

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO,	:	
	:	CASE NO. CA2014-09-066
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
	:	5/18/2015
- vs -	:	
	:	
MATTHEW LEE STURGILL,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2011CR0881

D. Vincent Faris, Clermont County Prosecuting Attorney, Nicholas Horton, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103, for plaintiff-appellee

Louis Rubenstein and John D. Hill, Jr., 125 East Court Street, Suite 1000, Cincinnati, Ohio 45202, for defendant-appellant

S. POWELL, J.

{¶ 1} Defendant-appellant, Matthew Lee Sturgill, appeals from the decision of the Clermont County Court of Common Pleas denying his pro se post-sentence motion to withdraw his guilty plea. For the reasons outlined below, we affirm.

{¶ 2} On October 5, 2011, a Clermont County grand jury returned an indictment against Sturgill charging him with one count of rape in violation of R.C. 2907.02(A)(1)(b), a

first-degree felony. According to the bill of particulars, the charge stemmed from allegations Sturgill digitally penetrated his then ten-year-old niece while she was asleep recovering from a broken leg. The initial charge carried a statutory term of ten-years-to-life in prison. However, after entering into a plea agreement, Sturgill instead pled guilty to rape in violation of R.C. 2907.02(A)(2) with an agreed five-year prison term. Sturgill was also informed that he would be subject to a mandatory five-year postrelease control term and be classified as a Tier III sex offender. Sturgill did not appeal from his conviction or sentence.

{¶ 3} On June 16, 2014, approximately two and one-half years after entering his guilty plea, Sturgill filed a pro se motion to withdraw his plea. In support of his motion, Sturgill alleged the following:

Defendant was meted ineffective counsel as there was insufficient evidence all along. Defendant's counsel failed to investigate exculpatory avenues. In addition, it was because of the nature of the case that Defendant's counsel was actually in favor of conviction from the beginning.

The only reason that Defendant went along with the plea is that the prosecution threatened Defendant by stating that he would ensure that Defendant never got out of prison unless he took the deal, Defendant's innocence notwithstanding.

The trial court denied Sturgill's motion without a hearing on August 15, 2014.

{¶ 4} On September 15, 2014, Sturgill filed a timely pro se notice of appeal. Approximately two weeks later, on October 1, 2014, Sturgill filed a motion requesting the trial court appoint appellate counsel for him. Shortly thereafter, on October 6, 2014, the trial court appointed the Clermont County Public Defender's Office to serve as Sturgill's appellate counsel. However, due to a conflict of interest, the Public Defender's Officer was forced to withdraw as counsel on November 13, 2014. The trial court then appointed alternative appellate counsel for Sturgill on November 20, 2014. Yet, by that time, Sturgill had already filed his pro se appellate brief with this court on October 30, 2014, with his appointed counsel

filing an additional appellate brief on February 23, 2015.

{¶ 5} Although raising a number of arguments regarding the trial court's decision, in reviewing Sturgill's pro se appellate brief, we note that Sturgill did not set forth any assignments of error for review as required by App.R. 16(A)(3). Sturgill's appellate counsel, however, did raise one assignment of error for review, generally alleging the same arguments previously raised by Sturgill. Therefore, we will review the trial court's decision denying Sturgill's pro se post-sentence motion to withdraw his guilty plea in light of the various arguments raised in both appellate briefs. In conducting this review, we note that it is not this court's duty to "root out" arguments that can support an assignment of error, nor will this court "conjure up questions never squarely asked or construct full-blown claims from convoluted reasoning." *State v. Fields*, 12th Dist. Brown No. CA2009-05-018, 2009-Ohio-6921, ¶ 7.

{¶ 6} THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT DEFENDANT-APPELLANT'S POST-CONVICTION MOTION TO WITHDRAW HIS GUILTY PLEA.

{¶ 7} In his single assignment of error, Sturgill argues the trial court erred by denying his pro se post-sentence motion to withdraw his guilty plea. We find this claim lacks merit.

Standard of Review

{¶ 8} Pursuant to Crim.R. 32.1, "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." A defendant who seeks to withdraw a plea after the imposition of sentence, such as the case here, has the burden of establishing the existence of a manifest injustice. *State v. Williams*, 12th Dist. Clermont No. CA2012-08-060, 2013-Ohio-1387, ¶ 11, citing *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph one of the syllabus.

{¶ 9} 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." *State v. Hobbs*, 12th Dist. Warren No. CA2012-11-117, 2013-Ohio-3089, ¶ 9. "The requirement of demonstrating a manifest injustice is designed to discourage a defendant from pleading guilty to test the weight of the potential reprisal, and later attempting to withdraw the plea if the sentence was unexpectedly severe." *State v. Daugherty*, 12th Dist. Clermont No. CA2013-08-063, 2014-Ohio-2236, ¶ 14. This sets forth an extremely high standard that is allowable only in extraordinary cases. *Id.*

{¶ 10} The decision to grant or deny a motion to withdraw a guilty plea is within the trial court's sound discretion. *State v. Carter*, 12th Dist. Clinton Nos. CA2010-07-012 and CA2010-08-016, 2011-Ohio-414, ¶ 16. In turn, this court reviews a trial court's decision to deny a motion to withdraw a guilty plea under an abuse of discretion standard. *State v. Ward*, 12th Dist. Clermont No. CA2008-09-083, 2009-Ohio-1169, ¶ 8, citing *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, ¶ 32. An abuse of discretion connotes more than an error of law or judgment; it implies the trial court's attitude was arbitrary, unreasonable, or unconscionable. *State v. Kelly*, 12th Dist. Butler No. CA2013-01-020, 2013-Ohio-3675, ¶ 20; *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 130. A decision is unreasonable when it is "unsupported by a sound reasoning process." *State v. Abdullah*, 10th Dist. Franklin No. 07AP-427, 2007-Ohio-7010, ¶ 16, citing *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990).

Ineffective Assistance of Counsel

{¶ 11} Initially, Sturgill argues the trial court erred by denying his pro se post-sentence motion to withdraw his guilty plea because he received ineffective assistance of counsel. We disagree.

{¶ 12} Ineffective assistance of counsel is a proper basis for seeking a post-sentence

withdrawal of a guilty plea. *State v. Eberle*, 12th Dist. Clermont No. CA2009-10-065, 2010-Ohio-3563, ¶ 56; *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, ¶ 8 (8th Dist.). When an alleged error underlying a motion to withdraw a guilty plea is the ineffective assistance of counsel, the defendant must show (1) his counsel's performance was deficient, and (2) that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty. *State v. Finkbine*, 12th Dist. Warren No. CA2005-06-068, 2006-Ohio-1788, ¶ 7; *State v. Xie*, 62 Ohio St.3d 521, 524 (1992). Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *State v. Hendrix*, 12th Dist. Butler No. CA2012-05-109, 2012-Ohio-5610, ¶ 14.

{¶ 13} In support of his ineffective assistance of counsel claim, Sturgill argues his trial counsel was ineffective for failing to investigate his claim that police bribed him into confessing to the crime with the promise of cigarettes and a reduction in his previously imposed community service obligations resulting from an unrelated misdemeanor assault conviction. Sturgill also argues his trial counsel was ineffective for failing to request a medical examination of the victim, as well as by not advising him of the "collateral consequences of his conviction;" namely, that he would be subject to a mandatory five-year postrelease control term and be classified as a Tier III sex offender. Sturgill, however, did not raise any of these arguments with the trial court as part of his pro se post-sentence motion to withdraw his guilty plea.

{¶ 14} "It is well-established that '[w]hen a defendant fails to raise a specific argument in a post-sentence motion to withdraw his plea, he forfeits the issue for purposes of appeal.'" *Daugherty*, 2014-Ohio-2236 at ¶ 9, quoting *State v. Walton*, 4th Dist. Washington No. 13CA9, 2014-Ohio-618, ¶ 14. Therefore, because Sturgill did not raise these issues as part of his motion submitted to the trial court, we find these issues are waived and we need not consider them for the first time on appeal. *State v. McGlosson*, 12th Dist. Butler No.

CA2012-03-057, 2013-Ohio-774, ¶ 16; *State v. Guzman-Martinez*, 12th Dist. Warren No. CA2010-06-059, 2011-Ohio-1310, ¶ 9.

{¶ 15} Regardless, even if Sturgill had not waived these issues, we would still find no merit to Sturgill's ineffective assistance of counsel claims. For instance, as it relates to Sturgill's argument that his trial counsel was ineffective for failing to investigate his claim that the police bribed him into confessing to the crime, such a claim is in no way supported by the record. Moreover, even if Sturgill's allegations were true, "[a] mere suggestion that cooperation may result in more lenient treatment is neither misleading nor unduly coercive, as people 'convicted of criminal offenses generally are dealt with more leniency when they have cooperated with the authorities.'" *State v. Huysman*, 12th Dist. Warren No. CA2005-09-107, 2006-Ohio-2245, ¶ 22, quoting *State v. Stringham*, 2d Dist. Miami No. 2002-CA-9, 2003-Ohio-1100, ¶ 16, quoting *State v. Farley*, 2d Dist. Miami No. 2002-CA-2, 2002-Ohio-6192, ¶ 44.

{¶ 16} In addition, as it relates to Sturgill's claim his trial counsel was ineffective for failing to request a medical examination of the victim, we fail to see how this would have provided any evidence favorable to the defense. As the record indicates, both Sturgill and the victim made statements to police directly implicating him as the perpetrator of the crime. As the victim stated: "I felt something touching me in my pepe. And I wouk (sic) up and [Sturgill] was touching me there and I tould (sic) him to get off of me and he did." Sturgill himself even admitted to "massaging [the victim's] vagina" before she woke up and told him to stop. Therefore, after a thorough review of the record, we find the failure to request a medical examination of the victim does not amount to ineffective assistance of counsel and could just as easily be deemed a product of sound trial strategy. "[E]ven debatable trial tactics and strategies do not constitute ineffective assistance of counsel." *State v. Davis*, 12th Dist. Butler No. CA2012-12-258, 2013-Ohio-3878, ¶ 22.

{¶ 17} Finally, in regards to his claim that his counsel was ineffective for failing to inform him that he would be subject to a mandatory five-year postrelease control term and be classified as a Tier III sex offender, Sturgill readily admits the transcript of the plea and sentencing hearings "belies the notion that [he] was unaware of the collateral sanctions being imposed against him." We agree that the record in this case firmly establishes that the trial court specifically informed Sturgill of both requirements prior to him entering his guilty plea.

In fact, as the trial court stated at the plea hearing:

THE COURT: And I believe that it would be a mandatory five year post-release control. Are you aware of that, sir?

THE DEFENDANT: Yes.

[THE STATE]: As well as a Tier III sex offense, Judge.

THE COURT: Okay. And the Tier III sex offense will require you to register every 90 days for the life – for your lifetime. Do you understand that?

THE DEFENDANT: Yes, Sir.

{¶ 18} In addition, Sturgill's written plea form, a form he acknowledges signing after consulting with his trial counsel, also explicitly states that "after my prison release I will have 5 years of mandatory post release [sic] control under conditions determined by the parole board." Therefore, Sturgill's claims that his trial counsel was ineffective for failing to inform him he would be subject to a mandatory five-year postrelease control term and be classified as a Tier III sex offender are not supported by the record and do not constitute ineffective assistance of counsel.

{¶ 19} Next, although not particularly clear, Sturgill argues his counsel was ineffective for advising him to accept the state's favorable plea deal when considering the unlikelihood and alleged physical impossibility of the victim's story. Specifically, as Sturgill argues in his pro se appellate brief:

If the defendant's victim was sleeping in a chair, how could the defendant have touched his victim in her vagina? The defendant would have to undo his victim's pants, pick her up, and pull down her pants, all at the same time without waking her, or her father, or her brother up.

{¶ 20} However, while Sturgill claims otherwise, it is now universally accepted that by entering his guilty plea, Sturgill explicitly admitted his guilt to the substantive crime. *State v. Pearce*, 12th Dist. Clermont No. CA2013-01-001, 2013-Ohio-3484, ¶ 8. Moreover, as this court has stated previously, "an attorney's advice to take a plea deal is not ineffective assistance of counsel." *State v. Robinson*, 12th Dist. Butler No. CA2013-05-085, 2013-Ohio-5672, ¶ 23, quoting *State v. Shugart*, 7th Dist. Mahoning No. 08 MA 238, 2009-Ohio-6807, ¶ 37. This is particularly true here considering the fact Sturgill specifically acknowledged as part of his written plea form that he was "satisfied with [his] attorney's advice, counsel, and competence." Therefore, Sturgill's arguments regarding the alleged ineffective assistance of his trial counsel are without merit and overruled.

"Coerced" Guilty Plea

{¶ 21} Sturgill also claims the trial court erred by denying his pro se post-sentence motion to withdraw his guilty plea because he was "coerced" into pleading guilty. In support of this claim, Sturgill takes issue with the fact that his trial counsel informed him "the penalty would be harsher if [he] wouldn't take the guilty plea." According to Sturgill, this constituted "constant pressure from his defense counsel to take the deal." We again disagree.

{¶ 22} As the record makes clear, Sturgill entered into the favorable plea agreement after discussing the matter with his trial counsel, weighing the options he faced in light of the significant evidence against him. This constitutes nothing more than counsel's attempts to provide Sturgill with informed advice, to relay worst case scenarios to him, and to make recommendations on how to proceed. In light of this advice, Sturgill ultimately agreed to plead guilty to rape in violation of R.C. 2907.02(A)(2), which carried an agreed five-year

prison sentence. This is in stark contrast to the indicted charge of rape in violation of R.C. 2907.02(A)(1)(b), a crime that carried a statutory term of ten-years-to-life in prison. Therefore, Sturgill's claim that he was somehow "coerced" into pleading guilty by accepting the state's favorable plea deal is likewise without merit and overruled.

Various Additional Arguments and Undue Delay

{¶ 23} Sturgill makes a variety of other claims regarding why he believes the trial court erred by denying his pro se post-sentence motion to withdraw his guilty plea. These include claims that he should be permitted to withdraw his guilty plea due to the emotional distress he was suffering following his brother's death, as well as allegations that the audio recording of his confession to the crime had been altered. However, not only did he fail to specifically raise these additional claims as part of his motion submitted to the trial court, similar to his alleged police bribery claim, there is nothing in the record to support these additional allegations. Rather, as the record reveals, prior to entering his guilty plea, Sturgill stated that he had his "head straight now" after taking his medication. Therefore, Sturgill's various additional claims are also without merit and overruled.

{¶ 24} In reaching this decision, we note that Sturgill did not file his motion to withdraw his guilty plea until approximately two and one-half years later. As this court has found, "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. Jordan*, 12th Dist. Warren No. CA2014-04-051, 2015-Ohio-575, ¶ 9, quoting *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph three of the syllabus. Sturgill served nearly half of his five-year prison term before he filed his post-sentence motion to withdraw his guilty plea, a fact we find clearly militates against the granting of Sturgill's motion. Therefore, having found no merit to any of the various claims advanced by Sturgill herein, we find the trial court did not abuse its discretion

in denying Sturgill's pro se post-sentence motion to withdraw his guilty plea.

{¶ 25} Judgment affirmed.

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