[Cite as *State v. Wise,* 2012-Ohio-4896.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2012-T-0028**
- vs -	:	
DAMION CRAIG WISE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2009 CR 00596.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Damion Craig Wise, pro se, PID# A582587, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, OH 45601 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Damion Craig Wise, appeals from the Judgment Entry of the Trumbull County Court of Common Pleas, denying his Motion to Withdraw Plea. The issue to be determined by this court is whether the trial court abused its discretion when it denied a motion to withdraw a plea pursuant to Crim.R. 32.1, without a hearing, when the defendant alleged he was incompetent to plead guilty due to an alleged suicide attempt. For the following reasons, we affirm the decision of the trial court.

{¶2} On August 26, 2009, Wise was indicted by the Trumbull County Grand Jury on one count of Felonious Assault, a felony of the second degree, pursuant to R.C. 2903.11(A)(2) and (D)(1)(a), and one count of Endangering Children, a felony of the third degree, in violation of R.C. 2919.22(B)(2) and (E)(1) and (3).

{¶3} On September 11, 2009, the grand jury issued a Superseding Indictment, charging Wise with the following: one count of Felonious Assault (Count One), a felony of the second degree, in violation of R.C. 2903.11(A)(2) and (D)(1)(a); four counts of Endangering Children (Counts Two, Eight, Nine, and Ten), felonies of the third degree, in violation of R.C. 2919.22(B)(2) and (E)(1) and (3); one count of Felonious Assault (Count Three), a felony of the second degree, in violation of R.C. 2903.11(A)(1) and (D)(1)(a); one count of Endangering Children (Count Four), a felony of the second degree, in violation of R.C. 2919.22(B)(2) and (E)(1) and (3); two counts of Endangering Children (Counts Five and Seven), misdemeanors of the first degree, in violation of R.C. 2919.22(A) and (E)(1) and (2)(a); and one count of Rape (Count Six), a felony of the first degree, in violation of R.C. 2907.02(A)(1)(b) and (B) and R.C. 2971.03(B)(1)(b).

{¶4} Wise entered a plea of not guilty by reason of insanity on November 2, 2009.

{¶5} On November 17, 2009, the trial court issued a Journal Entry titled "Order Directing Evaluation of Defendant's Sanity at the Time of the Offense Charged." In this Entry, the court ordered that an examination be completed to determine Wise's "mental condition at the time of the offenses charged" and ordered that the examiner submit a written report to the court within 30 days. The record does not indicate that such a report was ever filed with the court.

{¶6} On March 4, 2010, a "Finding of Guilty Plea to the Amended Indictment" was filed, in which Wise entered a guilty plea to all ten charges in the Superseding Indictment. The written plea stated that the plea was being made "knowingly and voluntarily." It also outlined all of the rights that Wise waived by pleading guilty. The plea contained a statement that Wise was advised of his rights and that the guilty plea was accepted by the trial court.

{¶7} Pursuant to an Amended Entry on Sentence filed by the court on April 12, 1010, Wise was sentenced to seven years in prison on Count One and Count Three. Count Two was found to merge with Count One and Count Four was found to merge with Count Three, for the purposes of sentencing. Wise was sentenced to six months each on Counts Five and Seven. On Count Six, Wise was sentenced to a minimum term of ten years and a maximum term of life imprisonment. On Counts Eight through Ten, Wise was sentenced to four years on each count. All sentences were ordered to be served concurrently, for an aggregate sentence of ten years to life in prison. Wise was also classified as a Tier III sex offender.

{¶8} On January 16, 2012, Wise filed a Motion to Withdraw Plea, pursuant to Crim.R. 32.1. In that Motion, Wise asserted that he was not competent at the time he entered his guilty plea, since he had attempted suicide while in jail prior to entering his plea and was placed on suicide watch.

{¶9} In the State's Memorandum in Opposition, it noted that there was no evidence to support Wise's assertion that he was incompetent or that his plea was not entered knowingly and voluntarily.

{¶10} On March 2, 2012, the trial court issued a Judgment Entry, denying Wise's Motion to Withdraw Plea.

{¶11} Wise timely appeals and raises the following assignment of error:

{¶12} "[The] trial court abused its discretion by denying the appellant's motion to withdraw his guilty plea, without a hearing."

{¶13} "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." Crim.R. 32.1. "The phrase 'manifest injustice' has been 'variously defined,' however, 'it is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases.'" *Conneaut v. Donofrio*, 11th Dist. No. 2008-A-0072, 2009-Ohio-2947, ¶ 11, citing *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977) (citation omitted).

{¶14} "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." *Smith* at paragraph one of the syllabus. "A motion made pursuant to Crim.R. 32.1 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 that court." *Id.* at paragraph two of the syllabus; *State v. Pough*, 11th Dist. No. 2010-T-0117, 2011-Ohio-3630, ¶ 15 (a trial court's denial of a motion to withdraw a guilty plea is reviewed pursuant to an abuse of discretion standard) (citation omitted).

{¶15} In the present matter, Wise argues that his Motion to Withdraw Plea should have been granted because the trial court failed to take into account his incompetency when accepting his guilty plea, and, therefore, his plea could not have been knowingly and intelligently entered. He argues that he attempted suicide prior to

entering his guilty plea.[1] Wise asserts that, due to this suicide attempt, the trial court should have ordered his re-evaluation for competency prior to accepting his plea, and that the court exhibited "a lack of concern for [his] health."

{¶16} As an initial matter, we note that there were no transcripts filed with the record and, therefore, the only evidence in the record related to the circumstances surrounding the entry of Wise's guilty plea is the "Finding of Guilty Plea to the Amended Indictment," signed by Wise, his counsel, the prosecutor, and the trial court judge. "Pursuant to App.R. 9(B), it is an appellant's duty to include within the record any material pertinent to the errors assigned." *State v. Price*, 11th Dist. No. 2007-G-2785, 2008-Ohio-1134, ¶ 40. To the extent that evidence or statements were presented at a plea hearing regarding Wise's competency, we are unable to review such statements. Therefore, the review of whether the trial court erred in accepting Wise's plea, and in denying Wise's motion, is confined to the pertinent portions of the record before this court.

{¶17} A review of the record reveals no evidence of Wise's incompetence to enter his guilty plea. Although he did initially enter a plea of not guilty by reason of insanity, no evidence was ever presented to support the contention that he was incompetent to enter a guilty plea. A competency evaluation was ordered to be completed, but no results were filed showing Wise to be incompetent. Wise himself, however, admitted in his Motion to Withdraw Plea that he was found competent to stand trial in a competency evaluation.

1. It is unclear on which date Wise's alleged suicide attempt occurred. He asserts in his brief that it occurred "prior to" the date of his trial set for March 8, 2010, but also states that it occurred "the day this case was scheduled for trial."

{¶18} The sole argument advanced by Wise was that his alleged suicide attempt is evidence of his incompetence to enter a guilty plea. However, the only support for the occurrence of the suicide attempt is Wise's self-serving statements, which were not even set forth in a sworn statement or affidavit. "Generally, a self-serving affidavit or statement is insufficient to demonstrate manifest injustice." (Citation omitted.) *State v. Gibson*, 11th Dist. No. 2007-P-0021, 2007-Ohio-6926, ¶ 33. This alone is not enough to support a claim that he was incompetent and his plea was not given knowingly and voluntarily. It is also contradicted by the written guilty plea, which states that Wise was "making the plea knowingly and voluntarily" and that Wise had a "full understanding" of his legal rights and the charges against him. The plea further contained a finding by the court that Wise understood all of his rights and had no notation regarding a lack of competency or a suicide attempt. This supports a finding, especially in the absence of any other evidence to the contrary, that his plea was given voluntarily. *See State v. Caskey*, 11th Dist. No. 2010-L-014, 2010-Ohio-4697, ¶ 12 (statements contained in a signed guilty plea can establish that a defendant's plea was given knowingly, voluntarily, and intelligently).

{¶19} Additionally, Wise points to no support for a finding that a suicide attempt alone is evidence of incompetence to enter a guilty plea. Several districts have found that a suicide attempt, when it is not coupled with any other evidence of a defendant's incompetence, does not warrant a conclusion that a defendant is incompetent to either stand trial or enter a plea of guilty. *See State v. Thayer*, 6th Dist. No. E-08-059, 2009-Ohio-5198, ¶ 60 (a plea was knowingly and intelligently made, although the defendant attempted suicide prior to entering the plea, when no other evidence was present to show the defendant was incompetent); *State v. Robinson*, 8th Dist. No. 89136, 2007-

Ohio-6831, ¶ 28 (where the only evidence related to a defendant's incompetence was a suicide attempt, and the record showed that he was properly advised of his rights and understood them, the trial court did not err by failing to hold a competency hearing).

{¶20} Wise also cites *Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975), for the proposition that the trial court erred by not holding a competency hearing prior to accepting his guilty plea.

{¶21} Criminal defendants are presumed to be competent to stand trial or enter a plea. *State v. Hackathorn*, 11th Dist. No. 2004-A-0008, 2004-Ohio-6694, ¶ 19. "This presumption is rebutted if the defendant shows he is unable to understand the proceedings or assist in his or her defense." *Id.*, citing *State v. Swift*, 86 Ohio App.3d 407, 411, 621 N.E.2d 513 (11th Dist.1993). As has been explained by the Ohio Supreme Court, *Drope* holds that the right to a competency hearing "* * * rises to the level of a constitutional guarantee where the record contains 'sufficient indicia of incompetence,' such that an inquiry * * * is necessary to ensure the defendant's right to a fair trial." (Citation omitted.) *State v. Skatzes,* 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 156, citing *Drope* at 171; *Hackathorn* at ¶ 20 (a defendant who enters a guilty plea is not entitled to a competency hearing when the record does not contain sufficient indicia of incompetence).

{¶22} We first note that, pursuant to the record, there was no evidence before the trial court that Wise had even attempted suicide, such that the court would have been aware of a potential issue related to Wise's competence. There is also nothing in the record to suggest that Wise or his counsel requested a second competency hearing, after the alleged suicide attempt.

{¶23} Moreover, there is no indication that "sufficient indicia of incompetence" existed in this case, such that a competency hearing was necessary, given the lack of evidence regarding the suicide attempt and how this attempt supports Wise's contention that he was incompetent. There is also a complete lack of any other evidence showing Wise was incompetent to enter a guilty plea. *See State v. Hall*, 11th Dist. No. 2001-T-0124, 2002-Ohio-4704, ¶ 15 (where a review of the record indicates no indicia of incompetency, the trial court did not err by failing to hold a competency hearing, and, therefore, by denying the defendant's subsequent motion to withdraw his guilty plea). Since a competency hearing was not required, the trial court did not err by failing to allow Wise to withdraw his plea based on the failure to hold such a hearing.

{¶24} Further, it must be emphasized that Wise filed his Motion to Withdraw Plea almost two years after he entered his guilty plea. "'[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.'" *State v. Nicholas*, 11th Dist. No. 2009-P-0049, 2010-Ohio-1451, ¶ 17, citing *Smith*, 49 Ohio St.2d 261, at paragraph three of the syllabus. When considering this delay, in addition to the factors discussed above, we cannot find that the trial court abused its discretion in failing to grant Wise's Motion to Withdraw Plea.

{¶25} Wise also argues that he was entitled to an evidentiary hearing on his Motion to Withdraw Plea.

{¶26} "While a trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of a guilty plea if the request is made before sentencing, the same is not true if the request is made after the trial court has

already sentenced the defendant. [*State v. Xie* 62 Ohio St.3d 521, 584 N.E.2d 715 (1992),] paragraph one of the syllabus. In those situations where the trial court must consider a post-sentence motion to withdraw a guilty plea, a hearing is only required if the facts alleged by the defendant, and accepted as true, would require withdrawal of the plea." (Citation omitted.) *Gibson*, 2007-Ohio-6926, at ¶ 32. "[A] trial court need not hold an evidentiary hearing on a post-sentence motion to withdraw a guilty plea if the record indicates the movant is not entitled to relief and the movant has failed to submit evidentiary documents sufficient to demonstrate a manifest injustice." *Caskey*, 2010-Ohio-4697, at ¶ 11, citing *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, 884 N.E.2d 607, ¶ 6 (8th Dist.). This court has also held that, "if the record, on its face, conclusively and irrefutably contradicts a defendant's allegations in support of his Crim.R. 32.1 motion, an evidentiary hearing is not required." *State v. Madeline,* 11th Dist. No. 2000-T-0156, 2002 Ohio App. LEXIS 1348, *17 (Mar. 22, 2002).

{¶27} When accepting Wise's alleged suicide attempt as true, but considering that there is no other evidence linking such an attempt to a finding of incompetence, there can be no finding that Wise was entitled to relief. There is no statement by Wise before the court as to how the suicide attempt caused Wise to be incompetent or that it prevented him from competently entering a plea. Additionally, the assertion that the plea was not rendered knowingly and intelligently due to incompetence is contradicted by the various statements in the written plea that the plea was being made "knowingly and voluntarily" and that Wise had a "full understanding" of his legal rights.

{¶28} In the present matter, as discussed above, the only evidence supporting a finding of incompetence is presented through the self-serving statements contained in Wise's Motion to Withdraw Plea. These are not enough to warrant any finding of a

manifest injustice or to require a hearing. *See State v. Williams*, 11th Dist. No. 2010-G-2973, 2011-Ohio-1864, ¶ 26 (where a defendant waited a year to file a motion to withdraw his plea, filed no transcript of the plea hearing, and provided no evidentiary material except for his self-serving statement, the trial court did not abuse its discretion by failing to hold a hearing on the motion to withdraw).

{¶29} The sole assignment of error is without merit.

{¶30} For the foregoing reasons, the Judgment Entry of Trumbull County Court of Common Pleas, denying Wise's Motion to Withdraw Plea, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.