

[Cite as *State v. Barrett*, 2011-Ohio-4986.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-375
	:	(C.P.C. No. 07CR-04-2458)
Nicholas E. Barrett,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 29, 2011

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

Nicholas E. Barrett, pro se.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Nicholas E. Barrett, appeals pro se from the judgment of the Franklin County Court of Common Pleas denying his motion to withdraw guilty plea pursuant to Crim.R. 32.1. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} The following facts were read into the record by the state at the plea hearing held on August 6, 2007. At approximately 3:00 a.m. on March 25, 2007, Sequoia Johnson, Alice Cowan, and Nicolette Woods were outside talking when Johnson threw a cup of water on appellant. Thereafter, appellant retrieved a 0.22 caliber rifle, returned outside, and fired five shots into a car containing two of the women. Only the car was struck. Columbus Police Officers arrived at the scene and were told the shooter went into 445 Cherry Street. After obtaining consent to enter the residence by Sharon Smith, officers found appellant inside the house and a 0.22 caliber rifle behind a bookcase. It was also noted at the hearing that appellant had a June 28, 2006 conviction for trafficking in drugs. No exceptions to the facts were made.

{¶3} On April 4, 2007, appellant was indicted by a Franklin County Grand Jury on two counts of felonious assault with specification, one count of tampering with evidence, and one count of having a weapon while under disability ("WUD"). On August 6, 2007, appellant entered pleas of guilty to one count of tampering with evidence and one count of WUD. Prior to sentencing, appellant filed a motion to withdraw guilty plea, which was granted by the trial court on January 18, 2008.

{¶4} On April 28, 2008, appellant entered pleas of guilty to two counts of felonious assault without specification, both second-degree felonies in violation of R.C. 2903.11, and one count of WUD, a third-degree felony in violation of R.C. 2923.13. A presentence investigation report was waived and the parties jointly recommended a sentence of community control. At the sentencing hearing, the trial court imposed a three-year term of community control, and ordered appellant to pay \$500 in restitution to the victim. Additionally, appellant was informed of the sentence that could be imposed if

he violated the terms of his community control. A journal entry reflecting such action was filed on May 1, 2008.

{¶5} On January 13, 2009, a request for probation revocation was filed. On January 30, 2009, though finding appellant to be in violation of his probation, the trial court permitted appellant to continue on probation with additional conditions. On October 2, 2009, another request for probation revocation was filed, and on November 6, 2009, a resentencing hearing was held. At this time, the trial court imposed seven years on each of the felonious assault convictions to be served concurrently, and four years on the WUD conviction to be served consecutively, for an aggregate sentence of 11 years to be served consecutively to case No. 08CR-2168. Additionally, appellant was awarded 217 days of jail-time credit.

{¶6} On June 11, 2010, asserting his trial counsel was ineffective, appellant filed a motion to withdraw his previously entered guilty pleas pursuant to Crim.R. 32.1. The state opposed the motion, and on March 17, 2011, finding "no merit" to appellant's motion, the trial court overruled the same. This appeal followed, and appellant brings the following two assignments of error for our review:

[1.] The trial court erred in binding the defendant-appellant over for two (2) counts of felonious assault and one count of having [a] weapon under disability.

[2.] A trial court does have the subject matter jurisdiction over ineffective assistance of counsel.

{¶7} The arguments made under each assignment of error are unclear. Therefore, we will address both assignments of error as one and treat them as an assertion that the trial court abused its discretion in overruling appellant's motion to

withdraw guilty plea. 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." Here, the motion to withdraw guilty plea was made after sentencing, therefore, the issue is whether granting the motion is necessary to correct a manifest injustice.

{¶8} "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. " '[I]t is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases.' " *State v. Gripper*, 10th Dist. No. 10AP-1186, 2011-Ohio-3656, ¶7, quoting *State v. Smith* (1977), 49 Ohio St.2d 261, 264. 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.

{¶9} 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.

{¶10} 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. *Smith*. "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.

{¶11} 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.

{¶12} In the trial court, appellant argued his post-sentence motion to withdraw guilty plea should be granted because his trial counsel was ineffective for not asserting that (1) his equal protection rights were violated; (2) his speedy trial rights were violated; and (3) the indictment was defective. On appeal, appellant does not raise these issues, but, instead, contends in a conclusory fashion that his trial counsel was ineffective because appellant should have been convicted of aggravated menacing and WUD, rather than felonious assault and WUD. We ascertain that appellant is asserting two reasons for this contention: (1) aggravated menacing is a lesser-included offense of felonious assault, therefore, the trial court should have convicted him of aggravated menacing; and (2) after he discovered the two women were in the vehicle, "the appellant shot at the vehicle 'in a joking way' only to just frighten the two (2) women, but [not] to 'serious[ly] physically harm anybody!' " (Appellant's Brief at 7.) Therefore, appellant states that he seeks to withdraw his previously entered pleas "so that he can [accept], [agree] and [sign] the correct guilty plea agreement of [aggravated menacing with having weapon while under disability]." (Appellant's Brief at 1.)

{¶13} It is well-settled law that issues not raised in the trial court may not be raised for the first time on appeal because such issues are deemed waived. *State v. Totten*,

10th Dist. No. 05AP-278, 2005-Ohio-6210, ¶9, citing *State v. Comen* (1990), 50 Ohio St.3d 206, 211. Further, "it has been specifically held that failure to present an argument in a post-sentence motion to withdraw a guilty plea waives the argument for purposes of appeal." *Id.*, citing *State v. Gegia*, 157 Ohio App.3d 112, 2004-Ohio-2124, ¶33. Thus, appellant has waived his argument that because his convictions "should have been" for aggravated menacing rather than felonious assault his trial counsel was ineffective.

{¶14} Also, we note that appellant's motion to withdraw his guilty pleas was filed over one and one-half years after his sentencing. Though not dispositive on its own, "[a]n 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.

{¶15} Moreover, a defendant seeking to withdraw a guilty plea post-sentence bears the burden of establishing manifest injustice based on specific facts either contained in the record or supplied through affidavits attached to the motion. *Orris* at ¶8; *Smith* at paragraph one of the syllabus. The good faith, credibility, and weight to be given to assertions made by a defendant in support of a motion to withdraw a guilty plea are matters to be resolved by the trial court. *State v. Smith*, 10th Dist. No. 07AP-985, 2008-Ohio-2802, ¶10. While appellant attached an affidavit to his motion stating that he believed his counsel was ineffective, the affidavit contains no statements regarding the specific allegations made to this court on appeal. Additionally, a self-serving affidavit made by the moving party is generally not sufficient to demonstrate manifest injustice. *Id.*; *State v. Moncrief*, 10th Dist. No. 08AP-153, 2008-Ohio-4594, ¶13.

{¶16} Further, the entry of guilty plea signed by appellant on April 28, 2008, clearly reflects that appellant was withdrawing his previously-entered plea of not guilty to all four counts contained in the indictment and pleading guilty to two counts of felonious assault and one count of WUD. Thus, we find no merit to appellant's contention that he "mistakenly" pled to felonious assault rather than aggravated menacing.

{¶17} For all of the above reasons, we find appellant's motion to withdraw guilty plea failed to demonstrate a manifest injustice had occurred. Accordingly, appellant's two assignments of error are overruled and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
