

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-1186
 : (C.P.C. No. 07CR-7182)
 Santi Gripper, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on July 26, 2011

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Santi Gripper, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Santi Gripper, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion to withdraw his guilty plea.

Defendant assigns a single error:

APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL LIED TO THE APPELLANT AND THE TRIAL COURT VIOLATED HIS FOURTEENTH AMENDMENT RIGHT WHEN IT REFUSED TO ALLOW THE

APPELLANT TO WITHDRAW HIS GUILTY PLEA BASED
ON COUNSEL'S INSUFFICIENT PERFORMANCE.

Because the trial court properly denied defendant's motion to withdraw his guilty plea, we affirm.

I. Facts and Procedural History

{¶2} On October 3, 2007, the Franklin County Grand Jury indicted defendant on one count of murder in violation of R.C. 2903.02, with a firearm specification under R.C. 2941.145, and one count of having a weapon while under disability in violation of R.C. 2923.13. On May 21, 2008, defendant entered a guilty plea to the murder charge and its accompanying specification, and the trial court sentenced defendant to the jointly recommended prison term of 16 years to life. As part of defendant's plea negotiations, the state dismissed the weapons charge. During the plea and sentencing proceedings, defendant stated that he "accept[ed] responsibility" for his past and apologized to the victim's family for their loss. (May 21, 2008 Tr. 15.)

{¶3} Nearly two years later, on April 28, 2010, defendant filed a motion for leave to file a delayed appeal, which this court denied. *State v. Gripper* (July 20, 2010), 10th Dist. No. 10AP-398 (Memorandum Decision). In the meantime, defendant on May 18, 2010 filed in the trial court a motion to withdraw his guilty plea pursuant to Crim.R. 32.1, arguing a manifest injustice occurred when the trial court failed to inform defendant he would be subject to post-release control. The trial court, without holding a hearing, denied defendant's motion to withdraw his guilty plea, since defendant is not subject to post-release control on his murder conviction. The trial court journalized its decision in a December 3, 2010 entry, and defendant timely appeals.

II. Analysis – Motion to Withdraw Guilty Plea

{¶4} Defendant's sole assignment of error asserts the trial court erred when it denied defendant's motion to withdraw his guilty plea.

{¶5} A defendant may seek to withdraw a plea pursuant to 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." Here, defendant moved to withdraw his plea after sentencing, so the issue resolves to whether granting the motion is necessary to correct a manifest injustice.

{¶6} Defendant bears the burden of establishing a manifest injustice based on specific facts in the record or facts supplied through affidavits attached to the motion. *State v. Hagler*, 10th Dist. No. 10AP-291, 2010-Ohio-6123, ¶7, citing *State v. Orris*, 10th Dist. No. 07AP-390, 2007-Ohio-6499. Because a Crim.R. 32.1 motion is addressed to the sound discretion of the trial court, our review is limited to determining whether the trial court abused its discretion in concluding no manifest injustice occurred. *State v. Marable*, 10th Dist. No. 03AP-97, 2003-Ohio-6653, ¶9 (citations omitted); see also *State v. Boyd* (Oct. 22, 1998), 10th Dist. No. 97APA12-1640, appeal not allowed (1999), 85 Ohio St.3d 1424 (listing factors the trial court properly may consider in exercising its discretion).

{¶7} Although the term "manifest injustice" has been variously defined, "it is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases." *State v. Smith* (1977), 49 Ohio St.2d 261, 264, citing *United States v. Semel* (C.A.Va. 1965), 347 F.2d 228, cert. denied, 382 U.S. 840, 86 S.Ct. 90. "A

manifest injustice comprehends a fundamental flaw in the path of justice so extraordinary that the defendant could not have sought redress from the resulting prejudice through any form of application reasonably available to him." *State v. Shupp*, 2d Dist. No. 06CA62, 2007-Ohio-4896, ¶6.

{¶8} Initially, we note defendant did not file his motion to withdraw his guilty plea until nearly two 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 mitigating against the granting of the motion." *Hagler* at ¶11, quoting *Smith* at paragraph three of the syllabus.

{¶9} Moreover, the reason defendant posits to support his motion lacks merit. Defendant seeks to withdraw his guilty plea because the trial court's failure to inform him he would be subject to post-release control if he were eventually released from prison created a manifest injustice such that his plea was not knowing, intelligent, and voluntary. See *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, paragraph two of the syllabus (stating that "[i]f the trial court fails during the plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control, the court fails to comply with Crim.R. 11, and the reviewing court must vacate the plea and remand the cause").

{¶10} In denying defendant's motion to withdraw his guilty plea, the trial court correctly concluded post-release control under R.C. 2929.14(F)(1) and 2967.02 does not apply to sentencing for murder in violation of R.C. 2903.02, an unclassified felony. Because defendant entered a guilty plea to a murder charge under that section, he was not subject to post-release control. See *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-

3748, ¶36 (stating "an individual sentenced for aggravated murder * * * is not subject to postrelease control, because that crime is an unclassified felony to which the postrelease-control statute does not apply"), citing R.C. 2967.28; *State v. Long*, 1st Dist. No. C-100285, 2010-Ohio-6115, ¶4 (stating R.C. 2967.28, "by its terms, does not apply to unclassified felonies like murder"). The trial court did not err in concluding defendant's murder conviction does not implicate post-release control.

{¶11} On appeal, defendant does not challenge the trial court's conclusion regarding post-release control. Instead, defendant raises additional issues he did not address in the trial court, suggesting the trial court erred in denying his motion to withdraw his guilty plea because his trial counsel rendered ineffective assistance of counsel. "Ineffective assistance of counsel can constitute manifest injustice sufficient to allow the post-sentence withdrawal of a guilty plea." *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780, ¶14, citing *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813, ¶18. Because, however, defendant did not raise the ineffective assistance of counsel in the trial court, he waived this issue. *State v. Burge* (1993), 88 Ohio App.3d 91, 93, citing *State v. Comen* (1990), 50 Ohio St.3d 206, 211; *State v. Linehan* (Sept. 4, 1998), 2d Dist. No. 16841 (noting "[i]t is axiomatic that a litigant's failure to raise an issue in the trial court waives his right to raise that issue on appeal").

{¶12} Even if we were to consider his argument, it lacks merit. Defendant contends his trial counsel was ineffective in (1) advising him he would receive, at most, a sentence of 10 years if he entered a guilty plea to the murder charge, (2) failing to fully explain the plea agreement to defendant who did not completely comprehend it due to his

limited understanding of English, and (3) failing to provide him with discovery materials, the contents of which defendant believes may have aided in his defense. To support his contentions, defendant attached to his appellate brief his own affidavit and the purported affidavit of his mother, Soodjai Rivera, which lacks the seal of a notary public. See, e.g., *State v. Graggs*, 10th Dist. No. 10AP-249, 2010-Ohio-5716, ¶¶28-29. Because the affidavits are not part of the trial court record, we cannot properly consider them. See *State v. Muhumed*, 10th Dist. No. 09AP-936, 2010-Ohio-3968, ¶8 (concluding a letter from appellant's trial attorney attached to his appellate brief to support his claim that the trial court erred in denying his motion to withdraw his guilty plea "is not in the trial record and, therefore, cannot be considered in this appeal"), citing *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus (stating "[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter").

{¶13} In the end, defendant is unable to point to anything in the record to support his claim of ineffective assistance of counsel. Despite his assertion that he did not understand the plea proceedings, the record of the plea and sentencing hearing indicates otherwise. The trial court specifically asked defendant whether he could "read and write the English language," to which defendant replied, "Yes, sir." (Tr. 4.) The trial court then inquired of defendant whether his attorney "explained everything to [him]," "answered all [his] questions," and whether defendant was "satisfied with his counsel and his advice." (Tr. 5.) Defendant answered affirmatively and on the record said his counsel explained the guilty plea form to him before he signed it.

{¶14} Similarly, when the trial court discussed the sentence with defendant, defendant stated he understood the nature of the sentence. (Tr. 6.) Indeed, the 16-year sentence the trial court imposed was the result of a joint recommendation from the state and defendant's counsel that was set out in the guilty plea form. See *Orris* at ¶10 (concluding that where defendant signed the guilty plea form including a jointly recommended sentence, stated on the record that he understood the plea, and the trial court did not deviate from the jointly recommended sentence, "nothing in the record itself suggests defendant entered his plea involuntarily, unknowingly, or unintelligently").

{¶15} Although defendant also alleges on appeal he was unaware that by pleading guilty he was giving up his right to appeal his conviction, the record again does not support his argument. The trial court told defendant he was "giving up [his] right to trial" so "there won't be any appeal," and defendant again stated he understood. (Tr. 8-9.) As a result, even if we were to consider his ineffective assistance of counsel contentions, they lack merit.

{¶16} In light of defendant's two-year delay in filing his motion to withdraw his guilty plea, the lack of merit in the argument he asserted in the trial court to support his motion, and his failure to raise in the trial court, or support with affidavits, his ineffective assistance of counsel claim, defendant did not demonstrate the manifest injustice needed to warrant withdrawing his guilty plea. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea.

{¶17} For the sake of completeness, we also note the trial court did not err in failing to hold a hearing on defendant's motion to withdraw his guilty plea. Defendant

failed to submit evidence containing sufficient operative facts to demonstrate that his plea was not entered knowingly and voluntarily. To the contrary, the argument defendant submitted to the trial court to support his motion failed as a matter of law. Because the record demonstrated defendant is not entitled to relief as a matter of law, the trial court properly dismissed defendant's motion without a hearing.

III. Disposition

{¶18} Accordingly, we overrule defendant's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
