[Cite as *State v. Johnson*, 2009-Ohio-5143.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

SILVANUS ANTHONY JOHNSON

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. 2009 CA 00038

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 01370

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 28, 2009

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Defendant-Appellant Silvanus Anthony Johnson appeals the decision of the Stark County Court of Common Pleas, denying his motion to withdraw his guilty pleas.

{¶2} Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶3} On July 25, 2008, Silvanus Anthony Johnson, the Appellant herein, was arrested for one count of Domestic Violence, one count of Abduction and one count of Felonious Assault.

{¶4} On September 8, 2008, Appellant was indicted on one count of Rape and one count of Kidnapping, both felonies of the First Degree, one count of Felonious Assault, a felony of the Second Degree, one count of Abduction, a Felony of the Third Degree, and one count of Domestic Violence, a felony of the Third Degree.

{¶5} Appellant pled not guilty to the charges.

{¶6} On September 17, 2009, Appellant's counsel filed requests for discovery and a bill of particulars. After nine days had passed and having not received the requested discovery, Appellant’s defense counsel filed for an extension of time in which to file additional pretrial motions. The trial court granted said motion.

{¶7} The State filed its response to the request for discovery and a bill of particulars.

{¶8} On September 30, 2008, additional discovery was provided to defense counsel under separate cover to include the victim's medical records and photographs of her injuries. The following week, Appellant's counsel filed a motion for an order compelling open file discovery and a motion for exculpatory evidence.

{¶9} On November 4, 2008, Appellant withdrew his not guilty plea and entered a plea of guilty as charged. Prior to entering said plea, Appellant signed a Crim.R.11(C) plea form which outlined the charges against him, the constitutional rights he was waiving by entering a guilty plea, the potential penalties he faced, notification of his sex offender tier level, and his post-release control obligations. The form further contained an acknowledgment by Appellant that he was entering his guilty pleas freely, voluntarily and by his own choice. Finally, the form indicated that Appellant had confidence in his attorney and that his attorney had effectively and diligently represented him.

{¶10} After Appellant executed the plea form, the trial court engaged in a plea colloquy with Appellant during which Appellant acknowledged his understanding of the rights he was waiving by entering guilty pleas. He further expressed his satisfaction with the amount of time his attorney had dedicated to his case, indicated that he had an opportunity to discuss his side of the case with his counsel and was satisfied with the quality of legal services provided. The trial court then accepted Appellant's pleas of guilty and sentenced him to an aggregate total of ten years incarceration.

{¶11} The Judgment Entry of Change of Plea and Sentence was docketed on November 24, 2008.

{¶12} On or about November 14, 2008, Appellant filed a pro se motion to withdraw his guilty pleas. The trial court appointed counsel to handle the matter.

{¶13} On December 29, 2008, counsel filed a new motion to withdraw the previously entered guilty pleas.

{¶14} On February 2, 2009, a hearing was held on Appellant’s motion to withdraw. At said hearing, Appellant and his mother, Gwendolyn Johnson, testified.

Mrs. Johnson claimed that her son's trial counsel told her that he never reviewed the letters and e-mails she had provided to him which were allegedly written by the victim in this case. She further alleged that counsel told her that he had not reviewed a recording on a cell phone that she had provided to him. Additionally, Mrs. Johnson alleged that her son did not receive discovery from the State, but by the time she obtained a copy of the discovery herself, her son had received a copy. Mrs. Johnson stated that she believed her son was going to exercise his right to a trial. She further testified that on the day Appellant entered his guilty pleas, she spoke with her son's trial counsel and he advised her of a plea offer of ten years incarceration. She testified that she told him she would never plead to that, and that counsel told her that they should let Appellant make that decision.

{¶15} Appellant testified that his counsel told him that his mother wanted him to take the State's offer of ten years because the situation was too stressful for her. Appellant further alleged that he depended on his mother's opinion because she was going to school to be a paralegal and therefore allegedly knew more than he did about the criminal justice system. Appellant later admitted, however, that he is no stranger to the criminal justice system having had at least 15 misdemeanor charges and two prior felony cases. He further admitted that during his change of plea hearing the trial court explained the rights he was waiving and questioned him to ensure that he was making a knowing, voluntary and intelligent plea. He also admitted that his trial counsel had reviewed the Crim.R.11(C) plea form with him and that he had been able to meet with his attorney to prepare for his plea hearing and had been able to discuss his version of the events that led to the charges. Further, Appellant stated that he had said he was

satisfied with the amount of time his attorney had dedicated to his case and finally that he was satisfied with the quality of services he had received from his attorney. Additionally, Appellant testified that his attorney had previously explained to him that if he went to trial and was convicted as charged, he faced up to 38 years incarceration. His counsel further advised him that if he was acquitted of the rape, he would potentially face 28 years, and if he was acquitted of rape and kidnapping, he was facing 18 years. Moreover, Appellant testified that his attorney expressed his concern that Appellant would not be acquitted on the remaining charges due to his prior record. Appellant stated that his attorney suggested that the ten years the State was offering was better than the minimum of 18 years he faced if convicted.

{¶16} By Judgment entry filed February 3, 2009, the trial court denied Appellant's motion to withdraw his guilty plea, finding that such plea was made knowingly, intelligently and voluntarily.

{¶17} It is from this denial of his motion to withdraw Appellant now appeals, raising the following assignments of error:

ASSIGNMENTS OF ERROR

{¶18} "I. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

{¶19} "II. THE COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO WITHDRAW PREVIOUSLY ENTERED GUILTY PLEA."

II.

{¶20} For purposes of clarity and ease of discussion, we shall address Appellant's assignments of error out of order.

{¶21} In his second assignment of error, Appellant contends that the trial court erred in denying his motion to withdraw his guilty pleas. We disagree.

{¶22} Crim.R. 32.1 addresses the withdrawal of a plea and provides as follows:

{¶23} "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."

{¶24} In this case, Appellant's request came after pronouncement of sentence so the appropriate standard is withdrawal only to correct a manifest injustice. See *State v. Patterson,* Muskingum App. No. CT2008-0054, 2009-Ohio-273. A "manifest injustice" has previously been defined as a "clear or openly unjust act." Citing *State ex rel. Schneider v. Kriener,* 83 Ohio St.3d 203, 208, 1998-Ohio-271, 699 N.E.2d 83. *State v. Walling,* 3d Dist. No. 17-04-12, 2005-Ohio-428, ¶ 6. Notably, a post-sentence withdrawal of a guilty plea is only available in "extraordinary cases." *Smith,* 49 Ohio St.2d at 264.

{¶25} The burden of proving manifest injustice rests on the defendant and must be supported with specific facts either from the record or affidavits in support of the motion. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus; *State v. Dixon*, Stark App.No. 2008-CA-00254, 2009-Ohio-3137.

{¶26} Furthermore, a trial court maintains discretion in determining whether a defendant established a "manifest injustice." *Id.,* at paragraph two of the syllabus. As such, this Court will not reverse a trial court's decision absent an abuse of discretion. *State v. Nathan* (1995), 99 Ohio App.3d 722, 725. An abuse of discretion suggests a

decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶27} Upon review of the record and the transcript of the change of plea hearing, we find that the trial court did not abuse its discretion in denying Appellant's motion to withdraw his guilty pleas. The only evidence presented to the trial court was the testimony of Appellant and his mother that his attorney misrepresented the mother's wishes as to whether Appellant should accept the plea agreement. Appellant claims that had he known that his mother would not approve of same, he would not have accepted the negotiated plea agreement. Appellant also argues that the communication of such misinformation constituted ineffective assistance of counsel, which we will review under Appellant's first assignment of error.

{¶28} Ultimately, it is within the sound discretion of the trial court to evaluate the credibility and weight of the movant's assertions. *State v. Smith* (1977), 49 Ohio St.2d at 264. The trial court had before it all of the information presented both at the oral hearing and apparently did not give much weight to the arguments of Appellant. We will not second-guess the trial court's credibility and weight determinations.

{¶29} Upon review of the record, we find the trial court complied with Crim.R. 11(D) and engaged Appellant in full colloquy of his rights. As this Court has previously stated, "when a petitioner submits a claim that his guilty plea was involuntary, a record reflecting compliance with Crim.R. 11 has greater probative value than a petitioner's self-serving affidavit." *State v. Surface,* 5th Dist. No. 2008-CA-00184, 2009-Ohio-950.

{¶30} Appellant, having been apprised of his rights, knowingly, voluntarily, and intelligently entered a guilty plea in this case and has failed to demonstrate any manifest

injustice that would warrant the withdrawal of his guilty pleas. We do not find that Appellant's failure to have his mother's approval of his plea constitutes manifest injustice in the case sub judice.

{¶31} Appellant's second assignment of error is overruled.

I.

{¶32} In his first assignment of error, appellant argues that he was denied the effective assistance of counsel. We disagree.

{¶33} The standard of review of an ineffective assistance of counsel claim is well established. Pursuant to *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 673, in order to prevail on such a claim, the appellant must demonstrate both (1) deficient performance, and (2) resulting prejudice, i.e., errors on the part of counsel of a nature so serious that there exists a reasonable probability that, in the absence of those errors, the result of the trial court would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶34} First, we must determine whether counsel's assistance was ineffective, i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his or her essential duties to the client.

{¶35} If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. As stated above, this requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. Id. Trial counsel is entitled to a

strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675.

{¶36} Appellant argues his trial counsel failed to provide him with copies of the discovery filed by the State of Ohio; failed to review the evidence provided to him by both Appellant and Appellant's mother; only met with him on six (6) occasions for short periods of time; failed to explain or review the plea form with him; and, failed to accurately convey information to him as to his mother's wishes concerning his plea bargain.

{¶37} Upon review of the record in the lower court, we do not find that such supports Appellant's allegations that his trial counsel was ineffective. The record below reveals that Appellant's trial counsel understood the facts in this case as evidenced by the filing of motions for discovery and for exculpatory evidence, including grand jury testimony, police reports, witness statements and statements made by the victim.

{¶38} As to Appellant's claim that his attorney failed to spend sufficient time with him, we find that Appellant testified that his attorney met with three (3) times at the jail and another three (3) times at the courthouse. While we are not making a determination as to how many meetings are sufficient, we find that in this case it appears that Appellant's counsel spent more than "minimal time" with him as complained of by Appellant.

{¶39} We further find that during his plea hearing, Appellant advised the trial court that he was satisfied with is counsel and with the amount of time spent reviewing his case.

{¶40} Upon review of Appellant's argument that his trial court misrepresented his mother's wishes as to whether or not he should accept the plea bargain, without making any determination as to the truth of this allegation, we find same to be irrelevant having determined that Appellant's plea in this matter was made knowingly, intelligently and voluntarily.

{¶41} Appellant's first assignment of error is overruled.

{¶42} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed.

By: Wise, J.

Farmer, P. J., and

Edwards, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ JULIE A. EDWARDS_____

JUDGES

JWW/d 0909

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
SILVANUS ANTHONY JOHNSON	:	
Defendant-Appellant	:	Case No. 2009 CA 00038

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ JULIE A. EDWARDS_____

JUDGES