

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2010-L-074</b>
MARK W. WILFONG,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 08 CR 000610.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*Sheila M. Sexton*, McNamara & Loxterman, 8440 Station Street, Mentor, OH 44060 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is predicated upon a final judgment of the Lake County Court of Common Pleas. Appellant, Mark W. Wilfong, contests the validity of the trial court’s decision overruling his post-sentencing motion to withdraw his guilty plea under Crim.R. 32.1. Specifically, appellant maintains that he should have been permitted to retract the guilty plea because he was denied effective assistance of trial counsel throughout the underlying criminal proceeding.

{¶2} In November 2008, the Lake County Grand Jury indicted appellant on two forms of operating a motor vehicle while under the influence of alcohol. Although each of the two counts contained slightly different allegations, both charged appellant with a third-degree felony under R.C. 4511.19(A). Furthermore, each count alleged that, prior to the institution of the instant action, he had been convicted of, or pleaded guilty to, two felony offenses under that same provision. Each count also had a specification under R.C. 2941.1413, asserting that appellant had been convicted of, or pleaded guilty to, at least five offenses under R.C. 4511.19(A) or (B) within the preceding 20 years.

{¶3} Approximately one month after entering an initial plea of not guilty to both counts, appellant negotiated a plea bargain with the state of Ohio. In return for the dismissal of the second count and accompanying specification, appellant agreed to plead guilty to the entire first count, including the main charge of operating a vehicle while under the influence and the R.C. 2941.1413 specification.

{¶4} Consistent with the terms of the plea bargain, appellant executed a written plea of guilty. In this document, appellant acknowledged that he was pleading guilty to a third-degree felony, and that the sentence for such an offense was a mandatory term of one to five years. Regarding the R.C. 2941.1413 specification, the document stated that appellant understood that he would be sentenced to a separate mandatory term of one to five years on this part of the count, and that this separate term would be served prior to and consecutive to the sentence on the main charge.

{¶5} On the same day appellant signed the written plea, the trial court held an oral hearing concerning the change of plea. In addition to describing the nature of the constitutional rights appellant was waiving, the court gave two explanations covering the

extent of the sentences which could be imposed for the “drunk driving” offense and the specification. These explanations were consistent with the “sentencing” statement set forth in the written plea. As part of the colloquy on this point, the trial court asked appellant if he understood that the shortest term he could receive for the offense and specification together was two years, and that the maximum possible term was 10 years. Appellant responded in the affirmative. Finally, the trial court expressly informed appellant that, in prior cases involving the same offense and specification, it had imposed a total term of 10 years.

{¶6} At the conclusion of the plea hearing, the trial court accepted appellant’s guilty plea and referred the case to the adult probation department for a pre-sentencing investigation and report. Upon receiving that report, the trial court conducted a separate sentencing hearing, during which it heard the legal arguments of both trial counsel and allowed appellant to make an oral statement on the record. After considering the various submissions, the court issued its final sentencing judgment. Appellant was ordered to serve consecutive terms of five years on the main charge and two years on the specification, for an aggregate sentence of seven years. The final judgment also imposed a mandatory fine of \$1,350 and suspended appellant’s license to drive for the remainder of his life.

{¶7} Immediately following the imposition of his sentence, appellant did not try to pursue a timely appeal of his conviction. However, after serving 15 months of his seven-year sentence, he filed a motion to withdraw his guilty plea under Crim.R. 32.1. As the primary basis for the motion, appellant asserted that his plea had not been entered knowingly and voluntarily because his trial attorney failed to provide adequate

advice regarding certain issues in the case. Specifically, he maintained that he should be allowed to retract his plea because: (1) his counsel had informed him that he would likely receive only a one-year sentence for the offense and specification; and (2) his counsel had not addressed the issue of whether his prior convictions for “drunk driving” could be used for purposes of enhancing his sentence. As a distinct argument, appellant also contended that he was entitled to relief because the trial court abused its discretion in sentencing him to an aggregate term of seven years.

{¶8} After the state submitted a written response to the motion to withdraw, the trial court rendered its judgment on the matter without the benefit of an oral hearing. In overruling the motion, the trial court expressly found that acceptance of the guilty plea did not result in a manifest injustice warranting its withdrawal. As to appellant’s “sentencing” argument, the court concluded that a review of the written guilty plea and the “plea” hearing demonstrated that he was fully informed of the extent of the possible sentence, and that he indicated in response to specific questions that he was aware of the possible maximum sentence for both the main charge and the specification. Concerning the “prior convictions” dispute, the trial court held that, since appellant did not raise this issue during the plea hearing, he was barred from asserting the point after sentencing under the doctrine of res judicata.

{¶9} In challenging the merits of the foregoing determination before this court, appellant has advanced the following assignment of error:

{¶10} “The trial court erred in overruling the defendant-appellant’s motion to withdraw his guilty plea as he was denied process of law.”

{¶11} Under this sole assignment, appellant essentially states that the trial court

failed to employ the required procedure in disposing of his motion to withdraw his guilty plea. According to him, the arguments asserted in his motion were sufficient to warrant an oral hearing prior to the issuance of any final determination, and that if the trial court had conducted such a proceeding, he would have been able to present new materials in support of his points. Based upon this, appellant submits that the denial of his motion must be reversed because his fundamental right to due process was violated.

{¶12} As previously indicated, appellant's motion before the trial court was made pursuant to Crim.R. 32.1. That rule provides that, although a motion to withdraw a guilty plea may typically be filed only before the imposition of sentence, such relief can still be granted via a post-judgment motion when it is necessary to avoid a "manifest injustice." In interpreting the key phrase of the rule, this court has defined a "manifest injustice" as a clear or openly unjust act. *State v. O'Connell*, 11th Dist. No. 2010-L-030, 2011-Ohio-652, at ¶31. "The logic behind this high standard is 'to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe.' *State v. Caraballo* (1985), 17 Ohio St.3d 66, 67, \*\*\*." *State v. Delmanzo*, 11th Dist. No. 2009-L-167, 2010-Ohio-3555, at ¶21. Given the nature of the "manifest injustice" standard, this court has consistently emphasized that a post-sentence motion to withdraw a guilty plea can only be granted when extraordinary circumstances actually exist. *State v. Madeline* (Mar. 22, 2002), 11th Dist. No. 2000-T-0156, 2002 Ohio App. LEXIS 1348, at \*7-8.

{¶13} As a general proposition, the burden of showing a manifest injustice rests upon the defendant. *O'Connell*, 2011-Ohio-652, at ¶31. To carry this burden, the defendant cannot rely solely upon bald assertions stated in the motion; rather, his

arguments must be supported by specific facts set forth in the trial record or in affidavits accompanying the motion. *Delmanzo*, 2010-Ohio-3555, at ¶22. Any ruling as to the existence of a manifest injustice must be predicated upon a consideration of all facts surrounding the entry of the plea, with special emphasis placed upon the Crim.R. 11(C) colloquy between the trial court and the defendant. *Id.* at ¶22, citing *State v. Padgett* (July 1, 1993), 8th Dist. No. 64846, 1993 Ohio App. LEXIS 3374, at \*2.

{¶14} In applying Crim.R. 32.1 on numerous occasions, this court has indicated that the decision to grant or deny a motion to withdraw lies within the sound discretion of the trial court; as a result, the scope of our review on appeal is limited to determining if an abuse of discretion took place. *State v. Borecky*, 11th Dist. No. 2007-L-197, 2008-Ohio-3890, at ¶14. As to the substance of this standard of review, we have stated that an abuse of discretion should only be found when the trial court's underlying attitude is either unreasonable, arbitrary or unconscionable. *Id.* Along the same lines, this court has noted that an abuse of discretion connotes a failure to employ sound, reasonable and legal decision-making. *O'Connell*, 2011-Ohio-652, at ¶26, citing *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62.

{¶15} A review of the prior precedent in our jurisdiction shows that a defendant's request to withdraw his guilty plea is often based upon a basic assertion of ineffective assistance of trial counsel. In describing the standard that must be used in considering the merits of such an assertion, this court has emphasized:

{¶16} "A properly licensed attorney is presumed to have rendered effective assistance to a defendant. \*\*\* In the context of a guilty plea, the standard of review for ineffective assistance of counsel is whether: (1) counsel's performance was deficient;

and (2) the defendant was prejudiced by the deficient performance in that there is a reasonable probability that, but for counsel's error, the defendant would not have pled guilty. \*\*\* The burden of proving ineffective assistance of counsel falls upon the defendant. \*\*\*." (Citations omitted.) *Delmanzo*, 2010-Ohio-3555, at ¶33.

{¶17} In regard to the necessary causal connection between the guilty plea and the ineffective assistance, our prior precedent indicates that the defendant cannot merely maintain that, if it were not for trial counsel's error, he never would have agreed to enter the guilty plea. *Madeline*, 2002 Ohio App. LEXIS 1348, at \*10, citing *State v. Sopjack* (Dec. 15, 1995), 11th Dist. No. 93-G-1826, 1995 Ohio App. LEXIS 5572, at \*11. "Rather, ineffective assistance of trial counsel is found to have affected the validity of a guilty plea when it precluded a defendant from entering his plea knowingly and voluntarily." *Id.*

{¶18} As was noted above, a defendant cannot carry his burden in attacking the validity of his guilty plea simply by making an unsupported assertion. In explaining this principle in the context of an "ineffective assistance" argument, we have stated:

{¶19} "A claim that a guilty plea was induced by ineffective assistance of counsel must be supported by evidence where the record of the guilty plea shows it was voluntarily made. *State v. Malesky* (Aug. 27, 1992), 8th Dist. No. 61290, 1992 Ohio App. LEXIS 4378; see, also, *State v. Kapper* (1983), 5 Ohio St.3d 36, \*\*\*. In *Malesky*, the court held:

{¶20} "A naked allegation by a defendant of a guilty plea inducement, is insufficient to support a claim of ineffective assistance of counsel, and would not be upheld on appeal unless it is supported by affidavits or other supporting materials,

substantial enough to rebut the record which shows that his plea was voluntary.’ 1992 Ohio App. LEXIS 4378, at \*5.

{¶21} “In *Kapper*, the Supreme Court adopted the following rationale:

{¶22} ““(\*\*\* ) (A)n allegation of a coerced guilty plea involves actions over which the State has no control. Therefore the defendant must bear the initial burden of submitting affidavits or other supporting materials to indicate that he is entitled to relief. Defendant’s own self-serving declarations or affidavits alleging a coerced guilty plea are insufficient to rebut the record on review which shows that his plea was voluntary. (\*\*\*).” Id. at 38.” *State v. Gotel*, 11th Dist. No. 2006-L-015, 2007-Ohio-888, at ¶11-14.

{¶23} In the instant matter, the primary contention in appellant’s post-judgment motion to withdraw was that his decision to plead guilty had turned upon the bad advice of his trial counsel regarding the extent of his sentence; i.e., according to him, counsel told him that he would only be given a one-year term for the “drunk-driving” offense and specification. However, in raising this point in the text of his motion, appellant failed to attach any affidavits or other evidentiary materials to actually prove the factual assertion upon which the contention was based.

{¶24} In conjunction with the foregoing, it must also be noted that the trial record before this court readily shows that appellant was fully informed of the extent of the jail term which could be imposed. That is, as part of the written guilty plea and the Crim.R. 11(C) colloquy with the trial court during the oral hearing, it was clearly explained to him that the range of his aggregate sentence was between two and 10 years. Thus, by not submitting any evidentiary materials supporting the alleged “one-year” statement by his trial counsel, appellant failed to rebut the fact established by the trial record that his



guilty plea had been made knowingly and voluntarily. To this extent, appellant's motion was legally insufficient to prove that the performance of his counsel had been deficient as it related to his understanding of the possible ramifications of pleading guilty.

{¶25} In relation to the issue of sentencing, appellant also argued in his motion to withdraw that he must be allowed to retract his guilty plea because the trial court had abused its discretion in imposing an aggregate term of seven years. In support of this point, appellant cited a series of prior cases which, according to him, demonstrated that other criminal defendants who had been charged with a third-degree felony under R.C. 4511.19(A) have typically received a substantially shorter sentence than what the trial court ordered in this instance.

{¶26} As to this point, this court would emphasize that appellant's sentence was obviously not imposed until after he had entered his guilty plea; as a result, any error as to his sentencing would have had no effect upon the validity of the plea. In light of this, it logically follows that if appellant wanted to challenge the propriety of the seven-year term, he could only do so in a timely direct appeal from his conviction. The trial record in the underlying case shows that appellant chose not to pursue that separate remedy when the trial court's sentencing judgment was rendered in January 2009. Therefore, appellant was barred under the doctrine of *res judicata* from raising the question in his subsequent motion to withdraw his guilty plea. See, e.g., *State v. Whatley*, 9th Dist. No. 24231, 2008-Ohio-6128, at ¶9.

{¶27} Under the third argument in his Crim.R. 32.1 motion, appellant stated that he was denied effective assistance at the trial level because his counsel never prepared to take his case to trial or otherwise protect his constitutional rights. He further stated

that, given the lack of preparation, counsel coerced him into accepting the plea bargain and entering the guilty plea.

{¶28} Regarding this argument, our review of the trial record again indicates that appellant did not attach to his motion any affidavits or other evidentiary materials directly supporting his “coercion” assertion. Hence, since the sole materials before the trial court could only be construed to establish that the guilty plea had been entered voluntarily, appellant again failed to prove that the actions of his trial counsel were deficient in any respect.

{¶29} Under the final aspect of his motion to withdraw, appellant argues that his conviction should not be allowed to stand because his trial counsel never reviewed the issue of whether he had received proper legal representation in his prior five convictions under R.C. 4511.19(A). In raising this separate point, though, appellant again failed to present sufficient materials to allow the trial court to address the merits of his argument. First, he never indicated which, if any, of his prior convictions had been “uncounseled” and, as a result, could not be used as a penalty enhancement. Second, and more importantly, he failed to submit any evidentiary materials indicating that he was not represented in any of the prior “drunk-driving” proceedings.

{¶30} In attempting to overcome the fact that he did not attach any evidentiary materials to his motion to withdraw, appellant maintains that he could have elaborated upon each of his four arguments if the trial court would have scheduled a hearing on the matter. In considering the need for an oral hearing in regard to a post-sentence motion under Crim.R. 32.1, this court has concluded that such a hearing is mandatory when the defendant’s allegations, if accepted as true, would be sufficient to justify the withdrawal

of the guilty plea. *Borecky*, 2008-Ohio-3890, at ¶30. On the other hand, an oral hearing is not necessary when the defendant's allegations are conclusively refuted by the trial record. *Id.*

{¶31} In our case, appellant's assertion as to the extent of his prison term was clearly contradicted by the information set forth in the written guilty plea and in the Crim.R. 11(C) colloquy. The same is also true of appellant's allegation that his guilty plea was coerced by his trial counsel. Moreover, regarding appellant's "uncounseled prior convictions" argument, the nature of his allegations was not such that they could be refuted by the trial record; nevertheless, they were still not sufficiently specific to indicate which convictions could be disputable for lack of representation. Therefore, as to the three arguments which could conceivably be viable grounds for a motion to withdraw, appellant did not satisfy his initial burden requiring an oral evidentiary hearing.

{¶32} For the foregoing reasons, appellant was unable to demonstrate in any of his four arguments that a manifest injustice would continue to exist if he was not allowed to withdraw his guilty plea. Thus, since the trial court did not abuse its sound discretion in overruling appellant's post-sentence motion under Crim.R. 32.1, his sole assignment of error is without merit.

{¶33} Consistent with the foregoing analysis, it is the order of this court that the judgment of the trial court is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.