[Cite as *State v. Peete*, 2019-Ohio-2513.]

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. 2018-T-0094**
- vs -	:	
DERRICK DEE PEETE (AKA "RIZZI"),	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2012 CR 786.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor; *Gabriel M. Wildman*, Assistant Prosecutor; and *Ashleigh Musick*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, Ohio 44481-1092 (For Plaintiff-Appellee).

Derrick Dee Peete, pro se, PID: A653-015, Allen Correctional Institution, P.O. Box 4501, Lima, Ohio 45802 (Defendant-Appellant).

THOMAS R. WRIGHT, P.J.

{¶1} Appellant, Derrick Dee Peete, appeals the denial of his post-sentencing motion to withdraw his guilty plea without a hearing. We affirm.

{¶2} In November 2012, a six-count indictment was returned against appellant, charging him with aggravated murder, tampering with evidence, improperly discharging a firearm into a habitation, attempted aggravated murder, felonious assault, and having a

weapon while under a disability based upon an incident in which two separate victims were shot during an exchange of gunfire. Four of the six counts had firearm specifications.

{¶3} Beginning in December 2012, appellant's trial counsel moved for, and was granted, four continuances of pretrial hearings. In October 2013, his counsel moved to continue the jury trial, scheduled for November 12, 2013. Counsel requested that the trial be postponed until after final disposition of a pending federal case against appellant. The motion was overruled and appealed. The appeal was ultimately dismissed for lack of a final appealable order, but trial was postponed until March 2014.

{¶4} Approximately four days before trial, consistent with plea negotiations, the state moved to amend the first count of the indictment from aggravated murder to murder, a first-degree felony under R.C. 2903.02(A), and dismissal of the four firearm specifications. The motion was granted and appellant pleaded guilty to the amended indictment.

{¶5} The court accepted the guilty plea and found him guilty on all six charges, as amended. Appellant waived his right to a presentencing investigation. The trial court accepted the joint sentencing recommendation and ordered appellant to serve a prison term of fifteen years to life on the murder charge. The court then imposed separate terms for the remaining five charges to be served concurrently with each other and the life sentence on the murder charge.

{¶6} Over four years later, in September 2018, appellant moved to withdraw his guilty plea under Crim.R. 32.1. First, appellant maintained that his open court plea was deficient because the entire plea agreement was not read into the record and the trial

court did not inform him of the total maximum sentence he could have received on all six charges. Second, he argued that trial counsel did not provide effective assistance because she coerced him into accepting the plea, failed to inform him of the type of evidence the state would have to present to prove prior calculation and design under the attempted aggravated murder count, and did not inform him that two of the six charges could merge for purposes of sentencing. Appellant's motion is supported with an affidavit, transcripts of the plea and sentencing, and disposition of trial counsel's disciplinary proceedings from an unrelated case.

{¶7} Within three days the trial court summarily overruled the motion.

{¶8} Appellant assigns the following as error:

{¶9} "[1.] The trial court abused its discretion by failing to hold a hearing on appellant's motion.

{¶10} "[2.] The trial court abused its discretion by failing to explain its reasoning for denying appellant's motion.

{¶11} "[3.] The court would deny appellant his right to appeal if it were to speculate on the trial court's reasoning and affirm its ruling."

{¶12} In his first assignment, appellant argues that the court was required to hold a hearing because the allegations in his motion state viable grounds for relief.

{¶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. Here, appellant filed a post-sentencing motion to withdraw his guilty plea. To be entitled to relief, he must therefore show a manifest injustice. *State v. Ober*, 11th

Dist. Portage Nos. 2018-P-0034 and 2018-P-035, 2019-Ohio-843, ¶ 14, quoting *State v. Gibson*, 11th Dist. Portage No, 2007-P-0021, 2007-Ohio-6926, ¶ 20, ¶ 21.

{¶14} Manifest injustice is a clear or openly unjust act and extraordinary circumstances must exist before granting a post-sentencing motion to withdraw. *State v. Wilfong*, 11th Dist. Lake No. 2010-L-074, 2011-Ohio-6512, ¶ 12. "'The rationale for 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 is unexpectedly severe.' [*State v.*] *Robinson*, [11th Dist. Lake No. 2011-L-145,] 2012-Ohio-5824, at ¶ 14, quoting *State v. Caraballo*, 17 Ohio St.3d 66, 67, (* * *) (1985)." *State v. Banks*, 11th Dist. Lake No. 2015-L-128, 2016-Ohio-4925, ¶ 9.

{¶15} "An appellate court analyzes a trial court's decision regarding a motion to withdraw a guilty plea based on an abuse of discretion standard * * *. *State v. Gibbs*, 11th Dist. No. 98-T-0190, 2000 Ohio App. LEXIS 2526, 2000 WL 757458 (June 9, 2000), *6-7. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. 09-CA-54, 2010-Ohio-1900, ¶ 62, quoting *Black's Law Dictionary* 11 (8th Ed.2004)." *State v. Brody*, 11th Dist. Lake Nos. 2012-L-050, 2012-L-051, and 2012-L-052, 2013-Ohio-340, ¶13.

{¶16} Appellate courts also apply an abuse-of-discretion standard in reviewing whether a trial court errs in deciding a Crim.R. 32.1 motion to withdraw without a hearing. *State v. Green*, 11th Dist. Trumbull Nos. 2018-T-0063, 2019-Ohio-1303, ¶ 24.

{¶17} "'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. * * * '[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.' (Citation omitted.) *State v. Caskey*, 11th Dist. Lake No. 2010-L-014, 2010-Ohio-4697, ¶ 11. [Moreover], '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. Trumbull No. 2000-T-0156, 2002 Ohio App. LEXIS 1348, 17 (Mar. 22, 2002)." *State v. Zimmerman*, 11th Dist. Geauga No. 2013-G-3146, 2014-Ohio-1152, ¶ 14.

{¶18} "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. Conteh*, 10th Dist. Franklin No. 09AP-490, 2009-Ohio-6780, ¶ 15, citing *State v. Smith*, 49 Ohio St.2d 261, 264 (1977).

{¶19} Appellant first argues that he was not informed of the aggregate maximum penalty for all charges at his plea. First, since this issue could have been raised in a direct appeal from appellant's conviction, it is barred from consideration under res judicata. *State v. Lowe*, 10th Dist. Franklin No. 14 AP-481, 2015-Ohio-382, ¶ 10; *State v. Rexroad,* 9th Dist. Summit No. 22214, 2004-Ohio-6271, ¶ 8.

{¶20} Crim.R. 11(C)(2) provides that in the context of a felony case, a trial court shall not accept a guilty plea "without first addressing the defendant personally and doing all of the following: (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved * * *."

Crim.R. 11(C)(2)(a) does not mandate that the defendant be advised of the aggregate maximum should consecutive sentences be imposed, but it requires the court to inform of the maximum penalty for each count. *State v. Nave*, 8th Dist. Cuyahoga No. 107032, 2019-Ohio-1123, ¶ 9-12, citing *State v. Johnson*, 40 Ohio St.3d 130, 134, 532 N.E.2d 1295 (1988). The trial court informed appellant of the maximum penalty for each charge at the plea as required.

{¶21} Under his second argument, appellant asserts that his plea is deficient because the plea agreement was not stated in open court. "When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court." Crim.R. 11(F).

{¶22} The rule is satisfied when the underlying terms or promises that delineate the underlying agreement upon which the plea is based is stated in open court. *See State v. Orleans*, 7th Dist. Mahoning No. 07-MA-1745, 2008-Ohio-5937, ¶ 31, quoting *State v. Mulhollen*, 119 Ohio App.3d 560, 566, 695 N.E.2d 1174 (11th Dist.1998).

{¶23} At the outset of appellant's plea hearing, the following exchange occurred:

{¶24} "THE COURT: Would the prosecutor outline the plea negotiations?

{¶25} "MR. BECKER: Yes, Your Honor. May it please the Court. At this time the state is asking for leave of Court to amend the previously filed indictment by amending Count 1, Aggravated Murder, to Murder, in violation of Section 2903.02(A) & (D), and dismissing the specifications in Counts 1, 3, 4 and 5."

{¶26} That appellant agreed to plead guilty in return and that the plea was based in part upon a jointly recommended sentence was not stated in open court. However,

any error in this regard could have been, but was not, raised on direct appeal. It is therefore barred by res judicata. *Lowe,* 2015-Ohio-382.

{¶27} Moreover, we fail to see any resulting prejudice much less a manifest injustice. Implicit is that in return for the amendment, appellant would enter a plea, and he indeed pleaded guilty. Moreover, the trial court ultimately accepted and imposed the jointly recommended sentence. Appellant got exactly what he agreed to and does not claim otherwise.

{¶28} Under his final three arguments, appellant claims he is entitled to withdraw his guilty plea because he was denied effective assistance of trial counsel.

{¶29} "'Ineffective assistance of counsel is a proper basis for seeking post-sentence withdrawal of a guilty plea.' [*State v. Gibson*, 11th Dist. Portage No. 2007-P-0021, 2007-Ohio-6926,] ¶ 26, citing *State v. Turner*, 171 Ohio App.3d 82, 2007-Ohio-1346, 869 N.E.2d 708, ¶ 27 (2d Dist.), citing *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813, 793 N.E.2d 509 (10th Dist.); *State v. Hamed*, 63 Ohio App.3d 5, 577 N.E.2d 1111 (8th Dist.1983). 'In order to prevail on an ineffective assistance of counsel claim, a petitioner must satisfy the two-prong test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674.' *Id*. (Citation omitted.) 'Thus, appellant must show that counsel's performance was deficient and "must also show prejudice resulting from the deficient performance."' *Id*., quoting *State v. Jackson*, 11th Dist. Ashtabula No. 2002-A-0027, 2004-Ohio-2442, 2004 WL 1085322, ¶ 9." *Ober*, 2019-Ohio-843, at ¶ 20.

{¶30} Under his first "ineffective assistance" argument, appellant submits that his guilty plea was not voluntary due to trial counsel coersion. He asserts (1) trial counsel

was not prepared to go to trial and needed the plea agreement to "save her own skin;" and (2) trial counsel lied to him when she said that the state's case against him was strong, and the state was unlikely to make a better plea offer.

{¶31} In regard to his first assertion, appellant established that, approximately a year after his case ended, trial counsel was sanctioned by the Supreme Court of Ohio for not attending scheduled hearings in a civil case and that his case was pending at the same time.

{¶32} However, it does not follow that counsel was therefore unprepared for trial in appellant's case. Similarly, his conclusory statement that counsel "lied" to him regarding the strength of the state's case and that a better deal would not be forthcoming, are not required to be given weight. *Conteh*, 2009-Ohio-6780 at ¶15.

{¶33} Under his second "ineffective assistance" argument, appellant asserts that he did not knowingly enter his plea because trial counsel did not inform him that the attempted aggravated murder charge and the felonious assault count *could* merge for sentencing purposes. However, failure, if any, to raise merger or of the trial court's failure to merge, was barred by res judicata as it could have been asserted in a direct appeal of the conviction. *State v. McBride*, 7th Dist. Mahoning No. 16 MA 0002, 2017-Ohio-4281, ¶ 14-15. *See also State v. Mobley*, 10th Dist. Franklin No. 18AAP-23, 2018-Ohio-3880, ¶ 19; *Brody*, 2013-Ohio-340, at ¶ 18.

{¶34} Under his last "ineffective assistance" argument, appellant argues that, prior to entering his guilty plea, trial counsel did not to discuss with him whether the state could prove its "prior calculation and design" element of attempted aggravated murder. But, in raising this in his motion to withdraw, appellant did not allege facts which would render

his plea a manifest injustice. Instead, he only cited the state's theory that the exchange of gunfire was caused by a "drug deal gone bad."

{¶35} Pursuant to the foregoing, the trial court did not abuse its discretion in ruling on his motion without an evidentiary hearing. *Zimmerman*, 2014-Ohio-1152, at ¶ 14. Appellant's first assignment lacks merit.

{¶36} Under his final two assignments, appellant argues that the trial court erred in failing to make findings of fact and conclusions of law.

{¶37} A trial court, however, has no duty to state findings of fact and conclusions of law in disposing of a Crim.R. 32.1 motion to withdraw a guilty plea. *Green*, 2019-Ohio-1303, at ¶ 28, quoting *State v. Dewey*, 11th Dist. Ashtabula No. 98-A-0027, 1998 WL 964499, *4 (Dec. 4, 1998). Accordingly, his second and third assignments lack merit.

{¶38} The judgment of the Trumbull County Court of Common Pleas is affirmed.

MATT LYNCH, J.,

MARY JANE TRAPP, J.,

concur.