

[Cite as *State v. Hill*, 2011-Ohio-2869.]

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-634
v.	:	(C.P.C. No. 08CR04-2303)
	:	
Mark Anthony Hill,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on June 14, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *John H. Cousins, IV*,  
for appellee.

*Mark Anthony Hill*, pro se.

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Mark Anthony Hill, appeals from a judgment of the Franklin County Court of Common Pleas denying his motion to withdraw a guilty plea. For the following reasons, we affirm that judgment.

**Factual and Procedural Background**

{¶2} On April 1, 2008, a Franklin County grand jury indicted Hill on one count of harassment with a bodily substance in violation of R.C. 2921.38. The charge alleged that Hill spit on someone while he was confined in a detention facility. On December 15,

2008, Hill pled guilty to the one count of harassment with a bodily substance. The trial court accepted Hill's plea, found him guilty, and sentenced him accordingly.<sup>1</sup>

{¶3} On September 3, 2009, Hill filed a motion to withdraw his guilty plea. His motion alleged that he did not have the requisite mens rea to commit the crime of harassment with a bodily substance. The motion also generally attacked the substance of his indictment. The trial court denied Hill's motion.

{¶4} Hill appeals and assigns the following errors:

1. Prosecutorial misconduct denied appellant's rights to due process and equal protection of the laws.
2. [The] trial court deprived appellant of equal protection of the laws, violating his right to due process.
3. Defense counsel's ineffective assistance deprived appellant of his rights to due process, equal protection of the laws and to efficient representation.
4. Evidence was insufficient to support the criminal offense and conviction is contrary to law.

{¶5} A post-sentence motion to withdraw a guilty plea may only be granted to correct a "manifest injustice." Crim.R. 32.1. A defendant who seeks to withdraw a guilty plea after the imposition of sentence carries the burden of establishing the existence of manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. A manifest injustice is defined as a "clear or openly unjust act." *State v. Odoms*, 10th Dist. No. 04AP-708, 2005-Ohio-4926, ¶9 (citing *State ex rel. Schneider v.*

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<sup>1</sup> This case had been joined with another indictment against Hill arising from the same events that charged him with two counts of felonious assault and another count of harassment with a bodily substance. In that case, Hill pled guilty to the harassment count, and a jury found him guilty of both felonious assault counts. This court affirmed those convictions on appeal. *State v. Hill*, 10th Dist. No. 09AP-398, 2010-Ohio-1687. Hill's prison sentence in this case was to be served concurrently with the eight-year sentence he received in the other case.

*Kreiner*, 83 Ohio St.3d 203, 208, 1998-Ohio-271). Manifest injustice is an extremely high standard, and a defendant may only withdraw his guilty plea in extraordinary cases. *State v. Tabor*, 10th Dist. No. 08AP-1066, 2009-Ohio-2657, ¶6 (citing *State v. Price*, 4th Dist. No. 07CA47, 2008-Ohio-3583, ¶11).

{¶6} A trial court's decision to grant or deny a Crim.R. 32.1 motion to withdraw guilty plea is reviewed under an abuse of discretion standard. *Id.* Thus, an appellate court will only reverse a trial court's ruling on such a motion if it is unreasonable, arbitrary, or unconscionable. *Odoms* at ¶10 (citing *State v. Blatnik* (1984), 17 Ohio App.3d 201).

{¶7} First, we note that Hill's arguments are barred by res judicata. The doctrine of res judicata provides that "a final judgment bars a convicted defendant \* \* \* from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that the defendant raised or could have raised at trial or on appeal." *State v. Brown*, 167 Ohio App.3d 239, 2006-Ohio-3266, ¶7 (citing *State v. Szefcyk*, 77 Ohio St.3d 93, 96, 1996-Ohio-337). Specifically, a defendant cannot raise any issue in a postsentence motion to withdraw a guilty plea that could have been raised at trial or on direct appeal. *Brown* (citing *State v. Reed*, 7th Dist. No. 04 MA 236, 2005-Ohio-2925, ¶11); *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780, ¶6.

{¶8} Because Hill could have but did not raise these arguments in a direct appeal, res judicata bars him from raising them in his Crim.R. 32.1 motion to withdraw. *State v. Oluoch*, 10th Dist. No. 07AP-45, 2007-Ohio-5560, ¶29.

{¶9} Even if we were to address Hill's arguments, they still fail on the merits and do not rise to the level of manifest injustice.

**First Assignment of Error - Prosecutorial Misconduct**

{¶10} Hill argues in this assignment of error that the prosecutor violated his constitutional rights by presenting false testimony to the grand jury that indicted him. However, a guilty plea waives any complaint as to claims of constitutional violations not related to the entry of a guilty plea. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶105. The presentation of false testimony to a grand jury does not relate to the entry of Hill's guilty plea. Thus, Hill cannot now complain of the alleged prosecutorial misconduct involving the grand jury proceedings. Hill's first assignment of error is overruled.

**Second Assignment of Error - Trial Court Improperly Accepted Hill's Guilty Plea**

{¶11} In this assignment of error, Hill argues the trial court erred by accepting his guilty plea when he did not understand that the state had to prove his specific intent in committing the offense. Because Hill did not raise this argument in his motion to withdraw his guilty plea, he has forfeited it. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶21.

{¶12} When a party forfeits an argument in the trial court, reviewing courts are limited to a plain error analysis. *Id.* at ¶15. Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Even if an error satisfies these prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. *Id.*

*State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416, ¶12. Courts are to notice plain error under Crim.R. 52(B) " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes* (quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus). The party asserting plain error carries the burden of demonstrating its existence. *Payne* at ¶17.

{¶13} Hill does not demonstrate error, let alone plain error, in this regard. Hill does not present any evidence indicating that he was unaware of the state's requirement to prove his specific intent. Hill admitted in the entry of guilty plea form that he signed that he "reviewed the facts and law of my case with my counsel" before he entered his guilty plea. Moreover, Hill did not file a transcript of the plea hearing during which the trial court would have discussed with Hill his guilty plea. Absent evidence in support of his claim, Hill cannot demonstrate error. We overrule Hill's second assignment of error.

### **Third Assignment of Error - Ineffective Assistance of Counsel**

{¶14} Hill alleges in this assignment of error that ineffective assistance of counsel deprived him of his due process rights and equal protection of the law. Specifically, Hill asserts that his trial counsel was ineffective for: (1) failing to investigate the spitting incident; (2) not objecting to the joinder of unrelated cases; and (3) allowing Hill to plead guilty to a crime he did not commit. Again, because Hill did not make this argument in his motion to withdraw, he has forfeited the issue on appeal absent plain error.

{¶15} Additionally, a guilty plea waives the right to assert ineffective assistance of counsel, unless the counsel's errors affected the knowing and voluntary nature of the plea. *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130. Hill's first two allegations

of ineffective assistance do not relate to the knowing or voluntary nature of his plea and we will, therefore, not consider them.

{¶16} Hill's final claim of ineffectiveness, that trial counsel allowed him to enter his guilty plea to a crime he did not commit, arguably relates to the knowing and voluntary nature of the plea. However, this claim fails because Hill presented no affidavit or other evidence that would demonstrate his counsel's ineffectiveness. *State v. Kimbrough*, 5th Dist. No. 07-CA-44, 2008-Ohio-4363, ¶25. Hill's bare allegations are insufficient to demonstrate ineffective assistance of counsel. Accordingly, we overrule Hill's third assignment of error.

#### **Fourth Assignment of Error - Sufficiency of the Evidence**

{¶17} Finally, Hill argues in this assignment of error that there was insufficient evidence to support his conviction for harassment with a bodily substance. However, Hill pled guilty to that charge. " 'By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.' " *Tabor* at ¶11 (quoting *State v. Kitzler*, 3d Dist. No. 16-02-06, 2002-Ohio-5253, ¶12). Thus, Hill admitted the elements of the offense when he pled guilty to the charge and cannot now dispute those elements. Accordingly, we overrule Hill's fourth assignment of error.

{¶18} In conclusion, we overrule Hill's four assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN and SADLER, JJ., concur.

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