

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

RUSSELL R. TOOPS

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 09-CA-146

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas Court, Case No.
08-CR-00032

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 7, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

KENNETH W. OSWALT
LICKING COUNTY PROSECUTOR

BY: CHRISTOPHER A. REAMER
Assistant Prosecuting Attorney
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Southeastern Correctional Institution
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Hoffman, J.

{¶1} Defendant-appellant Russell R. Toops appeals the November 24, 2009 Judgment Entry entered by the Licking County Court of Common Pleas, which denied his Motion to Withdraw Guilty Plea. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE¹

{¶2} On January 18, 2009, the Licking County Grand Jury indicted Appellant on one count of illegal manufacture of drugs, in violation of R.C. 2925.04(A)(C)(3)(a), a felony of the second degree; one count of illegal assembly or possession of chemicals for the manufacture of drugs, in violation of R.C. 2925.041(A)(C)(1), a felony of the third degree; and one count of having weapons while under disability, in violation of R.C. 2923.13(A)(2), a felony of the third degree. The trial court scheduled the matter for trial September 30, 2008, after continuing the matter several times at the requests of both Appellant and the State. On the morning of trial, the parties advised the trial court they had reached an agreement. Appellant would plead guilty to one count of illegal assembly and one count of weapons under disability, and in exchange, the State would dismiss the illegal manufacture of drugs charge and recommend a sentence of five years imprisonment. The trial court accepted Appellant's plea, found him guilty as charged, and sentenced him to an aggregate term of incarceration of five years.

{¶3} On May 15, 2009, Appellant filed a Petition to Vacate or Set Aside Sentence. The trial court found the petition not well taken and denied the same. Subsequently, on September 28, 2009, Appellant filed a Motion to Withdraw Guilty Plea,

¹ A Statement of the Facts underlying Appellant's convictions is not necessary to our disposition of this appeal.

requesting a hearing pursuant to Crim.R. 32.1. Via Judgment Entry filed September 29, 2009, the trial court denied the motion, noting Appellant failed to include any affidavits or evidentiary material, and finding Appellant failed to demonstrate any manifest injustice. Appellant filed another Motion to Withdraw Guilty Plea on October 30, 2009. The State responded, asserting Appellant's claim to set aside his guilty plea was based upon ineffective assistance of counsel, and such was barred under the doctrine of res judicata. Via Judgment Entry filed November 24, 2009, the trial court denied Appellant's motion, finding not only were the issues raised barred by the doctrine of res judicata, but also no demonstration of a manifest injustice.

{¶4} It is from this judgment entry Appellant appeals. Appellant has failed to comply with App.R. 16(A)(3) as his Brief does not include “[a] statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected.” Appellant has simply provided this Court with a “State of Issues”, which reads:

{¶5} “I. WAS DEFENSE COUNSEL INEFFECTIVE BY NOT THOROUGHLY INVESTIGATING OR INFORMING HIS CLIENT OF THE FORTH [SIC] AMENDMENT RIGHTS?

{¶6} “II. WAS DEFENSE COUNSEL INEFFECTIVE, CREATING A ‘MANIFEST INJUSTICE’ BY NOT MOTIONING [SIC] TO SUPPRESS ALL EVIDENCE DUE TO THE FACT THAT NO WARRANT WAS ISSUED NOR WAS VERIFIABLE CONSENT GIVEN?

{¶7} “III. WAS DEFENSE COUNSEL INEFFECTIVE FOR NOT OFFERING HIS CLIENT ANY OTHER AVENUE OF RESOLVE?

{¶18} “IV. WAS DEFENSE COUNSEL INEFFECTIVE FOR NOT MAINTAINING ‘OHIO RULES OF PROFESSIONAL CONDUCT’ COMPETENCE, DILIGENCE, AND COMMUNICATION?”

{¶19} “V. HAD DEFENSE COUNSEL INFORMED HIS CLIENT OF THE CURRENT SEARCH AND SEIZURE LAWS WOULD THE OUTCOME OF [SIC] BEEN 100% DIFFERENT?”

{¶10} Appellant appears to argue the trial court abused its discretion in denying his motion to withdraw his guilty plea as defense counsel’s ineffectiveness resulted in a manifest injustice.

{¶11} Ohio Crim. R. 32.1 governs the withdraw of a plea of guilty, and reads:

{¶12} “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.”

{¶13} A Criminal Rule 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 the motion are matters to be resolved by the trial court.” *State v. Reed*, 7th Dist. No. 04 MA 236, 2005-Ohio-2925, ¶ 7, citing *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph two of the syllabus. An abuse of discretion implies the trial court’s judgment was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Notably, a post-sentence withdrawal of a guilty plea is only available in “extraordinary cases.” *Smith*, 49 Ohio St.2d at 264, 361 N.E.2d 1324.

{¶14} We find the trial court did not abuse its discretion in denying Appellant's motion to withdraw guilty plea. Appellant has failed to demonstrate a manifest injustice for which he is entitled to withdraw his guilty plea. Manifest injustice has been defined as "a clear or openly unjust act." *State v. Walling*, 3d App. Dist. No. 17-04-12, 2005-Ohio-428 ¶6. The burden of proof is on Appellant. *State v. Totten*, 10th App. Dist. Nos. 05AP-278, 05AP-508, 2005-Ohio-6210, ¶5.²

{¶15} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE

² Having determined the trial court did not abuse its discretion in concluding no manifest injustice was demonstrated warranting withdrawal of the plea, we find it is unnecessary to address Appellant's contention the trial court committed error by finding *res judicata* also barred Appellant's motion according to the two-issue rule.

