[Cite as *State v. Taylor*, 2009-Ohio-6496.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio — Court of Appeals No. H-08-026

Appellee — Trial Court No. CRI 20070509

v.

Clabe Taylor — **DECISION AND JUDGMENT**

Appellant — Decided: December 11, 2009

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, for appellee.

Megan K. Mattimoe, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Huron County Court of Common Pleas, following a guilty plea, in which the trial court found appellant, Clabe Taylor, guilty of one count of trafficking in drugs, in violation of R.C. 2925.03(A)(1)(C)(4)(d). On appeal, appellant sets forth the following four assignments of error:

{¶ 2} "First assignment of error: Trial counsel did not effectively assist appellant in his defense in violation of the Sixth Amendment.

{¶ 3} "Second assignment of error: Appellant did not knowingly, voluntarily and intelligently enter his guilty plea in violation of appellant's right to due process.

{¶ 4} "Third assignment of error: The trial court erred when it failed to hold a hearing on appellant's motion to withdraw his guilty plea prior to sentencing in violation of appellant's right to due process.

{¶ 5} "Fourth assignment of error: The trial court erred when it denied appellant's motion to withdraw his guilty plea post-sentencing in violation of appellant's right to due process."

{¶ 6} On June 22, 2007, appellant was indicted by the Huron County Grand Jury on one count of trafficking in cocaine, a schedule II drug, in violation of R.C. 2925.03(A)(1) and (C)(4)(d), a third degree felony. The charge in the indictment was made after appellant was arrested as part of a sting operation conducted by the Norwalk Police Department on May 4, 2007 at a local motel. During the operation, appellant sold $800 worth of cocaine to a confidential informant ("CI"). The transaction was videotaped by Norwalk police officers in an adjacent motel room. After the transaction occurred, appellant exited the motel room, where he was promptly arrested. Police searched appellant at the scene and found $800 in marked currency on his person. While police were arresting appellant, the confidential informant used some of the cocaine, placed an additional amount of the drug in her bra, and flushed some more of it down the toilet. Approximately 12 grams of the cocaine sold to the CI were recovered by Norwalk police.

{¶ 7} On July 30, 2007, appellant, appearing with retained defense counsel, entered a not guilty plea in the Huron County Court of Common Pleas, and was released on bond. However, on October 5, 2007, appellant entered into a plea agreement in which he agreed to plead guilty to one count of trafficking in drugs, as charged in the indictment. In exchange, the state verbally agreed to recommend the continuation of appellant's bond until the time of sentencing, and to recommend that appellant be given a less-than-maximum prison sentence.

{¶ 8} That same day, a plea hearing was held, at which the trial court addressed appellant directly, during which appellant stated that he was not under the influence of alcohol, drugs, or prescription medication. The trial court then reviewed the charge against appellant, and stated that appellant could receive a prison sentence of one to five years if convicted of the charge of trafficking in drugs. The trial court further explained the conditions of postrelease control, and the consequences of violating a postrelease control sanction, if one was imposed, as well as his limited right to appeal any conviction.

{¶ 9} The trial court advised appellant of his constitutional rights to a trial by a 12-member jury; to have the elements of the offense charged proven beyond a reasonable doubt; to have a unanimous verdict; to cross-examine witnesses at trial; to subpoena his own witnesses for trial; to have an attorney at all stages of the court proceedings and not to testify in his own defense. After the recital of each constitutional right, appellant indicated that he understood and wished to give up that right as part of his plea.

{¶ 10} Following the above inquiry, appellant told the court that he had been advised by counsel as to the charge against him and his possible defenses. Appellant then stated that he was satisfied with his attorney's advice and competence, and he fully understood the terms and conditions of the plea agreement. Appellant indicated that it was in his best interest to enter into the plea agreement, and he told the court that he had not received any threats or promises in exchange for his plea. The trial court then explained that it was not bound to accept the prosecution's recommendation of a reduced sentence. Thereafter, the prosecutor recited the factual basis for the plea, and appellant agreed that the facts, as stated, were true. Appellant then reaffirmed his intent to enter a guilty plea, and stated that the plea was voluntary, and of his own free will.

{¶ 11} Based on the above-stated facts and appellant's in-court statements, the trial court found that appellant's plea was voluntarily, knowingly, and intelligently made. The trial court then accepted the plea and found appellant guilty as charged in the indictment. A presentence investigation report was ordered, and the matter was continued for sentencing, during which time appellant's bond was continued.

{¶ 12} A sentencing hearing was held on November 20, 2007. At the outset of the hearing, the trial court stated that it had received a letter from appellant "indicating that [appellant] potentially believed the plea agreement was not in his best interest, and [he] would like to consider withdrawing that plea."[1] Defense counsel then indicated that appellant had changed his mind since the letter was written and was ready to proceed

[1]The record does not contain a copy of appellant's letter to the trial court.

with sentencing. In response, the trial court asked appellant if he was satisfied that the concerns raised in his letter had been addressed, to which appellant replied: "Yes, sir."

{¶ 13} The trial court noted that it had reviewed appellant's presentence report, which included a lengthy record of offenses and several prison terms. The prosecutor then stated that, although appellant did not have a record of violent offenses, his criminal behavior had been allowed to go on for "too long." The prosecutor also stated that appellant sold the CI a "fair amount of cocaine." Accordingly, the prosecutor asked the court to give appellant a three to four-year prison term and a mandatory $5,000 fine.

{¶ 14} In response, defense counsel stated that appellant had been incarcerated three times in the past; however, he had not been in prison since 2001. Counsel stated that, at the time of the instant offense, appellant was employed and was attempting to better himself by attending college. Defense counsel asked the trial court to sentence appellant to serve a two-year prison term.

{¶ 15} Appellant told the trial court that he regretted his actions, and he stated that he sold drugs to help support his children. He asked the trial court to give him a chance to show that he is able to be a productive member of the community and not sell drugs. Appellant further stated that, at the time his plea was entered, he understood that the prosecutor would recommend a sentence of not more than two years.

{¶ 16} After hearing the above statements, the trial court stated that it had reviewed the record of proceedings and considered the applicable factors in R.C. 2929.11, including the rehabilitation of the defendant, the provision of restitution to the

victim, the need to incapacitate the defendant and the deterrence of the defendant and others. The trial court also stated that it tried to achieve the overriding purposes of sentencing by "making this sentence reflect the seriousness of the defendant's conduct and its impact upon society and also to be consistent with sentences for similar crimes and similar defendants * * *." The trial court found that there were no factors making appellant's crime more or less serious, and noted that appellant had not responded favorably to court-imposed sanctions in the past. The trial court also found that appellant is not amenable to community control. Thereafter, the trial court imposed a prison sentence of three years and ordered appellant to pay a mandatory minimum fine of $5,000.

{¶ 17} A judgment entry of sentencing was journalized on November 27, 2007. On January 29, 2008, appellant filed a postsentence motion to withdraw his guilty plea, pursuant to Crim.R. 32.1. In support of his motion, appellant stated that his plea was not voluntarily, knowingly and intelligently made, and that he made his plea in exchange for release on bond because he was "intimidated by the prospect of jail awaiting trial." In addition, appellant stated that he was told the recommended sentence would be two years, and defense counsel told him that the prosecutor might be willing to "drop [the sentence] down to one year to eighteen months * * *." Finally, appellant stated that he was surprised to find out that the trial court was not going to hold a hearing on the withdrawal of his plea on November 20, 2008; however, he went ahead with his plea because, at the time, he was under "intense duress" due to "threats" made by the prosecutor.

{¶ 18} On April 14, 2008, the trial court held a hearing on appellant's postsentence motion to withdraw his guilty plea. At the hearing appellant, acting pro se, told the court that his case had been mishandled by the Norwalk Police Department and the Huron County Sheriff's Department, because the CI was allowed to consume and otherwise dispose of part of the cocaine. Appellant stated that defense counsel did not argue on his behalf at the plea hearing, and the prosecutor threatened that his bond would be revoked if he did not enter the plea. Finally, appellant argued that the remaining 12.1 grams of cocaine recovered from the CI should not be used as evidence against him because the chain of custody of the drugs had been broken.

{¶ 19} The prosecutor stated at the hearing that, whether or not appellant's bond was "true consideration" to support his plea, the fact remains that appellant wanted less than a five-year prison sentence, and he only received a three year sentence. The prosecutor also reminded the trial court that the entire transaction between appellant and the CI was videotaped by police in the next room, and that, at the time of the hearing, appellant had additional criminal charges pending in Erie County.

{¶ 20} The trial court stated that it had reviewed the transcripts of the plea hearing, and found no irregularities in that proceeding. The court also recalled that appellant stated at the plea hearing that his plea was voluntarily made. Although appellant sent a letter questioning whether a plea was in his best interest, he ultimately stated at the plea hearing that he would proceed with the plea. At that point, appellant stated that he decided not to withdraw his plea because the prosecutor threatened to revoke his bond.

The trial court replied that appellant was informed of the risks of entering a guilty plea and, under the circumstances, the prison sentence appellant received was fair.

{¶ 21} On May 16, 2008, the trial court issued a judgment entry in which it denied appellant's postsentence motion to withdraw his plea. On September 2, 2008, appellant filed a notice of appeal from the trial court's November 20, 2007, judgment entry. On October 7, 2008, this court construed appellant's notice of appeal as a motion for delayed appeal pursuant to App.R. 5(A), granted the motion, and appointed counsel to represent appellant on appeal.

{¶ 22} In his first assignment of error, appellant asserts that he received ineffective assistance of trial counsel. In support, appellant argues that: (1) defense counsel failed to file a motion to suppress the evidence obtained through the controlled drug buy, even though there was a reasonable probability that such a motion would have been granted; (2) defense counsel advised appellant to enter into a plea that was "invalid and therefore unknowing, involuntary and unintelligent" because the plea was based on an "illusory promise" that was inadequate consideration; and (3) defense counsel failed to ask the trial court to give appellant a minimum sentence.

{¶ 23} We note at the outset that, in order to succeed in claiming ineffective assistance of counsel, a defendant must prove both "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448,

citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674. In establishing the first prong of the *Strickland* test, a defendant "must overcome the strong presumption that licensed attorneys are competent, and that the challenged action is the product of sound trial strategy * * *." *State v. Ghee,* 12th Dist. No. CA2008-08-017, 2009-Ohio-2630, ¶ 21, citing *Strickland,* supra, at 690-91. In order to show prejudice, a defendant must affirmatively demonstrate the existence of a reasonable probability that, but for counsel's alleged error, the result would have been different. *State v. Kearns,* 4th Dist. No. 08CA3075, 2009-Ohio-2357, ¶ 7, citing *State v. White* (1998), 82 Ohio St.3d 16, 23; *State v. Clark,* 4th Dist. No. 02CA684, 2003-Ohio-1707, ¶ 22. (Other citations omitted.)

{¶ 24} As to appellant's first argument, it is well-established that "failure to file a suppression motion does not constitute per se ineffective assistance of counsel." *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305. Appellant asserts that the 12.1 grams of cocaine ultimately recovered by police from the CI is inadmissible against appellant because the CI consumed a portion of the drugs she purchased from appellant and flushed another portion down the toilet before police arrived. However, it is undisputed that appellant was videotaped by Norwalk police officers as he sold cocaine to the CI, and that police found $800 in marked bills on appellant's person as he exited the motel room. Accordingly, the exclusion of the drugs as evidence against appellant does not necessarily create a reasonable probability that the trial court would have had a reasonable doubt respecting appellant's guilt. Appellant has,

therefore, failed to meet the second prong of the *Strickland* test, and his first argument is without merit. See *State v. Kearns*, supra, at ¶ 6. (If nothing appears in the record to establish prejudice, an appellate court need not address the question of whether counsel's performance was deficient.)

{¶ 25} As to appellant's second argument, the written plea agreement states, in relevant part, that: "I understand the nature of these charges and possible defense I might have. I am satisfied with my attorney's advice and competence. I am not under the influence of drugs or alcohol. No threats have been made to me. No promises have been made except as part of this plea agreement stated entirely as follows: The Defendant will plead guilty to Count I, Trafficking In Cocaine, contrary to Ohio Revised Code Section 2925.03(A)(1)(C)(4)(d), a felony of the third degree." The plea agreement further stated that the range of possible sentencing for trafficking in cocaine in violation of R.C. 2925.03(A)(1)(C)(4)(d) is one to five years, with a maximum possible fine of $10,000, and that a prison term, while not mandatory, is presumed.

{¶ 26} At the plea hearing, as promised, the prosecutor recommended that appellant's bond be continued until the time of sentencing. The prosecution then asked the trial court to order appellant to serve three to four years out of a possible five-year sentence, and appellant's defense attorney asked the court to sentence appellant to a maximum of two years in prison. Ultimately, appellant received a three-year sentence and a $5,000 fine, both of which are well below the maximum possible penalty. Later, at the hearing on appellant's postsentence motion to withdraw his plea, appellant, acting pro

se, argued that he received nothing in exchange for his plea, since the state's recommendation of continued bond pending sentencing was "routine practice." The prosecutor responded:

{¶ 27} "Yeah, well, as I understood the plea bargain that we did have at the time of entering the plea of guilty, the only thing the State said was that they would recommend the continuance of the bond for Mr. Taylor. Whether that was a true consideration for a plea or simply standard practice [as alleged by appellant], it was mentioned as consideration for the plea. He entered the plea of guilty to the charge, hoping to be able to persuade the Court for a lesser sentence at the time of the sentence, less than five years. He certainly succeeded in that. The Court give [sic] a three year sentence."

{¶ 28} Appellant correctly states that, generally, a contract is improperly based on an "illusory promise" when one party, particularly the state, retains "an unlimited right to determine the nature or extent of his performance * * *." See *State v. Aponte* (2001), 145 Ohio App.3d 607, 612-613. However, in *Aponte*, the defendant entered into a plea agreement whereby he agreed to provide the state with information in exchange for being allowed to withdraw his guilty plea at a later time. The agreement was ultimately determined to be an "illusory promise," since the withdrawal of a guilty plea is subject to the sole discretion of the trial court, not the state. Id., at 613.

{¶ 29} In contrast, in this case, the record shows that the state agreed to recommend both a continuation of bond pending sentencing and a less-than-maximum sentence. The prosecutor did, in fact, make both recommendations. However, appellant

stated at the November 20 hearing that he did not wish to withdraw his guilty plea at that time, which resulted in immediate sentencing and the termination of appellant's bond. As set forth above, the terms of appellant's plea clearly stated that the length of appellant's sentence would be determined by the trial court, not the prosecutor. Finally, appellant's dissatisfaction with the length of his sentence is not sufficient to establish that the plea was based on an illusory promise. In other words, "a deal is a deal." *State v. Butts* (1996), 112 Ohio App.3d 683, 688.

{¶ 30} On consideration, we find that the reasoning expressed in *Aponte*, supra, does not apply in this case. Appellant has not otherwise established that the state's offer to continue his bond pending sentencing, and to recommend a less-than-maximum sentence, constitutes the type of "illusory promise" that is legally insufficient consideration to support his guilty plea. See, also, *State v. Gonzalez*, 6th Dist. No. L-06-1048, 2006-Ohio-6458. (There is no authority in Ohio to support the claim that a plea bargain is void for lack of consideration based on a defendant's expectation that he would receive a less-than-maximum sentence. Id., ¶ 17.) Appellant's argument to the contrary is without merit.

{¶ 31} As to appellant's third argument, "when a defendant enters a plea of guilty as part of a plea bargain [he or] she waives all appealable errors, unless such errors are shown to have precluded the defendant from entering a knowing and voluntary plea." *State v. Radel*, 5th Dist. No. 2009-CA-00021, 2009-Ohio-3543, ¶ 12, citing *State v. Kelly* (1991), 57 Ohio St.3d 127. (Other citations omitted.) A defendant's mistaken belief

regarding the consequences of his plea is not sufficient to show that the plea was not knowingly and voluntarily made. Id. at ¶ 13, citing *State v. Sabatino* (1995), 102 Ohio App.3d 483.

{¶ 32} As set forth above, at the plea hearing, the trial court informed appellant of the nature and consequences of his plea, including the possibility that he could be sentenced to serve between one and five years in prison. Appellant states that defense counsel told appellant he would ask for the "minimum sentence" in exchange for appellant's plea but asked the court for a two-year sentence instead. Nevertheless, regardless of what appellant's attorney may have told appellant regarding a minimum sentencing recommendation, the fact remains that appellant was aware of the sentencing options available to the trial court. While the issue of ineffectiveness of counsel based on counsel's alleged decision to ask for a less-than-minimum sentence may be the proper subject of a motion for postconviction relief pursuant to R.C. 2953.21, it is not appropriately raised in a direct appeal of appellant's conviction and sentence. See *State v. Cooperrider* (1983), 4 Ohio St.3d 226. (Postconviction relief is the appropriate remedy whether allegations of ineffectiveness of counsel are based on evidence outside the trial court record. Id., at 228.)

{¶ 33} On consideration of the foregoing, this court finds that appellant has not demonstrated that defense counsel's performance fell below an objective standard of reasonableness, or that counsel's performance prejudiced appellant's defense such that he

did not receive a reliable or fair trial. Appellant's first assignment of error is not well-taken.

{¶ 34} In his second assignment of error, appellant asserts that his plea was not knowing and voluntary. In support, appellant argues that, but for defense counsel's ineffectiveness, he would not have entered a guilty plea. Appellant further argues that the consideration offered in exchange for his plea was insufficient.

{¶ 35} As set forth in our determination of appellant's first assignment of error, appellant has not demonstrated that there was insufficient consideration to support his guilty plea, or that counsel's representation was so deficient as to deprive appellant of a fair trial. Appellant' second assignment of error is, therefore, not well-taken.

{¶ 36} In his third assignment of error, appellant asserts that the trial court erred by not holding a hearing on his presentence motion to withdraw his plea. In support, appellant states that, pursuant to Crim.R. 32.1, the trial court was required to hold a hearing, based on appellant's letter to the trial court, in which appellant asked the trial court for permission to withdraw his plea.

{¶ 37} Pursuant to Crim.R. 32.1, "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 may set aside the judgment of conviction and permit the defendant to withdraw his plea." The rule does not provide guidelines for presentence withdrawal of a guilty plea; however, generally, courts hold that the decision to grant or deny such a motion is within the sound discretion of the trial court. *State v. Xie* (1992), 62 Ohio St.3d 521, 526.

In addition, it is well established that, where appropriate, a presentence motion to withdraw a guilty plea "shall be freely and liberally granted." Id.

{¶ 38} It is undisputed that appellant did not file a formal presentence motion to withdraw his guilty plea. As set forth above, the record does not contain a copy of appellant's letter to the trial court. The first reference in the record to an attempt to withdraw appellant's plea before sentencing appears in the transcript of appellant's sentencing hearing, when the following exchange took place:

{¶ 39} "The Court: The Court has received – I had an opportunity to address this with the attorneys in chambers prior to coming on the record. I had received a communication from Mr. Taylor indicating that he potentially believed the plea agreement was not in his best interest, and would like to consider withdrawing that plea.

{¶ 40} "Mr. Mason [appellant's attorney] has indicated that's not the case with the defendant here today; that he's prepared to proceed with sentencing, is that correct, Mr. Mason?

{¶ 41} "Mr. Mason: Yes, Your Honor.

{¶ 42} "The Court: Okay. And, Mr. Taylor, is that – is your attorney representing it correctly to the Court, at this time you do not have any interest in withdrawing your plea?

{¶ 43} "[Appellant]: Yes, sir.

{¶ 44} "The Court: Okay. The concerns that you had in the letter, you're satisfied that you've addressed those and you're ready to proceed with sentence today?

{¶ 45} "[Appellant]: Yes, sir."

{¶ 46} At least one Ohio court has stated that a letter sent by a defendant to the trial court indicating a desire to withdraw his guilty plea is the functional equivalent of a presentence motion to withdraw the plea. *State v. Cuthbertson*, 139 Ohio App.3d 895, 899, 2000-Ohio-2638.[2] However, in this case, even if the letter is construed as a presentence motion to withdraw appellant's plea, appellant clearly indicated to the trial court at the outset of the sentencing hearing that he no longer wished to withdraw his plea. Accordingly, the trial court did not err by not holding a hearing on the issues raised in appellant's letter. Appellant's third assignment of error is not well-taken.

{¶ 47} In his fourth assignment of error, appellant asserts that the trial court erred by denying his postsentence motion to withdraw his guilty plea. In support, appellant argues that the combination of circumstances surrounding the presentence motion to withdraw his plea, coupled with defense counsel's deficient performance, satisfies his burden to demonstrate the existence of "manifest injustice" in this case.

{¶ 48} As set forth above, Crim.R. 32.1 states that a postsentence motion to withdraw a guilty plea may be granted "to correct manifest injustice." "'Manifest injustice' relates to some fundamental flaw in the proceedings which results in a miscarriage of justice or is inconsistent with the demands of due process. *State v. Ruby*,

---

[2]Nevertheless, when a defendant is represented by counsel, the preferred practice is for a such a motion to be made by counsel either orally at a hearing, or in writing. *State v. Greenleaf*, 11th Dist. No. 2005-P-0017, 2006-Ohio-4317, ¶ 70-71; *State v. Thompson* (1987), 33 Ohio St.3d 1, 6-7.

9th Dist. No. 23219, 2007-Ohio-244, at ¶ 11. "Manifest injustice" has been defined as a "clear or openly unjust act." *State v. Minker*, 2d Dist. No. 2009 CA 16, 2009-Ohio-5625, ¶ 25.

{¶ 49} Generally, a postsentence motion to withdraw a plea should be granted only in extraordinary cases. *State v. Smith* (1977), 49 Ohio St.2d 261, 264. The burden is on the individual seeking withdrawal of his plea to establish the existence of manifest injustice. Id. at paragraph one of the syllabus; *State v. Rice*, 9th Dist. No. 08CA0054-M, 2009-Ohio-5419, ¶ 6. Ultimately, the decision to grant or deny a motion to withdraw a guilty plea is within the sound discretion of the trial court. Id., ¶ 7. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 50} As set forth above, the trial court did not err by allowing appellant to withdraw his guilty plea prior to sentencing; the record does not show that defense counsel was ineffective; and there was ample evidence, including a videotape of the drug transaction and the recovery of 12.1 grams of cocaine and the police money used to purchase the drugs, to support appellant's conviction. In addition, the record shows that the trial court complied with the dictates of Crim.R. 11 at the plea hearing before concluding that appellant's plea was voluntarily, knowingly, and intelligently made. Accordingly, appellant has failed to demonstrate the existence of any "manifest injustice" that would justify the postsentence withdrawal of his guilty plea.

{¶ 51} On consideration of the foregoing, this court finds that the trial court did not abuse its discretion by refusing to grant appellant's postsentence motion to withdraw his guilty plea. Appellant's fourth assignment of error is not well-taken.

{¶ 52} The judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Charles D. Abood, J. _____
CONCUR.
JUDGE

Judge Charles D. Abood, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.