[Cite as *State v. Congrove*, 2010-Ohio-2933.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09 CAA 09 0080
PATRICIA J. CONGROVE	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of Common Pleas, Case No. 08 CR I 04 0217

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: June 24, 2010

APPEARANCES:

For Defendant-Appellant:

JOHN R. CORNELY
941 Chatham Lane, Suite 201
Columbus, OH 43221

For Plaintiff-Appellee:

DAVID YOST
DELAWARE COUNTY PROSECUTOR

DOUGLAS DUMOLT
140 N. Sandusky St., 3rd Floor
Delaware, OH 43015

Delaney, J.

{¶1} Defendant-Appellant, Patricia J. Congrove appeals the revocation of her community control sanction by the Delaware County Court of Common Pleas on September 1, 2009. Plaintiff-Appellee is the State of Ohio

STATEMENT OF THE FACTS AND THE CASE

{¶2} On April 18, 2008, the Delaware County Grand Jury indicted Appellant for one count of theft, a fourth-degree felony in violation of R.C. 2913.02(A)(1) and one count of tampering with records, a fourth-degree felony in violation of R.C. 2913.42. It was alleged that she stole funds from her employer, Ohio Rebar Erectors. Appellant pleaded not guilty to the charges and Appellant was appointed trial counsel.

{¶3} On November 12, 2008, Appellant entered into a negotiated plea agreement where she agreed to enter an *Alford* plea to a lesser-included offense of the first count of the indictment. The State dismissed the second count of the indictment. Appellant agreed to pay restitution to Ohio Rebar Erectors in the amount of $6,194.88. After a colloquy with Appellant and a statement of facts from the State, the trial court accepted Appellant's plea and entered a guilty finding to a violation of R.C. 2913.02(A)(1), a fifth-degree felony. The trial court ordered a pre-sentence investigation.

{¶4} On December 16, 2008, the trial court sentenced Appellant to five years of community control to be monitored by the Adult Parole Authority, the first two years of which was to be monitored by the Delaware County Office of Adult Court Services. Paragraph 2 of the sentencing entry states, "The Defendant shall refrain from any

misconduct or violation of law. Specifically, she shall incur no further felony convictions, nor convictions for misdemeanors, minor misdemeanors nor moving traffic violations."

{¶5} The State filed a notice of community control violation on July 2, 2009. The notice alleged that Appellant had violated sanction number two by committing misconduct by stealing from her employer, Schwartz Brothers Construction, LLC. A hearing was set for July 20, 2009 where the trial court found probable cause to believe that the violation had occurred and ordered Appellant arrested.

{¶6} On August 17, 2009, Appellant filed a Motion to Withdraw Guilty Plea. The trial court held a hearing on the alleged community control violation and the motion to withdraw guilty plea. The following evidence was determined at the hearing.

{¶7} Appellant began working for Schwartz Brothers Construction, LLC in September 2007. Samuel Schwartz and Laura Schwartz own Schwartz Brothers Construction, LLC. Appellant never advised her new employer of her pending charges or later conviction. (T. 91).

{¶8} Appellant was employed as the secretary and accountant. (T. 32). Samuel Schwartz testified that Appellant answered phone calls and she was responsible for accounts payable and overseeing accounts receivable. Id. Appellant had no authority to sign checks, but Appellant would prepare checks for signature by Samuel Schwartz or Laura Schwartz. (T. 35). Appellant would give Laura Schwartz blank checks to sign. (T. 26). Laura Schwartz had no other administrative duties with the company.

{¶9} Samuel Schwartz terminated Appellant's employment in June 2009 for poor performance. (T. 33). Appellant had failed to pay the payroll taxes and never

completed the profit and loss statements. Appellant notified her Probation Officer of her termination and the Probation Officer contact Samuel Schwartz to determine the reason for Appellant's termination. That was the first Samuel Schwartz knew of Appellant's criminal conviction. (T. 32). Samuel Schwartz began investigating his financial records to determine if Appellant had misappropriated any funds during her employment.

{¶10} Upon review of the financial records, Samuel Schwartz determined that Appellant took approximately $25,000 from the company. (T. 42). Schwartz discovered that Appellant, without authorization, wrote checks payable to herself out of the operating account and paid herself unapproved commissions. In two instances, Schwartz found that Appellant had written a check payable to herself in an amount that matched an account payable. (T. 50). The discrepancy was discovered when the vendors contacted the company because the bills were not paid. (T. 50).

{¶11} Until Appellant's termination, Samuel Schwartz admitted that he did not thoroughly maintain oversight of the financial records, but has since employed a C.P.A. to review the records. (T.46). Schwartz testified at the time of the hearing he had filed a police report with the Morrow County Sheriff's Department and the Sheriff's Department was investigating the matter. (T. 42).

{¶12} Appellant testified at the hearing. She stated that she wrote checks payable to herself in order to pay Amish construction employees who did not have social security numbers to obtain bank accounts. (T. 93). Appellant testified that because her employer's bank closed at noon, she would make the check payable to herself, take the check to her bank which was open later, cash the check, and give the cash to the Amish employees. (T. 94). Samuel Schwartz testified that when paying his

employees without social security numbers, he customarily wrote a check made to cash and endorsed the back of the check. The check would be cashed at Farmers Citizens Bank, which closed at 4:00 p.m. (T. 48).

{¶13} Appellant testified that she was entitled to commissions. She produced a letter signed by Laura Schwartz detailing the terms of Appellant's employment, which included commissions and reimbursements. (T. 96).

{¶14} The trial court also took evidence on Appellant's motion to withdraw her guilty plea. While Appellant stated on November 12, 2008 at her change of plea hearing that she understood her rights and she was acting voluntarily, she testified that her plea was not voluntary. (T. 62). She stated her attorney yelled and screamed at her anytime that Appellant tried to discuss her case with him. Id. When Appellant tried to discuss not taking a plea, her attorney told her that she was facing three years in prison. (T. 65). She said that he told her if she took the plea agreement, she would do no more than one year of probation. (T. 63).

{¶15} Appellant testified that she was so upset by her attorney that she could not remember the change of plea hearing or answering the judge's questions. (T. 65). The State entered the recording of the November 12, 2008 change of plea hearing into the record. (T. 66).

{¶16} Appellant presented her friend as a witness to Appellant's interaction with her attorney on November 12, 2008. (T. 79). The witness testified that as Appellant sat in the hall of the courthouse with her attorney before the change of plea hearing, the witness did not see the attorney review any documents with Appellant. (T. 80). The

witness felt the attorney was very short with Appellant. (T. 81). The witness was only present for that one meeting between Appellant and her counsel.

{¶17} At the conclusion of the evidence, the trial court first denied Appellant's motion to withdraw her guilty plea. (T. 91). The trial court went on to find that based on the evidence presented, Appellant was in violation of the terms of her community control. (T. 110). The trial court found that Appellant was not amenable to community control and imposed a 12-month prison term.

{¶18} It is from this decision Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶19} Appellant raises two Assignments of Error:

{¶20} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT APPELLANT VIOLATED THE TERMS OF HER COMMUNITY CONTROL.

{¶21} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO WITHDRAW HER *ALFORD* PLEA."

I.

{¶22} Appellant argues in her first Assignment of Error that the trial court abused its discretion in finding that Appellant violated the terms of her community control. We disagree.

{¶23} Because a community control revocation hearing is not a criminal trial, the State does not have to establish a violation with proof beyond a reasonable doubt. *State v. Payne,* Warren App. No. CA2001-09-081, *2002-Ohio-1916,* citing *State v. Hylton* (1991), 75 Ohio App.3d 778, 782, 600 N.E.2d 821. Instead, the prosecution must present "substantial" proof that a defendant violated the terms of his community control

sanctions. Id., citing *Hylton* at 782, 600 N.E.2d 821. Accordingly, we apply the "some competent, credible evidence" standard set forth in *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, to determine whether a court's finding that a defendant violated the terms of his community control sanction is supported by the evidence. See *State v. Umphries* (July 9, 1998), Pickaway App. No. 97CA45; *State v. Puckett* (Nov. 12, 1996), Athens App. No. 96CA1712. This highly deferential standard is akin to a preponderance of the evidence burden of proof. See *State v. Kehoe* (May 18, 1994), Medina App. No. 2284-M.

{¶24} Once a court finds that a defendant violated the terms of his community control sanction, the court's decision to revoke community control may be reversed on appeal only if the court abused its discretion. *Columbus v. Bickel* (1991), 77 Ohio App.3d 26, 38, 601 N.E.2d 61. An abuse of discretion connotes more than an error in law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Maurer* (1984), 15 Ohio St.3d 239, 253, 473 N.E.2d 768.

{¶25} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180, certiorari denied (1990), 498 U.S. 881, 111 S.Ct. 228, 112 L.Ed.2d 183. Reviewing courts should accord deference to the trial court's decision because the trial court has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections which cannot be conveyed to us through the written record, *Miller v. Miller* (1988), 37 Ohio St.3d 71, 523 N.E.2d 846.

{¶26} Upon review of the record, we find there was substantial proof that Appellant engaged in financial misconduct while employed by Schwartz Brothers

Construction, LLC thereby violating the terms of her community control. The trial court heard testimony from the business owners and Appellant in regards to their explanations of the financial management of the business and we give weight to the trial court's determination of credibility.

{¶27} When paying employees without social security numbers, Samuel Schwartz testified that the check was to be made out to "cash" and was to be processed at Farmers Citizens Bank. Appellant was not authorized to make checks payable to herself. Evidence was also presented that checks were written to Appellant in amounts matching unpaid bills. We find this evidence to be sufficient to show that Appellant engaged in financial misconduct in violation of her community control and the trial court did not abuse its discretion in its decision to revoke Appellant's community control sanction.

{¶28} Appellant's first Assignment of Error is overruled.

II.

{¶29} Appellant argues in her second Assignment of Error that the trial court abused its discretion by denying her Crim.R. 32.1 motion. We disagree.

{¶30} Crim.R. 32.1 governs the withdrawal of a no contest plea, stating as follows: "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." *State v. Copeland-Jackson*, Ashland App. No. 02COA018, 2003-Ohio-1043, ¶6. The standard upon which the trial court is to review a request for a change of plea after sentence is whether there is a need to correct a

manifest injustice. The accused has the burden of showing a manifest injustice warranting the withdrawal of a guilty plea. *State v. Rockwell*, Stark App. No. 2008CA00009, 2008-Ohio-2162, ¶40 citing *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus. A manifest injustice has been defined as a “clear or openly unjust act.” *State ex rel. Schneider v. Kreiner* (1998), 83 Ohio St.3d 203, 208.

{¶31} With respect to statements made during change of plea hearings, the United States Supreme Court has stated, “the representation of the defendant, his lawyer, and the prosecutor in such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.” *Machibroda v. United States* (1962), 368 U.S. 487, 497, 82 S.Ct. 510, 515. Generally, a self-serving affidavit or statement is insufficient to demonstrate manifest injustice. *Patterson,* supra (citing *State v. Laster,* Montgomery App. No. 19387, 2003-Ohio-1564). An appellant's bare assertions of coercion are self-serving and insufficient to show manifest injustice. See *State v. Brown,* 167 Ohio App.3d 239, 2006-Ohio3266, at ¶ 13.

{¶32} Our review of the trial court's decision under Crim.R. 32.1 is limited to a determination of whether the trial court abused its discretion. *State v. Caraballo* (1985), 17 Ohio St.3d 66, 477 N.E.2d 627. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and

not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. “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.” *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph two of the syllabus

{¶33} As this Court noted in *Rockwell*, “an 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. Bush,* 96 Ohio St.3d 235, 2002-Ohio-3393. See also *State v. Copeland-Jackson,* supra ([t]he length of passage of time between the entry of a plea and a defendant's filing of a Crim.R. 32.1 motion is a valid factor in determining whether a “manifest injustice” has occurred). In this case, Appellant moved to withdraw her guilty plea when Appellant was facing a revocation of her community control sanctions.

{¶34} Appellant’s arguments pertain to ineffective assistance of trial counsel. Challenges to guilty pleas based on allegations of ineffective assistance of counsel during the plea process are evaluated under the familiar two-pronged cause and prejudice test of *Strickland v. Washington,* 466 U.S. 668, 687-88, 694 (1984). *Hill v. Lockhart* (1985), 474 U.S. 52, 58. In order to satisfy the second prong in the context of a plea, appellant must show that “there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill,* 474 U.S. at 59, 106 S.Ct. 366.

{¶35} Appellant alleges that but for the behavior of her attorney, Appellant would not have pleaded guilty and would have insisted on going to trial. The evidence before the trial court of the attorney's inappropriate behavior was Appellant's testimony and the testimony of Appellant's friend. The trial court also reviewed the colloquy between Appellant and the trial court. The recording of the hearing on November 12, 2008 shows no evidence that Appellant failed to knowingly, intelligently, and voluntarily enter her plea.

{¶36} Appellant also argues that her attorney pressured her into accepting a plea agreement because he told her if she was convicted by a jury on both counts, she could serve a maximum of three years in jail. "'A lawyer has a duty to give the accused an honest appraisal of his case. * * * Counsel has a duty to be candid; he has no duty to be optimistic when the facts do not warrant optimism.'" *Brown v. United States* (C.A.D.C.1959), 264 F.2d 363, 369 *(en banc),* quoted in *McKee v. Harris (C.A.2,* 1981), 649 F.2d 927, 932. "'If the rule were otherwise, appointed counsel could be replaced for doing little more than giving their clients honest advice.'" *McKee,* 649 F.2d at 932, quoting *McKee v. Harris* (S.D.N.Y.1980), 485 F.Supp. 866, 869." Id. at 73, 717 N.E.2d at 304-305. The maximum sentence possible on two counts of fourth-degree felonies is three years.

{¶37} Upon the record presented, we cannot find the trial court abused its discretion in finding Appellant failed to establish a manifest injustice warranting the withdrawal of her guilty plea.

{¶38} Appellant's second Assignment of Error is overruled.

{¶39} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. SHEILA G. FARMER

PAD:kgb

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
PATRICIA J. CONGROVE Defendant-Appellant	:	Case No. 09 CAA 09 0080

For the reasons stated in our accompanying Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. SHEILA G. FARMER