[Cite as *State v. Frye*, 2015-Ohio-3012.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 14AP-988 (C.P.C. No. 07CR-3561)
v.	:	No. 14AP-989 (C.P.C. No. 07CR-9129)
Michael L. Frye,	:	
		(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 28, 2015

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Michael L. Frye, pro se.

APPEALS from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, Michael L. Frye, appeals from judgments of the Franklin County Court of Common Pleas in favor of plaintiff-appellee, State of Ohio, denying appellant's "motion for leave to file a delayed motion for new trial." For the reasons that follow, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} In May 2007, a Franklin County Grand Jury indicted appellant for murder, with a three-year firearm specification. The grand jury subsequently indicted appellant in a related case on one count of tampering with evidence and one count of obstructing justice. On June 2, 2008, appellant pleaded guilty to voluntary manslaughter with a

specification and tampering with evidence. At appellant's plea hearing, the facts underlying the murder charge were set forth as follows:

> [PROSECUTOR]: * * * Back on May 9, 2007, the victim in this case, Adrian Haithcock, resided at 133 South Champion Avenue here in Franklin County, Ohio. Apparently the Defendant, Mr. Frye, was at least staying or may have been even living for a short period next door to that location with a friend of his, Corey Hart, and his girlfriend, Ashley Atkins.
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> On this day, Mr. Frye and Mr. Haithcock got into an argument. If witnesses had testified, they would have testified to the fact that * * * [t]here was some argument over a period of time either for the repayment of maybe money owed by Mr. Haithcock to Mr. Frye or there was maybe a drug debt, and some of the witnesses would have probably testified that they believed that there may have been a drug debt that was actually owed by Mr. Haithcock to Mr. Frye and possibly some other individuals, including Corey Hart.
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> * * *
>
> At one point, Mr. Haithcock took a running start at Mr. Frye, who was at that time standing on a landing that would have gone into the two apartments. Some witnesses would have testified that Mr. Haithcock took a swing at Mr. Frye and may have struck him in the side of the face with his fist, at which time Mr. Frye shot Mr. Haithcock once with a firearm, handgun that he had on his person. That bullet struck Mr. Haithcock in the chin and then the bullet entered his chest area. Mr. Haithcock was taken by Columbus medics to Grant Hospital, where he expired.
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> * * *
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> THE COURT: * * * [A]ny exceptions or additions?
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> [DEFENSE COUNSEL]: Yes, Your Honor, I have one exception that does not affect the underlying basis of the plea. However, I thoroughly investigated this case, and I believe that we would have provided testimony that there was no debt or obligation between Mr. Frye and Mr. Haithcock, that the drug transaction was between Mr. Hart and Mr. Haithcock.

(June 2, 2008 Tr. 6-10.)

{¶ 3} After entering his plea of guilty to the reduced charge of voluntary manslaughter with a firearm specification and tampering with evidence, appellant made the following statement:

> I'm here to take full responsibility for what I've done. I want the family to know that I'm very sorry and it wasn't my intentions to hurt nobody. This all stems from a laptop that was stolen from Mr. Haithcock's home that I played no part in stealing. Over a period of time explaining to him and his wife that I did not take part in stealing his laptop, I guess he just didn't believe me, so threats was made and the situation escalated and got out of hand. I understand and know that nobody's life is worth a laptop, and I didn't mean this to happen, and I am truly sorry.

(June 2, 2008 Tr. 11.) The trial court imposed a prison term of 15 years. Appellant did not timely appeal from his conviction and sentence.

{¶ 4} On October 7, 2014, more than six years after his conviction and sentence, appellant filed a "motion for leave to file a delayed motion for new trial." On November 4, 2014, the trial court denied appellant's motion in a decision that reads, in relevant part, as follows:

> Upon consideration the Court does not find the motion well taken. First, the Court finds Defendant's motion is untimely pursuant to the requirements of R.C. 2953.21(A)(2) applicable to petitions for post-conviction relief. Second, the Court finds that Defendant's claim is barred by *res judicata* as Defendant could have raised this issue on direct appeal. Finally, the Court finds that Defendant has not met the burden of proving manifest injustice and therefore is not entitled to a hearing.

(Citations omitted.) (Decision, 1-2.)

{¶ 5} Appellant filed a timely notice of appeal to this court on December 1, 2014.[1]

II. ASSIGNMENTS OF ERROR

{¶ 6} Appellant assigns the following as error:

> [I.] Defendant-Appellant was denied effective assistance of counsel as guaranteed under the Sixth and Fourteenth

[1] Appellant filed a separate notice of appeal in each case. Accordingly, on December 8, 2014, this court issued a journal entry consolidating the two cases "for purposes of record filing, briefing and oral argument."

> Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.
>
> [II.] Defendant-Appellant's convictions is against the manifest weight of the evidence.
>
> [III.] Defendant-Appellant was entitled to file a delayed motion for new trial based upon Newly Discovered Evidence of prosecution's misconduct in withholding and concealing exculpatory evidence.
>
> [IV.] The trial court abused its discretion and erred to the prejudice of Defendant-Appellant by denying his motion for leave to file a delayed motion for a new trial where evidence was presented that the prosecution knowingly and unlawfully withheld and concealed exculpatory evidence **Brady Material**, he was entitled to a hearing.

(Emphasis sic.)

III. STANDARD OF REVIEW

{¶ 7} The trial court treated appellant's October 7, 2014 motion as a Crim.R. 32.1 motion to withdraw his guilty plea, rather than a motion for delayed new trial pursuant to Crim.R. 33. Crim.R. 32.1 permits a motion to withdraw a guilty plea " '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.' " *State v. Lowe*, 10th Dist. No. 14AP-481, 2015-Ohio-382, ¶ 6, citing *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶ 5. " '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.' " *Id.*, quoting *Williams* at ¶ 5. A motion made, pursuant to Crim.R. 32.1, is generally addressed to the sound discretion of the trial court. *Id.* at ¶ 7, citing *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph two of the syllabus. Accordingly, an appellate court will ordinarily not reverse a trial court's denial of a motion to withdraw a plea absent an abuse of discretion. *Id.*, citing *State v. Totten*, 10th Dist. No. 05AP-278, 2005-Ohio-6210, ¶ 5.

{¶ 8} Whether res judicata bars claims raised in a motion to withdraw a guilty plea is a question of law for the court. *Id.*, citing *State v. Muhumed*, 10th Dist. No. 11AP-1001, 2012-Ohio-6155, ¶ 11. We review questions of law under a de novo standard. *Id.*

See also EMC Mtge. Corp. v. Jenkins, 164 Ohio App.3d 240, 2005-Ohio-5799, ¶ 15 (10th Dist.); *Prairie Twp. Bd. of Trustees v. Ross*, 10th Dist. No. 03AP-509, 2004-Ohio-838, ¶ 12.

A. Legal Analysis

{¶ 9} As a preliminary matter, we find that the trial court properly treated appellant's motion as a Crim.R. 32.1 motion to withdraw his guilty plea, rather than a motion for a new trial pursuant to Crim.R. 33(B). *See State v. Cooper*, 8th Dist. No. 100537, 2014-Ohio-2404, ¶ 20 ("Crim.R. 33(B) has no application to cases in which the defendant entered a guilty plea."). *See also State v. Demyan*, 9th Dist. No. 11CA010096, 2012-Ohio-3634, ¶ 5; *State v. Burke*, 2d Dist. No. 17955 (Mar. 9, 2001). We will review the appeal accordingly.

B. First Assignment of Error

{¶ 10} In his first assignment of error, appellant argues that the trial court abused its discretion when it denied his motion inasmuch as he submitted evidence to support a claim of ineffective assistance of trial counsel. The specific instances of ineffective assistance of trial counsel appellant raised in his motion are as follows: (1) counsel's failure to raise the Castle Doctrine[2] as a defense to the murder charge, (2) counsel's failure to follow up on a pre-trial motion to dismiss the indictment, and (3) counsel's failure to properly investigate the case and obtain a police report in support of his defense to the murder charge.

{¶ 11} "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish a claim of ineffective assistance of counsel, a defendant must show that the performance of trial counsel was deficient and that the deficient performance prejudiced him. *Id*. at 687. The failure to make either showing defeats a claim of ineffective assistance of counsel. *Id*. at 697.

{¶ 12} "Ineffective assistance of counsel can constitute manifest injustice sufficient to allow the post-sentence withdrawal of a guilty plea." *State v. Dalton*, 153 Ohio App.3d

[2] *See* R.C. 2901.05(B)(1).

286, 2003-Ohio-3813, ¶ 18 (10th Dist.), citing *State v. Lake*, 10th Dist. No. 95APA07-847 (Mar. 28, 1996). In determining whether a claim of ineffective assistance of counsel allows the withdrawal of a guilty plea, the Supreme Court of Ohio has held that the defendant must demonstrate both of the following: (1) counsel's performance was deficient, and (2) there is a reasonable probability that, but for counsel's errors, defendant would not have pleaded guilty. *Id*., citing *State v. Xie*, 62 Ohio St.3d 521, 524 (1992), quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

C. Res judicata

{¶ 13} Even if we were to conclude that appellant's trial counsel's performance was deficient in the manner he alleges, res judicata bars claims of ineffective assistance of counsel that could have been raised in a timely appeal from the conviction and sentence. *Totten*; *Muhumed*. In a direct appeal to this court from his conviction and sentence, appellant could have raised counsel's alleged ineffectiveness both in failing to assert a defense based on the Castle Doctrine and in failing to follow up on the motion to dismiss. Each of these alleged deficiencies in the performance of trial counsel occurred prior to the guilty plea and are reflected in the trial court record. Consequently, res judicata barred appellant from raising claims of ineffective assistance in his post-conviction motion that were based on trial counsel's alleged failure to assert the Castle Doctrine as a defense to the murder charge and counsel's failure to follow up on a pre-trial motion to dismiss the indictment.

D. The Police Report

{¶ 14} Appellant submitted a copy of a police report as an exhibit to his motion. The document, entitled "Columbus Division of Police Preliminary Investigation," states that on April 27, 2007, the victim's wife accused the victim of stealing her laptop computer and that "[t]his stems from [a] domestic violence incident." (Oct. 7, 2014 Motion, Exhibit C.[3]) Appellant now claims that the information in the police report would have proven his claim of self-defense and that his trial counsel provided ineffective assistance by failing to obtain the police report in his investigation of the case.

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[3] Appellant also attached a docketing statement from the Franklin County Court of Common Pleas purportedly showing that the victim pleaded guilty to domestic violence in 2005. (Oct. 7, 2014 Motion, Exhibit H.)

{¶ 15} We note that at his plea hearing, appellant voiced no disagreement with trial counsel's assertion that he had "thoroughly investigated" the case. (June 2, 2008 Tr. 9.) Nevertheless, when considering whether newly discovered evidence warrants withdrawal of a guilty plea, a trial court should consider whether the defendant may have a complete defense to the charges, the length of time between the entry of the guilty plea and the time that the motion to withdraw the guilty plea was filed, and the appellant's diligence in discovering the evidence. *See State v. Gabbard*, 12th Dist. No. CA2006-03-025, 2007-Ohio-461, ¶ 11, citing *State v. Van Dyke*, 9th Dist. No. 02CA008204, 2003-Ohio-4788; *State v. Fish*, 104 Ohio App.3d 236, 240 (1st Dist.1995); *United States v. Spencer*, 836 F.2d 236, 238-39 (6th Cir.1987). " 'Prejudice to the state and a long delay in the proceedings are two major considerations weighing in favor of overruling a motion to withdraw a plea of guilty.' " *Gabbard* at ¶ 11, quoting *State v. Price*, 1st Dist. No. C-030262, 2003-Ohio-7109, ¶ 11.

{¶ 16} In this case, appellant filed his motion more than seven years after the victim's death and more than six years after he pleaded guilty. Given the lengthy delay, the state could be significantly prejudiced if appellant were permitted to withdraw his guilty plea. *See State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶ 40 ("The more time that passes between the defendant's plea and the filing of the motion to withdraw it, the more probable it is that evidence will become stale and that witnesses will be unavailable."). Other than his incarceration, appellant has not asserted any reason why he could not have earlier discovered the police report.

{¶ 17} Moreover, even if we were to conclude that trial counsel should have discovered this evidence, appellant's affidavit confirms that there were several individuals who could have testified that the victim accused appellant of stealing his wife's laptop computer. In addition to appellant's roommate and his girlfriend, appellant avers that the victim also told appellant's neighbors that appellant had broken into his home and stolen his wife's laptop.[4] Though the police report would have provided evidence that the victim knew his allegations against appellant were false, it is not clear to the court how this

[4] Appellant avers that "on a number of times while being drunk when neighbors would be outside, [the victim] would tell them I broke in his wife's home." (Affidavit, ¶ 21.)

additional evidence would have provided further support for his claim of self-defense. *See Van Dyke* at ¶ 19 (trial court did not abuse its discretion when it denied appellant's motion to withdraw his guilty plea to the charge of resisting arrest based on a newly discovered videotape of incident where appellant failed to set forth any specific reason why the videotape would have provided him with a meritorious defense). Similarly, while evidence that the victim had committed domestic violence in the past may be relevant to appellant's claim of self-defense when offered to prove that the victim was the aggressor, the prosecutor acknowledged in his recitation of the facts that the victim "took a running start at Mr. Frye" and that there was evidence that the victim "took a swing at Mr. Frye and may have struck him in the side of the face with his fist." (June 2, 2008 Tr. 7-8.) In short, none of the alleged newly discovered evidence submitted by appellant would have provided appellant with a complete defense to the murder charge, nor is it clear that such evidence would have provided meaningful support to his claim of self-defense.

{¶ 18} We hold that the trial court did not abuse its discretion when it denied appellant's motion to withdraw his guilty plea. Appellant's first assignment of error is overruled.

E. Second Assignment of Error

{¶ 19} In appellant's second assignment of error, he argues that his convictions are against the manifest weight of the evidence. Appellant pleaded guilty to involuntary manslaughter with a firearm specification and tampering with evidence. Consequently, there was no trial in this matter. A manifest weight analysis is inapplicable where a defendant has pleaded guilty. *State v. Reeves*, 10th Dist. No. 14AP-631, 2015-Ohio-2123, ¶ 9. Accordingly, appellant's second assignment of error is overruled.

F. Third Assignment of Error

{¶ 20} In his third assignment of error, appellant contends that the prosecutor was guilty of misconduct at his plea hearing when he stated that a drug debt was the cause of the dispute between appellant and the victim. Because the trial court record reveals the very conduct of which appellant now complains, appellant could have raised the prosecutor's alleged misconduct in a direct appeal to this court. *State v. Hillman*, 10th Dist. No. 06AP-1230, 2008-Ohio-2341, ¶ 62. Accordingly, res judicata barred appellant

from raising the issue for the first time in his postconviction motion. *Id*. Appellant's third assignment of error is overruled.

G. Fourth Assignment of Error

{¶ 21} In appellant's fourth assignment of error, appellant contends that his guilty plea was the result of the prosecutor's misconduct in failing to disclose material exculpatory evidence in the form of the previously mentioned police report. We disagree.

{¶ 22} Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution's suppression of evidence favorable to the accused violates due process where the evidence is material to either guilt or punishment, irrespective of a good or bad faith of the prosecution. *Id*. at 87. " 'Evidence suppressed by the prosecution is "material" within the meaning of *Brady* only if there exists a "reasonable probability" that the result of the trial would have been different had the evidence been disclosed to the defense.' " *State v. Moore*, 10th Dist. No. 11AP-1116, 2013-Ohio-3365, ¶43, quoting *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 27. The accused bears the burden of proving a *Brady* violation and consequent denial of due process. *Id*., citing *State v. Jackson*, 57 Ohio St.3d 29, 33 (1991).

{¶ 23} Even if we were to conclude that the prosecutor suppressed the police report, as noted above, the report is merely cumulative of other evidence available to appellant at the time he pleaded guilty. Nor is the evidence probative of appellant's claim of self-defense. Accordingly, appellant's fourth assignment of error is overruled.

IV. CONCLUSION

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

Judgments affirmed.

BROWN, P.J., and KLATT, J., concur.
