entitlement to a hearing turn on whether Appellant has sufficiently alleged manifest injustice in his motion to withdraw, the assignments of error are addressed together.

APPELLANT WAS DENIED HIS RIGHT TO COUNSEL PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT FAILED TO APPOINT COUNSEL TO AID IN THE POST-SENTENCE MOTION TO WITHDRAW GUILTY PLEAS.

THE TRIAL COURT ERRED IN REFUSING TO HOLD AN EVIDENTIARY HEARING ON APPELLANT'S POST-SENTENCE MOTION TO WITHDRAW GUILTY PLEAS.

{¶16} Ohio Crim. R. 32.1, captioned "Withdrawal of Guilty plea," reads, 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." Accordingly, "[a] defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice." *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus.

{¶17} A "manifest injustice" is a "clear or openly unjust act," *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998), and relates to a fundamental flaw in the plea proceedings resulting in a miscarriage of justice. *State v. Straley*, 159 Ohio St.3d 82, 2019-Ohio-5206, 147 N.E.3d 623, ¶14. The term "has been variously defined, but it is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases." *Id.*, quoting *Smith* at 264, 361 N.E.2d 1324.

{¶18} In his first assignment of error, Appellant concedes that he has no statutory or common law right to appointment of counsel for his motion to withdraw. Because motions to withdraw guilty pleas are part of original criminal actions, rather than collateral proceedings, he argues that the trial court abused its discretion when it failed to appoint counsel on the form motion.

{¶19} Appellant cites no case law addressing the appointment of counsel for post-sentence motions to withdraw guilty pleas, but broadly states that "the courts of appeal have routinely held that an indigent defendant is entitle[d] to appointment of counsel to pursue pre-sentence withdrawal of guilty pleas." (Appellant's Brf., p. 2.) He cites one

case, *State v. Dellinger*, 6th Dist. Huron No. H-02-007, 2002-Ohio-4652. In *Dellinger,* the appellant alleged in his motion to withdraw plea that his only contact with the public defender, other than court appearances, was a telephone conversation on the day before the plea hearing.

{¶20} The public defender appeared at the hearing on the pre-sentence motion to withdraw the guilty plea. He agreed with Dellinger's statement of the facts surrounding the plea, most notably that the public defender declined to file a motion to suppress because Dellinger's letter requesting the motion was misplaced by his office. The public defender explained that he was overburdened with work at the time, but that he would not have filed the motion to suppress based on the facts surrounding the crime.

{¶21} In concluding that substitute counsel should have been appointed, the Sixth District observed:

> Appellant's public defender appeared at the motion hearing with the understanding that his services had been terminated. Yet, no substitute counsel was appointed, and the testimony the public defender offered was deleterious to his client/former client's former position. Appellant correctly characterizes this testimony as more in the nature of counsel explaining his own actions rather than advocating his client/former client's position. Whether the public defender was not appellant's counsel or was not acting as appellant's counsel, the trial court's failure to appoint another defense counsel or make the necessary inquiries as to whether appellant waived counsel at that point, deprived appellant of the counsel to which he was entitled through each critical stage of the proceeding. Crim.R. 44; see, also, *State v. Pruitt* (1984), 18 Ohio App.3d 50, 57, 480 N.E.2d 499. Moreover, by failing to appoint substitute counsel for the motion hearing, the court deprived itself of advocacy in favor of the motion to withdraw the plea.

Id. at ¶ 12. It is important to note that the Sixth District ultimately found that the trial court applied the wrong standard for pre-sentence motions, and that Dellinger had a reasonable and legitimate basis to withdraw his pre-sentence plea.

{¶22} Appellant also cites *State v. Pruitt*, 18 Ohio App.3d 50, 57, 480 N.E.2d 499

(1984), a case cited in support of the Sixth District's holding in *Dellinger.* However, *Pruitt* provides no insight into the resolution of this appeal. In *Pruitt,* the defendant asserted a total breakdown in communication with his court-appointed counsel. Without any investigation regarding Pruitt's competency to represent himself, the trial court gave Pruitt two options, to go to trial with his current counsel, or to represent himself. Pruitt chose to represent himself with no assistance from appointed counsel. Pruitt was convicted and the Eighth District held that the trial court's refusal to appoint new counsel, in the absence of bad faith or intentional delay, constituted a denial of effective assistance of counsel.

{¶23} In his second assignment of error, Appellant concedes that a hearing is not required on a post-sentence Crim.R. 32.1 motion, if the facts alleged by the defendant and accepted as true by the trial court would not require the court to permit a guilty plea to be withdrawn. *State v. Howard*, 7th Dist. Mahoning No. 12 MA 41, 2013-Ohio-1437, ¶ 19. Thus, a defendant is only entitled to a hearing on a motion to withdraw if the trial court determines the defendant has alleged facts sufficient to prove a manifest injustice. *Id.*

{¶24} An appellate court reviews a trial court's decision on a motion to withdraw a plea under an abuse-of-discretion standard. *Smith, supra,* at paragraph two of the syllabus; *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 32. An abuse of discretion connotes more than an error of judgment; it implies an attitude on the part of the court that is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶25} When reviewing the denial of a post-sentence motion to withdraw a plea, the facts surrounding Appellant's plea are essential to establishing manifest injustice. Relevant to the above-captioned appeal, the same factual assertions inform the trial court's exercise of its discretion in appointing counsel and conducting a hearing on the motion. For instance, in both *Dellinger* and *Pruitt*, *supra*, the appellate courts predicated their conclusions regarding the appointment of counsel on the specific facts in each case. However, Appellant has failed to allege any such facts in his pro se motion.

{¶26} Simply stated, Appellant provides no underlying facts, that, if believed, would demonstrate manifest injustice. Instead, the form motion contains only bald assertions that Appellant was compelled to enter his pleas and that he is innocent of the crimes for which he was convicted. We have recently held that bald assertions in a post-

sentence motion to withdraw a plea are insufficient to demonstrate manifest injustice. We reasoned that a claim of innocence by itself does not provide a reasonable basis for withdrawing a plea, otherwise withdrawal would effectively become an automatic right. *State v. Magby,* 7th Dist. Mahoning No. 17 MA 0006, 2019-Ohio-877, ¶ 44, *citing State v. Holin,* 174 Ohio App.3d 1, 2007-Ohio-6255, 880 N.E.2d 515 (11th Dist.).

{¶27} Appellant has failed to offer facts, which, if believed, would show that he was actually innocent. Likewise, there are no facts asserted that demonstrate Appellant was coerced into entering his pleas, or misled by his appointed counsel regarding the essential elements of his crimes or the potential penalty. Appellant's signed plea agreement plainly states, "I have not been coerced or induced into making these pleas by any threats or promises, other than any recommendations the state has agreed to make as part of this agreement." Further, a review of the record demonstrates that appointed counsel vigorously litigated this matter.

{¶28} In the absence of the assertion of facts, which, if believed, would constitute manifest injustice, we find that the trial court did not abuse its discretion when it declined to appoint counsel or conduct a hearing on the form motion to withdraw. Accordingly, we find that the trial court did not abuse its discretion, and the judgment entry of the trial court is affirmed.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.