

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-86
v.	:	(C.P.C. No. 05CR11-7645)
	:	
Kendrick Sappington,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on August 18, 2009

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*Ron O'Brien*, Prosecuting Attorney, and *John H. Cousins IV*,  
for appellee.

*Kendrick Sappington*, pro se.

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} This is an appeal by defendant-appellant, Kendrick Sappington ("appellant"), from a judgment of the Franklin County Court of Common Pleas denying appellant's motion to withdraw a guilty plea. For the reasons that follow, we affirm.

{¶2} Appellant was initially charged in Franklin County Juvenile Court for offenses arising from an incident that occurred on July 8, 2005. On December 1, 2005,

appellant was indicted by a Franklin County Grand Jury on 12 counts, consisting of attempted murder with specifications, aggravated burglary with specifications, aggravated robbery with specifications, felonious assault with specifications, and improperly discharging a firearm at or into a habitation or in a school safety zone.

{¶3} On March 7, 2006, appellant pled guilty to attempted murder with specification and to the stipulated lesser included offense of robbery. On April 26, 2006, the trial court sentenced defendant to seven years imprisonment with an additional three years for the gun specification to run consecutively on Count 1, and four years on Count 5 to run concurrently. Appellant did not appeal his conviction and sentence.

{¶4} Two and a half years later, on December 9, 2008, appellant filed a motion seeking to withdraw his guilty plea or, in the alternative, a petition seeking post-conviction relief. On January 5, 2009, the trial court denied defendant's motion. Appellant timely appealed asserting the following assignment of error:

THE TRIAL COURT ERRED, ABUSED ITS DISCRETION AND DENIED DUE PROCESS WHEN IT DENIED APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL.<sup>1</sup>

{¶5} 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."

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<sup>1</sup> Appellant does not assert any error in the trial court's denial of his alternative petition seeking post-conviction relief.

{¶6} Because appellant sought to set aside a guilty plea after sentencing, appellant must demonstrate a "manifest injustice" in order to set aside the plea. *State v. Eck*, 10th Dist. No. 08AP-675, 2009-Ohio-1049, ¶7. A showing of manifest injustice requires that there exist "some fundamental flaw in the proceedings that resulted in a miscarriage of justice or was inconsistent with the requirements of due process." *Id.*, quoting *State v. Smith*, 10th Dist. No. 08AP-420, 2008-Ohio-6520, ¶9. The appellant bears the burden of demonstrating manifest injustice based on the facts contained in the record or supplied through affidavits. *Smith*.

{¶7} A reviewing court will not disturb a trial court's ruling on a motion to withdraw a guilty plea absent an abuse of discretion. *Eck* at ¶7. Abuse of discretion means "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Smith* at ¶10, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶8} In the present case, appellant alleges his counsel was ineffective because, notwithstanding the maximum possible sentence for the charges to which he pled guilty, his counsel had informed him that he would be required to serve no more than four and a half years. In support of his argument, appellant points to the fact that his trial counsel was suspended by the Supreme Court of Ohio for charges arising from a pattern of neglect of criminal cases, including appellant's case. *Columbus Bar Assn. v. Ellis*, 120 Ohio St.3d 89, 2008-Ohio-5278.

{¶9} However, appellant's motion seeking to withdraw his plea of guilty was not based on a claim that his trial counsel neglected his case, but rather on a claim that counsel misrepresented the length of the sentence appellant would receive. "An undue

delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant." *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph three of the syllabus. Although appellant would have been aware of counsel's alleged misrepresentation when the trial court announced the sentence that was imposed, appellant nonetheless waited more than 31 months to file his motion. Given this delay, we cannot say the trial court abused its discretion in finding that the basis alleged by appellant for his claim of ineffective assistance of counsel lacked credibility.

{¶10} Therefore, appellant's assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT and TYACK, JJ., concur.

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