[Cite as *State v. Miller*, 2023-Ohio-2290.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ARQUISE MILLER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 MA 0090

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 19-CR-680

BEFORE:
David A. D'Apolito, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Gina DeGenova, Mahoning County Prosecutor, and *Atty. Ralph M. Rivera*, Assistant Chief, Criminal Division, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. James S. Gentile, and *Atty. Ronald D. Yarwood*, The Liberty Building, 42 North Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: June 26, 2023

D'Apolito, P.J.

{¶1} Appellant, Arquise Miller, appeals the denial of his motion to withdraw his post-sentence plea of guilty without a hearing by the Mahoning County Court of Common Pleas. Appellant asserts his trial counsel never discussed nor gave Appellant the opportunity to review any discovery produced by the state. Appellant further asserts that his trial counsel incorrectly informed Appellant that he was eligible for judicial release after eighteen months of incarceration, instead of five years of incarceration.

{¶2} In his sole assignment of error, Appellant argues that the foregoing facts accepted as true are grounds to vacate his plea and convictions, and therefore the trial court should have conducted a hearing on the merits. For the following reasons, we affirm the decision of the trial court overruling Appellant's motion to withdraw his plea without a hearing.

FACTS AND PROCEDURAL HISTORY

{¶3} On August 29, 2019, Appellant was indicted for one count of possession of cocaine in violation of R.C. 2925.11(A), (C)(4)(f), a felony of the first degree, with a major drug offender specification pursuant to R.C. 2941.1410(A), and a forfeiture specification for money in a drug case pursuant to R.C. 2941.1417(A) ($729.00); one count of possession of heroin in violation of 2925.11(A), (C)(6)(e), a felony of the first degree, with a forfeiture specification for money in a drug case pursuant to R.C. 2941.1417(A) ($729.00); and one count of illegal use or possession of drug paraphernalia in violation of R.C. 2925.14(C)(1), (F)(1), a misdemeanor of the fourth degree, with a forfeiture specification for money in a drug case pursuant to R.C. 2941.1417(A) ($729.00).

{¶4} On November 16, 2020, Appellant executed a written plea to the amended crimes of possession of cocaine in violation of R.C. 2925.11(A), (C)(4)(e), a felony of the first degree, possession of heroin in violation of 2925.11(A), (C)(6)(c), a felony of the third degree, and a $729.00 forfeiture specification. In exchange for Appellant's plea, the state essentially dismissed the major drug offender specification in count one by reducing the amount of drugs charged in the amended count. The state amended the heroin possession charge in count two from a first-degree felony to a third-degree felony by likewise reducing the amount of heroin in amended count two. The state also agreed to

dismiss the misdemeanor charged in count three in its entirety. Finally, the state agreed to a jointly- recommended aggregate sentence of six to eight-and-a-half years, that is, five to seven-and-a-half years on amended count one and one year on amended count two, to run consecutively. Appellant was on probation from an earlier conviction at the time of the plea/sentencing hearing.

{¶5} At the plea/sentencing hearing, the trial court began the colloquy with Appellant as follows:

> THE COURT: And the record should reflect that I did have an opportunity to meet with counsel before coming into court, and just so that the I's are completely dotted and the T's crossed, I know that as part of this Rule 11 agreement, the – [Appellant] would be statutorily eligible for judicial release after serving how much –
>
> THE STATE: Five years, Your Honor.
>
> THE COURT: Five years. And pursuant to the agreement, the state would oppose judicial release. I don't know enough about [Appellant] or this case to say whether or not I would grant it, but just indicating, so [Appellant] is aware, and I know [defense counsel] has had an opportunity to go over this with him, that he is statutorily eligible for it.
>
> So [Appellant], good morning.
>
> APPELLANT: Good morning.
>
> THE COURT: I have to go over some things with you. * * * My first question, I assume you are completely satisfied with the representation and with the advice you have received from [your trial counsel]?

APPELLANT: Yes, sir.

(11/12/20 Plea/Sent. Hrg., p. 4-6.) At the conclusion of the plea hearing, the trial court overruled Appellant's motion to delay sentencing and to release Appellant on bond pending a future sentence date, then imposed the agreed sentence.

{¶6} Roughly eighteen months later on June 22, 2022, Appellant filed the motion to withdraw his guilty plea currently before us on appeal. Attached to the motion are the affidavits of Appellant and his mother. Both affiants attest that Appellant's trial counsel informed them prior to the entry of Appellant's plea that Appellant would be eligible for judicial release following eighteen months of incarceration. In addition, Appellant attests he repeatedly asked his trial counsel for the state's discovery, but defense counsel never shared it. Appellant's mother attests that she continued to request the state's discovery from Appellant's trial counsel after Appellant's incarceration, but Appellant's trial counsel did not produce it. Ultimately, Appellant's trial counsel responded to a request for the state's discovery from his current counsel.

{¶7} The trial court summarily overruled the motion to withdraw plea without a hearing on July 15, 2022. This timely appeal followed.

ASSIGNMENT OF ERROR

THE COURT ERRED IN OVERRULING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA WITHOUT A HEARING.

{¶8} Criminal Rule 32.1 provides, "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." Crim.R. 32.1. The Ohio Supreme Court has defined "a manifest injustice" as a "clear or openly unjust act." *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998). We have defined it as "an extraordinary and fundamental flaw in the plea proceedings." *State v. Threats*, 7th Dist. Jefferson No. 18 JE 0003, 2018-Ohio-3825 at ¶ 39. The burden of establishing the existence of a manifest injustice is on the party seeking to vacate the plea. *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977).

{¶9} It is within the trial court's discretion to determine whether a manifest injustice occurred. *Id.* at paragraph two of the syllabus. A hearing is 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 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. In other words, 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.*

{¶10} We review the trial court's denial of a post-sentence motion to withdraw a guilty plea for an abuse of discretion. The trial court abuses its discretion when its attitude is unreasonable, arbitrary, or unconscionable. *State v. Xie*, 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992), citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶11} First, the state argues Appellant's motion to withdraw his plea is procedurally barred, because the arguments in the motion could have been raised in a direct appeal. To the contrary, Appellant's motion to withdraw his plea is predicated upon evidence outside of the record, that is, his affidavit and the affidavit of his mother. Therefore, we find res judicata does not bar the motion.

{¶12} Appellant's motion to withdraw his plea is predicated upon ineffective assistance of counsel. Typically, in order to establish a claim of ineffective assistance of counsel, an appellant must demonstrate: (1) his trial counsel's performance was deficient or unreasonable under the circumstances; and (2) the deficient performance prejudiced the defense. *State v. Brown*, 7th Dist. Belmont No. 21 BE 0012, 2022-Ohio-893, ¶ 13, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, in the context of a guilty plea, an appellant must demonstrate a reasonable probability that, but for his counsel's deficient or unreasonable performance, the appellant would have insisted on going to trial. *Xie*, 62 Ohio St.3d at 524, 584 N.E.2d 715; citing *Hill v. Lockhart* (1985), 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203.

{¶13} Moreover, "[t]actical or strategic trial decisions do not generally constitute ineffective assistance." *State v. Gawron*, 7th Dist. Belmont No. 20 BE 0009, 2021-Ohio-3634, ¶ 94, citing *State v. Frazier*, 61 Ohio St.3d 247, 255, 574 N.E.2d 483 (1991). "Rather, the errors complained of must amount to a substantial violation of counsel's

essential duties to his client." *Gawron* at ¶ 94, citing *State v. Bradley*, 42 Ohio St.3d 136, 141-142 (1989).

{¶14} Appellant cites *State v. Williams,* 10th Dist. Franklin No. 03AP-1214, 2004-Ohio-6123 for the proposition that a plea is not knowing, intelligent, and voluntary when it is predicated upon incorrect information. In *Williams,* the trial court advised the defendant he would be eligible for judicial release at the plea hearing, but the subsequent imposition of consecutive sentences resulting in a greater-than-ten-year aggregate sentence rendered Williams ineligible for judicial release.

{¶15} Williams filed a motion to withdraw his plea, asserting that he would not have entered his plea had he been notified that his eligibility for judicial release was dependent on the then-undetermined length of his sentence. The Tenth District reversed the trial court's decision overruling Williams' motion to withdraw his plea and remanded the matter for a hearing on the motion. The Tenth District took no position on the merits of Williams' motion or the credibility of his allegations, opining that those determinations were for the trial court to address following the evidentiary hearing. *Id.* at ¶ 10.

{¶16} Appellant contends that the trial court should have conducted a hearing on his motion insofar as the facts in the affidavits taken as true establish a manifest injustice. However, the trial court plainly stated during the plea portion of the plea/sentencing hearing that Appellant would be eligible for judicial release after five years of incarceration. Therefore, *Williams*, *supra*, is inapposite insofar as the trial court in this appeal correctly stated Appellant's eligibility for judicial release at the plea/sentencing hearing.

{¶17} Next, Appellant argues that discovery in this case reveals the search warrant, which yielded the drugs that provide the basis for Appellant's convictions, was predicated upon three controlled buys. Because the seller at the three controlled buys was not identified, Appellant alleges "[t]hese facts would give rise to the absolute necessity to file a motion to suppress in order to effectively represent [Appellant]." (Appellant's Brf., p. 4.)

{¶18} However, we find Appellant's argument regarding the state's discovery is speculative. Appellant does not allege there exists exculpatory evidence in the state's discovery, which Ohio district courts have typically recognized as grounds for withdrawing

a plea. See *State v. Hale*, 8th Dist. Cuyahoga No. 100447, 2014-Ohio-3322, at ¶ 10 ("Without knowledge of * * * potentially exculpatory evidence, it cannot be said that Hale entered his plea knowingly, intelligently, and voluntarily.") Further, Appellant's trial counsel may have chosen to forego a motion to suppress based on the state's agreement to significantly reduce the amount of drugs alleged in counts one and two and dismiss count three in its entirety.

{¶19} Finally, the trial court asked Appellant if he was satisfied with his trial counsel's representation. Despite the opportunity to inform the trial court that trial counsel had not shared the state's discovery with Appellant, he chose instead to express his satisfaction with his trial counsel's representation and enter his plea. In *State v. Howard*, 2nd Dist. Montgomery No. 28328, 2019-Ohio-5357, the Second District held that Howard's election to enter his guilty plea despite the state's alleged failure to fully comply with its discovery obligations contravened Howard's claim that he suffered a manifest injustice. *Id.* at ¶ 40.

{¶20} In summary, Appellant was notified at the plea/sentencing hearing that he was ineligible for judicial release until he completes five years of his sentence. Further, Appellant eschewed the opportunity to notify the trial court that his trial counsel had not provided the state's discovery for Appellant's review, choosing instead to endorse his trial counsel's representation. Finally, Appellant has not demonstrated, but for his trial counsel's performance, he would not have entered his plea.

{¶21} Insofar as the record contravenes the averments in the affidavits provided in support of the motion to withdraw plea, Appellant has not demonstrated that he suffered a manifest injustice. Accordingly, the judgment entry of the trial court overruling the motion to withdraw without a hearing is affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is 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 taxed against the Appellant.

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.