

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 12AP-463
 : (C.P.C. No. 11CR-11-5884)
 Randolph Hill, Jr., : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on February 26, 2013

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

Yeura R. Venters, Public Defender, and *David L. Strait*, for
appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

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

I. BACKGROUND

{¶ 2} By way of indictment filed on November 7, 2011, appellant was indicted on two counts of domestic violence. One count was a felony of the third degree based upon the allegation that appellant had prior convictions for domestic violence. The second count was a felony of the fifth degree based upon the allegation that the victim was pregnant.

{¶ 3} On January 4, 2012, appellant entered a plea of guilty to domestic violence, as a third-degree felony, in violation of R.C. 2919.25. According to the facts read into the record by appellee, in October 2011, independent witnesses at a grocery store observed appellant repeatedly strike his live-in girlfriend, K.D. When witnesses attempted to intervene, appellant started to fight with them. Appellee indicated a plea agreement was reached due to the victim's lack of cooperation. Appellant, through counsel, took no exception to the facts other than to reiterate "yes, [K.D.] denied that he struck her." (Tr. 7.) Appellant made no comments on his own behalf.

{¶ 4} During the plea hearing, appellant was informed that the charge to which he was entering a guilty plea carried a potential sentence of up to five years incarceration and a fine of up to \$10,000. These possible penalties were also set forth in the entry of guilty plea signed by appellant. The entry of guilty plea also stated the parties were jointly recommending a sentence of probation following a presentence investigation ("PSI") and a mental health assessment. As "part of the agreement," while awaiting sentencing, appellant was released on a reporting recognizance bond with conditions. (Tr. 10.)

{¶ 5} A sentencing hearing was scheduled for February 24, 2012. At this time, while both parties were represented by counsel, neither appellee's attorney nor appellant's attorney were the ones that appeared at the plea hearing. The prosecutor expressed some concern about the PSI wherein it was reported appellant denied committing the offense. According to the prosecutor, despite entering a guilty plea as opposed to an *Alford* plea, appellant was now denying commission of the offense; therefore, appellee's "end of the bargain, which is to jointly recommend community control, is also off the table." (Tr. 13.) Because neither the prosecutor nor appellant's counsel were the attorneys that attended the plea hearing, the trial court, with agreement from the parties, continued the matter until April 11, 2012.

{¶ 6} At the sentencing hearing held on April 11, as part of its discussion on the record, the trial court recalled the joint recommendation for community control and the reporting recognizance bond. The court indicated appellant "didn't do anything he was supposed to do during that time on reporting recognizance" in that appellant "was out of state, he didn't report, and on and on and on." (Tr. 20.) Appellee stated its position that a community control recommendation was contingent upon appellant's admission of guilt

as well as appellant's compliance with the terms of his bond. Because the PSI indicated appellant denied his guilt and because appellant violated the terms of his bond, appellee asked the court to disregard any joint recommendation for community control.

{¶ 7} In response, appellant's counsel stated appellant entered the plea because he believed he would be getting community control, and appellant thought that he had permission to leave the state when he did. The trial court then discussed appellant's history, including his fairly extensive prior criminal record, and imposed a sentence of two years.

{¶ 8} After pronouncement of the sentence, appellant's counsel asked to withdraw the plea. The trial court stated the request was "denied at this time" but, if desired, counsel could file a motion to withdraw the guilty plea. (Tr. 27.)

{¶ 9} On April 18, 2012, appellant filed a Crim.R. 32.1 motion to withdraw guilty plea. Therein, appellant argued that his willingness to proceed with the plea agreement was based upon the fact that appellee would recommend probation. Because appellee did not do so, appellant argued he established the existence of manifest injustice such that he should be permitted to withdraw his previously entered guilty plea. The state filed a memorandum contra, and the trial court held a hearing on the matter. After consideration, the trial court denied appellant's motion.

II. ASSIGNMENT OF ERROR

{¶ 10} This appeal followed and appellant brings the following assignment of error for our review:

The trial court committed reversible error by denying Defendant-Appellant's presentence motion to withdraw his guilty plea.

III. DISCUSSION

{¶ 11} Crim.R. 32.1 provides:

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.

{¶ 12} In the trial court, appellant cited the standard applicable to a postsentence motion to withdraw guilty plea. However, on appeal, appellant cites the standard applicable to a motion to withdraw guilty plea made prior to sentencing. The distinction is significant because, while a presentence motion to withdraw a guilty plea should be freely and liberally granted, a postsentence motion to withdraw a guilty plea requires a showing of manifest injustice. *State v. Xie*, 62 Ohio St.3d 521 (1992); Crim.R. 32.1.

{¶ 13} In *State v. Hall*, 10th Dist. No. 03AP-433, 2003-Ohio-6939, the defendant entered a plea of guilty to felonious assault. After the court announced its sentence, but prior to the filing of the judgment entry, the defendant moved to withdraw his plea. The trial court denied the motion. On appeal, the defendant argued that, although a sentence had been imposed, his plea should be treated as a presentence motion because the judgment entry had not yet been filed. In rejecting the defendant's argument, this court noted "[t]he purpose of a motion to withdraw a guilty plea after sentence has been imposed is to correct a manifest injustice, not to allow the defendant to test the weight of potential punishment and, if dissatisfied, withdraw his guilty plea." *Id.* at ¶ 10. Similarly, in *State v. Matthews*, 6th Dist. No. WD-10-025, 2011-Ohio-1265, the court held "[w]here a Crim.R. 32.1 motion is made after the trial court pronounced sentence at the sentencing hearing but before a sentencing judgment [entry] is filed, the motion is to be treated as a postsentence motion under the rule." *Id.* at ¶ 26. *See also State v. McComb*, 2d Dist. No. 22570, 2009-Ohio-295 (Crim.R. 32.1 motion made after a defendant learns of the sentence but before the filing of a sentencing entry requires use of the postsentence standard); *State v. Neely*, 12th Dist. No. CA2008-08-034, 2009-Ohio-2337 (request to withdraw plea made after sentence pronouncement is reviewed under the standard requiring a manifest injustice); *State v. Surface*, 5th Dist. No. 2008 CA 00184, 2009-Ohio-950; *State v. Gordon*, 9th Dist. No. 25317, 2011-Ohio-1045.

{¶ 14} In the case before us, appellant orally moved to withdraw his guilty plea at the sentencing hearing and filed a motion to withdraw his guilty plea prior to the filing of a sentencing judgment entry. Nonetheless, both of appellant's requests were made after pronouncement of the sentence. Therefore, we treat appellant's motion to withdraw guilty plea as a postsentence motion and utilize the manifest injustice standard in accordance with Crim.R. 32.1.

{¶ 15} "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. " '[I]t is clear that under such standard, a postsentence withdrawal motion is allowable only in extraordinary cases.' " *State v. Gripper*, 10th Dist. No. 10AP-1186, 2011-Ohio-3656, ¶ 7, quoting *State v. Smith*, 49 Ohio St.2d 261, 264 (1977). A defendant seeking to withdraw a postsentence 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.

{¶ 16} A motion to withdraw a guilty plea after sentence is addressed to the sound discretion of the trial court, and the trial court's judgment will not be reversed absent a demonstration of abuse of discretion in concluding no manifest injustice occurred. *State v. Marable*, 10th Dist. No. 03AP-97, 2003-Ohio-6653, ¶ 9; *State v. Boyd*, 10th Dist. No. 97APA12-1640 (Oct. 22, 1998), appeal not allowed, 85 Ohio St.3d 1424 (1999). In order to find that the trial court abused its discretion, we must find more than an error of law or judgment. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 17} Initially, we note appellant does not challenge the trial court's compliance with Crim.R. 11, nor any other aspect of the plea hearing during which time appellant was informed of the jointly recommended sentence of community control, as well as the potential maximum sentence that could be imposed. Additionally, at the hearing on appellant's motion to withdraw guilty plea, appellant's counsel stated she informed appellant the trial court was not bound by, and could reject, a jointly recommended sentence.

{¶ 18} At the initial sentencing hearing held on February 24, 2012, prior to any discussion regarding appellee's withdrawal of its recommendation for community control, the trial court indicated that, after review of appellant's history, the court was inclined to sentence appellant to a term of imprisonment. At the sentencing hearing held on April 11, 2012, the trial court reiterated its surprise that a sentence of community control had been jointly recommended because, after its independent review of the matter, the trial court concluded "nothing but prison" would be appropriate in this case. (Tr. 25.)

{¶ 19} Additionally, we note that, though withdrawing its recommendation of community control, appellee neither recommended a new sentence nor advocated for any specific term of imprisonment. Rather, appellee asked that the trial court disregard the joint recommendation because appellant did not comply with the terms of the plea agreement by denying guilt and by violating the terms of his bond.

{¶ 20} "Where a defendant enters a plea of guilty in exchange for the prosecutor's promise to recommend probation, an implied condition exists that circumstances surrounding the bargain will remain substantially the same, and a subsequent change is sufficient to relieve the state of its obligation." *State v. Pascall*, 49 Ohio App.2d 18 (9th Dist.1972), syllabus (requiring a prosecutor to recommend probation where a defendant committed another crime while awaiting sentencing would in effect reward the defendant's behavior); *State v. Calderon*, 2d Dist. No. CA 15250 (Nov. 29, 1995) (where a defendant's implied promise is not fulfilled, the other parties are not required to keep their part of the bargain).

{¶ 21} In *State v. Cox*, 11th Dist. No. 92-T-4753 (Dec. 10, 1993), the defendant filed an appeal from a judgment imposing consecutive sentences. The record established the defendant entered pleas of guilty, and the state promised to recommend concurrent sentences. After entering the plea, the defendant was released on bond, but, prior to sentencing, his bond was revoked. At the sentencing hearing, the state made no recommendation, and the trial court imposed consecutive sentences. On appeal, the defendant argued the state breached the negotiated terms of the plea agreement. The court, relying on *Pascall*, concluded the defendant's actions, after he entered his guilty plea, relieved the state of its duty to recommend concurrent sentences. *See also State v. Grier*, 3d Dist. No. 3-10-09, 2011-Ohio-902 (prosecutor no longer bound to recommend a sentence when defendant violated terms of the plea agreement).

{¶ 22} Similarly, in the case before us, the trial court was informed that, between the plea and sentencing hearings, appellant violated the terms of his bond. Based on *Pascall* and *Cox*, under these circumstances, appellee was relieved of its obligation to jointly recommend a sentence. For this reason, and those previously stated, we conclude the trial court did not abuse its discretion by finding appellant failed to demonstrate a

manifest injustice sufficient to allow the withdrawal of his guilty plea. Consequently, we overrule appellant's assignment of error.

IV. CONCLUSION

{¶ 23} Having overruled appellant's sole assignment of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
