[Cite as *State v. Jordan*, 2015-Ohio-575.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-04-051
	:	O P I N I O N
- vs -		2/17/2015
	:	
JOSEPH JORDAN,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09 CR 26144

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Joseph Jordan, #A628031, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601, defendant-appellant, pro se

RINGLAND, J.

{¶ 1} Defendant-appellant, Joseph Jordan, appeals pro se from a Warren County Court of Common Pleas decision denying a motion to withdraw his guilty plea. For the reasons outlined below, we affirm.

{¶ 2} On October 12, 2009, the Warren County Grand Jury indicted Jordan on ten counts related to his alleged activities in trafficking in drugs. On April 28, 2010, pursuant to a

plea agreement, Jordan pled guilty to the following five counts (1) Count 1, trafficking in cocaine in violation of R.C. 2925.03(A)(2), a third-degree felony; (2) Count 3, aggravated trafficking in drugs (ecstasy), in violation of R.C. 2925.03(A)(2), a second-degree felony; (3) Count 5, aggravated trafficking in drugs (methadone) in violation of R.C. 2925.03(A)(2), a second-degree felony; (4) Count 8, having weapons while under disability in violation of R.C. 2923.13(A)(3), a third-degree felony; and (5) Count 9, illegal manufacture of drugs, in violation of R.C. 2925.04(A), a second-degree felony. In exchange for pleading guilty, the remaining five counts were dismissed. Jordan was sentenced on the same day he entered his guilty plea. As part of the plea agreement, Jordan received five years each on Counts 1, 3, 5, and 8, which were to be served concurrent to one another. Jordan also received five years on Count 9, which was ordered to be served consecutively to the other counts. Jordan was therefore sentenced to a total prison term of ten years, with five years being mandatory.[1]

{¶ 3} Jordan did not timely appeal his conviction and sentence. Rather, Jordan sought to file a delayed appeal on August 29, 2011.[2] However, this court denied the motion. *State v. Jordan*, 12th Dist. Warren No. CA2011-08-092, Entry Denying Motion for Delayed Appeal, (Nov. 9, 2011).

{¶ 4} On January 13, 2014, over three years after entering his guilty plea, Jordan moved to withdraw his guilty plea claiming he received ineffective assistance of counsel. The trial court denied Jordan's motion, finding he failed to establish that a manifest injustice occurred warranting the withdrawal of his guilty plea.

1. The record indicates that the state and Jordan's counsel originally negotiated a total prison sentence of 11 years, with five years being mandatory. However, at the sentencing hearing, the trial court amended the sentence and imposed a lesser sentence of ten years, with five years being mandatory.

2. In his motion for delayed appeal, Jordan asserted that a timely appeal was not filed due to fault of his counsel. Jordan claimed he requested counsel to file an appeal on his behalf, yet counsel failed to do so.

{¶ 5} Jordan appeals raising three assignments of error for our review.

{¶ 6} Assignment of Error No. 1:

{¶ 7} TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INFORM THE DEFENDANT OF HIS POSSIBLE DEFENSES OF INSUFFICIENT INDICTMENT AND VENUE EVIDENCE IN VIOLATION OF HIS 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10, OF THE OHIO CONSTITUTION.

{¶ 8} In his first assignment of error, Jordan asserts that the ineffective assistance of counsel and misinformation provided by the trial court during the plea colloquy created a manifest injustice such that he should be permitted to withdraw his plea.

{¶ 9} Pursuant to Crim.R. 32.1, "[a] motion to withdraw a plea of guilty or no contest may be made only before a 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 defendant who seeks to withdraw a plea after the imposition of sentence has the burden of establishing the existence of a manifest injustice. *State v. Kelly*, 12th Dist. Butler No. CA2013-01-020, 2013-Ohio-3675, ¶ 19. In general, "manifest injustice relates to a fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the demands of due process." *Id.* Under such a standard, a motion seeking to withdraw a guilty plea is granted only in extraordinary cases. *State v. Hendrix*, 12th Dist. Butler No. CA2012-05-109, 2012-Ohio-5610, ¶ 13, citing *State v. Smith*, 49 Ohio St.2d 261, 264 (1977). Moreover, as this court has consistently stated, "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." *State v. Resendiz*, 12th Dist. Preble No. CA2009-04-012, 2009-Ohio-6177, ¶ 22, quoting *Smith* at paragraph three of the syllabus.

{¶ 10} A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court. *Hendrix* at ¶ 12, citing *Smith* at paragraph two of the syllabus. Accordingly, this court reviews the trial court's decision for an abuse of discretion. *Kelly* at ¶ 20. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 130.

{¶ 11} We first note that several of the grounds Jordan now raises for withdrawing his plea were not raised before the trial court in the motion to withdraw his guilty plea. Specifically, Jordan asserts on appeal that the trial court failed to inform him of the maximum possible sentence he faced as well as "incorrectly informed [him] that he would receive a jury trial from citizens of the county." It is axiomatic that the failure to raise an issue in the trial court waives the right to raise the issue on appeal. *State v. Williams*, 51 Ohio St.2d 112 (1977), paragraph one of the syllabus; *City of Hamilton v. Johnson*, 12th Dist. Butler No. CA99-02-025, 1999 WL 1087024 (Dec. 3, 1999) ("a party cannot raise new issues or legal theories for the first time on appeal"). Accordingly, the arguments relating to the information provided by the trial court during the plea hearing have been waived. Jordan's remaining arguments, regarding the alleged ineffective assistance of counsel, are properly before us.

{¶ 12} Ineffective assistance of counsel can be a proper basis for seeking a post-sentence withdrawal of a guilty plea. *State v. Daugherty*, 12th Dist. Clermont No. CA2013-08-063, 2014-Ohio-2236, ¶ 16. When the alleged error underlying a motion to withdraw a guilty plea is ineffective assistance of counsel, the movant must show that (1) his counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, he would not have pled guilty. *State v. Williams*, 12th Dist. Warren No. CA2009-03-032, 2009-Ohio-6240, ¶ 15, citing *State v. Xie*, 62 Ohio St.3d 521, 524 (1992) and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Counsel is strongly presumed to have

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *State v. Williams*, 12th Dist. Clermont No. CA2012-08-060, 2013-Ohio-1387, ¶ 15.

{¶ 13} Jordan asserts he received ineffective assistance of counsel in the plea bargaining process such that he should be permitted to withdraw his guilty plea. Specifically, Jordan claims that his attorney was ineffective for advising him to plead guilty to four counts which did not take place in Warren County. Jordan contends that venue was not proper in Warren County as to Counts 3, 5, 8, and 9 as these offenses took place in Butler and Montgomery Counties.[3] Based on this alleged lack of venue, Jordan claims he could have defended against these four counts by challenging the sufficiency of the indictment and the sufficiency of the evidence to establish venue at trial. Further, Jordan claims that had he been aware of these defenses due to the lack of venue, he would have rejected the plea and insisted on going to trial.

{¶ 14} As an initial matter, we find that Jordan could have challenged his trial counsel's performance and the alleged lack of venue by directly appealing his conviction and sentence. "It is well established by pertinent Ohio case law that claims submitted in support of a Crim.R. 32.1 motion to withdraw plea that could have been raised on direct appeal, but were not raised in direct appeal, are barred by res judicata." *Hendrix*, 2012-Ohio-5610 at ¶ 11, quoting *State v. Madrigal*, 6th Dist. Lucas Nos. L-10-1142 and L-10-1143, 2011-Ohio-798, ¶ 16; *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, ¶ 59-60. In the instant case, Jordan failed to file a direct appeal of his conviction and sentence. Accordingly, because Jordan could have raised these issues on direct appeal, but did not, those matters are now barred by res judicata. However, even if the claims were not barred by res judicata, the record does not

3. Jordan has conceded that venue was proper in Warren County as to Count 1.

support Jordan's claims.

{¶ 15} Although the trial court stated there may have been some dispute regarding whether the state was able to establish venue, we find that the facts and circumstances in evidence are sufficient to demonstrate that venue was proper in Warren County as to all counts.

{¶ 16} Venue is not a material element of the offense, yet it is a fact that must be proven beyond a reasonable doubt. *State v. Birt*, 12th Dist. Butler No. CA2012-02-031, 2013-Ohio-1379, ¶ 27. Venue need not be proven in express terms; it may be established either directly or indirectly by all the facts and circumstances of the case. *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, ¶ 144; *Birt* at ¶ 27. "Venue is satisfied where there is a sufficient nexus between the defendant and the county of the trial." *State v. Behanan*, 12th Dist. Butler No. CA2009-10-266, 2010-Ohio-4403, ¶ 19, quoting *State v. Chintalapalli*, 88 Ohio St.3d 43, 45 (2000).

{¶ 17} In the present case, Jordan claims venue was improper in Warren County because counts 3, 5, and 8 occurred in Butler County, while Count 9 occurred in Montgomery County. According to Jordan, in order to establish venue, the state was required to prove that at least one element from each charged offense occurred in Warren County. Because the state did not prove or allege that one element of each of the charged offenses occurred in Warren County, Jordan argues he was entitled to an acquittal as to Counts 3, 5, 8, and 9, and therefore counsel was ineffective for advising him to plead guilty to these counts.

{¶ 18} Although Jordan is correct that venue lies in any jurisdiction in which the offense or any element of the offense was committed, Ohio's venue statute, R.C. 2901.12 further provides that when an offender commits offenses in different jurisdictions as part of a course of criminal conduct, venue lies for all the offenses in any jurisdiction in which the offender committed one of the offenses or any element of one of those offenses. R.C.

2901.12(A),(H); *see also State v. Hubbard*, 12th Dist. No. CA2006-10-248, 2008-Ohio-3379, ¶ 11. Evidence that the offenses were committed "as part of the same transaction or chain of events, or in furtherance of the same purpose or objective" or were committed with the "same or similar modus operandi" is prima-facie evidence of a course of criminal conduct. R.C. 2901.12(H)(3) and (5). Accordingly, as long as there was evidence from which the trial court could have determined beyond a reasonable doubt that one of the alleged offenses was committed in Warren County as part of a course of criminal conduct, then venue was properly established.

{¶ 19} Here, the bill of particulars specified that the offenses took place in Warren, Butler, and Montgomery Counties. The bill of particulars also states that Jordan was involved in the trafficking of drugs, specifically, crack cocaine, ecstasy, and methadone. It is evident that Jordan committed Count 1, trafficking in cocaine, when he brought cocaine into the city of Lebanon, Warren County for the purpose of selling the cocaine. As noted in the bill of particulars and by the evidence provided during a hearing on a motion to suppress, Jordan, as part of his trafficking in drugs, utilized residences in Butler and Montgomery Counties to facilitate his trafficking business. Indeed, a search of the Butler County residence revealed several grams of crack cocaine, a digital scale, and a loaded .380 handgun. According to the discovery in this case, Jordan stated he possessed the handgun "to protect himself and his drugs." In addition, a search of the Montgomery County residence further revealed several items utilized in the manufacture of crack cocaine. From this evidence there is certainly a sufficient nexus between Jordan and Warren County. In addition, although the trafficking in ecstasy (Count 3), trafficking in methadone (Count 5), and having a weapon while under disability (Count 8) occurred in Butler County, and the illegal manufacture of drugs (Count 9) occurred in Montgomery County, the record demonstrates the conduct in all counts was the selling and manufacturing of drugs. Accordingly, Jordan's conduct and activity in Warren

County, Montgomery County, and Butler County furthered the same purpose and objective, namely the selling and manufacture drugs. Therefore, there is prima facie evidence that the crimes alleged in the indictment were part of a course of criminal conduct. R.C. 2901.12(H)(3).

{¶ 20} On this record, the trial court certainly could have determined beyond a reasonable doubt that offenses alleged in the indictment were part of a course of criminal conduct and one of the offenses, trafficking crack cocaine, was committed in Warren County. Based on these facts and circumstances, Warren County had proper venue to try all of the offenses. Accordingly, we cannot say trial counsel was deficient for failing to challenge venue.

{¶ 21} In addition, there is no indication in the record that trial counsel was deficient for failing to challenge the sufficiency of the indictment. Jordan claims the indictment was insufficient because the Warren County Grand Jury exceeded its authority by indicting him on offenses which occurred outside of Warren County. Contrary to Jordan's arguments, however, the Warren County Grand Jury was well within its powers to indict him on crimes that occurred outside of Warren County where the offenses were part of a course of criminal conduct. *Jackson*, 2014-Ohio-3707 at ¶ 131. "R.C. 2901.11 and R.C. 2901.12 permit a grand jury to indict an offender for offenses that occurred outside of the county, provided that the offenses are part of the same course of criminal conduct that took place in the county in which the grand jury resides." *Id.* Therefore, counsel was not deficient for failing to move to dismiss the indictment on this basis.

{¶ 22} Notwithstanding any issues related to venue, the record simply does not support Jordan's claim that he would not have pled guilty if he was aware of the potential problems with venue. The only evidence Jordan presented to support his claim was his own self-serving affidavit, wherein he stated, "if I had been informed that Counts II-X allowed for

two defenses, an insufficient indictment and insufficient evidence to sustain a conviction, I would have rejected a plea and insisted on a trial." After considering the evidence, the trial court was not convinced that the lack of information regarding venue-related defenses justified vacating Jordan's guilty plea. After a review of the record in this case, we find the trial court did not abuse its discretion in reaching this conclusion. The record demonstrates that Jordan requested to withdraw his guilty plea over three years after he entered the plea. Such a delay affects Jordan's credibility and certainly weighs against the granting of the motion.

{¶ 23} Moreover, the record contains no indication, beyond Jordan's affidavit, that Jordan would have rejected the plea agreement. In exchange for pleading guilty, 5 of the 10 counts in the indictment against Jordan were dismissed. It is clear from Crim.R. 11 plea hearing that the plea deal was a bargained-for exchange where Jordan choose the certainty of a guilty plea and the possibility of a recommended 11-year sentence over the uncertainty of proceeding to trial and the possibility of a much greater sentence. In addition, from the plea hearing transcript, it is clear that Jordan was well aware that by pleading guilty, he was giving up the right to require the state to prove each essential element of the charges beyond a reasonable doubt.

> THE COURT: Okay. If we had a trial tomorrow I would instruct the jury that you are presumed to be innocent, that you have nothing to prove, that only the [s]tate must prove something and the [s]tate must prove that you are guilty beyond a reasonable doubt. That means at the end of the case the jury would be told that if the [s]tate failed to prove any essential element of any or all ten of the charges against you beyond a reasonable doubt then their duty as jurors would be to find you not guilty of that charge or those charges.
>
> If you plead guilty to the five charges outlined here this afternoon you are admitting your guilt to those charges and you are giving up your right to require the [s]tate to prove that guilt beyond a reasonable doubt. Do you understand that Mr. Jordan?

A: Yes.

{¶ 24} On this record, we cannot say the trial court abused its discretion in finding that Jordan failed to put forth operative facts which supported his claim and required his guilty plea to be withdrawn to correct a manifest injustice. The record is simply devoid of the type of extraordinary circumstances that would necessitate allowing Jordan to withdraw his guilty plea more than three years after sentencing. Jordan's first assignment of error is overruled.

{¶ 25} Assignment of Error No. 2:

{¶ 26} TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO REQUEST AN ACQUITTAL AFTER THE APPELLANT PLED GUILTY TO CHARGES THAT VENUE WAS NOT PROVEN IN VIOLATION OF APPELLANT'S 6TH AND 14TH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10, OF OHIO CONSTITUTION.

{¶ 27} In his second assignment of error, Jordan again claims he should be permitted to withdraw his guilty plea due to the ineffective assistance of counsel. Jordan asserts trial counsel's performance was deficient because counsel failed to request an acquittal after appellant pled guilty because the "state failed to prove that at least one element from each offense occurred in Warren County." Jordan contends he was prejudiced as he would have received a lesser sentence had counsel moved for an acquittal.

{¶ 28} As an initial matter, it appears that Jordan is raising this argument for the first time on appeal. Jordan did not raise this argument to the trial court in the motion to withdraw his guilty plea. Accordingly, this argument has been waived for purposes of appeal. *See Williams*, 51 Ohio St.2d at paragraph one of the syllabus. However, even considering Jordan's assertions, we find the argument is without merit.

{¶ 29} Venue is not jurisdictional and is also not a material element of the offense. *Birt*, 2013-Ohio-1379 at ¶ 27; *State v. Morrar*, 12th Dist. Madison No. CA2013-08-027, 2014-

Ohio-3663, ¶ 12. By pleading guilty, a defendant admits to committing the offense as charged. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶ 14; *State v. Greathouse*, 158 Ohio App.3d 135, 2004-Ohio-3402, ¶ 8 (2d Dist.). Moreover, by pleading guilty, a defendant waives the opportunity to challenge the factual issue of venue. *State v. McCartney*, 55 Ohio App.3d 170 (9th Dist.1988); *State v. Woodliff*, 11th Dist. Portage No. 2004-P-00006, 2005-Ohio-2257, ¶ 22.

{¶ 30} As Jordan pled guilty to the five offenses, the state was not required to prove venue. Rather, Jordan's guilty plea admitted venue was proper. The record from the plea hearing, as well as the change of plea and entry signed by Jordan, reflects that Jordan was aware that by pleading guilty he was admitting to committing the five offenses and consequently that the state was not required to prove his guilt beyond a reasonable doubt. Therefore, Jordan has waived the ability to challenge the factual issue of venue and counsel was not deficient for failing to request an acquittal after Jordan entered his guilty plea.

{¶ 31} Based on foregoing, Jordan's second assignment of error is overruled.

{¶ 32} Assignment of Error No. 3:

{¶ 33} THE CUMULATIVE EFFECT OF THE ERRORS VIOLATED THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CUMULATIVE EFFECT DOCTRINE.

{¶ 34} In his third and final assignment of error, Jordan argues that his plea was involuntary, unintelligent, and unknowing because of the cumulative effect of the errors by the trial court and trial counsel.

{¶ 35} According to the cumulative error doctrine, a conviction will be reversed where the cumulative effect of errors deprives a defendant of his constitutional rights, even though each error individually does not rise to the level of prejudicial error. *State v. Garner*, 74 Ohio St.3d 49, 64 (1995); *see also State v. Hoop*, 12th Dist. Brown No. CA2011-07-015, 2012-

Ohio-992, ¶ 58.

{¶ 36} Having previously found no error as set forth above, we find no cumulative error. Accordingly, Jordan's third and final assignment of error is overruled.

{¶ 37} Judgment affirmed.

PIPER, P.J., and M. POWELL, J., concur.