

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 09AP-459
Plaintiff-Appellee,	:	(C.P.C. No. 00CR09-5692)
	:	No. 09AP-460
v.	:	(C.P.C. No. 01CR12-7551)
	:	No. 09AP-461
Angelo J. Felder,	:	(C.P.C. No. 02CR01-0153)
	:	
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on November 19, 2009

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*,
for appellee.

Angelo J. Felder, pro se.

APPEALS from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Angelo J. Felder ("appellant"), filed these appeals seeking reversal of a decision by the Franklin County Court of Common Pleas denying his motion to withdraw his plea of guilty pursuant to Crim.R. 32.1. For the reasons that follow, we affirm.

{¶2} Appellant was indicted by the Franklin County Grand Jury in three separate cases. In case No. 00CR09-5692, appellant was indicted on two counts of receiving stolen property in violation of R.C. 2913.51 and one count of misuse of a credit card in violation of R.C. 2913.21, each a fifth-degree felony.

{¶3} In case No. 01CR12-7551, appellant was indicted on one count of aggravated robbery in violation of R.C. 2911.01, a first-degree felony; one count of robbery in violation of R.C. 2911.02, a second-degree felony; one count of robbery in violation of R.C. 2911.02, a third-degree felony; and two counts of kidnapping in violation of R.C. 2905.01, both first-degree felonies. Each of the five counts in case No. 01CR12-7551 included a gun specification.

{¶4} In case No. 02CR01-0153, appellant was indicted on two counts of aggravated robbery in violation of R.C. 2911.01, each a first-degree felony; three counts of kidnapping in violation of R.C. 2905.01, each a first-degree felony; one count of attempted murder in violation of R.C. 2923.02 and 2903.02, a first-degree felony; one count of felonious assault in violation of R.C. 2903.11, a second-degree felony. Each of the counts against appellant in case No. 02CR01-0153 included a gun specification.

{¶5} On January 31, 2003, appellant entered into an agreement whereby appellant pleaded guilty to one count of receiving stolen property in case No. 00CR09-5692; one count of robbery, without the gun specification, in case No. 01CR12-7551; and one count of aggravated robbery, with the gun specification, in case No. 02CR01-0153. The agreement included a jointly recommended sentence for appellant to serve a 12-month sentence in case No. 00CR09-5692, a six-year sentence in case No. 01CR12-7551, and a sentence of nine years, plus three years for the gun specification, in case No.

02CR01-0153. The sentences in case Nos. 01CR12-7551 and 02CR01-0153 were to be served consecutively, and the sentence in case No. 00CR09-5692 was to be served concurrently. Thus, appellant's total aggregate sentence was 18 years. The trial court accepted the guilty pleas and imposed the jointly recommended sentence.

{¶6} In 2005, appellant filed a motion seeking postconviction relief. The trial court initially scheduled a new sentencing hearing to impose a sentence in conformance with the decision by the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. On the state's motion for reconsideration, the trial court vacated the new sentencing hearing. Subsequently, the trial court dismissed appellant's postconviction petition.

{¶7} Appellant then filed a motion seeking relief from the trial court's judgment pursuant to Civ.R. 60(B). The trial court denied the motion. Appellant appealed, and we affirmed. *State v. Felder*, 10th Dist. No. 07AP-148, 2007-Ohio-4595.

{¶8} On February 25, 2009, appellant filed a motion seeking to withdraw his guilty plea. The trial court denied the motion without holding a hearing. Appellant filed this appeal, asserting three assignments of error:

ASSIGNMENT OF ERROR NO. 1.

The trial court erred and deprived the Appellant of his absolute right to procedural due process of law in not applying the principles of *State v. Cimpritz*, [1953], 158 Ohio St. 490 to Appellant's case contrary the Constitution of Ohio and the United States.

ASSIGNMENT OF ERROR NO. 2.

Defendant-Appellant's guilty plea to generic robbery and aggravated robbery is void under Ohio Criminal Rule

11[C](2)(a) and the due process clause of the Ohio and United States Constitution.

ASSIGNMENT OF ERROR NO. 3.

Defendant-Appellant was deprived of the effective assistance of trial counsel where counsel induced him to plead guilty to offenses he could not have been convicted by bench or jury in violation of the Sixth & 14th Amendment United States Constitution.

(Sic passim.)

{¶9} Appellant's assignments of error are interrelated, and will therefore be addressed together. Essentially, appellant argues that the trial court erred when it denied his motion to withdraw his plea of guilty.

{¶10} Motions to withdraw pleas of no contest are controlled by Crim.R. 32.1, which provides, in relevant part, that "[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." Because the motion in this case was made after sentencing, the issue before the trial court was whether granting the motion would correct a manifest injustice. "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶5. A defendant seeking to withdraw a post-sentence guilty plea bears the burden of establishing manifest injustice based on specific facts either contained in the record or supplied through affidavits attached to the motion. *State v. Orris*, 10th Dist. No. 07AP-390, 2007-Ohio-6499.

{¶11} A trial court's decision to deny a post-sentence motion to withdraw a plea of guilty, and the decision whether to hold a hearing on the motion, are subject to review for abuse of discretion. *State v. Smith* (1977), 49 Ohio St.2d 261. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} Appellant argues that a manifest injustice occurred in his case because the indictments charging him with aggravated robbery and robbery did not allege the mental state of recklessness. Therefore, appellant argues that the indictments were defective, and he could not have been convicted of those two offenses.

{¶13} Appellant argues that this case is controlled by the decision of the Supreme Court of Ohio in *State v. Cimpritz* (1953), 158 Ohio St. 490, in which the court held that a conviction based on a defective indictment must be reversed. However, because appellant did not raise any objection regarding the alleged defect in the indictment at the trial court level, the issue of the allegedly defective indictment and its effect on a conviction is informed by the decisions in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"), and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*").

{¶14} In *Colon I*, the court held that failure to include a mental state in an indictment charging robbery in violation of R.C. 2911.02(A)(2) constitutes structural error that cannot be waived by a defendant's failure to raise any objection to the indictment at the trial court level. In *Colon II*, the court on reconsideration of its decision in *Colon I* concluded that the decision in *Colon I* would not be applied retroactively.

{¶15} We have considered how the *Colon* decisions apply in the context of a motion to withdraw a guilty plea much like appellant's case, and concluded that no manifest injustice occurs in such instances. *State v. Straughter*, 10th Dist. No. 08AP-777, 2009-Ohio-641. In *Straughter*, we first noted that a number of appellate courts have concluded that *Colon* has no applicability to cases in which the defendant entered a guilty plea because the plea to the indictment waives any defect. *Id.* at ¶8, citing *State v. Smith*, 6th Dist. No. L-07-1346, 2009-Ohio-48; *State v. Hayden*, 8th Dist. No. 90474, 2008-Ohio-6279; *State v. McGinnis*, 3d Dist. No. 15-08-97, 2008-Ohio-5825; *State v. Ellis*, 5th Dist. No. 2007-CA-46, 2008-Ohio-7002. We also concluded in *Straughter* that no manifest injustice occurred based on the Supreme Court's decision in *Colon II* that *Colon I* would not be applied retroactively to cases that had concluded prior to those decisions. *Straughter* at ¶10.

{¶16} Here, as in *Straughter*, appellant waived any defects in the indictments against him by pleading guilty to those charges rather than proceeding to trial, and his case had concluded prior to the Supreme Court's decision in *Colon I*. Thus, the trial court did not abuse its discretion in concluding that the alleged defects in the indictments did not constitute a manifest injustice requiring that appellant be allowed to withdraw his guilty pleas.

{¶17} Appellant also argues that manifest injustice occurred because he received ineffective assistance of counsel due to his counsel's recommendation that he plead guilty to the allegedly defective indictments. Ineffective assistance of counsel can form the basis for a claim of manifest injustice to support withdrawal of a guilty plea pursuant to Crim.R. 32.1. *State v. Dalton*, 153 Ohio App.3d 286, 2003-Ohio-3813. A defendant

seeking to withdraw a guilty plea based on ineffective assistance of counsel must show first that counsel's performance was deficient, and second that there is a reasonable probability that, but for counsel's errors, the defendant would not have agreed to plead guilty. *State v. Xie* (1992), 62 Ohio St.3d 521.

{¶18} We cannot say that appellant's trial counsel was ineffective for failing to raise any defects in the indictments. If trial counsel had raised the alleged defects in the indictments prior to the entry of appellant's guilty pleas, Crim.R. 7(D) would have allowed the state to amend the indictments to allege the required mental state because the rule allows amendment of the indictment "at any time before, during, or after a trial." Thus, we cannot say that the outcome of the proceedings would have been different but for counsel's failure to raise the issue.

{¶19} Accordingly, we overrule appellant's three assignments of error and affirm the judgment by the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.
