

[Cite as *State v. Hagler*, 2010-Ohio-6123.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 10AP-291  
 : (C.P.C. No. 05CR08-5646)  
 Marcus C. Hagler, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellant. :

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D E C I S I O N

Rendered on December 14, 2010

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for  
appellee.

*Marcus C. Hagler*, pro se.

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Marcus C. Hagler ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas overruling appellant's motion to withdraw his guilty plea. For the reasons that follow, we affirm.

{¶2} On August 22, 2005, appellant was indicted by the Franklin County Grand Jury on three counts of felonious assault as a second-degree felony, one count of child

endangering as a second-degree felony, and one count of child endangering as a third-degree felony. In January 2006, appellant entered into a plea agreement whereby he agreed to enter guilty pleas to two counts of child endangerment as third-degree felonies in exchange for dismissal of the remaining counts. The agreement included a joint recommendation that appellant would serve a period of community control. However, after review of the presentence investigation report, the trial court declined to accept the joint recommendation, and appellant was allowed to withdraw his guilty pleas.

{¶3} On May 3, 2007, appellant again agreed to enter guilty pleas to two counts of child endangerment as third-degree felonies. The agreement did not include a joint recommendation on sentencing. The court held a sentencing hearing, during which the court was informed that while the case was pending, appellant had been convicted on a charge of burglary in Lorain County. The court explained all of the rights appellant was waiving by entering the guilty pleas, and noted that each of the counts carried a maximum sentence of five years, and that the sentences could be imposed consecutively to each other and consecutively to the sentence appellant was serving on the Lorain County case. Appellant stated that he understood the rights he was waiving, as well as the possible sentence that could be imposed. When asked whether any promises had been made in order to persuade appellant to enter the guilty pleas, appellant responded in the negative. The court accepted appellant's guilty pleas, and imposed sentences of five years on each of the child endangerment counts, and ordered those sentences to be served consecutively.

{¶4} On January 13, 2010, appellant filed a motion seeking to withdraw his guilty pleas pursuant to Crim.R. 32.1. Appellant argued that before he entered the plea agreement, his trial counsel had informed him that under the agreement he would receive one-year sentences on each of the two child endangerment charges, that the sentences would be served concurrently, and that he would then be placed on probation. Appellant also argued that counsel told him that after the agreed upon sentence was not imposed, trial counsel told him the sentence would be appealed, but that no appeal was ever filed. Finally, appellant argued that the sentences on the two counts of child endangerment should have merged as allied offenses of similar import.

{¶5} Appellant claimed that these facts demonstrated that he had not entered his guilty pleas knowingly, voluntarily, and intelligently; and that the facts demonstrated that his right to effective assistance of counsel had been violated. Thus, appellant argued that he had demonstrated a manifest injustice that required that he be allowed to withdraw his guilty pleas.

{¶6} The trial court denied the motion without holding a hearing. Appellant filed this appeal, and asserts three assignments of error:

Assignment of Error No. I The trial court err by failing to grant defendant's Motion to with draw his guilty plea pursuant to 32.1 without first holding a Evidentiary hearing.

Assignment of Error No. II Defendant was denied right to effective assistance of counsel at trial in violation of his Sixth Amendment to the United States Constitution Article I Section 10, 16, by the choices his counsel made at trial with prejudiced defendant into taking his plea.

Assignment of Error No. III The Trial court erred by failing to hold a merger hearing as required pursuant to R.C. 2941.25 when allied offenses are in question arising out of a single incident.

(Sic passim.)

{¶7} Appellant's assignments of error are interrelated, and will therefore be addressed together. Motions to withdraw pleas of guilty are governed by Crim.R. 32.1, which 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 the motion in this case was made after sentencing, the issue before the trial court was whether granting the motion would correct a manifest injustice. "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶5. A defendant seeking to withdraw a post-sentence guilty plea bears the burden of establishing manifest injustice based on specific facts either contained in the record or supplied through affidavits attached to the motion. *State v. Orris*, 10th Dist. No. 07AP-390, 2007-Ohio-6499.

{¶8} A trial court is not automatically required to hold a hearing on a post-sentence motion to withdraw a plea of guilty. A hearing must only be held if the facts alleged by the defendant, accepted as true, would require that the defendant be allowed to withdraw the plea. *Williams*, citing *State v. Kent*, 10th Dist. No. 03AP-722, 2004-Ohio-2129.

{¶9} A trial court's decision to deny a post-sentence motion to withdraw a plea of guilty, and the decision whether to hold a hearing on the motion, are subject to review for abuse of discretion. *State v. Smith* (1977), 49 Ohio St.2d 261; *Kent*. "The term 'abuse of discretion' connotes 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.

{¶10} In deciding a Crim.R. 32.1 motion, the good faith, weight, and credibility of a moving party's assertions are a matter for resolution by the trial court. *Smith*. Thus, the trial court has great discretion in assessing the credibility of affidavits used to support a Crim.R. 32.1 motion. *State v. Roberts*, 8th Dist. No. 93439, 2010-Ohio-1436.

{¶11} We note that appellant did not file his motion to withdraw his guilty pleas until approximately two and one-half years after his sentencing. "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 and militating against the granting of the motion." *Smith* at paragraph three of the syllabus.

{¶12} We also note that the issues appellant raises to support his argument that the trial court should have granted his Crim.R. 32.1 motion are all issues that should have been raised on a direct appeal. Res judicata bars a party from raising issues in a post-sentencing Crim.R. 32.1 motion that were or could have been raised in a direct appeal. *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780. Furthermore, even if the issues raised by appellant were not barred by res judicata, we find no merit to the claims appellant asserts.

{¶13} Appellant first argues that he should be allowed to withdraw his guilty pleas because the trial court imposed a sentence greater than that which appellant's counsel told him he would receive. Appellant argues that he would not have agreed to enter the pleas if he had not believed a lesser sentence would have been imposed. Appellant points to affidavits executed by him and by his mother, in which each stated that appellant's trial counsel informed him that a plea agreement had been reached whereby appellant would be sentenced to a term of one year of incarceration on each of the two child endangering counts, with the sentences to be served concurrently.

{¶14} At the sentencing hearing, the assistant prosecuting attorney specifically stated that there was no joint recommendation regarding the sentence to be imposed. In addition, the plea agreement that was signed by appellant contained no reference to any agreed sentence. At the hearing, the trial court informed appellant that the maximum sentence that could be imposed as a result of the agreement was five years on each count, and that the sentences could be ordered served consecutively, for a maximum total sentence of ten years, and appellant stated on the record that he understood the maximum sentence. Nothing in the hearing transcript or elsewhere in the record provides any support for appellant's claim that there was a plea agreement under which appellant would serve the sentence he now claims should have been imposed.

{¶15} Given the record, as well as the time that elapsed before appellant sought to assert his claim that a lesser sentence should have been imposed, the trial court did not abuse its discretion in concluding that the facts asserted by appellant did not warrant holding a hearing on appellant's Crim.R. 32.1 motion. Nor did the trial court

abuse its discretion in rejecting appellant's assertion that his plea was not entered knowingly, voluntarily, and intelligently.

{¶16} Appellant also argues that he should have been allowed to withdraw his guilty pleas because his right to the effective assistance of counsel was violated. Appellant argues that his trial counsel's performance was ineffective because: (1) counsel misinformed him regarding the sentence that would be imposed, (2) failed to object when the trial court imposed the maximum sentence, and (3) failed to pursue an appeal of the trial court's sentence after assuring appellant that an appeal would be filed.

{¶17} 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: (1) that counsel's performance was deficient, and (2) 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.

{¶18} Here, the evidence in the record contradicts the claims regarding trial counsel's actions set forth in the affidavits appellant used to support his motion. The record shows that appellant was advised of the possible sentence that could be imposed, and the discussions reflected that there was no recommendation regarding sentencing, nor were there any promises made to appellant to persuade him to plead guilty. Thus, we cannot say the trial court abused its discretion in finding that appellant's assertions regarding trial counsel's actions were not credible, and therefore

did not support appellant's claim that a manifest injustice requiring that he be allowed to withdraw his pleas had occurred.

{¶19} Finally, appellant argues that he should have been allowed to withdraw his guilty pleas because the trial court improperly imposed sentences on each count of child endangerment when the two counts should have merged as allied offenses of similar import.

{¶20} Merger of offenses is governed by R.C. 2941.25, which provides that when charges constitute allied offenses of similar import, the defendant can only be convicted on one charge. The test to be applied in such cases requires the court to first consider whether the two offenses are allied offenses of similar import, and then, if the offenses are allied offenses, to consider whether they were committed with a separate animus. *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291.

{¶21} In this case, the relevant counts of the indictment are Counts 4 and 5, which charged appellant with child endangerment as a second-degree felony and child endangerment as a third-degree felony, respectively. The plea agreement resulted in appellant pleading guilty to the lesser included offense of child endangerment as a third-degree felony on Count 4, and guilty to the charge in Count 5. Thus, the two charges to which appellant pleaded guilty were the same offense.

{¶22} Because the two charges were the same offense, it is not necessary to consider whether the two offenses were allied offenses of similar import. Rather, the issue is whether the two charges alleged the exact same conduct.

{¶23} At the sentencing hearing, the assistant prosecuting attorney set forth the factual basis for the charges to which appellant was pleading guilty. The prosecutor stated that:

It was discovered that the child had blood on the base of his brain, old and new injuries, rib fractures on the left and right side of his body. The child was again examined by a doctor at Children's Hospital.

At the time, [the victim] was three-and-a-half months old. He was having seizures, had retinal hemorrhages, subdural hematomas, acute and possibly chronic, as well as healing and newer rib fractures. The subdural hematomas and the healing rib fractures were seven to ten days old.

\* \* \* X-rays showed that the child had been injured on more than one occasion.

The mechanism for production of the subdural hematoma was significant acceleration/deceleration forces of the type seen in shaking, and that could be with and without impact. The mechanism for production of the rib fractures is the forceful squeezing of the chest.

(Tr. 10-11.)

{¶24} The facts as set forth in the sentencing hearing establish that the charges were based on more than one act. The description of the victim's injuries show differences in time between the infliction of the injuries, as well as multiple actions that inflicted the injuries, e.g., shaking and squeezing the victim. Because the charges were not based on the same conduct, the trial court was not required to merge the two charges for sentencing.

{¶25} The trial court did not abuse its discretion in declining to hold a hearing on appellant's Crim.R. 32.1 motion, nor did the court abuse its discretion in denying that motion. Consequently, appellant's three assignments of error are overruled.

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

*Judgment affirmed.*

TYACK, P.J., and KLATT, J., concur.

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