

STATE OF OHIO
COUNTY OF CUYAHOGA

) IN THE COURT OF COMMON PLEAS
) SS.
) CR. 322010

STATE OF OHIO, Plaintiff
Vs.
VICTOR WANGUL, Defendant

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JOURNAL ENTRY AND OPINION

Kathleen Ann Sutula, J:

IT IS ORDERED AS FOLLOWS:

Defendant Victor Wangul (hereinafter “Defendant”) has filed a motion to withdraw his previously entered plea of guilty pursuant to Criminal Rule 32.1. Defendant moves the Court to grant his motion on the basis that 1) the Court’s behavior prejudiced Defendant; 2) he was not afforded effective assistance of counsel; and 3) Defendant’s plea was not made knowingly, voluntarily, and intelligently.

The Court had previously denied this motion as moot, and the Eighth District Court of Appeals affirmed the Court’s ruling in *State v. Wangul* (Cuyahoga 2002), 2002-Ohio-4277.¹ In its ruling, the appellate court held that Defendant’s motion “was properly treated...as a petition for postconviction relief,” with the result that Defendant’s motion was filed untimely. *Id.*, 2002-Ohio-4277 at ¶13.

In *State v. Bush*, decided after the Court of Appeals rendered its ruling, the Ohio Supreme Court held that the statutes relevant to postconviction relief do not govern Rule 32.1 postsentence motions to withdraw a guilty plea. *Id.*, 96 Ohio St.3d 235, syllabus.

¹ The Court adopts and incorporates by reference the facts as set forth by the 8th District in its opinion.

This case, which was appealed to the Supreme Court, was subsequently remanded. It is pursuant to *Bush*, therefore, that this matter is once again placed before the Court.²

I. Standard of Review

Postsentence motions, such as the one pending before the Court, are not freely granted since the result of that practice would lead to a slippery slope whereby defendants could routinely move for withdrawal of their guilty pleas in an attempt to avoid an unfavorable sentence. *State v. Peterseim* (Cuyahoga 1980), 68 Ohio App.2d 211. Nevertheless, Criminal Rule 32.1 permits courts to grant postsentence motions for withdrawal of guilty pleas only upon a showing of “manifest injustice.” *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph 1 of the syllabus. It is, therefore, left to the trial court’s discretion whether a defendant satisfies this burden. *Id.*, 49 Ohio St.2d 261, paragraph 2 of the syllabus.

II. Defendant’s claim of judicial prejudice

In his motion, Defendant avers that the Court was prejudiced against him. Defendant relies on unsubstantiated allegations that the Court tampered with its docket

² It is important at this point to detail the tortured process that befell Defendant’s motion preceding the hearing date and the Court’s ruling on the motion. Initially, the case was called for a hearing on Defendant’s motion. At that first hearing, the Court appointed the Public Defender’s Office to represent Defendant as he claimed indigence and reset the hearing date. During this time, despite being represented by counsel, Defendant proceeded to file several motions on his own behalf. A few days prior to the continued hearing date, Defendant’s attorney filed a motion to withdraw based on the assumption that Defendant had retained new counsel. At that time, the Court inquired as to how Defendant was to pay his retained attorney (who was not present). Defendant was unsure and when further asked said that the lawyer would not be working *pro bono*. Despite these facts, the Court once again continued the hearing on Defendant’s motion. Shortly afterwards, Defendant notified the Court that he had been mistaken and that the lawyer Defendant thought he had hired would not be handling the case. The public defender who had previously been assigned was re-assigned to the matter, and the Court finally held the hearing on Defendant’s postsentence motion for withdrawal of his guilty plea (in spite of the fact that Ohio law does not require courts to conduct hearings on these types of motions). See *State v. McNeal* (Cuyahoga 2004), 2004-Ohio-50.

and imposed an arbitrary and irrational sentence.³ The record, however, is void of any evidence to support such claims. As a result, Defendant fails to satisfy his burden of establishing a manifest injustice with relation to this charge.

III. Defendant's claim of ineffective assistance of counsel

In addition to the allegation discussed in Section II, *supra*, Defendant argues that he was deprived of his Sixth Amendment right to effective of assistance of counsel. In order for Defendant to prevail in this instance he must show that his attorney's performance was deficient and that, if not for the lawyer's deficiency, Defendant would not have entered a guilty plea. *Hill v. Lockhart* (1985), 474 U.S. 52; *State v. Xie* (1992), 62 Ohio St.3d 521.

At the hearing on this matter, counsel who represented Defendant in the underlying criminal matter testified pursuant to Defendant's subpoena. Defendant's former attorney stated, under oath, that he did prepare and investigate the matter, but there was not much of a case for him to defend as Defendant lacked a credible defense to the charges that were pending against him. Notwithstanding, counsel indicated that he would have been prepared to go to trial if Defendant so desired.

Similarly, at the hearing, the Court gave Defendant himself wide latitude to proffer any evidence he had that could establish a defense in the underlying case. The hearing was the only event the Court had at that time of day, and there were no other matters to intrude upon the Court's time. The Court did not hurry Defendant's presentation, and in fact issued two capiases when the witnesses subpoenaed by Defendant failed to appear at the proper time. Despite the Court bending over backward

³ Defendant had also previously filed an affidavit of disqualification with the Supreme Court, which was denied as meritless.

to accommodate Defendant, no evidence was submitted that contradicted the testimony of his former attorney.

In fact, there is no evidence that Defendant's lawyer could have conducted himself in a different fashion, and that such changes would have resulted in a different result.⁴ As before, unfounded, conclusory statements do not meet the burden Ohio courts have mandated must be satisfied to show a manifest injustice.

IV. Defendant's guilty plea

Finally, Defendant relies on a Criminal Rule 11 argument that his plea was not entered knowingly, voluntarily, and intelligently. The basis for Defendant's argument is that he was under "duress" at the time of the plea, and because of this his plea did not comply with Crim.R. 11.

The record in this matter is replete with evidence that Defendant was a former lawyer who stated in open court at the time he changed his plea to guilty that he understood the charges against him, he was satisfied with the representation provided by his attorney, and he understood the possible the possible consequences. For a person of Defendant's education and experience to now claim that his plea was not entered into knowingly, voluntarily, or intelligently because he did not understand what he was pleading to is tantamount to an insult to common sense.

While it may be true that Defendant was under "duress" at the time he entered his plea, it could easily be said that any defendant under prosecution for a criminal matter would be under duress. In fact, the Court is not so foolish or naïve to deny that a person

⁴ The Court also notes that the evidence supports Defendant's counsel's statement that he attempted to arrange a restitution plan in the hope of persuading this Court to impose community control sanctions. Defendant's inability to pay restitution resulted in defense counsel being unable to put forward any type of repayment plan that would have compensated the victim in the underlying criminal matter.

with a pending criminal matter would not be under stress. When one's freedom is at risk, one should not have a happy-go-lucky attitude.

With that having been said, the evidence presented at the hearing lends itself to the inference that Defendant is displeased with the imposition of a prison term rather than community control. It is well settled law in Ohio that a change of heart upon receipt of a sentence is insufficient to withdraw a formerly entered plea of guilt. *State v. Blalock* (Cuyahoga 2002), 2002-Ohio-3637. Courts have long recognized that allowing a defendant to withdraw a guilty plea based on averments that counsel promised community control rather than prison would lead to a deluge of motions similar to the one currently before the Court.⁵ See *State v. Lambros* (Cuyahoga 1988), 44 Ohio App.3d 102.

Since the record clearly denotes that the Court more than substantially complied with Criminal Rule 11, and as the attendant facts and circumstances more than adequately detail that Defendant made his plea knowingly, voluntarily, and intelligently, Defendant's argument is without merit.

V. Conclusion

It is, therefore, ORDERED, ADJUDGED, and DECREED:

For the reasons previously stated, the Court finds that there are no grounds for granting Defendant's motion to withdraw guilty plea. Defendant fails to demonstrate the existence of any manifest injustice that would justify the granting of his motion pursuant to Criminal Rule 32.1. Defendant's motion is hereby denied.

⁵ In this case, Defendant alleges that his attorney told him he would receive community control. At the hearing, however, counsel testified that his standard procedure was to never promise a client what kind of sentence he would get. While the attorney stated that if Defendant could repay the victim the chances of receiving community control might be better, such an analysis of the Court's sentencing preferences falls far short of being an actual promise.

DATE: April ____, 2004

KATHLEEN ANN SUTULA, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and Opinion has been sent via regular U.S.

mail on this _____ day of April, 2004, to the following:

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