

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 13AP-225
v.	:	(C.P.C. No. 05CR11-7737)
	:	
Jovaugny R. Hairston,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on September 5, 2013

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*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

*Jovaugny R. Hairston*, pro se.

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APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Defendant-appellant, Jovaugny R. Hairston, appeals from a judgment of the Franklin County Court of Common Pleas denying his petition for postconviction relief filed pursuant to R.C. 2953.23 and request to withdraw his guilty plea. For the following reasons, we affirm that judgment.

**I. Factual and Procedural Background**

{¶ 2} In 2005, a grand jury indicted appellant with single counts of aggravated robbery, robbery, aggravated burglary, burglary, kidnapping, theft and having a weapon while under disability, as well as multiple counts of receiving stolen property. In August 2006, appellant entered a guilty plea to counts of aggravated robbery, aggravated burglary, kidnapping (all which also contained firearm specifications), having a weapon

while under disability, and three counts of receiving stolen property. The trial court accepted appellant's guilty plea, found him guilty, and, on September 29, 2006, sentenced him accordingly. Appellant did not appeal his conviction or sentence.

{¶ 3} In January 2009, appellant filed a petition for postconviction relief pursuant to R.C. 2953.23 in the trial court. He claimed that his guilty plea was not made knowingly, intelligently or voluntarily due to his trial counsel's ineffective assistance. The trial court denied appellant's petition because it was not timely filed. This court affirmed that decision. *State v. Hairston*, 10th Dist. No. 09AP-205, 2009-Ohio-4387.

{¶ 4} Undeterred, appellant filed another petition for postconviction relief on January 31, 2013. This petition again claimed that his guilty plea was not made knowingly, intelligently or voluntarily due to his trial counsel's ineffective assistance. He also claimed that his trial counsel forged his signature on his plea form. Appellant later amended his petition to include a claim that he should be allowed to withdraw his guilty plea. The trial court denied appellant's petition for a number of reasons, including that the petition was untimely and that his claims were barred by res judicata. The trial court also rejected appellant's request to withdraw his guilty plea, concluding that he failed to demonstrate a manifest injustice to support withdrawal.

## **II. The Appeal**

{¶ 5} Appellant appeals the trial court's decision and assigns the following errors:

[1.] Trial court erred using the application of res judicata to appellant's allegations.

[2.] Trial court erred applying "the law of the case" doctrine.

[3.] Appellant's guilty plea was the product of ineffective assistance of counsel, and induced under false pretenses making the plea void.

[4.] Trial court lacked jurisdiction to sentence appellant without a jury.

[5.] Trial court abused its discretion denying appellant's Motion to withdraw guilty plea as the record clearly corroborates appellant's assertions of manifest injustice.

[6.] The time constraints of R.C. 2953.21(A)(2) does not govern convictions obtained in violation of Ohio's and United

States Constitution thus trial court erred by barring post-conviction petition as untimely pursuant to R.C. 2953.21.

### **A. Appellant's Second Petition for Postconviction Relief**

{¶ 6} We first address appellant's sixth assignment of error, in which he argues that the trial court erred by concluding that it lacked jurisdiction to consider his second petition for postconviction relief because it was untimely. We disagree. Although he claims that the time constraints found in R.C. 2953.21 do not apply to his claims, he presents no argument to support his claim. It is clear that, pursuant to R.C. 2953.23(A), a trial court does not have jurisdiction to consider a second or successive petition for postconviction relief for similar relief unless the petitioner satisfies one of the exceptions found in R.C. 2953.23(A)(1) or (2). *State v. Turner*, 10th Dist. No. 06AP-876, 2007-Ohio-1468, ¶ 10. Here, appellant's second petition requested the same relief and even asserted the same grounds for such relief as his first petition: the vacation of his convictions based on his guilty plea that was not made knowingly, intelligently or voluntarily due to his trial counsel's ineffective assistance. Therefore, appellant had to demonstrate that one of those exceptions applied before the trial court had jurisdiction to consider his second petition.

{¶ 7} Under the exception set forth in R.C. 2953.23(A)(1), a trial court may consider a successive petition for similar relief if:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

{¶ 8} In order to satisfy this exception, appellant alleged that he was unavoidably prevented from discovering facts in support of his claims for relief. R.C. 2953.21(A)(1)(a). He specifically alleged that his attorney forged his signature on his entry of guilty plea form and that he did not discover that fact for many years.<sup>1</sup> Even with this allegation, appellant cannot satisfy the second part of the exception, that "but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted[.]" R.C. 2953.23(A)(1)(b). Appellant made no such allegation and, more importantly, appellant was convicted pursuant to his guilty plea, not a trial. *State v. Hamilton*, 10th Dist. No. 03AP-852, 2004-Ohio-3556, ¶ 4; *State v. Clark*, 5th Dist. No. 2007 CA 00206, 2008-Ohio-194, ¶ 18. Therefore, the exception found in R.C. 2953.23(A)(1) does not allow the trial court to consider appellant's second petition.

{¶ 9} R.C. 2953.23(A)(2) also permits a court to consider a second or successive petition if the petitioner alleges that DNA results establish the petitioner's actual innocence. Here, appellant did not argue that DNA results established his actual innocence. Therefore, this exception also does not apply.

{¶ 10} Because appellant failed to establish the applicability of an exception that would allow the trial court to consider his second petition, the trial court lacked jurisdiction to entertain the petition for postconviction relief. *State v. Yusuf*, 10th Dist. No. 08AP-751, 2009-Ohio-1328, ¶ 9. Accordingly, the trial court did not err in denying appellant's second petition, although technically, the petition should have been dismissed for lack of jurisdiction. *Hamilton* at ¶ 9. We overrule appellant's sixth assignment of error.

### **B. Appellant's Request to Withdraw his Guilty Plea**

{¶ 11} In his fifth assignment of error, appellant contends that the trial court abused its discretion by denying his request to withdraw his guilty plea without a hearing. We must consider this assignment of error because motions to withdraw a guilty plea filed pursuant to Crim.R. 32.1 are separate and distinct from petitions for postconviction relief pursuant to R.C. 2953.23. *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, ¶ 14; *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266, ¶ 17 (10th Dist.) (Bryant, J.,

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<sup>1</sup> The claimed forgery was, in reality, the insertion of appellant's name in the caption of the Entry of Guilty Plea form. Appellant admitted in his brief that he did sign the plea form.

concurring). Although appellant did not file a separate motion to withdraw his guilty plea, the request that he made as an amendment to his petition for postconviction relief was clearly laid out as one pursuant to Crim.R. 32.1. Therefore, as the trial court properly did, we will also separately consider appellant's motion to withdraw.

{¶ 12} Crim.R. 32.1 permits a motion to withdraw a guilty plea "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." "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. Sappington*, 10th Dist. No. 09AP-988, 2010-Ohio-1783, ¶ 7, quoting *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶ 5. A defendant who seeks to withdraw a guilty plea after the imposition of sentence carries the burden of establishing the existence of manifest injustice. *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph one of the syllabus. Manifest injustice is an extremely high standard, and a defendant may only withdraw his guilty plea in extraordinary cases. *State v. Tabor*, 10th Dist. No. 08AP-1066, 2009-Ohio-2657, ¶ 6, citing *State v. Price*, 4th Dist. No. 07CA47, 2008-Ohio-3583, ¶ 11. A trial court is not required to hold an evidentiary hearing on a post-sentence motion to withdraw a guilty plea, except when the facts, as alleged by the defendant, indicate a manifest injustice would occur if the plea was allowed to stand. *State v. Britford*, 10th Dist. No. 11AP-646, 2012-Ohio-1966, ¶ 12, citing *State v. Thomson*, 6th Dist. No. L-05-1213, 2006-Ohio-1224, ¶ 58.

{¶ 13} A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court. *Sappington* at ¶ 8, citing *Smith* at paragraph two of the syllabus. Therefore, this court's review of a trial court's denial of a post-sentence motion to withdraw a guilty plea is limited to a determination of whether the trial court abused its discretion. *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780, ¶ 16. Although an abuse of discretion is typically defined as an unreasonable, arbitrary or unconscionable decision, *State v. Beavers*, 10th Dist. No. 11AP-1064, 2012-Ohio-3654, ¶ 8, we note that no court has the authority, within its discretion, to commit an error of law. *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶ 70; *In re L.D.*, 10th Dist. No. 12AP-985, 2013-Ohio-3214, ¶ 8.

{¶ 14} Appellant premised his request to withdraw on the allegation that he decided to plead guilty with the understanding that he was to receive a prison sentence much shorter than the sentence he ultimately received. The trial court concluded, without a hearing, that appellant's allegation did not demonstrate a manifest injustice. That decision was not an abuse of discretion. Appellant's allegation is not persuasive, in light of his plea form which contained the possible penalties for each of his convictions and his failure to raise this issue on direct appeal or in his first petition. We also note the lengthy delay in raising this claim, which appellant was obviously aware of when he was sentenced in 2006. " 'An undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of the motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.' " *Beavers* at ¶ 20, quoting *Smith* at 264; *State v. Hagler*, 10th Dist. No. 10AP-291, 2010-Ohio-6123, ¶ 15 (two and one-half year delay after sentencing warranted against motion to withdraw).

{¶ 15} For all these reasons, the trial court did not abuse its discretion by concluding, without a hearing, that appellant failed to demonstrate a manifest injustice to warrant the withdrawal of a guilty plea. We overrule appellant's fifth assignment of error.

### **III. Conclusion**

{¶ 16} We overrule appellant's fifth and sixth assignments of error. Because the trial court lacked jurisdiction to consider appellant's second petition, appellant's other assignments of error, which address the merits of his petition, are moot. *State v. Hatfield*, 10th Dist. No. 07AP-784, 2008-Ohio-1377, ¶ 9. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN and T. BRYANT, JJ., concur.

T. BRYANT, J., retired, of the Third Appellate District,  
assigned to active duty under authority of Ohio Constitution,  
Article IV, Section 6(C).

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