

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| | : | |
| Plaintiff-Appellee, | : | |
| | : | |
| v. | : | No. 12AP-241 |
| | : | (C.P.C. No. 11CR-01-107) |
| James Morgan, Jr., | : | |
| | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on December 6, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

James Morgan, Jr., pro se.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, James Morgan, Jr. ("defendant"), appeals from the March 13, 2012 entry of the Franklin County Court of Common Pleas denying his motion to withdraw his guilty plea. For the following reasons, we affirm the judgment of the trial court.

{¶ 2} On October 11, 1991, a jury found defendant guilty of two counts of rape, both aggravated first-degree felonies, in violation of former R.C. 2907.02, and one count of kidnapping, an aggravated felony of the second degree, in violation of former R.C. 2905.01. The trial court sentenced defendant to concurrent terms of six to twenty-five years in prison on the rapes and four to fifteen years on the kidnapping.

{¶ 3} On January 6, 2011, defendant was indicted by the Franklin County Grand Jury on one count of failure to provide notice of change of address, in violation of R.C. 2950.05. Defendant entered a plea of not guilty and filed an affidavit of indigency. The office of the Franklin County Public Defender was assigned to represent defendant. Counsel for defendant filed a demand for discovery with which plaintiff-appellee, the State of Ohio ("the State") complied.

{¶ 4} On March 2, 2011, defendant appeared in court represented by counsel. At that time, the State asked that the matter be continued until March 28, 2011 because the prosecuting attorney was in trial. Counsel for defendant approved the request; however, defendant refused to do so. The State's motion was granted.

{¶ 5} On March 23, 2011, defendant and counsel appeared in court. Defendant was advised of his rights under Crim.R. 11 and entered a plea of guilty to the stipulated lesser included offense of failure to provide notice of change of address. The parties jointly recommended a sentence of six months incarceration. The trial court followed the joint recommendation and imposed a six-month term of incarceration.

{¶ 6} Ten months later, on February 7, 2012, defendant filed a motion to withdraw guilty plea. Defendant argued that Judge Hogan was not an impartial judge because he had been the prosecutor in defendant's original case. Defendant also argued that he received ineffective assistance of counsel because his trial counsel failed to move for dismissal of the indictment and failed to advise him that he was statutorily prohibited from being convicted of escape. Defendant also asserted that his conviction was against the manifest weight of the evidence and that his conviction for escape and failure to notify of change of address was void because R.C. 2967.15(C)(2) excludes him from the class of people who can be convicted for escape. The State filed a memorandum contra to defendant's motion, arguing that defendant failed to satisfy the manifest injustice standard and that his motion should be denied.

{¶ 7} In an entry filed March 13, 2012, the trial court denied defendant's motion to withdraw his guilty plea because it was both untimely and did not demonstrate a manifest injustice as required by Crim.R. 32.1.

{¶ 8} It is from this entry that defendant has filed the instant appeal, and asserts three assignments of error for our review:

[I.] THE RIGHT TO AN IMPARTIAL JUDGE.

[II.] INEFFECTIVE ASSISTANCE [O]F COUNSEL.

[III.] "THE COURT ERRED IN CONVICTING THE DEFENDANT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 9} Crim.R. 32.1 pertains to a motion to withdraw a guilty plea and specifically provides:

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.

{¶ 10} A post-sentence motion to withdraw a guilty plea may be made only to correct a manifest injustice. Crim.R. 32.1. Therefore, the trial court was required to determine whether granting the motion was necessary to correct a manifest injustice. "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶ 5. Manifest injustice " 'is an extremely high standard, which permits a defendant to withdraw his guilty plea only in extraordinary cases.' " *State v. Tabor*, 10th Dist. No. 08AP-1066, 2009-Ohio-2657, ¶ 6, quoting *State v. Price*, 4th Dist. No. 07CA47, 2008-Ohio-3583, ¶ 11.

{¶ 11} "A defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice." *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph one of the syllabus. A motion pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court. *Id.*, at paragraph two of the syllabus. Thus, appellate review of the trial court's denial of a post-sentence motion to withdraw a guilty plea is limited to the determination of whether the trial court abused its discretion. *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780, ¶ 16. "An abuse of discretion implies that the court's attitude was unreasonable, arbitrary, or unconscionable." *Id.*, citing *State v. Widder*, 146 Ohio App.3d 445, ¶ 6 (9th Dist.2001).

{¶ 12} In denying defendant's motion to withdraw his guilty plea, the trial court specifically found his motion was untimely and did not demonstrate a manifest injustice

as required by Crim.R. 32.1. The timeliness of a defendant's post-sentence motion to withdraw a guilty plea is a factor the trial court may consider and, an undue delay in the filing of the motion is a factor which adversely affects the credibility of a defendant's claims. Specifically, "[a]n 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." *Smith* at paragraph three of the syllabus.

{¶ 13} Here, defendant waited more than ten months after he was sentenced before he filed his motion to withdraw his guilty plea. In fact, defendant's motion was filed well after he had completed serving the six-month prison term imposed by the trial court. In his motion, defendant failed to provide an explanation for his delay in filing his motion, and the trial court found that his unexplained delay was unreasonable, and that it adversely affected the credibility of his claim.

{¶ 14} This court finds that the trial court did not abuse its discretion when it denied defendant's motion after finding that the motion was untimely.

{¶ 15} Further, we find that the trial court did not abuse its discretion when it determined that defendant had failed to demonstrate a manifest injustice as required by Crim.R. 32.1.

{¶ 16} Defendant first argues that he was denied his right to an impartial judge. Specifically, defendant argued that the trial court judge who accepted his guilty plea had been employed in 1991 as the assistant prosecuting attorney for the State in his underlying criminal action. While the State concedes this fact, this court finds that the defendant did not demonstrate any bias or prejudice on the part of the trial court.

{¶ 17} R.C. 2701.03 allows a party to file an affidavit of bias and prejudice with the court to seek the disqualification of a biased judge. Defendant did not avail himself of this procedure. Further, even if defendant would have filed such an affidavit, this court finds that defendant's arguments fail to establish a manifest injustice. The only specific instance of bias or prejudice defendant alleges the trial court judge demonstrated was his bias of conspiring with the Ohio Adult Parole Authority to force defendant to participate in a sex offender treatment program. Defendant argues that this demonstrates bias because defendant has not been convicted of a sex offense.

{¶ 18} Defendant's argument lacks merit because he was, in fact, convicted of two counts of rape in 1991. In 2011, when defendant appeared before the trial court and pled guilty to one count of failing to provide notice of change of address, the trial court sentenced him to a jointly recommended term of six months in prison. The fact that he was thereafter referred to a sex offender treatment program does not demonstrate a conspiracy between the trial court and the Ohio Adult Parole Authority. We find that the trial court did not abuse its discretion in finding that this argument did not demonstrate a manifest injustice.

{¶ 19} Defendant also argues that he received ineffective assistance of counsel. Defendant alleged that the public defender failed to move for dismissal of the indictment, and failed to advise defendant that he was statutorily prohibited from being convicted of escape, and failed to move for disqualification or recusal of the trial court because he had participated in prosecuting defendant on the 1991 rape and kidnapping case.

{¶ 20} In order to succeed on the claim of ineffective assistance of counsel, defendant must satisfy a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to prevail on an ineffective assistance of counsel claim, defendant was required to demonstrate that (1) defense counsel's performance was so deficient that he was not functioning as the counsel guaranteed under the Sixth Amendment to the United States Constitution, and (2) that defense counsel's errors prejudiced defendant, depriving him of a trial whose result is reliable. *Id.*

{¶ 21} " 'When a claim of ineffective assistance of counsel is based on counsel's failure to file a particular motion, a defendant must show that the motion had a reasonable probability of success.' " *State v. Jones*, 10th Dist. No. 11AP-1123, 2012-Ohio-3767, ¶ 31, quoting *State v. Carmon*, 10th Dist. No. 11AP-818, 2012-Ohio-1615, ¶ 13. Because defendant did not demonstrate a reasonable probability that a motion to dismiss the indictment would have been successful, he failed to demonstrate that trial counsel was ineffective for failing to file such a motion. Defendant likewise failed to demonstrate that trial counsel was ineffective for failing to file either a motion to dismiss or a motion for disqualification.

{¶ 22} First, defendant does not explain why trial counsel was ineffective for failing to move to dismiss the indictment. A motion to dismiss an indictment tests the

sufficiency of the indictment and defendant has provided no explanation establishing that the indictment was not sufficient. Defendant failed to show that trial counsel's performance was deficient in this regard or that he was prejudiced by counsel's failure to file such a motion.

{¶ 23} Next, defendant argues that he was denied effective assistance of counsel when counsel failed to advise him that he was statutorily prohibited from being convicted of escape. Defendant cited R.C. 2967.15(C)(2), which provides that a person on parole, under transitional control, or otherwise supervised by the adult parole authority can be prosecuted for escape if the person absconds from supervision. However, there is nothing in the record which explains defendant's arguments in this regard. Defendant was indicted for failing to provide notice of his change of address. There is no escape charge and, as such, defendant cannot show that counsel was ineffective for failing to advise him that he could not be convicted of escape.

{¶ 24} Defendant also argues that trial counsel was ineffective for failing to move for disqualification or recusal of the trial court judge because of his prior involvement prosecuting defendant in the 1991 rape and kidnapping case. As noted previously, defendant did not avail himself of the process for requesting that the trial court judge be removed and, even if he had, it is unlikely that he would have been entitled to disqualification, particularly given that the trial court judge agreed with the joint recommendation to six months incarceration. Defendant has not shown that the outcome would have been different.

{¶ 25} Finally, defendant submits that he should have permitted to withdraw his guilty plea because his conviction is against the manifest weight of the evidence. Here, defendant again challenges his conviction for escape when in fact he was never charged with nor convicted of escape. Defendant claims that he was charged with escape, a first-degree felony, but was deceived into pleading guilty to a fourth-degree felony. Defendant then explains that his violation of parole is actually a first-degree misdemeanor with a maximum penalty of six months of imprisonment.

{¶ 26} Inasmuch as defendant was never charged with escape, his arguments do not demonstrate that trial counsel was ineffective with regard to an escape charge. Defendant simply has not demonstrated that the trial court abused its discretion when it

denied his motion to withdraw his guilty plea filed ten months after he was sentenced and several months after he had served the six-month period of incarceration. Further, defendant has failed to demonstrate that the trial court abused its discretion by finding that he had not demonstrated a manifest injustice. To the extent that defendant raises additional arguments in this appeal, this court's review is confined to those issues raised in his motion to withdraw his guilty plea. *See Mindlin v. Zell*, 10th Dist. No. 11AP-983, 2012- Ohio-3543, ¶ 18 ("Because appellant failed to raise these arguments in the trial court, we decline to address them for the first time on appeal.").

{¶ 27} Accordingly, because defendant did not establish that the trial court abused its discretion by denying his motion to withdraw his guilty plea, defendant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK and SADLER, JJ., concur.
