[Cite as *State v. Farley*, 2003-Ohio-7338.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 02CA32
	:	
v.	:	
	:	
ROGER FARLEY,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	**RELEASED 12/30/03**

APPEARANCES:

PRO SE APPELLANT:
Roger Farley, #391554
Noble Correctional Institution
15708 State Route 78 West
Caldwell, Ohio 43724

COUNSEL FOR APPELLEE:
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EVANS, P.J.

{¶1} Defendant-Appellant Roger Farley appeals the judgment of the Lawrence County Court of Common Pleas denying his post-sentence motion to withdraw his plea of no contest. Appellant argues that the trial court abused its discretion in denying his motion when it failed to grant an evidentiary hearing on the motion, failed to make adequate

findings in denying the motion, and failed to notify appellant of all possible consequences before accepting his no contest plea.

{¶2} Because we find that appellant's arguments lack merit, we overrule his assignments of error in toto. Therefore, we affirm the judgment of the trial court.

I. Proceedings Below

{¶3} On June 25, 1999 and July 13, 1999, appellant was arraigned in separate indictments for various drug offenses, which were subsequently consolidated for trial. On March 8, 2000, pursuant to a plea agreement, appellant pled no contest to three of the charges contained in the July 13, 1999 indictment. Specifically, appellant pled no contest to three counts of aggravated possession of drugs, violations of R.C. 2925.11(A); because of the quantity and type of drug involved, count one amounted to a second-degree felony, count two amounted to a third-degree felony, and count three amounted to a fifth-degree felony. The state dismissed the seven counts of aggravated trafficking in drugs and the three counts of trafficking in drugs contained in the June 25, 1999 indictment. It also dismissed one count of illegal use of food stamp or WIC program benefits from the July 13, 1999 indictment. The state also dismissed firearm specifications from the remaining charges in the July indictment provided that appellant forfeit the firearm. The trial court stated the above on the record as the underlying agreement upon which appellant's plea was based.

{¶4} In its colloquy, the trial court explained the charges to which appellant was pleading no contest and explained the maximum sentences for each charge. The court further explained that by entering a plea of no contest, appellant would be waiving certain constitutional rights. Appellant responded that he understood everything the court explained. Appellant then entered his pleas of no contest to the three remaining charges. Following entry of appellant's no contest pleas, the trial court found appellant guilty of each charge. After its judgment of conviction, the court initiated sentencing. The court sentenced appellant to three years incarceration and a $7,500 fine for count one, two years incarceration, consecutively, and a $5,000 fine for count two, and one year incarceration, concurrently, and a $1,250 fine for count three. The trial court noted, for the record, that the state would not oppose judicial release after appellant served three years of the five-year sentence. In the sentencing transcript, the trial court took no position on the issue of judicial release, declaring that "the Court has not committed itself one way or the other. Not said, 'yes,' not said, 'no.'"

{¶5} On June 24, 2002, appellant filed a motion for judicial release. The trial court denied the motion. Thereafter, on June 29, 2002, the Lawrence County Prosecutor filed a civil complaint against appellant for forfeiture of his residence pursuant to R.C. 2925.43. Specifically, the complaint alleged that appellant's house was used in the commission of the felony drug abuse offenses to which appellant

pled no contest, and as such, all right, title, and interest in the real estate became vested in the State of Ohio upon appellant's commission of the acts that gave rise to the convictions. On September 18, 2002, appellant filed a motion to withdraw his no contest plea. Appellant argued that the state and court agreed to judicial release after he served three years of his sentence, and that it was a manifest injustice that the court did not grant his motion for judicial release. He also argued that he would not have agreed to the plea bargain had he not been promised judicial release after three years. Appellant further argued that he was not apprised of all the consequences of his plea pursuant to Crim.R. 11. This argument flowed from the fact that appellant was not informed that the prosecutor could, or would, initiate forfeiture proceedings against appellant's real property in connection with appellant's conviction pursuant to R.C. 2925.43. The trial court denied appellant's motion to withdraw his pleas, and this appeal followed.

II. The Appeal

{¶6} In his brief, appellant raised the following assignments of error:

{¶7} First Assignment of Error: "The trial court erred as a matter of law/abuse of discretion [sic] and to the prejudice of appellant in denying appellant's motion to withdraw no contest plea after sentencing without granting an evidentary [sic] hearing."

{¶8} Second Assignment of Error: "The trial court erred as a matter of law/abuse of discretion [sic] to the prejudice of appellant

where the court failed to make adequate findings denying the motion to withdraw no contest plea."

{¶9} Third Assignment of Error: "The trial court erred as a matter of law/abuse of discretion [sic] to the prejudice of the appellant under the United States and Ohio Constitutions and Crim.R. 11 by failing to notify appellant of the sentence he faced before accepting a no contest plea."

{¶10} Appellant argues that the trial court abused its discretion by denying his motion to withdraw his no contest pleas for three reasons: 1) because appellant was not granted an evidentiary hearing on the motion; 2) because the trial court failed to make adequate findings denying the motion; and 3) because the trial court failed to notify appellant of the maximum sentence he faced before accepting the no contest pleas in violation of Crim.R. 11. Because we find that the trial court did not abuse its discretion in denying appellant's motion to withdraw his no contest pleas, we overrule appellant's assignments of error and affirm the judgment of the trial court.

A. Standard of Review

{¶11} Crim.R. 32.1 states that 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." Thus, a post-sentence motion to withdraw a plea should be granted only in extraordinary cases. See *State v. Cosavage* (June 28, 1995), 9th Dist. Nos. 17074, 17075, citing *State v. Blatnik* (1984), 17

Ohio App.3d 201, 203, 478 N.E.2d 1016. Furthermore, the onus is on the defendant seeking to withdraw his no contest plea after imposition of sentence to demonstrate the existence of manifest injustice. Id., citing *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus.

{¶12} Therefore, we review the trial court's decision under Crim.R. 32.1 to determine whether the trial court abused its discretion. See *State v. Caraballo* (1985), 17 Ohio St.3d 66, 477 N.E.2d 627. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary or unconscionable. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. The Supreme Court of Ohio has stated that "[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*, supra, paragraph two of the syllabus.

B. First Assignment of Error

{¶13} In his First Assignment of Error, appellant argues that the trial court abused its discretion when it denied his motion to withdraw his no contest pleas without holding an evidentiary hearing on the motion. Appellant attached an affidavit to his motion setting forth the reasons that the trial court should allow him to withdraw his pleas. Appellant averred that, prior to sentencing, his attorney represented to him that the state and court had agreed to judicial

release after he served three years of his five-year sentence. Appellant further alleged that his motivation for pleading no contest was based primarily on this promise. Thus, appellant argues that he has alleged enough facts to demonstrate a manifest injustice such that the trial court should have granted an evidentiary hearing on his motion. Therefore, he argues, the trial court's denial of his motion without such a hearing constituted an abuse of discretion. We disagree.

{¶14} In *State v. Wilburn* (Dec. 22, 1999), Lawrence App. No. 98CA47, we held that "the determination of whether an evidentiary hearing is warranted for a Crim.R. 32.1 motion requires a two step analysis. First, a hearing need only be conducted if the motion is justified; that is, if the facts, as alleged by the defendant, indicate a manifest injustice would occur if the plea of guilty or no contest were not allowed to be withdrawn. (Citations omitted.)

{¶15} "Second, it must be determined whether the allegations made by the defendant in support of his motion are conclusively and irrefutably contradicted by the record. If the allegations upon which Crim.R. 32.1 motion is based are so contradicted by the record, an evidentiary hearing is not required. *State v. Legree* (1988), 61 Ohio App.3d 568, 574 [, 573 N.E.2d 687]." See, also, *State v. Jacobson*, Adams App. No. 01CA730, 2003-Ohio-1201; *State v. Moore*, Pike App. No. 01CA674, 2002-Ohio-5748.

{¶16} Appellant alleges the following facts in support of his position that he should have been allowed a hearing on his motion to

withdraw his no contest pleas: 1) prior to appellant entering his plea, his attorney represented to him that an agreement had been reached with the court and state that appellant would serve three years of his five-year sentence and then be granted judicial release; 2) appellant pled no contest only after hearing this representation; and 3) that on June 24, 2002, appellant filed a motion for judicial release which was denied. Appellant argues that these facts, taken as true, indicate a manifest injustice would occur if he were not allowed to withdraw his no contest pleas. We disagree.

{¶17} In order for a no contest plea to comply with due process, the plea must be made knowingly, voluntarily, and intelligently. See Crim.R. 11(C)(2)(a)-(c); see, also, *State v. Aponte* (2001), 145 Ohio App.3d 607, 614, 763 N.E.2d 1205; *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450. "Failure on any of these points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." *Engle* at 527.

{¶18} If a plea of no contest is induced by promises or threats which deprive it of the character of a voluntary act, it is void, and a "conviction based upon such a plea is open to collateral attack." *Machibroda v. United States* (1962), 368 U.S. 487, 493, 82 S.Ct. 510; see, also, *State v. Milanovich* (1975), 42 Ohio St.2d 46, 49, 325 N.E.2d 540. Moreover, a no contest plea which is induced by unfulfilled promises by the prosecution, court, or defense counsel is not voluntary. See *Aponte*, supra. "Out of just consideration for persons accused of crime, courts are careful that a plea *** shall not

be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Kercheval v. United States* (1927), 274 U.S. 220, 223, 47 S.Ct. 582.

{¶19} A conviction based on a plea coerced through false promises is not voluntary. See *Aponte*, supra. Thus, a plea based on false promises results in a manifest injustice such that a defendant should be allowed to withdraw the involuntary plea. Therefore, appellant's allegations state facts that indicate the existence of a manifest injustice were he not allowed to withdraw the pleas. Thus, appellant's motion is justified because he has alleged facts that indicate a manifest injustice. However, our inquiry requires an inspection of the record to determine whether those allegations are clearly contradicted by the record. See *Wilburn*, supra.

{¶20} The record shows that appellant reached an agreement with the state to plead no contest to three charges, and the state would dismiss ten charges. Pursuant to Crim.R. 11(F), the trial court stated on the record the underlying agreement upon which appellant's pleas were based. The trial court noted that all ten counts in the June 25, 1999 indictment, as well as count four in the July 13, 1999 indictment were to be dismissed by the state. In exchange, appellant was to plead no contest to count one, two, and three of the July indictment, except that the state would dismiss the firearm specifications to those counts and appellant would forfeit the firearm.

{¶21} Appellant's attorney is on the record as stating that the above was an accurate statement of his understanding of the agreement. Appellant, himself, did not object to the trial court's recitation of the agreement. After its statement of the agreement, the trial court advised appellant of the maximum sentences for each charge he was pleading no contest to. Nowhere in the trial court's recording of the agreement was it stated that appellant would be granted judicial release upon serving three years of his five-year sentence.

{¶22} The only mention of judicial release occurred after the trial court imposed sentence, when it noted that the state would not oppose judicial release at the end of appellant serving three years. We find that this is what appellant bargained for in his plea negotiations. However, appellant alleged that he was told by his attorney that "the court would not oppose judicial release." The record clearly contradicts this allegation. First, the prosecutor, and not the court, negotiated the plea for the state. Thus, the state was not in a position to promise judicial release; all it could promise was that the state would not *oppose* it after appellant served three years. Second, the court stated on the record that it was "taking no position on judicial release. No matter who hears this matter, the Court has not committed itself one way or the other. Not said 'yes,' not said 'no.'" Therefore, anything his attorney represented to him would have been contradicted by what the court said concerning judicial release. However, appellant did not object upon hearing this. The record demonstrates that appellant was promised

that the *state* would not oppose judicial release. In fact, the court noted the state's intention on the record, and indeed, the state did not oppose judicial release when appellant filed for it. Therefore, appellant's pleas were not influenced by any false promises by the state, court, or defense counsel.

{¶23} Moreover, from reading the entire record, we find that appellant's pleas were not motivated by the promise for judicial release at the culmination of three years in prison. The plea agreement between the state and appellant indicates that appellant's pleas were motivated by the fact that the state dismissed ten charges of trafficking in drugs and one charge of trafficking in illegal food stamps, as well as the fact that the firearm specifications in the three charges that appellant pled no contest to were also dismissed. These were significant gestures on behalf of the state and undoubtedly formed part of appellant's motivation to plead no contest. Accordingly, it cannot reasonably be argued that appellant's pleas were based solely on the promise that he would be granted judicial release upon serving three years imprisonment. "When a petitioner submits a claim that his [no contest] plea was involuntary, a 'record reflecting compliance with Crim.R. 11 has greater probative value' than a petitioner's self-serving affidavit. *State v. Brehm* ([July 18,] 1997), Seneca App. No. 13-97-05, following *State v. Moore* (1994), 99 Ohio App.3d 748, 749, 753, 651 N.E.2d 1319." *State v. Saylor* (1998), 125 Ohio App.3d 636, 641, 709 N.E.2d 231.

{¶24} While appellant has alleged facts that would give rise to a manifest injustice, the alleged facts are clearly contradicted by the record. Therefore, because the allegations upon which appellant's Crim.R. 32.1 motion was based are contradicted by the record, an evidentiary hearing was not required. See *State v. Wilburn* and *State v. Legree*, supra. Thus, the trial court did not abuse its discretion by denying appellant's motion to withdraw the plea without an evidentiary hearing.

{¶25} Appellant's First Assignment of Error is overruled.

C. Second Assignment of Error

{¶26} In his Second Assignment of Error, appellant argues that the trial court abused its discretion by denying his motion to withdraw his no contest plea without stating its essential findings on the record pursuant to Crim.R. 12(E). We disagree.

{¶27} Initially, we note that appellant has cited to one rule but quoted another in his brief. The reason for this is that Crim.R. 12 was amended in July 2001, and the relevant section now appears at Crim.R. 12(F).

{¶28} Crim.R. 12(F) states: "The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means. A motion made pursuant to divisions (C)(1) to (C)(5) of this rule shall be determined before trial. Any other motion made pursuant to division (C) of this rule shall be determined before trial whenever possible. Where the court defers ruling on any motion made by the prosecuting attorney before

trial and makes a ruling adverse to the prosecuting attorney after the commencement of trial, and the ruling is appealed pursuant to law with the certification required by division (K) of this rule, the court shall stay the proceedings without discharging the jury or dismissing the charges. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record."

{¶29} Crim.R. 12(F) applies to pretrial motions, specifically those motions outlined in Crim.R. 12(C). More accurately, Crim.R. 12(F) applies to suppression motions. See *State v. Glime*, 9th Dist. No. 01CA007856, 2001-Ohio-1658. Appellant's motion to withdraw his no contest plea is not a suppression motion, nor is it one outlined in Crim.R. 12(C). Moreover, in order to invoke Crim.R. 12(F), a defendant must specifically request that the court make factual findings. Id. See, also, *State v. Benner* (1988), 40 Ohio St.3d 301, 317-318, 533 N.E.2d 701; *Bryan v. Knapp* (1986), 21 Ohio St.3d 64, 488 N.E.2d 142, syllabus.

{¶30} Because Crim.R. 12(F) does not apply to appellant's motion, and, assuming arguendo that it did, because he has not demonstrated that he specifically invoked Crim.R. 12(F), we find that the trial court was not unreasonable by omitting factual findings on the record. Appellant's Second Assignment of Error is overruled.

D. Third Assignment of Error

{¶31} In his Third Assignment or Error, appellant argues that the trial court violated Crim.R. 11 by failing to notify appellant of all the consequences he faced before the court accepted his no contest plea. Specifically, appellant asserts that he was not notified that

the prosecutor would, or could, use his no contest plea to file a civil complaint for forfeiture pursuant to R.C. 2925.43. Thus, he argues, the forfeiture of his real property results in manifest injustice, and he should be able to withdraw his no contest plea. We disagree.

{¶32} Upon reading the plea and sentencing hearing transcript, it is evident that the trial court complied with each of the rules prescribed in Crim.R. 11(C)(2). However, appellant argues that the trial court failed to inform him of all the consequences of his plea, required by Crim.R. 11(C)(2)(a), because it did not inform him that his real property would be subject to forfeiture pursuant to R.C. 2925.43.

{¶33} Crim.R. 11(C) requires the trial court to make certain findings before accepting a plea of guilty or no contest. That section states, in the pertinent part:

{¶34} "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶35} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing."

{¶36} Appellant's conclusion that he has suffered manifest injustice is premised on the fact that the trial court, at sentencing, in its recitation of the maximum penalties to the charges of aggravated drug abuse, did not inform him of the possibility that the prosecutor could file a complaint for civil forfeiture pursuant to R.C. 2925.43. Further, he alleges that because the prosecutor's complaint "clearly states that it is premised upon the no contest plea entered on March 8, 2000" that manifest injustice would arise if he were not permitted to withdraw his plea. We disagree.

{¶37} R.C. 2925.43 is Ohio's civil forfeiture statute. It states in the pertinent part that, "(A) The following property is subject to forfeiture to the state in a civil action as described in division (E) of this section, and no person has any right, title, or interest in the following property:

{¶38} "***

{¶39} "(2) Any property that was used or intended to be used in any manner to commit, or to facilitate the commission of, an act that, upon the filing of an indictment, complaint, or information, could be prosecuted as a felony drug abuse offense ***.

{¶40} "(B)(1) All right, title, and interest in property described in division (A) of this section shall vest in the state upon the commission of the act giving rise to a civil forfeiture under this section.

{¶41} "(2) The provisions of section 2933.43 of the Revised Code relating to the procedures for the forfeiture of contraband do not

apply to a civil action to obtain a civil forfeiture under this section."

{¶42} A proceeding under R.C. 2925.43, as described above, is civil in nature. See *In re Forfeiture of Real Property Located at 952 Gilmore Street Chillicothe, Ohio* (Jan. 29, 1997), Ross App. No. 96CA2206. As such, it is not a criminal penalty to which the trial court must inform the appellant of in its recitation of the maximum penalty according to Crim.R. 11(C)(2)(a).

{¶43} Furthermore, there is no guarantee that the property will, in fact, be forfeited to the state. First, at the forfeiture hearing, the court is required to find, by clear and convincing evidence, that appellant's property at issue is of the nature described in R.C. 2925.43(A)(1) or (2). See *State ex rel. Mason v. $17,000 in U.S. Currency*, 8th Dist. No. 80941, 2003-Ohio-993, at ¶22. In the event that the court makes such a finding, then the appellant has an opportunity to prove, by a preponderance of the evidence, that the property had a lawful source. Id. Therefore, the "burden is on the state, after which an opportunity is then granted to the [appellant] to, in effect, rebut the state's charges." Id. Thus, unlike the criminal penalties, appellant is allowed to defend his property subject to the civil forfeiture proceeding.

{¶44} Appellant has further argued that the prosecutor's complaint "is premised on" appellant's plea of no contest. While this may be true, the prosecutor was not required to prove that appellant had been convicted of the charges in order to file the forfeiture complaint.

"R.C. 2925.43(D)(2) specifically provides that the action to obtain a civil forfeiture may be commenced whether or not the [appellant] who committed the felony drug abuse offense has been charged with the offense, has pleaded guilty to or been found guilty, or has even been found not guilty." *Property Located at 952 Gilmore Street*, supra, at fn. 2. In this way, a civil forfeiture action under R.C. 2925.43 differs from criminal forfeitures under R.C. 2933.43, which have been held to be separate criminal penalties. See *State v. Casalicchio* (1991), 58 Ohio St.3d 178, 182-183, 569 N.E.2d 916; see, also, R.C. 2925.43(B)(2), supra. Thus, it is apparent that the forfeiture complaint was not derivative of appellant's no contest plea, instead the forfeiture complaint derived from appellant's criminal acts of felony drug abuse.

{¶45} Therefore, because the trial court complied with Crim.R. 11 in sentencing appellant, and because the forfeiture complaint is not an additional criminal penalty, the forfeiture complaint filed by the state did not give rise to manifest injustice. Accordingly, the trial court did not abuse its discretion by denying appellant's motion to withdraw his plea. Appellant's Third Assignment of Error is overruled.

III. Conclusion

{¶46} Based on the record, we find that the trial court was not required to hold an evidentiary hearing on appellant's motion to withdraw his post-sentence no contest plea. Moreover, the trial court was not required to state its factual findings on the record.

Likewise, the trial court was not required to apprise appellant of the possibility that the state could initiate civil forfeiture proceedings against his property as part of its maximum sentence colloquy. Therefore, the trial court did not abuse its discretion. Appellant's assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

Harsha, J., and Kline, J.: Concur in Judgment Only.

FOR THE COURT

BY: _____
David T. Evans, Presiding Judge