[Cite as *State v. Tunstall*, 2010-Ohio-4926.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23730
Plaintiff-Appellee	:	
	:	Trial Court Case No. 94-CR-2547
v.	:	
	:	(Criminal Appeal from
DONNIE D. TUNSTALL	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

. . . .

O P I N I O N

Rendered on the 8th day of October, 2010.

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Defendant-Appellant, *pro se*

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BROGAN, J.

{¶ 1} Donnie Tunstall appeals pro se from the trial court's denial of his Crim.R. 32.1 motion to vacate two guilty pleas.

{¶ 2} In his sole assignment of error, Tunstall contends the trial court erred in overruling his motion without conducting an evidentiary hearing.

{¶ 3} The record reflects that Tunstall pled guilty in 1995 to improperly discharging a firearm at or into a habitation and aggravated menacing. He received a suspended sentence and was placed on probation. He obtained early termination of his probation in 1998. Tunstall moved to vacate his guilty pleas in September 2009. The impetus behind Tunstall's motion was his desire to reduce a twenty-year prison sentence he received in 2001 following federal convictions on charges related to an armed bank robbery. Tunstall asserted in his motion that he may be entitled to a federal sentence reduction if his state-court convictions are vacated. Tunstall raised three grounds in support of his motion: (1) ineffective assistance of trial counsel; (2) the lack of knowing, intelligent, and voluntary guilty pleas; and (3) actual innocence. Accompanying the motion was Tunstall's own affidavit and a request for a hearing. The trial court overruled the motion without a hearing, finding no "manifest injustice."

{¶ 4} On appeal, Tunstall advances the following three arguments in support of his claim that the trial court erred in overruling his motion without a hearing:

{¶ 5} "1. A motion to withdraw a guilty plea and vacate the judgment of guilty based on a violation of the defendant's constitutional rights should be granted when the defendant contends that he did not knowingly, intelligently, and voluntarily enter into the plea and there is no evidence to the contrary.

{¶ 6} "2. A trial court should hold a hearing on a claim of a violation of a defendant's constitutional rights when there are no transcripts available for review.

{¶ 7} "3. A trial court should hold a hearing when ineffective assistance of counsel is alleged by a defendant after entry of a guilty plea."

{¶ 8} Regarding the first issue, Tunstall contends "he was not advised of his basic constitutional and statutory rights, nor was he aware of the essential elements the state would have the burden of proving during a trial." Tunstall insists he "was fully unaware that he was legally innocent and that the state had to prove his guilt." He further asserts that neither the trial court nor his attorney assured that there was a proper factual basis for his guilty pleas. As for the second issue, Tunstall contends the trial court should have held a hearing on the validity of his rights waiver because his affidavit established grounds for relief that are not controverted by the record due to the absence of a plea transcript. Concerning the third issue, Tunstall incorporates by reference the ineffective assistance of counsel arguments raised in his motion to vacate.

{¶ 9} We review a trial court's ruling on a post-sentence motion to withdraw a plea and its decision whether to grant a hearing for an abuse of discretion. *Xenia v. Jones*, Greene App. No. 07-CA-104, 2008-Ohio-4733, ¶6. Under Crim.R. 32.1, a defendant must demonstrate a "manifest injustice" to withdraw a guilty plea after sentencing. "A manifest injustice has been defined as 'a clear or openly unjust act' that involves 'extraordinary circumstances.'" *State v. Minker*, Champaign App. No. 2009 CA 16, 2009-Ohio-5625, at ¶ 25, quoting *State v. Stewart,* Greene App. No. 2003-CA-28, 2004-Ohio-3574. "A hearing on a post-sentence motion to withdraw a guilty plea is not necessary if the facts alleged by the defendant, even if accepted as true, would not require the court to grant the motion[.]" *State v. Burkhart,* Champaign App. No. 07-CA-26, 2008-Ohio-4387, ¶12, citing *State v. Blatnik* (1984), 17 Ohio App.3d 201, 204. To obtain a hearing, "a movant must establish a reasonable likelihood that the withdrawal is necessary to correct a manifest injustice[.]" *State v. Whitmore,* Clark App. No. 06-CA-50, 2008-Ohio-2226, ¶11.

{¶ 10} "[A]n undue delay between the occurrence of the alleged cause of a withdrawal of a guilty plea and the filing of a Crim.R. 32 motion is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *State v. Harden*, Montgomery App. No. 22839, 2009-Ohio-3431, ¶ 7, citing *State v. Smith* (1972), 49 Ohio St.2d 261. "The more time that passes between the defendant's plea and the filing of the motion to withdraw it, the more probable it is that evidence will become stale and that witnesses will be unavailable. The state has an interest in maintaining the finality of a conviction that has been considered a closed case for a long period of time. It is certainly reasonable to require a criminal defendant who seeks to withdraw a plea to do so in a timely fashion rather than delaying for an unreasonable length of time." *State v. Francis,* 104 Ohio St.3d 490, 497, 2004-Ohio-6894, ¶ 40.

{¶ 11} With the foregoing guidelines in mind, we find Tunstall's arguments to be unpersuasive. As a threshold matter, we note that he entered his guilty pleas in 1995 and did not seek to vacate them until 2009. Notwithstanding the arguments in Tunstall's affidavit, this fourteen-year delay militates strongly against his efforts to undo the finality that attached long ago.

{¶ 12} Regarding Tunstall's first argument about the knowing, intelligent, and voluntary nature of his pleas, the absence of a plea transcript means we must presume the regularity of proceedings below. *State v. Wright*, Montgomery App. Nos. 23330, 23403, 23404, 23521, 2010-Ohio-1899, ¶14 ("We further note, a transcript of Wright's plea in case no. 1978 CR 840 is not before us, and we must presume the regularity of the proceedings below in the absence of a transcript and affirm."); *State v. Hytower*, Montgomery App. No. 22363, 2008-Ohio-1754, ¶22 ("The fact that there is no usable

transcript of the plea proceeding does not operate to [the defendant's] advantage. Absent a record, an appellate court will employ the presumption of regularity in the proceedings of the trial court."). In addition, the record does contain two waiver and plea forms in which Tunstall acknowledged the rights he was waiving and his understanding of them. He also acknowledged that no promises were made to induce the pleas. (Doc. #13-14). Likewise, the trial court filed two entries in which it found, inter alia, that Tunstall understood "the waiver or giving up of his constitutional rights, the nature of the offense(s), the maximum penalty(ies) that could be imposed, and that he is eligible for probation * * *." The trial court further found that Tunstall "understood the effect of his plea(s) and that said plea(s) * * * were made voluntarily and that there is a factual basis for said plea(s)." (Id.).

{¶ 13} Tunstall's bare affidavit is insufficient to rebut the waiver and plea forms, the trial court's entries, and the presumption of regularity that attaches in the absence of a plea-hearing transcript. Therefore, we reject the first proposition advanced by Tunstall on appeal. His argument fails because the presumption of regularity applies and the record does contain evidence establishing that he knowingly, intelligently, and voluntarily entered his pleas. See, e.g., *State v. Plemons*, Montgomery App. No. 21039, 2006-Ohio-1608, ¶15 (recognizing that "a defendant's own self-serving declarations or affidavits are insufficient to rebut the record on review which shows that his plea was voluntary"); *State v. Ridenour*, Montgomery App. No. 20538, 2005-Ohio-5238, ¶9 ("Moreover, it is well-established that where the record belies a defendant's claim, he is not entitled to a hearing on his motion absent some evidence besides his own self-serving affidavit.").

{¶ 14} For essentially the same reasons, we also reject Tunstall's second

argument, namely that the in the absence of a transcript, the trial court was required to hold an evidentiary hearing to determine whether he validly waived his rights when he entered his pleas. In light of the presumption of regularity and the existence of plea forms showing that Tunstall properly entered his pleas, the trial court did not abuse its discretion in declining to hold an evidentiary hearing fourteen years after the fact.

{¶ 15} Finally, we are unpersuaded by Tunstall's argument that ineffective assistance of trial counsel entitled him to withdraw his guilty pleas. As an initial matter, we note that "[a] guilty plea waives the right to allege ineffective assistance of counsel, except to the extent the errors caused the plea to be less than knowing and voluntary." *State v. King*, Montgomery App. No. 23325, 2010-Ohio-2839, ¶11; see, also, *State v. Carson*, Montgomery App. No. 20285, 2004-Ohio-5809, ¶12. In other words, "a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130. "[P]oor advice from an attorney doesn't render a defendant's decision to enter a plea of guilty or no contest less than knowing, intelligent, and voluntary when the advice concerns a matter collateral to either the waiver of rights the plea involves or the procedure for entering the plea. Then, the advice is merely another matter that enters a defendant's calculus to elect to enter the plea, and misapprehension of his calculus to enter a plea of guilty or no contest does not render the plea less than knowing, intelligent, and voluntary." *State v. Milbrandt*, Champaign App. No. 2007-CA-3, 2008-Ohio-761, ¶17. Thus, poor advice does not rise to

the level of ineffective assistance of counsel where the advice was collateral to the defendant's "understanding of the offenses, the sentence he could receive, the rights he was waiving, and the procedure for waiving them." Id. at ¶18.

{¶ 16} In the present case, the only evidence supporting Tunstall's ineffective assistance of counsel claim is found in the affidavit accompanying his motion. In that affidavit, Tunstall averred:

{¶ 17} "1. I am the defendant in the above-referred to Criminal Docket Number;

{¶ 18} "2. On or about August 29, 1994, I was charged with the Crimes of Improper Discharge of a Firearm at or into a Habitation, Aggravated Menacing.

{¶ 19} "3. I was unable to afford retainment of a private counsel, and the Court appointed attorney Russell Carter to represent me.

{¶ 20} "4. At the first meeting I informed counsel that I was innocent of the charges.

{¶ 21} "5. Counsel Carter assured me that he would investigate the circumstances of the case, and would file all the necessary motions for Suppression Hearings prior to trial. I took this in my trust, yet he failed to file to suppress the evidence.

{¶ 22} "6. Mr. Carter's only concern was to dispose of this case as quickly and as effectively as possible.

{¶ 23} "7. Mr. Carter failed to explain to me that by entering a guilty plea that I would be surrendering essential constitutional rights;

{¶ 24} "8. Nor did Mr. Carter explain to me that by pleading guilty to a crime that I was not guilty of that conviction could and would be used against me at a later time for sentencing enhancement purposes.

{¶ 25} "9. Prior and during this time period I was very abusive with alcohol and

drugs and have a very bad time recalling the exact conversations. I recall being tricked by Mr. Carter to plead guilty with the numerous promises.

{¶ 26} “10. That counsel coerced me and I tried to get counsel to retract my guilty plea, because I felt if there was a trial mitigating evidence would be brought out.

{¶ 27} “11. That Mr. Carter told me I could not appeal a plea at all, and as such, I felt I had no redress or other avenue in which to pursue relief as a result of the prejudice I was subjected too [sic], and such has been the cause for delay, coupled with my deficient learning capacity.”

{¶ 28} The first deficiency alleged in the affidavit is counsel’s unspecified failure to “investigate” the case and “file a suppression motion.” Tunstall’s affidavit makes no effort, however, to identify any particular investigation that should have been performed or to identify any potentially beneficial evidence counsel might have uncovered. Nor does his affidavit identify any grounds that might support granting a suppression motion. Moreover, Tunstall presumably knew when he entered his guilty pleas the extent of his attorney’s investigation and that a suppression motion had not been filed. His affidavit does not indicate otherwise. The fact that he entered his pleas anyway indicates that these alleged deficiencies did not impact the knowing, intelligent, and voluntary nature of the pleas.

{¶ 29} Tunstall next alleges that his attorney wanted to dispose of his case “as quickly and as effectively as possible.” As a general principle, we see nothing inherently wrong with these goals. Defense counsel promptly assisted Tunstall in negotiating a plea deal that resulted in two firearm specifications and a charge of having a weapon while under disability being dismissed. Absent more, the fact that counsel pursued speedy and effective resolution of Tunstall’s case is not grounds for finding ineffective assistance of

counsel.

{¶ 30} Tunstall also alleges that his attorney failed to explain that the guilty pleas would result in the waiver of various constitutional rights. Even if counsel did not explain this, the record reflects that the trial court did so prior to the entry of Tunstall's pleas. Tunstall next complains about his attorney's failure to explain that his convictions "could and would be used against [him] at a later time for sentencing enhancement purposes." Tunstall cites nothing, however, establishing that defense counsel had a duty to foresee his client's future bank robbery or to warn him about the possibility of an enhanced sentence if he committed federal crimes.

{¶ 31} Tunstall further asserts that he was abusing alcohol and drugs around the time of his pleas and that he now has "a very bad time recalling the exact conversations." This admission perhaps calls into question Tunstall's present ability to aver with certainty that he was not properly advised in 1995, but it does nothing to establish ineffective assistance of counsel. Tunstall also asserts that he was "tricked by [defense counsel] to plead guilty with the numerous promises." This vague allegation is belied by the waiver and plea forms in which he admitted that he was entering his pleas "voluntarily and without any promises made to [him] to induce" them.

{¶ 32} Tunstall next avers that defense counsel somehow "coerced him" and refused to seek retraction of his guilty pleas. An allegation of unspecified coercion, however, is insufficient to rebut the record, which indicates that Tunstall entered his pleas voluntarily.

{¶ 33} As for retraction of the pleas, nothing in the record before us suggests that Tunstall desired or attempted to withdraw the pleas until he discovered the federal

sentence enhancement

{¶ 34} in 2001.[1] At that time, defense counsel reasonably may have believed that no grounds existed for withdrawing the pleas and, in any event, counsel's representation of Tunstall presumably ended after sentencing, relieving counsel of any obligation to seek vacation of the pleas. Furthermore, defense counsel's alleged failure to assist Tunstall in *withdrawing* his guilty pleas cannot possibly have caused Tunstall's *entry* of those pleas to have been less than knowing, intelligent, and voluntary.

{¶ 35} Tunstall's final argument is that his attorney told him he *could not* appeal from a guilty plea, leading Tunstall to believe he had no avenue of relief. We fail to see, however, how such advice could have caused Tunstall to enter his guilty pleas involuntarily. Tunstall cannot seriously claim that he would have refused to enter the pleas if he had known that he actually *could* appeal from them. Assuming, arguendo, that defense counsel or even the trial court misinformed Tunstall about the appealability of a guilty plea, he might have had grounds to seek a delayed appeal. But the failure properly to advise a defendant of his appellate rights has no bearing on the validity of a guilty plea. *State v. Nicholas*, Portage App. No. 2009-P-0049, 2010-Ohio-1451, ¶26.

{¶ 36} Based on the reasoning set forth above, and with particular emphasis on the fourteen-year delay between the entry of Tunstall's guilty pleas and his motion to vacate them, we cannot say the trial court abused it discretion in denying the motion. Accordingly, we overrule Tunstall's assignment of error and affirm the judgment of the Montgomery County Common Pleas Court.

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[1]As noted above, we have not been provided with a plea or sentencing transcript.

FAIN and GRADY, JJ., concur.

Copies mailed to:

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Johnna M. Shia
Donnie D. Tunstall
Hon. Gregory F. Singer