

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-210319
	:	TRIAL NO. B-1905167
Plaintiff-Appellee,	:	
vs.	:	<i>OPINION.</i>
TYSHAWN JAMES,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 22, 2021

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Angela J. Glaser, for Defendant-Appellant.

WINKLER, Judge.

{¶1} Defendant-appellant Tyshawn James appeals from a decision of the Hamilton County Court of Common Pleas denying his postsentence motion to withdraw his guilty plea. We find no merit in his sole assignment of error, and we affirm the trial court’s judgment.

{¶2} The record shows that James was originally indicted for one count of aggravated burglary and two counts of felonious assault. As part of a plea agreement, James agreed to plead guilty to one count of felonious assault, and the state agreed to dismiss the other two charges. In March 2020, James signed an entry withdrawing his plea of not guilty and entering a plea of guilty. The form specifically stated that he faced a potential sentence of two to eight years.

{¶3} The plea hearing did not occur until December, 16, 2020. At the hearing, the state’s statement of facts showed that James had knowingly caused serious physical harm to the victim with a hammer, which resulted in six staples in the victim’s head and four stitches above her eye. When the trial judge asked James if the statement of facts were true, he responded, “Yes, sir.”

{¶4} The trial court conducted a full Crim.R. 11 colloquy. The court asked James if, other than the threat to prosecute the charge against him, anyone had threatened or promised him anything to get him to plead guilty. James replied, “No, sir.” The court further asked him if he understood that if it accepted his plea, it could sentence him “to any penalty up to the maximum penalty * * *.” Finally, the court asked if he understood that it was not “bound by any preliminary discussions among Counsel or any recommendation they might make and that technically the full range of sentencing options was available to the Court.” James replied that he understood. James also told the court that he had read and signed the written plea form and that he understood it. The court determined that James had made a knowing, intelligent and voluntary decision to withdraw his plea of not guilty and enter a guilty plea.

{¶5} As to sentencing, defense counsel stated that she had had discussions with the court in chambers in 2019 and, more recently, on the phone. She asked the court to impose the minimum sentence of two years. The victim addressed the court, noting that she still had ongoing medical problems as a result of the offense, and she asked the court to impose the maximum sentence of eight years.

{¶6} After considering the presentence investigation, the victim's statement, James's criminal record and other relevant information, the court sentenced him to serve six years in prison. Subsequently, defense counsel told the court that she would be filing a motion to withdraw James's plea. When the court asked if she could "shed any light" on the basis for the motion, she stated, "I believe it would be better spoken in chambers. I don't want it to be put on the record at this time."

{¶7} James did not file a direct appeal from his conviction. Two months later, he filed a motion to withdraw his guilty plea, in which he alleged that the trial court had said that it "saw no reason why [it] wouldn't be sentencing [James] to the minimum sentence of two years * * *." Defense counsel stated that based on that discussion, she had advised her client to plead guilty. In a conference in chambers held after the imposition of the sentence, counsel asked the court if it had forgotten about the discussion where it said it would impose the two-year minimum sentence. Notably, the previous trial judge had retired, and the motion was filed on the same day that the new judge took the bench.

{¶8} James's motion was accompanied by his affidavit stating that on the advice of his counsel, he had entered a guilty plea because his counsel had advised him that he would receive a sentence of two years. He added, "I would never have pled guilty to this charge had my attorney not told me I would receive a sentence of two years."

{¶9} The motion was also accompanied by defense counsel’s affidavit, in which she stated that she had advised James to plead guilty after discussions she had in chambers with the court and prosecutor where the court had indicated that it would impose a sentence of two years. She further stated that during an in-chambers discussion after the sentencing hearing, she had reminded the court that it had stated it would sentence her client to two years. The court replied that the sentence was subject to the presentence report and that James was lucky that he had only received a six-year sentence because after reading the presentence report, it was going to impose the maximum sentence of eight years.

{¶10} Counsel also stated that she believed that the court did not “even remember promising my client two years.” Finally, she stated that she was “ineffective counsel for not checking with [the trial court] prior to allowing my client to enter his plea * * *. I knew or should have known that [the trial court’s] ability to recall conversations from ten months prior would be suspect.”

{¶11} At a hearing before the new trial judge, defense counsel asserted that the previous judge had told her in chambers he would impose a two-year sentence. The court asked her if that promise was “firm” and “how was it taken by you?” Defense counsel replied that she took it as a “firm promise.” Counsel represented that because the case had been delayed for several months, she had reminded the previous trial judge about a month before the plea hearing about the promise of a two-year sentence, but the judge stated that he needed to see what the presentence investigation said. Counsel did not have a discussion with the court immediately before the plea hearing, and that was why she was ineffective. After the court announced the sentence, she thought she should discuss it with the court off the record, “which once again was probably not the best thing.”

{¶12} Counsel further indicated that she had waited to file the motion to withdraw the plea on the day the new judge took the bench because she did not

believe that James could get a fair hearing from the previous trial judge. The court asked her why she did not wait to enter the plea until after the new judge had taken the bench, and she stated that she did not believe she had that option and that she did not see the harm in doing the plea in front of the previous judge until he did not impose the promised sentence. She added that it was her fault that she “didn’t follow through on that day * * *.”

{¶13} The court addressed James personally, asking him what “was the promise made to you?” Regarding the two-year sentence, James replied, “That’s what I thought they would give me. I knew it wasn’t no promise * * *.” He later stated, “I know that nothing ain’t a promise but I thought they was going to be two years * * *.” He told the judge that if he had known he was going to get six years, he would not have agreed to the plea.

{¶14} The court told defense counsel that after so much time had elapsed and the previous trial judge had said that he needed to look at the presentence investigation, “that should have given [her] pause that * * * two years was no longer going to be the case and that [she] needed to revisit that issue with the judge before entering the plea.” It also pointed out that counsel did not file an appeal and then waited two months to file the motion to withdraw the plea. Finally, the court stated that James knew the maximum sentence that could have been imposed and he had acknowledged that no promises had been made. Consequently, the trial court overruled James’s motion to withdraw his plea.

{¶15} In his sole assignment of error, James contends that the trial court erred in denying his motion to withdraw his plea. He argues that his plea was not made knowingly, intelligently, and voluntarily, and that his fundamental misunderstanding of the sentence due to his trial counsel’s failure to properly advise him resulted in a manifest injustice. This assignment of error is not well taken.

{¶16} Under Crim.R. 32.1, the trial court may set aside the judgment of conviction and grant a postsentence motion to withdraw the defendant’s plea to correct a manifest injustice. The defendant bears the burden to establish manifest injustice. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph one of the syllabus; *State v. Royal*, 1st Dist. Hamilton No. C-160666, 2017-Ohio-4146, ¶ 9. A postsentence motion to withdraw a plea should only be granted in extraordinary circumstances. *Smith* at 264; *State v. Testerman*, 1st Dist. Hamilton No. C-010040, 2001 WL 930125, *2 (Aug. 17, 2001). The decision whether to grant or deny the motion lies within the trial court’s discretion, which an appellate court will reverse only upon a showing of an abuse of discretion. *Smith* at paragraph two of the syllabus; *Royal* at ¶ 9.

{¶17} A manifest injustice has been defined as a “clear or openly unjust act,” evidenced by an extraordinary and fundamental flaw in the proceeding. *State v. Tekulve*, 188 Ohio App.3d 792, 2010-Ohio-3604, 936 N.E.2d 1030, ¶ 7 (1st Dist.), quoting *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998). James contends that a manifest injustice occurred because his plea was induced by counsel’s statement that he would receive a two-year sentence. “Manifest injustice may result from counsel’s statements to a defendant regarding a promised sentence; however, ‘[m]anifest injustice does not ispro facto’ result from such statements.” *Royal* at ¶ 10, quoting *State v. Alsip*, 1st Dist. Hamilton No. C-130699, 2014-Ohio-4180, ¶ 9. A mere change of heart is not a reasonable ground to justify the withdrawal of a guilty plea. *Royal* at ¶ 12; *State v. Feller*, 2012-Ohio-6016, 985 N.E.2d 210, ¶ 29 (1st Dist.).

{¶18} This is not the extraordinary case where a postsentence motion to withdraw a plea should have been granted. The trial court conducted a full plea colloquy. It informed James of the minimum and maximum sentence he could receive and the rights he was waiving by pleading guilty. James stated that he

understood. He also stated that no promises had been made to induce him to plead guilty, that he understood that the trial court was not bound by any preliminary discussions among counsel, and that the full range of sentencing options was available to the court.

{¶19} Further, James did not file an appeal immediately after the sentencing, in which he could have argued ineffective assistance of counsel. Though counsel stated immediately after the sentencing that James would file a motion to withdraw the plea, it was not filed until two months later. “An undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion.” *Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324, at paragraph three of the syllabus. Also as the trial court stated, because counsel opted to discuss the matter off the record in chambers, it left the record “void of those facts.”

{¶20} Without the plea, James faced a possible 19 years’ imprisonment. Though he said that if he had known he would get a six-year sentence, he would not have entered his plea, the trial court was not bound by that statement. “[T]he good faith, credibility and weight of the movant’s assertions in support of the motion are matters to be resolved by the [trial] court.” *Smith* at paragraph two of the syllabus. Ultimately, we cannot say that the trial court’s decision denying James’s motion to withdraw his plea was so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion. *See State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980); *Tekulve*, 188 Ohio App.3d 792, 2010-Ohio-3604, 936 N.E.2d 1030, at ¶ 7.

{¶21} James also argues that because of his counsel’s ineffectiveness, his plea was not knowingly, intelligently and voluntarily made. A defendant seeking to withdraw a guilty plea on the ground that counsel was ineffective must show that counsel’s performance fell below an objective standard of reasonableness, and that,

but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992).

{¶22} This court has stated that defense counsel renders ineffective assistance where counsel inaccurately represents a promise of a sentence to the defendant. *Royal*, 1st Dist. Hamilton No. C-160666, 2017-Ohio-4146, at ¶ 8. But we have recognized that there is a difference between defense counsel's inaccurate representation to her client that there is a promise or agreement to as to the sentence and defense counsel's prediction of the sentence her client will likely receive. *Id.* at ¶ 8; *Testerman*, 1st Dist. Hamilton No. C-010040, 2001 WL 930125, at *3. Defense counsel's inaccurate representation of the sentence that his or her client will likely receive does not constitute ineffective assistance of counsel. *Royal* at ¶ 8.

{¶23} Even if we determine that an enforceable agreement existed after the initial plea discussions that the trial court would impose a two-year sentence, the passage of approximately ten months and the trial court's statement that it would have to look at the presentence investigation should have alerted James and his counsel that a two-year sentence was only a possibility among the range of sentences available to the trial court. Thus, even if we accept defense counsel's assertion that she was ineffective, James has not shown that he was prejudiced by her ineffectiveness.

{¶24} Though James asserts that he would not have entered the plea if he had known he would receive a six-year sentence, the trial court was in the best position to judge the credibility of those claims. Despite his claim that he would not have entered the plea, James acknowledged that he had not been promised any particular sentence. Further, the record shows that other inducements for James to enter a guilty plea existed. The most serious charge against him was dismissed, and he was aware that he could receive a sentence of two to eight years if he entered a

guilty plea, versus the 19 years he faced if he had gone to trial. The trial court was in best position to evaluate the motivations behind the guilty plea rather than an appellate court, which only reviews a record of the hearing. *See Xie*, 62 Ohio St.3d at 525, 584 N.E.2d 715.

{¶25} In sum, the record shows that James’s plea was made knowingly, intelligently, and voluntarily, and that he has not met his burden to show that but for counsel’s ineffectiveness, he would not have pleaded guilty. Under the circumstances, we cannot hold that the trial court’s denial of James’s motion to withdraw his plea was an abuse of discretion. Therefore, we overrule James’s assignment of error and affirm the trial court’s judgment.

Judgment affirmed.

CROUSE, P.J., and **BOCK, J.**, concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.