

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-03-032
- vs -	:	<u>OPINION</u> 11/30/2009
LINDSEY M. WILLIAMS	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 07CR23884

Rachel A. Hutzel, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

George A. Katchmer, 115 Brookside Drive, Yellow Springs, Ohio 45387, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Lindsey Williams, appeals the decision of the Warren County Court of Common Pleas overruling his postsentence motion to withdraw his guilty plea without holding an evidentiary hearing.

{¶2} Appellant pled guilty and was sentenced in November 2007 on numerous criminal offenses related to an incident involving both a police stand-off, in which more

than 100 rounds were reportedly fired by appellant, and a police chase.¹ Appellant subsequently filed a Crim.R. 32.1 postsentence motion to withdraw his guilty plea in 2009, alleging that, due to the ineffective assistance of trial counsel, his plea was not knowingly, intelligently and voluntarily given. Appellant attached affidavits and other materials to his motion and memorandum. The trial court denied the motion without an evidentiary hearing.

{¶13} Appellant appeals the trial court's decision, presenting a single assignment of error for our review.

{¶14} Assignment of Error:

{¶15} "A HEARING MUST BE GRANTED ON A MOTION TO WITHDRAW PLEA IF THERE ARE FACTS OUTSIDE OF THE RECORD THAT DEMONSTRATE THAT THE PLEA WAS NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY GIVEN DUE TO THE INEFFECTIVENESS OF COUNSEL AND THE COURT MAY NOT DISCOUNT THE STATEMENTS OF SUPPORTING AFFIANTS IN AN ARBITRARY MANNER TO DENY A HEARING[.]" [sic]

{¶16} Appellant specifically challenges the trial court's refusal to hold an evidentiary hearing. The trial court determined that no manifest injustice existed to permit the withdrawal of appellant's plea. Therefore, we will review the trial court's finding of no manifest injustice in reference to appellant's assignment of error.

{¶17} Appellant argues that an evidentiary hearing was warranted to show his trial counsel neglected to secure and use all of the testimony and audio and videotapes he claims would have assisted in trial preparation or plea negotiation. Appellant avers that he did not realize that his trial counsel failed to obtain all of this evidence until after

1. The offenses appellant pled guilty to included multiple counts of felonious assault with gun specifications, aggravated robbery with a gun specification, and failure to comply with an order of a police

the plea and sentencing and, had he been aware of his counsel's failure, he would not have pled guilty.

{¶18} According to appellant, this evidence would prove: he did not fire in the officers' direction and did not attempt to harm the police officers, he fled with weapons in a police car in an attempt to surrender, and he was unarmed when shot by police at the conclusion of the police chase.

{¶19} Appellant submitted his own affidavit averring to his motives during his encounter with police and the alleged shortcomings of his trial counsel's representation. He presented affidavits from his twin brother and his neighbors, indicating, in part, that appellant became agitated after police "tazed" his twin brother, and that appellant was an excellent marksman and could have easily shot the police officers if he had wanted to harm them. Appellant claimed videotapes from the scene of the stand-off would have shown that officers were not hiding behind the police cruisers pierced by bullets. Further, appellant asserts that counsel did not obtain audio or video that purportedly confirmed appellant attempted to surrender during the police chase and was not holding a weapon when he was shot.

{¶110} A defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of a manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus; Crim.R. 32.1.

{¶111} 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. Under such a standard, a postsentence withdrawal motion is allowable only in extraordinary cases. *Smith* at 264; *State v. Minkner*, Champaign App. No. 2009 CA 16,

2009-Ohio-5625, ¶25 (manifest injustice identifies a fundamental flaw in the path of justice so extraordinary that defendant could not have sought redress from the resulting prejudice through another form of application reasonably available to him).

{¶12} 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.

Minkner.

{¶13} A motion made pursuant to Crim.R. 32.1 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 the motion are matters to be resolved by that court. *Smith*, 49 Ohio St.2d at paragraph two of the syllabus.

{¶14} A trial court need not hold an evidentiary hearing on every postsentence motion to withdraw a guilty plea. *State v. Degaro*, Butler App. No. CA2008-09-227, 2009-Ohio-2966, ¶13. A defendant 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. *Id.* (Internal citations omitted.)

{¶15} 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. See *State v. Xie* (1992), 62 Ohio St.3d 521, 524, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

{¶16} Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See *Strickland* at 690; see, also, *State v. Wilson* (Oct. 22, 1992), Cuyahoga App. No. 61199, 1992 WL 309378 at *1.

{¶17} Appellant challenges the trial court's determination of the credibility of the affidavits attached to his motion to withdraw his plea. However, a trial court may, in the exercise of its discretion, judge the credibility of affidavits submitted in support of a motion to withdraw a plea in determining whether to accept the affidavits as true statements of fact. See *State v. Mays*, 174 Ohio App.3d 681, 2008-Ohio-128, ¶14. To hold otherwise would require a hearing every time a defendant filed a motion to withdraw a guilty plea. *Id.*; *State v. Goney* (June 2, 2000), Montgomery App. No. 17799, 2000 WL 706831, at *3.

{¶18} The trial court noted that numerous subpoenas were issued on appellant's behalf prior to his decision to change his plea, and appellant was represented by three attorneys at the plea hearing and at the sentencing hearing held more than a month after the plea.² The trial court observed that, during the Crim.R. 11 colloquy, appellant expressed no dissatisfaction with his counsel's representation. Further, appellant did not challenge the statement of facts read into the record at the plea hearing.

{¶19} The record indicates that appellant neglected to take the opportunities available during and since his plea to inform the trial court of the evidence he now argues was vital to his decision to admit guilt. See *Smith*, 49 Ohio St.2d at paragraph three of syllabus (undue delay between occurrence of alleged cause for withdrawal of guilty plea and filing of motion under Crim.R. 32.1 is a factor adversely affecting credibility of movant and militating against granting of the motion); cf. *State v. Heath*, Warren App. No. CA2006-03-036, 2006-Ohio-7045, ¶9 (generally, a self-serving affidavit of movant is insufficient to demonstrate manifest injustice).

{¶20} Appellant has failed to show that he would have not otherwise pled, and

2. In his affidavit, appellant named one of the three attorneys as the trial counsel who was allegedly ineffective.

failed to establish a reasonable likelihood that a withdrawal of his plea was necessary to correct a manifest injustice to warrant a hearing.

{¶21} The trial court did not abuse its discretion in finding no manifest injustice requiring the withdrawal of his guilty plea and did not err in refusing to hold an evidentiary hearing on the motion. *State v. Coniglio*, Cuyahoga App. No. 84302, 2004-Ohio-6909, ¶6 (hearing is not necessary if the facts as alleged by the defendant, even if accepted as true, would not require the court to grant the motion to withdraw his plea); see *Wilson*, at *2 (given the nature of felonious assault, defendant himself would know of any applicable defense or potential mitigating circumstances); see *State v. Straubhaar*, Stark App. No. 2008 CA 00106, 2009-Ohio-4757, ¶63 (cannot say counsel was ineffective for failing to subpoena records when there is no evidence that they existed); see *State v. Otte*, 74 Ohio St.3d 555, 566, 1996-Ohio-108 (defendant must demonstrate more than vague speculations of prejudice to show counsel was ineffective).

{¶22} Appellant's single assignment of error is overruled.

{¶23} Judgment affirmed.

YOUNG and RINGLAND, JJ., concur.