

THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Nos. 08AP-1012
	:	(C.P.C. No. 05CR-1024) and
v.	:	08AP-1013
	:	(C.P.C. No. 06CR-2577)
Calvin L. Golsby,	:	
	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on May 21, 2009

Ron O'Brien, Prosecuting Attorney, and *Richard A. Termuhlen*, for appellee.

Calvin L. Golsby, pro se.

APPEALS from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} In this consolidated appeal, defendant-appellant, Calvin L. Golsby (“appellant”), appeals from a judgment of the Franklin County Court of Common Pleas denying his motion to withdraw guilty plea.

{¶2} In Franklin County Common Pleas Court case No. 05CR-1024, appellant was indicted for burglary, a felony of the second degree. On March 29, 2005, appellant pled guilty to attempted burglary, a felony of the third degree. The trial court imposed four years of community control sanctions, which included appellant entering into a

community-based correctional facility ("CBCF"), followed by intensive control supervision, drug evaluations, drug screenings, and aftercare as recommended. The court further indicated that it would impose a term of incarceration of five years if appellant violated community control.

{¶3} In April 2006, appellant was indicted in case No. 06CR-2577, for aggravated burglary, a felony of the first degree, and burglary, a felony of the second degree. The offense giving rise to the indictment was alleged to have occurred on March 29, 2006, while appellant was on community control in case no. 05CR-1024. On June 5, 2006, appellant pled guilty to burglary, the lesser offense of the second count of the indictment.

{¶4} On July 17, 2006, the court determined that appellant had violated community control in case No. 05CR-1024, and sentenced appellant to a term of four years incarceration, to be served consecutively to the sentence imposed in case No. 06CR-2577, which was also four years. On September 14, 2006, appellant filed a motion for delayed appeal in both cases, which this court denied. Appellant also filed post-conviction relief petitions in both cases, which the trial court denied on July 31, 2007. Appellant appealed the trial court's decision; this court dismissed appellant's appeal based on his failure to file an appellate brief.

{¶5} Appellant subsequently moved to withdraw his guilty pleas entered in both case Nos. 05CR-1024 and 06CR-2577. On October 31, 2008, the trial court denied appellant's motions and this appeal followed. Appellant sets forth two assignments of error as follows:

[1.] The ineffectiveness of Trial Counsel in leading Mr. Golsby in believe [sic] that his plea agreement was binding [sic] and that he was going to be sent back to the Alvis House as it was arranged in open court.

[2.] Counsel[] failed to follow their plea agreement which is binding by law, and the Ohio Constitution Article 1 Section 16.

{¶6} We will address appellant's first and second assignments of error together as they are interrelated. The common thread running through both assignments of error is that appellant claims he did not receive the benefit of his bargained-for exchange. According to appellant, he pled guilty on June 5, 2006, because he was promised by his trial counsel, as well as the court, that he would be sentenced to a halfway house instead of prison. Appellant asserts that because he was sentenced to prison, and not sent to a halfway house, that his guilty plea was not entered knowingly and intelligently, and, thus, the trial court abused its discretion when it denied his motions to withdraw the same.

{¶7} Crim.R. 32.1 provides that, "[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." Because appellant sought to withdraw his guilty plea after sentencing, appellant must demonstrate a manifest injustice in order to set aside the plea. *State v. Smith* (1977), 49 Ohio St.2d 261. In order to show a manifest injustice, a defendant must show that there was some fundamental flaw in the proceedings that resulted in a miscarriage of justice or was inconsistent with the requirements of due process. *State v. Moncrief*, 10th Dist. No. 08AP-153, 2008-Ohio-4594. The defendant bears the burden of showing manifest injustice based on facts contained in the record or supplied through affidavits. *State v. Orris*, 10th Dist. No. 07AP-

390, 2007-Ohio-6499. "A change of heart after becoming aware of an imminent, unexpectedly harsh sentence does not entitle a defendant to withdraw his guilty plea." *State v. McComb*, 2d Dist. No. 22570, 2008-Ohio-295, ¶9 (citation omitted).

{¶8} Reviewing courts will not disturb a trial court's decision on a motion to withdraw a guilty plea absent an abuse of discretion. *State v. Caraballo* (1985), 17 Ohio St.3d 66. Abuse of discretion means "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶9} Ineffective assistance of counsel can form the basis for a claim of manifest injustice to support withdrawal of a guilty plea pursuant to Crim.R. 32.1. *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813. A defendant seeking to withdraw a guilty plea based on ineffective assistance of counsel must show first that counsel's performance was deficient, and second that there is a reasonable probability that, but for counsel's errors, the defendant would not have agreed to plead guilty. *State v. Xie* (1992), 62 Ohio St.3d 521; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

{¶10} Upon review, we conclude that the trial court did not abuse its discretion when it denied appellant's motions. First, there is no evidence in the record that supports appellant's assertion that he was promised a sentence to a halfway house in exchange for his guilty plea; in fact, the hearing transcripts completely belie appellant's argument. Second, appellant has wholly failed to meet his burden under *Strickland*. And, lastly, "[u]nder the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising or litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have

been raised * * * on an appeal from that judgment." *State v. Perry* (1967), 10 Ohio St.2d 175, 180. Thus, because the issues raised by appellant herein could have been brought in a direct appeal, the doctrine of res judicata precludes us from considering the same. Appellant's two assignments of error are overruled.

{¶11} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, P.J., and BROWN, J., concur.
