

[Cite as *State v. Powell*, 2009-Ohio-6552.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-05-028
- vs -	:	<u>OPINION</u> 12/14/2009
PAUL KERRY POWELL,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2003-CR-781

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 N. Third Street, Batavia, OH 45103-3033, for plaintiff-appellee

George A. Katchmer, 115 Brookside Drive, Yellow Springs, OH 45387, for defendant-appellant

YOUNG, P.J.

{¶1} Defendant-appellant, Paul Kerry Powell, appeals the decision of the Clermont County Court of Common Pleas denying his post-sentence motion to withdraw his guilty plea without an evidentiary hearing.

{¶2} Appellant was indicted in 2003 on three counts each of rape, gross sexual imposition, and felonious sexual imposition. The charges stemmed from a

course of conduct between 1989 and 1993 and involved appellant's niece who was less than 13 years old at the time of the offenses. On March 4, 2004, appellant pled guilty to one count of rape and one count of felonious sexual penetration. In exchange for these pleas, the state of Ohio agreed to dismiss the remaining seven charges, and further agreed not to seek new indictments for rape with life force specifications. After completion of a presentence investigation report, appellant was sentenced on March 29, 2004 to an aggregate sentence of 15 to 50 years in prison.

{¶13} On February 19, 2009, appellant moved to withdraw his guilty plea pursuant to Crim.R. 32.1 on the ground his plea was not knowing and voluntary due to his lack of prior involvement with the law and ineffective assistance of trial counsel. In April 2009, finding that no manifest injustice had occurred, the trial court denied the motion without an evidentiary hearing.

{¶14} Appellant appeals, raising two assignments of error which will be considered together.

{¶15} Assignment of Error No. 1:

{¶16} "A PLEA THAT IS NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED MUST BE VACATED."

{¶17} Assignment of Error No. 2:

{¶18} "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO WITHDRAW PLEA SINCE HE WOULD NOT HAVE ENTERED THIS PLEA BUT FOR THE INEFFECTIVENESS OF COUNSEL."

{¶19} Crim.R. 32.1 provides that a trial court may grant a defendant's post-sentence motion to withdraw a guilty plea only to correct manifest injustice. Therefore, "[a] defendant who seeks to withdraw a plea of guilty after the imposition

of sentence has the burden of establishing the existence of manifest injustice." *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus.¹ In general, manifest injustice relates to a "fundamental flaw in the proceedings [that] results in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Degaro*, Butler App. No. CA2008-09-227, 2009-Ohio-2966, ¶10, citing *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266. Under such standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. *Smith* at 264.

{¶10} A Crim.R. 32.1 motion "is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by the trial court." *Id.* Generally, a self-serving affidavit of the movant is insufficient to demonstrate manifest injustice. *Degaro* at ¶11. Absent an abuse of discretion, an appellate court will not reverse a trial court's denial of a motion to withdraw a guilty plea. *Id.* Abuse of discretion implies that the trial court's attitude is arbitrary, unreasonable, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶11} Ineffective assistance of counsel is a proper basis for seeking post-sentence withdrawal of a guilty plea. *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, ¶8. When the alleged error underlying a motion to withdraw a guilty plea is ineffective assistance of counsel, the movant must show that (1) his counsel's

1. In his brief, appellant cites the Ohio Supreme Court's decision in *State v. Nero* (1990), 56 Ohio St.3d 106, for the proposition that a defendant's plea "is void if not made in substantial compliance with Crim.R. 11(C), i.e., that under the totality of the circumstances the defendant **subjectively** understood the implications of his plea and the rights he was waiving." In *Nero*, the defendant challenged his guilty plea via a much delayed appeal, and not pursuant to a Crim.R. 32.1 post-sentence motion. The issue addressed by the supreme court was "whether the trial judge substantially complied with Crim.R. 11(C)(2)(a) when he accepted a guilty plea for the nonprobationable crime of rape without informing the defendant that he was not eligible for probation." In the case at bar, appellant does not challenge the trial court's compliance with Crim.R. 11 at the plea hearing. *Nero* is therefore inapplicable.

performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, he would not have pled guilty. *State v. Heath*, Warren App. No. CA2006-03-036, 2006-Ohio-7045, ¶8.

{¶12} Appellant argues his guilty plea was not voluntary and intelligent because it was the result of police questioning without *Miranda* warnings, a polygraph test during which he was intimidated and threatened, and a false promise as to sentencing. These allegations were included in appellant's own affidavit which he attached in support of his motion. Appellant further argues his trial counsel was ineffective because he failed to discuss or file a motion to suppress even though "counsel was aware of the circumstances of [his] interrogation by the police and the threats, coercion and deception applied to obtain a statement, then a plea." In his affidavit, appellant stated that "if I had known that I had a right to have a Motion to Suppress filed, that I did not have to take an uncounseled and abusive polygraph, and that I had a right to see my discovery and that the sentence promised to me was false, I would not have pled."

{¶13} "[F]ailure to file a motion to suppress is not per se ineffective assistance of counsel. Even when some evidence in the record supports a motion to suppress, counsel is presumed to be effective if the counsel could have reasonably concluded that the filing of a motion to suppress would have been a futile act. In such a case, where probability of success is slim, appellant fails to establish prejudice." *State v. Thomas*, Allen App. No. 1-08-36, 2008-Ohio-6067, ¶13. (Internal citations omitted.)

{¶14} In its decision denying appellant's motion to withdraw his guilty plea, the trial court stated:

{¶15} "[T]he Court has considered the following evidentiary materials: the

motion and affidavits [sic] filed on behalf of the Defendant; the presentence investigation report including the Defendant's statement to the probation officers at that time; audio recordings of both the plea hearing and the sentencing hearing, including the statement of the Defendant, for the purpose of determining the inflection and demeanor of the Court, the Defendant and counsel during such hearing; the plea bargain itself as set forth in the record of the proceedings, which included that no re-indictment of the Defendant would be attempted by the prosecutor for rape with life force specifications; the exhibits introduced by the State at the hearing on sexual predator classification, including the narrative supplement of the police officer dated September 2, 2003, Defendant's statement dated September 25, 2003 with *Miranda* waiver, and Defendant's letter to the victim of apology.

{¶16} "Having reviewed these materials, the Court finds that the Defendant has failed to establish that his counsel's performance was deficient in failing to file a motion to suppress. The record contains written *Miranda* waivers and reference in the narrative supplement to a second *Miranda* waiver reading. Further, the statements on their face indicate the Defendant was not under arrest at the time they were provided and that his consent to the polygraph examinations were voluntarily made.

{¶17} "The Court further concludes based upon the above record that the colloquy between the Court and the Defendant at the time of the plea was full and complete and that the Defendant gave no indication by demeanor, inflection or conduct that he had been coerced or promised anything with respect to sentence prior to the entry of his plea. The Defendant affirmatively indicated that no such promises or threats had been made in order to coerce his plea.

{¶18} "While not directly related ***, the colloquy between the Court, the Defendant and counsel at sentencing is also enlightening. The victim of the offense gave a statement in open court concerning the events which were not controverte[d] by Defendant when given an opportunity for allocution. When given such opportunity Defendant read a letter of apology containing his admission of the underlying circumstances. Nothing about his presentation indicates that he was in any way coerced into writing or reading such statement to the Court.

{¶19} "The Court is, based on the foregoing, denying both the Defendant's request for evidentiary hearing on his motion to withdraw his guilty plea after sentencing. Further, based upon the record, the Court finds no manifest injustice has occurred and therefore denies the motion to withdraw the former plea of guilty."

{¶20} Upon reviewing the evidence submitted by appellant in support of the withdrawal of his guilty plea, and based upon the record before us (which includes the written transcript but not the audio recordings of the plea hearing and sentencing hearing), we find that appellant has failed to show a manifest injustice warranting the withdrawal of his guilty plea or that the trial court erred in denying the motion without an evidentiary hearing.

{¶21} Other than his self-serving affidavit, appellant provided no substantiation for his allegations he was questioned by the police without *Miranda* warnings or that his polygraph test was coerced; the record does not support such allegations. Likewise, aside from appellant's self-serving affidavit, there is nothing in the record to demonstrate appellant's trial counsel was deficient for not filing a motion to suppress, nor evidence of a reasonable probability that, but for counsel's errors, appellant would not have pled guilty. See *Heath*, 2006-Ohio-7045. There is a nearly

five-year delay in filing the motion to withdraw the plea; appellant only states in his affidavit that no attorney would take his case until his current attorney, and that he did not know he could withdraw his plea. On this record, the trial court could reasonably conclude that appellant's allegations did not justify vacating his guilty plea. *Id.*

{¶22} We therefore find that the trial court did not abuse its discretion in overruling appellant's motion to withdraw his guilty plea and in doing so without an evidentiary hearing. The record is simply devoid of the type of extraordinary circumstances that would necessitate allowing appellant to withdraw his guilty plea more than four years after sentencing. Appellant's two assignments of error are overruled.

{¶23} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.