

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-18-1208

Appellee

Trial Court No. CR0199107059

v.

Michael Thomson

DECISION AND JUDGMENT

Appellant

Decided: July 12, 2019

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Michael Thomson, pro se.

* * * * *

MAYLE, P.J.

{¶ 1} Defendant-appellant, Michael Thomson, appeals the June 25, 2018 judgment of the Lucas County Court of Common Pleas, denying his motion to withdraw his guilty plea. For the reasons that follow, we affirm the trial court judgment.

I. Background

{¶ 2} On September 16, 1991, Thomson was indicted on charges of aggravated murder with two death-qualifying specifications and a firearm specification, aggravated

robbery with a firearm specification, and aggravated burglary with a firearm specification. A jury trial began on October 21, 1992. On October 28, 1992, following several days of testimony, Thomson reached an agreement with the state whereby (1) he would enter a plea of guilty to aggravated murder, with a firearm specification, and aggravated robbery; (2) the state would request a nolle prosequi on the death-qualifying specifications attached to the aggravated murder charge, on the firearm specification attached to the aggravated robbery charge, and on the aggravated burglary charge, together with its firearm specification; and (3) in sentencing Thomson, the court would impose a term of imprisonment of 20 years to life on the murder conviction, three years' actual incarceration on the gun specification, and seven to 25 years on the aggravated robbery conviction, with all of the sentences to be served consecutively.

{¶ 3} The trial court accepted Thomson's plea, made a finding of guilty, imposed the agreed-upon sentence, and ordered a nolle prosequi of the remaining counts and specifications. Thomson did not appeal the convictions or sentences.

{¶ 4} On January 12, 1996, Thomson filed a petition for postconviction relief, seeking to vacate his conviction due to prosecutorial misconduct, improper participation by the trial court in the plea bargaining process, and ineffective assistance of counsel. The trial court denied Thomson's petition and we affirmed. *State v. Thomson*, 6th Dist. Lucas No. L-97-1127, 1997 WL 669673, *4 (Oct. 24, 1997).

{¶ 5} On June 8, 2004, Thomson moved to withdraw his guilty plea. He argued that (1) his plea agreement was deficient because it made no mention of the disposition of

his aggravated robbery conviction; (2) the trial court lacked subject-matter jurisdiction to accept his pleas because the nolle prosequi on the death specifications had not yet been entered when the plea was accepted and the sentence imposed, therefore, a three-judge panel was required to entertain his pleas under R.C. 2945.06 and Crim.R. 11(C)(3); (3) the trial court failed to comply with Crim.R. 11 when it accepted his guilty pleas because it did not inform him of his right to have a three-judge panel determine whether he was guilty of aggravated murder; (4) his conviction was based upon insufficient evidence because the failure to conduct an examination of witnesses by a three-judge panel rendered his conviction legally infirm; and (5) trial counsel rendered constitutionally ineffective assistance by informing him that he was foregoing his right to appeal by entering a guilty plea, failing to challenge the trial court's alleged breach of the written plea agreement, and failing to object to the trial court's failure to convene a three-judge panel. The trial court denied Thomson's motion and we affirmed. *State v.*

Thomson, 6th Dist. Lucas No. L-05-1213, 2006-Ohio-1224.

{¶ 6} On August 17, 2016, Thomson filed a second motion to withdraw his guilty plea. This is the motion that forms the basis for his present appeal. In it, Thomson argued that (1) the trial court failed to merge allied offenses; (2) the court violated the double jeopardy clause by subjecting him to multiple punishments for the same offense; (3) the trial court failed to properly explain the nature of the offenses, preventing him from fully understanding the implications of his plea; (4) at the time he entered his plea, he was afflicted by Asperger's syndrome—then-undiagnosed—which impaired his ability

to understand the consequences of his plea to aggravated robbery; (5) counsel provided ineffective assistance; (6) counsel failed to raise the issue of allied offenses; and (7) the state would suffer no prejudice because only the robbery conviction would be vacated and not the related murder conviction.

{¶ 7} The trial court denied Thomson’s motion. It held that his first, second, third, fifth, sixth, and seventh arguments were barred by res judicata because they could have or should have been raised on direct appeal or in a postconviction petition. The court acknowledged that Thomson’s fourth claim—that he was afflicted by Asperger’s syndrome, which was undiagnosed until 2006—was not barred on res judicata grounds. It found, however, that Thomson had not demonstrated “manifest injustice” resulting in “prejudice that may be remediable at this juncture.” It concluded that Thomson’s “claimed diminished ability to participate in the plea colloquy was not a substantial impediment to his understanding the nature of sentencing.”

{¶ 8} Thomson appealed and assigns the following errors for our review:

Assignment of Error I:

Court’s Failure To Merge Allied Offenses Of Similar Import Are Not Barred By Res Judicata And Do Constitute A Manifest Miscarriage Of Justice.

Assignment of Error II:

The Court Committed Plain And Reversible Error By Not Properly Explaining The Nature Of The Offenses And Maximum Penalties Involved.

Assignment of Error III:

Defendant Was Neurologically Impaired From Understanding The Consequences Of His Plea To Aggravated Robbery And That He Would Receive A Separate Consecutive Sentence For Same.

Assignment of Error IV:

Ineffective Assistance Of Counsel During The Plea Hearing Amounted To A Manifest Miscarriage Of Justice.

Assignment of Error V:

There Is No Prejudice Against The State In Granting Defendant's Motion To Withdraw His Guilty Plea To Aggravated Robbery.

II. Law and Analysis

{¶ 9} Crim.R. 32.1 governs the withdrawal of a plea of guilty or no contest and provides that such motion “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.” A manifest injustice is a “clear or openly unjust act.” *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998). It is an extremely high standard reserved for only extraordinary cases. *State v. Harmon*, 6th Dist. Lucas No. L-10-1195, 2011-Ohio-5035, ¶ 12. “The defendant bears the burden of establishing the existence of manifest injustice.” *State v. Romero*, Slip Opinion No. 2019-Ohio-1839, ¶ 13. We will reverse a trial court's decision denying a motion to withdraw a plea only for an abuse of discretion. *Id.*

A. Allied Offenses of Similar Import and Consecutive Sentences

{¶ 10} In his first assignment of error, Thomson argues that he was improperly sentenced for allied offenses of similar import, and that the trial court erred by failing to inquire whether his convictions merged for purposes of sentencing. In his second assignment of error, he argues that the trial court failed to properly explain the nature of the offenses and maximum penalties involved because it did not resolve the issue of allied offenses of similar import. In his fifth assignment of error, he argues that there is no record of a plea agreement for a consecutive sentence of seven to 25 years. And in his fourth assignment of error, he claims that counsel was ineffective for failing to ensure that the trial court perform an allied-offenses analysis, failing to object to the consecutive sentence of seven to 25 years, and failing to inform him of this possible sentence.

{¶ 11} The state urges that res judicata bars Thomson's objections. Thomson responds that a sentence that is contrary to law may be reviewed at any time, on direct appeal or by collateral attack.

{¶ 12} We begin by noting that this is Thomson's second motion to withdraw his guilty plea. "[R]es judicata bars successive Crim.R. 32.1 motions to withdraw guilty pleas, where the grounds to withdraw the plea were raised or could have been raised in the initial motion to withdraw." *State v. Kelm*, 6th Dist. Wood No. WD-11-024, 2013-Ohio-202, ¶ 10. Here, Thomson's first, second, fourth, and fifth assignments of error could have been raised in his initial motion to withdraw.

{¶ 13} In any event, the Supreme Court of Ohio held in *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 26, that “when a trial court finds that convictions are not allied offenses of similar import, *or when it fails to make any finding regarding whether the offenses are allied*, imposing a separate sentence for each offense is not contrary to law and any error must be asserted in a timely appeal or it will be barred by principles of res judicata.” (Emphasis added.)

{¶ 14} Here, the trial court made no finding regarding whether offenses were allied, it specifically informed Thomson that the seven-to-25 year sentence for the aggravated robbery conviction could be imposed consecutive to the sentences for the aggravated murder conviction and firearms specification, and the parties presented to the court that as a part of their negotiated plea agreement, consecutive sentences would be imposed. We find that Thomson’s challenge to the consecutive sentences imposed here for what he claims were allied offenses could have or should have been raised on direct appeal. *See State v. Williams*, 6th Dist. Lucas No. L-14-1011, 2014-Ohio-4117, ¶ 7 (observing that issues related to allied offenses are capable of resolution on direct appeal); *State v. Guevara*, 6th Dist. Lucas No. L-12-1218, 2013-Ohio-728, ¶ 9 (“[T]he failure to raise an allied-offenses claim on direct appeal precludes the issue from being litigated in a postconviction proceeding.”¹); *State v. Mobley*, 10th Dist. Franklin No.

¹ “[A] motion to withdraw a guilty plea pursuant to Crim.R. 32.1 is a postconviction proceeding encompassed by res judicata.” *State v. Hill*, 6th Dist. Lucas No. L-14-1088, 2014-Ohio-4865, ¶ 8.

18AP-23, 2018-Ohio-3880, ¶ 19 (“[R]es judicata barred appellant from raising the merger argument in his subsequent Crim.R. 32.1 motion to withdraw his guilty plea.”).

We find that any purported related deficiencies of trial counsel are also barred by res judicata.

{¶ 15} Accordingly, we find Thomson’s first, second, fourth, and fifth assignments of error not well-taken.

B. Thomson’s Asperger’s Diagnosis

{¶ 16} In his third assignment of error, Thomson argues that he should be permitted to withdraw his plea due to his January 28, 2006 Asperger’s syndrome diagnosis. He insists that he should have been granted a hearing to allow him to demonstrate his diminished ability to participate in the plea colloquy on account of this disorder.

{¶ 17} Thomson claims that his condition causes him to interpret language literally without understanding implied meaning. He points to a deficiency in his plea agreement whereby no mention is made of his intent to plea to aggravated robbery, and he indicates that the trial court stated at the plea hearing that he *could* impose a consecutive sentence of seven to 25 years. He maintains that this omission and the equivocal language used by the court—taken together—failed to adequately apprise him that upon entering a plea, he *would* be sentenced to a consecutive sentence of seven to 25 years for aggravated robbery.

{¶ 18} We begin by noting that Thomson filed his motion more than 11 years after the date he claims that he was first diagnosed with Asperger's. "The 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." *State v. Tinney*, 5th Dist. Richland No. 2011 CA 41, 2012-Ohio-72, ¶ 25. *See also State v. Rittner*, 6th Dist. Fulton No. F-05-003, 2005-Ohio-6526, ¶ 28 ("[W]hile there is no explicit time limit on the filing of a motion to withdraw a plea, '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.'"). We find that Thomson's 11-year delay in filing his motion is a factor weighing against the existence of manifest injustice.

{¶ 19} In addition to waiting 11 years after his diagnosis to file his motion to withdraw his plea, Thomson failed to submit any competent evidence in support of his position that his condition rendered him unable to understand the consequences of his plea. A trial court may deny a motion to withdraw a plea without a hearing where the defendant fails to present "evidentiary-quality materials raising sufficient operative facts which would entitle the defendant to the requested relief." *State v. Hutchison*, 2018-Ohio-200, 104 N.E.3d 91, ¶ 43 (5th Dist.). *State v. Amstutz*, 5th Dist. Stark No. 2000-CA-00047, 2001 WL 46324, *2 (Jan. 16, 2001) ("The party moving to withdraw the guilty plea must support the allegations contained in the motion with affidavits and/or the record."). While Thomson attached a handful of unauthenticated mental health records

from the Department of Rehabilitation and Corrections and made unsworn assertions about his diminished ability to participate in the plea colloquy, he offered no affidavits or reports from qualified medical professionals indicating that his diagnosis rendered him unable to understand the consequences of his plea. *See, e.g., City of N. Royalton v. Czupik*, 8th Dist. Cuyahoga No. 74100, 1999 WL 328498, *4 (May 20, 1999) (finding no abuse of discretion in denial of motion to withdraw plea where defendant delayed in seeking to withdraw his plea and failed to submit competent medical evidence to support his position); *State v. Never*, 6th Dist. Lucas No. L-08-1076, 2009-Ohio-1473, ¶ 72, 75 (affirming denial of motion to withdraw plea where motion was filed six years after plea and defendant failed to present “evidentiary documents” to support claim that psychiatric medication rendered him “confused and irritable”).

{¶ 20} We, therefore, find no abuse of discretion in the trial court’s conclusion that withdrawal of Thomson’s plea is not necessary to correct a manifest injustice. We find Thomson’s third assignment of error not well-taken.

III. Conclusion

{¶ 21} We find no abuse of discretion in the trial court’s denial of Thomson’s motion to withdraw his guilty plea. His challenges based on his claim that his convictions were allied offenses of similar import were barred by res judicata because (1) they could have been raised on direct appeal or in a prior proceeding; and (2) successive motions to withdraw a plea had been filed. We, therefore, find his first, second, fourth, and fifth assignments of error not well-taken.

{¶ 22} As to Thomson’s claim that his 2006 diagnosis of Asperger’s syndrome rendered him unable to understand the consequences of his plea, we find that withdrawal of his plea is not necessary to correct a manifest injustice because (1) he waited 11 years to file his motion; and (2) he failed to present competent evidence in support of his position. We, therefore, find his third assignment of error not well-taken.

{¶ 23} Accordingly, we affirm the June 25, 2018 judgment of the Lucas County Court of Common Pleas. The costs of this appeal are assessed to Thomson under App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____

JUDGE

Arlene Singer, J. _____

JUDGE

Christine E. Mayle, P.J.
CONCUR. _____

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio’s Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court’s web site at: <http://www.supremecourt.ohio.gov/ROD/docs/>.