

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2014-12-255
 :
 - vs - : OPINION
 : 7/27/2015
 :
 MITCHELL PAUL SIMON, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2013-12-1973

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RINGLAND, J.

{¶ 1} Defendant-appellant, Mitchell Simon, appeals the denial of his petition for postconviction relief ("PCR") and motion to withdraw guilty plea in the Butler County Court of Common Pleas.

{¶ 2} The background facts of the present case were set forth in this court's prior decision in *State v. Simon*, 12th Dist. Butler No. CA2014-06-139, 2015-Ohio-970, ¶ 2-3, 5.

When Simon was 16 years old, he attempted to kill his parents by setting his family's home on fire while his parents were sleeping in separate bedrooms. Simon used an accelerant to start fires in two separate areas of the upstairs near the bedrooms. Fire investigators also found rope tied around the doorknobs of the bedroom doors where Simon's parents slept so that they could not open the doors to escape. Simon's parents survived the fire, and Simon was eventually arrested.

Simon originally appeared in the Butler County Juvenile Court for a probable cause hearing. The juvenile court found that probable cause existed, and then transferred the case to the common pleas court pursuant to Ohio's mandatory bindover statutes. Simon was therefore tried as an adult. Simon was indicted on two counts of attempted aggravated murder and one count of aggravated arson. He entered a plea of not guilty by reason of insanity, and also challenged his competency to stand trial. The trial court ordered psychiatric evaluations as to Simon's claims of insanity and incompetency. The evaluations determined that Simon did not suffer from a severe mental defect and that he was competent to stand trial. Simon later withdrew his not guilty by reason of insanity plea and entered a guilty plea to each charge.

* * *

The trial court reviewed the principles and purposes of sentencing, and referred to the evaluations of Simon's mental health before ordering nine-year sentences on each of the three charges, to be served concurrently.

{¶ 3} Subsequently, Simon filed a petition for PCR and a motion to withdraw guilty plea on the basis that he was not provided effective assistance of counsel. Simon attached affidavits from himself, his father, mother, and uncle in support of the petition and motion.¹ Those affidavits alleged that Simon's counsel misinformed him of the terms of his plea

1. Simon makes reference to affidavits submitted by Andrea Simon and Dr. Samuel T. Robertson that were attached to a motion for reconsideration filed with the trial court following that court's denial of Simon's petition for PCR and motion to withdraw guilty plea. The trial court denied the motion for reconsideration. This court then struck Simon's amended notice of appeal that sought to include the judgment denying his motion for reconsideration because a motion for reconsideration at the trial level is a nullity. Accordingly, the affidavits of Andrea Simon and Dr. Samuel T. Robertson were not before the trial court when it issued its decision denying Simon's petition for PCR and motion to withdraw guilty plea, and thus may not be considered by this court in the present appeal.

agreement. The trial court denied the petition and motion without conducting an evidentiary hearing.

{¶ 4} Simon now appeals the trial court's decision, raising four assignments of error for review. Because of the interrelation of Simon's first and third assignments of error and second and fourth assignments of error, respectively, we will discuss them together.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT ERRED IN DENYING APPELLANT'S PETITION FOR POST-CONVICTION RELIEF.

{¶ 7} Assignment of Error No. 3:

{¶ 8} THE TRIAL COURT ERRED IN DENYING APPELLANT A HEARING ON HIS PETITION FOR POST CONVICTION RELIEF.

{¶ 9} Within these assignments of error, Simon argues that his petition should have been granted because he was denied his constitutional right to effective assistance of counsel. In the alternative, Simon argues he should have been afforded an evidentiary hearing to prove that he was denied effective assistance of counsel.

{¶ 10} To establish a claim of ineffective assistance of counsel, a defendant must show that his or her counsel's actions were outside the wide range of professionally competent assistance and prejudice resulted by reason of counsel's actions. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Sheldon*, 12th Dist. Brown No. CA2013-12-018, 2014-Ohio-5488, ¶ 40. Accordingly, counsel's performance will not be deemed ineffective unless (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by that deficient performance in that there is a reasonable probability but for counsel's deficient performance, the outcome of trial would have been different. *Strickland* at 687-688.

{¶ 11} A trial court's decision to summarily deny a postconviction petition without

holding an evidentiary hearing pursuant to R.C. 2953.21(C) will not be reversed absent an abuse of discretion. *State v. Francis*, 12th Dist. Butler No. CA2013-05-078, 2014-Ohio-443, ¶ 22.

{¶ 12} Under R.C. 2953.21(C) "a trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *State v. Calhoun*, 86 Ohio St.3d 279 (1999) at paragraph two of the syllabus. When a trial court reviews a postconviction relief petition filed pursuant to R.C. 2953.21, the court "should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact." *Id.* at paragraph one of the syllabus.

{¶ 13} In *Calhoun*, the Ohio Supreme Court determined that "[t]o hold otherwise would require a hearing for every postconviction relief petition[,] and that because R.C. 2953.21 "clearly calls for discretion in determining whether to grant a hearing, accepting all supporting affidavits as true is certainly not what the statute intended." *Id.* Therefore, the court held that "[t]he trial court may, under appropriate circumstances in postconviction relief proceedings, deem affidavit testimony to lack credibility without first observing or examining the affiant." (Emphasis added.) *Id.* "That conclusion is supported by common sense, the interests of eliminating delay and unnecessary expense, and furthering the expeditious administration of justice." *Id.*

{¶ 14} The court in *Calhoun* also discussed the factors a trial court should consider in determining the credibility of supporting affidavits in PCR proceedings. *Id.* at 284-285. *Calhoun* states that a trial court should consider "all relevant factors" in determining the

credibility, or lack thereof, of supporting affidavits submitted in PCR proceedings, including:

(1) whether the judge reviewing the postconviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial.

Id. at 285, citing *State v. Moore*, 99 Ohio App.3d 748 (1st Dist.1994).

{¶ 15} *Calhoun* also states that "[d]epending on the entire record, one or more of these or other factors may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility[,]" and that "[s]uch a decision should be within the discretion of the trial court." *Id.*

{¶ 16} In determining that the affidavits attached to Simon's petition for PCR were not credible, the trial court specifically considered the factors set forth in *Calhoun*. The trial court found that,

[f]irst, this Court was the court that was assigned this matter and heard all matters relating to the case in chief. Secondly, the court finds that all four affidavits contain identical language, or otherwise appear to have been drafted by the same person. Additionally, all four affidavits reference statements made by trial counsel, Brad Kraemer to the affiants. Fourth, all the affidavits are from family members of the defendant. Mr. Simon's mother, father and Uncle all submitted affidavits in support of their son/nephew, Mitchell Simon.

Further, any evidence of a "promised" sentence at either the time of the plea or at disposition is absent. No mention of a "promised" sentence or "agreed" sentence is in the transcript because there was no "promised" sentence or "agreed" sentence.

{¶ 17} Having determined that Simon's affidavits lacked credibility, the trial court found no evidence to support Simon's claim that his counsel was ineffective. It is a well-established principle that this court should not substitute its own judgment regarding credibility for that of

the trial court. Accordingly, we do not find that the trial court abused its discretion in denying Simon's petition for PCR on the basis of ineffective assistance of counsel where the trial court found that the attached affidavits lacked credibility pursuant to the factors set forth in *Calhoun*.

{¶ 18} In light of the foregoing, having found that the trial court did not abuse its discretion in denying Simon's petition for PCR without a hearing, Simon's first and third assignments of error are overruled.

{¶ 19} Assignment of Error No. 2:

{¶ 20} THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO WITHDRAW PLEA.

{¶ 21} Assignment of Error No. 4:

{¶ 22} THE TRIAL COURT ERRED IN DENYING APPELLANT A HEARING ON HIS MOTION TO WITHDRAW PLEA.

{¶ 23} Within these assignments of error, Simon argues that his motion to withdraw guilty plea should have been granted because it was not made voluntarily and intelligently. In the alternative, Simon argues he should have been afforded an evidentiary hearing to prove that his plea was not made voluntarily and intelligently.

{¶ 24} 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).

{¶ 25} In addition, a trial court is not required to hold an evidentiary hearing on a motion to withdraw a guilty plea unless the defendant establishes a reasonable likelihood that a withdrawal of his plea is necessary to correct a manifest injustice. *State v. Williams*, 12th Dist. Warren No. CA2009-03-032, 2009-Ohio-6240, ¶ 14

{¶ 26} This court has recognized that 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.

{¶ 27} "A trial court's decision regarding a post-sentence motion to withdraw a guilty plea is reviewed on appeal under an abuse of discretion standard." *State v. Rose*, 12th Dist. Butler CA2010-03-059, 2010-Ohio-5669, ¶ 15. 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. Robinson*, 12th Dist. Butler No. CA2013-05-085, 2013-Ohio-5672, ¶ 14.

{¶ 28} Simon argues that the trial court erred in denying his motion to withdraw guilty

plea because his counsel erroneously informed him that he would receive a maximum of three years in prison with the potential for judicial release after six months. After a review of the record, we do not find that the trial court abused its discretion in denying Simon's motion to withdraw guilty plea without an evidentiary hearing.

{¶ 29} As discussed above, the trial court found that the affidavits attached to Simon's motion from himself, his mother, father, and uncle in support of the motion lacked credibility. And we again recognize that this court should not substitute its own judgment regarding credibility for that of the trial court. Furthermore, at the plea hearing, the following exchange took place:

THE COURT: Has anyone made you any promises in exchange for this plea?

[SIMON]: No, sir.

* * *

THE COURT: Okay. Now you understand, sir, that Count I is attempted aggravated murder and carries with it a possibility of 11 years in prison and a \$20,000 fine. Count II is attempted aggravated murder. Again, that carries with it 11 years in prison and a \$20,000 fine. And Count III is attempted aggravated arson. That carries with it a maximum of 11 years in prison and a \$20,000 fine. You understand that?

[SIMON]: Yes, sir.

THE COURT: You understand, sir, that you're exposing yourself to the possibility of being sentenced to 33 years in prison and being fined \$60,000?

[SIMON]: Yes, sir.

{¶ 30} In addition, Simon signed a plea form which set forth the potential maximum prison terms and acknowledged that no promises were made in return for the plea. At no point did Simon make mention of any alleged promises regarding a lenient sentence. Based upon the plea hearing, plea form, and the trial court's determination that Simon's affidavits

lacked credibility, the trial court did not err in finding that Simon failed to establish a reasonable likelihood that a withdrawal of his plea was necessary to correct a manifest injustice. Therefore, we do not find that the trial court abused its discretion in denying Simon's motion to withdraw guilty plea without conducting an evidentiary hearing.

{¶ 31} In light of the foregoing, having found that the trial court did not abuse its discretion in denying Simon's motion to withdraw guilty plea without an evidentiary hearing, Simon's second and fourth assignments of error are overruled.

{¶ 32} Judgment affirmed.

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