

[Cite as *State v. Harden*, 2009-Ohio-3431.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

CHARLES HARDEN

Defendant-Appellant

Appellate Case No. 22839

Trial Court Case No. 95-CR-2190

(Criminal Appeal from
Common Pleas Court)

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OPINION

Rendered on the 10th day of July, 2009.

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MATHIAS H. HECK, JR., by R. LYNN NOTHSTINE, Atty. Reg. #0061560, Montgomery County Prosecutor’s Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422

Attorney for Plaintiff-Appellee

CHARLES HARDEN, #43563-061, USP – Allenwood, P.O. Box 3000, White Deer, Pennsylvania 17887

Defendant-Appellant, *pro se*

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BROGAN, J.

{¶ 1} Charles Harden appeals from the trial court’s denial of his motion to withdraw guilty plea filed over twelve years after his conviction of aggravated arson. Harden claims

that the trial court erred in denying his motion to withdraw guilty plea because he did not enter a knowing, intelligent, and voluntary guilty plea. Harden also claims that the State breached his plea agreement. Harden also contends that the trial court did not follow the appropriate sentencing procedures.

{¶ 2} Harden did not appeal from his conviction and sentence. On August 3, 2004, Harden filed a motion to withdraw his guilty plea, claiming that his attorney had rendered ineffective assistance at trial because he failed to investigate the facts of the case, and because his history of mental health problems made his plea involuntary. After the State filed a memorandum contra, the trial court overruled Harden's motion to withdraw his plea on September 21, 2004.

{¶ 3} On November 4, 2004, nearly nine years after he was convicted and sentenced, Harden filed a petition for postconviction relief pursuant to R.C. 2953.21. Harden alleged the same grounds for relief he had earlier presented in his motion to withdraw his guilty plea. On November 18, 2004, the trial court overruled Harden's petition for postconviction relief, without a hearing.

{¶ 4} On October 21, 2005, this court affirmed the trial court's denial of Harden's post-conviction relief petition. We found that Harden's petition was untimely and he failed to demonstrate that the exception for untimely petitions in R.C. 2953.23 applied. We noted that Harden failed to show that he was prevented from discovering the facts upon which his claim for relief relied. See *State v. Harden* (Oct. 21, 2005), Mont. App. No. 20803, 2005-Ohio-5580.

{¶ 5} On March 11, 2008, Harden filed a second motion to withdraw his 1995 guilty plea. He asserted his plea was not knowingly, voluntarily and intelligently made because

he was on a prescription medication, the State breached a plea agreement that he would receive probation if he pleaded guilty to the charge, and the trial court erred in not ordering a pre-sentence investigation before sentencing him. The trial court overruled Harden's motion without a hearing on July 8, 2008. This appeal followed.

{¶ 6} Harden claims the trial court abused its discretion in overruling his motion because he provided two sworn affidavits that he was under the influence of prescribed medications at the time he entered his plea. The State argues that we should affirm the trial court's decision because Harden cannot portray his alleged errors in the absence of a transcript.

{¶ 7} Crim.R. 32.1 provides that the trial court may set aside a judgment of conviction and permit a defendant to withdraw a plea to correct a manifest injustice. The Ohio Supreme Court has held that an undue delay between the occurrence of the alleged cause of a withdrawal of a guilty plea and the filing of a Crim.R. 32 motion is a factor adversely affecting the credibility of the movant and militating against the granting of the motion. *State v. Smith* (1972), 49 Ohio St.2d 261. The delay in filing the motion can also adversely affect the State's ability to prosecute years after the crime was committed and the defendant charged.

{¶ 8} Harden raised these same allegations in the previous untimely post-conviction relief petition. Harden was aware at the time of sentencing that the alleged "deal" that he would receive probation for his plea had been breached. He also knew that he was taking prescribed medication. Harden's sister stated in the affidavit attached to Harden's motion that Harden told her when she visited him in the county jail in 1995 that he was taking some new pills which made him sleepy. His brother, Tommy Coles, Jr., stated

that in 1991 his brother attempted suicide, and when he was in the Dayton prison, his brother told him he heard voices.

{¶ 9} Harden attached a copy of the plea form he signed in 1995. He acknowledged that he understood the effect of his guilty plea and that it was made voluntarily and without any promises to induce his plea. The affidavits submitted by Harden do not refute Harden's acknowledgment. Lastly, the trial court was not required to have a pre-sentence investigation conducted prior to imposing sentence.

{¶ 10} The trial court did not abuse its discretion in denying Harden's motion without a hearing. His assignments of error are Overruled.

{¶ 11} The judgment of the trial court is Affirmed.

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FROELICH AND HARSHA, JJ., concur.

(Hon. William H. Harsha, from the Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

Copies mailed to:

Mathias H. Heck, Jr.
R. Lynn Nothstine
Charles Harden #43563-061
Hon. Michael Tucker