

[Cite as *State v. Degaro*, 2009-Ohio-2966.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-09-227
- vs -	:	<u>OPINION</u> 6/22/2009
STEVEN J. DEGARO,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2007-03-0406

Robin N. Piper, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011-6057, for plaintiff-appellee

Gary A. McGee, 332 South Front Street, Hamilton, OH 45011, for defendant-appellant

YOUNG, J.

{¶1} Defendant-appellant, Steven Degaro, appeals the decision of the Butler County Court of Common Pleas denying his post-sentence motion to withdraw his guilty plea without an evidentiary hearing.

{¶2} Appellant was indicted in 2007 on one count of violating a protection order, R.C. 2919.27(A)(1), a felony of the third degree, and one count of menacing by stalking,

R.C. 2903.211, a felony of the fourth degree. On April 19, 2007, appellant pled guilty to the third-degree felony as charged; the fourth-degree felony was merged. After completion of a presentence investigation report, he was sentenced to four years in prison on June 5, 2007. On July 16, 2008, through new counsel, appellant moved to withdraw his guilty plea pursuant to Crim.R. 32.1 on the ground his plea was not knowing and voluntary due to ineffective assistance of trial counsel. A hearing was held on the motion.

{¶3} At the hearing, appellant argued his trial counsel was ineffective when he failed to receive and review recordings of telephone calls made by appellant to the victim, before allowing appellant to plead guilty. In support of his motion, appellant attached two affidavits. One was appellant's own affidavit which asserted that the "recordings [did] not contain any threats of violence by [appellant] against the victim;" and that "[he] would have never plead guilty if [trial counsel] had told [him] he did not listen to the recordings or had listened to the recordings and did not hear a threat of physical violence by [appellant] to the victim." The other affidavit was from appellant's newly retained counsel.¹ Based on the affidavits, appellant argued that his guilty plea was not knowing, intelligent, and voluntary, but rather, was a blind plea; he then requested that an evidentiary hearing be held as an injustice had occurred.

{¶4} The trial court denied the motion without an evidentiary hearing, stating: "there has not been any demonstration due to the prima facie demonstration that would manifest injustice that would justify this Court to any legal argument or evidence on a

1. In his affidavit, appellant's attorney asserted that trial counsel told him he had never listened to the recordings; appellant's attorney listened to the recordings and did not believe there was any threat of physical harm by appellant to the victim; and appellant's attorney believed the content of the recordings "would not cause the 'mental distress' required under the menacing by stalking statute." The record does

motion to withdraw a guilty pleas as envisioned in [Crim.R.] 32.1."

{¶15} Appellant appeals, raising two assignments of error which will be considered together.

{¶16} Assignment of Error No. 1:

{¶17} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY DENYING APPELLANT AN EVIDENTIARY HEARING ON HIS MOTION TO SET ASIDE PLEA."

{¶18} Assignment of Error No. 2:

{¶19} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY FAILING TO GRANT THE MOTION TO SET ASIDE GUILTY PLEA."

{¶10} Crim.R. 32.1 provides that a trial court may grant a defendant's post-sentence motion to withdraw a guilty plea only to correct manifest injustice. Therefore, "[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* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. 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. Taylor*, Madison App. No. CA2007-12-037, 2009-Ohio-924, ¶12, citing *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266. Under such standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. *Smith* at 264.

{¶11} A Crim.R. 32.1 motion "is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of

not indicate that the trial court listened to the recordings (which were attached to appellant's motion) before denying appellant's motion to withdraw his guilty plea. As a result, we have not listened to the recordings.

the motion are matters to be resolved by that court." *Smith* at 264. Generally, a self-serving affidavit of the movant is insufficient to demonstrate manifest injustice. *State v. Heath*, Warren App. No. CA2006-03-036, 2006-Ohio-7045, ¶9. Absent an abuse of discretion, an appellate court will not reverse a trial court's denial of a motion to withdraw a guilty plea. *Id.* at ¶10. Abuse of discretion implies that the trial court's attitude is arbitrary, unreasonable, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶12} Ineffective assistance of counsel is a proper basis for seeking post-sentence withdrawal of a guilty plea. *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, ¶8. 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. *Heath*, 2006-Ohio-7045 at ¶8, citing *State v. Xie* (1992), 62 Ohio St.3d 521.

{¶13} A trial court need not hold an evidentiary hearing on every post-sentence motion to withdraw a guilty plea. *Heath* at ¶8. A trial court need not hold such a hearing where the record indicates the movant is not entitled to relief. *Mays* at ¶6. However, an evidentiary hearing on a post-sentence motion to withdraw a guilty plea is required if the facts alleged by the defendant and accepted as true would require the court to permit that plea to be withdrawn. *Id.*; *State v. Hamed* (1989), 63 Ohio App.3d 5. "The movant must establish a reasonable likelihood that a withdrawal of his plea is necessary to correct a manifest injustice before a trial court must hold [an evidentiary] hearing on his motion." *State v. Stewart*, Greene App. No. 2003-CA-28, 2004-Ohio-3574, ¶6.

{¶14} Appellant argues that his trial counsel was ineffective because he failed to receive and review recordings of telephone calls made by appellant to the victim, before allowing appellant to plead guilty. Appellant asserts that without the recordings, there was no evidence the victim suffered mental distress. Consequently, appellant argues, his guilty plea was not entered knowingly, voluntarily, and intelligently. We note that appellant does not allege that the trial court failed to comply with Crim.R. 11 when he entered his plea, and we have not been provided with a transcript of the plea hearing. We therefore examine appellant's guilty plea from the stand point of his ineffective assistance of counsel assertion.

{¶15} Effective representation carries with it a duty to investigate. See *State v. Bradley* (1989), 42 Ohio St.3d 136. The reasonableness of counsel's determination regarding the extent, method, and scope of any criminal pretrial discovery necessarily depends upon the particular facts and circumstances of each case. See *State v. Wilson* (Oct. 22, 1992), Cuyahoga App. No. 61199.

{¶16} Upon reviewing the evidence submitted by appellant in support of the withdrawal of his guilty plea, we find that appellant has failed to show a manifest injustice warranting the withdrawal of his guilty plea or that the trial court erred in failing to hold an evidentiary hearing on the motion.

{¶17} The record does not indicate, and appellant does not claim, that his trial counsel failed to conduct any pretrial investigation; only that he failed to receive and review recordings of phone calls made by appellant to the victim. Nor does the record show, and appellant does not claim, that his trial counsel failed to interview him or the victim in preparing the case. During the hearing on appellant's Crim.R. 32.1 motion, the

prosecutor stated that the parties had "extensive pretrial discussions and plea discussions regarding the evidence in [the] case. Actually, at the very beginning, [trial counsel] knew the case better than [the prosecutor], and discussed it at length prior to entering a plea."

{¶18} Further, the recordings of the phone calls appellant claims his trial counsel failed to investigate were phone calls made by appellant to the victim. Thus, appellant knew the content of the evidence against him and knowingly and voluntarily chose to plead guilty. See *State v. Gibbs* (June 16, 1997), Washington App. No. 96CA44 (finding there was no ineffective assistance of counsel where tapes not investigated by trial counsel were conversations between the defendant and a police informant and where the defendant knew the content of the evidence against him and chose to plead guilty); *Wilson*, Cuyahoga App. No. 61199 (given the nature of felonious assault, defendant himself would know of any applicable defense or potential mitigating circumstances).

{¶19} We find that the cases cited by appellant are not akin to the ineffective assistance of trial counsel alleged here. In *State v. Kidd*, 168 Ohio App.3d 382, 2006-Ohio-4008, the defendant, pursuant to a plea agreement, pled guilty to trafficking in crack cocaine, thereby admitting he knowingly sold or offered to sell crack cocaine in an amount exceeding five grams. The Second Appellate District held that an evidentiary hearing was required on the defendant's Crim.R. 32.1 motion where the record showed that lab reports not seen by the defendant and not sought by his trial counsel before the guilty plea revealed that the amount of crack cocaine was less than five grams. *Id.* at ¶14.

{¶20} The *Hamed* decision, 63 Ohio App.3d 5, involved severely and

undisputedly deficient representation by trial counsel. In *Hamed*, the defendant sought to withdraw his post-sentence no contest plea on the ground his trial counsel was ineffective. The defendant alleged his trial counsel: failed to discuss the facts of the case with him or interview potential witnesses; disregarded information the defendant produced which identified the true offender; told the defendant he would be found guilty whether he had committed the crime (trafficking in food stamps) or not; advised him to plead no contest in order to resolve the case without offending the trial judge; and failed to discuss plausible defenses, alternative strategies, and the nature and consequences of the no contest plea. Finding that if the defendant's allegations were true, his attorney failed to make even minimal, rudimentary preparations to represent his client's interests and did little more than stand by his client's side at the plea hearing, the Eighth Appellate District held that the defendant's allegations required an evidentiary hearing. *Id.* at 7-8.

{¶21} In *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813, the defendant moved to withdraw his guilty plea to pandering obscenity involving a minor on the ground of ineffective assistance of counsel. The defendant argued his trial counsel erroneously advised him to plead guilty due to her misunderstanding that one of the charges was based upon the description of an actual sexual molestation of a real minor when it was in fact based upon a purely fictitious, personal journal involving fictional minors. Noting the constitutional significance between pornographic depictions of real children and similar depictions of fictional children, which in turn affects the possible constitutional and statutory defenses, the Tenth Appellate District held that trial counsel's ineffective assistance constituted manifest injustice sufficient to allow the post-

sentence withdrawal of the defendant's guilty plea. Id. at ¶34.

{¶22} We therefore find that the trial court did not abuse its discretion in overruling appellant's motion to withdraw his guilty plea and in failing to hold an evidentiary hearing on the motion. The record is simply devoid of the type of extraordinary circumstances that would necessitate allowing appellant to withdraw his guilty plea more than a year after sentencing. Appellant's two assignments of error are overruled.

{¶23} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.