IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HANCOCK COUNTY

THE CITY OF FINDLAY,

PLAINTIFF-APPELLEE, **CASE NO. 5-15-19**

v.

FENGXIAO TAO, **JUDGMENT ENTRY**

DEFENDANT-APPELLANT.

This appeal, having been placed on the accelerated calendar, is being considered pursuant to App.R. 11.1(E) and Loc.R. 12. This decision is therefore rendered by summary judgment entry, which is only controlling as between the parties to this action and not subject to publication or citation as legal authority under Rule 3 of the Ohio Supreme Court Rules for the Reporting of Decisions.

Defendant-Appellant, Fengxiao Tao, appeals the judgment of the Findlay Municipal Court denying his motion to withdraw his no contest plea. On appeal, Tao argues that the trial court erred when it denied his motion to withdraw a no contest plea because he was not the person that entered the plea and that he was innocent of the charges. For the reasons that follow, we reverse the judgment of the trial court.

The facts of this case originate from a traffic stop on September 19, 2012. As a result of the traffic stop, the driver of the vehicle, an imposter posing as Tao

("the imposter"), was charged with one count of operating a vehicle while under the influence ("OVI") in violation of Findlay Codified Ordinances 333.01(A)(1)(D), a misdemeanor of the first degree; and one count of changing lanes without due regard in violation of Findlay Codified Ordinances 332.08(A)(1), a minor misdemeanor. The imposter originally entered pleas of not guilty to both charges. On January 2, 2013, the imposter changed his plea to no contest regarding the OVI charge, and the trial court dismissed the remaining charge the same day. The court found Tao guilty of OVI, and the case proceeded immediately to sentencing. The court sentenced him to 30 days in jail, 23 of which were suspended. Additionally, Tao's license was suspended for a period of one year. Further, Tao had to finish several driving programs in order to get his license back.

On June 6, 2013, Tao filed a motion for post-conviction relief. A hearing was held on August 21, 2013 and October 22, 2013 where the following testimony was elicited.[1]

Tao was the sole witness to testify at the August 21 hearing. Tao testified that he is from China and has never been charged with OVI in Findlay or anywhere else. Further, he stated that he never appeared before the trial court to answer for an OVI charge originating from a traffic stop on September 19, 2012.

[1] Although this appeal does not concern Tao's motion for post-conviction relief, the trial court incorporated the testimony presented during those hearings as part of the record for Tao's motion to withdraw his plea. Therefore, they are properly before this court and will be considered for the purposes of rendering a decision.

Tao explained that Jing Lu, another Chinese national, called him and Lu told him that Lu had been arrested for OVI. According to Tao, Lu identified himself as Tao to the officer. Lu presented Tao's driver's license to the officer as well.

Tao testified that he did not go to the police and report the identity fraud because Lu expressed to him that Lu would handle the situation and that he would get his license back shortly. Tao stated that he had never met or seen the judge or the attorney that represented "Tao" in the OVI case.

On cross-examination, Tao testified that he was at home with his wife, Diana, on September 19, 2012, at the time when the alleged OVI occurred. He explained that Lu and he were friends and that Lu was currently in jail in Cleveland. Next, Tao identified Lu by a mugshot.

Attorney Jeffrey Whitman, the attorney who represented "Tao" in the OVI case, was permitted to ask Tao several questions. While the OVI case was going on, Tao admitted that he knew that Diana was serving as an interpreter for Lu and Whitman. Tao explained that he did not want to get involved because Lu insisted that he was taking care of the problem and that Tao did not want to spend any of his money since it was not his mistake that caused the problem.

Next, the court asked Tao several questions. Tao stated that he did not give Lu his license to use. Tao admitted that he knew about the identity fraud the day after the OVI arrest. Although he explained that he did not quite understand how a

sentence works, Tao admitted that he knew generally about the punishments resulting from the OVI case.

At the conclusion of Tao's testimony, the court ordered the hearing to be continued for more testimony regarding the identity of the driver who was arrested, charged, and convicted of OVI.

The hearing resumed on October 22, 2013. Tao was the first witness to testify. Tao testified that Lu was his wife's brother, making Lu his brother-in-law. He stated that he was unaware Lu was going to give his name when Lu was arrested for OVI on September 19, 2012.

Tao also admitted that he knew that Lu was telling Whitman that Lu was Tao. He further admitted that he knew that his wife had served as Lu's interpreter on more than one occasion.

Officer Chris Huber of the Findlay Police Department was the only other witness to testify. Officer Huber testified that he conducted an investigation to determine the identity of the individual cited for OVI, on September 19, 2012, who identified himself as Tao. Officer Huber stated that Lu, not Tao, was the individual that was operating the vehicle. He added that he looked at Lu's booking photograph and at Tao. Based on all of this information, he testified that Tao was not the person that was operating the vehicle.

Officer Huber stated that Lu continuously held himself out as Tao during the whole ordeal. He testified that an OVI offense is not a felony offense. Officer

Huber corroborated Tao's testimony in full, but added that Tao indicated to him that Tao and Lu agreed that as long as Lu took care of everything that Tao was OK with Lu's course of conduct. He clarified, though, that there was no conspiracy to have Lu identify himself as Tao prior to the offense.

The court ultimately denied Tao's motion because it found that he had participated in a conspiracy to commit fraud upon the court. Interestingly, the court conceded that Tao "established that Mr. Tao who sits before me *is not* the one who operated the vehicle on September the 19th, 2012." (Emphasis added.) Oct. 22, 2013 Hrg. Tr., p. 22. The court memorialized its opinion in an entry dated October 23, 2013.

Tao appealed that decision, and we affirmed on June 9, 2014, finding that the trial court lacked jurisdiction to consider Tao's motion since post-conviction relief is not an available remedy in municipal courts. *City of Findlay v. Tao*, 3d Dist. Hancock No. 5-13-37 (June 9, 2014); *see also State v. Cowan*, 101 Ohio St.3d 372, 2004-Ohio-1583, syllabus ("A municipal court is without jurisdiction to review a petition for post-conviction relief filed pursuant to R.C. 2953.21.").

On January 27, 2015, Tao filed a motion to withdraw his plea. A hearing was conducted on March 31, 2015. On April 22, 2015, the trial court denied Tao's motion. Again the trial court reasoned that although it knew that Tao was not guilty of OVI, it nonetheless had to find that there was no manifest injustice since Tao engaged in conduct that amounted to fraud upon the court. That being said,

the court stated "if Jing Lu would ever come forward and ultimately be convicted of the offense(s) that occurred on September 19, 2012, then the Court could reconsider whether to grant Fengxiao Tao's motion since it would be manifestly unjust for two people to be convicted of the same offense(s) arising out of this set of facts." (Docket No. 38, p. 8).

Tao filed this timely appeal, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT'S FAILURE TO GRANT APPELLANT [SIC] MOTION TO WITHDRAW PLEA WAS UNREASONABLE, ARBITRARY AND UNCONSCIONABLE.

Assignment of Error No. II

THE TRIAL COURT ERRED BY DENYING THE APPELLANT'S MOTION TO WITHDRAW PLEA BASED UPON EQUITABLE CONSIDERATIONS.

Given the nature of Tao's assignments of error, we elect to address them together.

Assignments of Error Nos. I & II

In his first and second assignments of error, Tao argues that the trial court erred by denying his motion to withdraw his plea. Specifically, Tao argues that he should be permitted to withdraw his no contest plea because the evidence clearly establishes that he is not the person that entered a plea in this case and that he is innocent. We agree.

Appellate review of the trial court's denial of a motion to withdraw a guilty or no contest plea is limited to whether the trial court abused its discretion. *See State v. Nathan*, 99 Ohio App.3d 722, 725 (3d Dist.1995), citing *State v. Smith*, 49 Ohio St.2d 261, 264 (1977). An abuse of discretion connotes more than an error of law or judgment and implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *State v. Nagle*, 11th Dist. Lake No. 99-L-089, 2000 WL 777835, *4 (June 16, 2000), citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying an abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. *Id.*

Crim.R. 32.1 provides that "[a] motion to withdraw a plea of * * * 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." The party moving to withdraw the plea of no contest bears the burden of establishing a manifest injustice. *See Smith* at paragraph one of the syllabus. A manifest injustice is an exceptional defect in the plea proceedings, *State v. Vogelsong*, 3d Dist. Hancock No. 5-06-60, 2007-Ohio-4935, ¶ 12, or a " 'clear or openly unjust act.' " *State v. Walling*, 3d Dist. Shelby No. 17-04-12, 2005-Ohio-428, ¶ 6, quoting *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208 (1998). Accordingly, a post-sentence motion to withdraw a guilty plea is only granted in "extraordinary cases." *Smith* at 264.

"It is well established that a plea of guilty or no contest must be made knowingly, intelligently, and voluntarily for it to be valid and enforceable." *State v. Thomas*, 3d Dist. Mercer No. 10-10-17, 2011-Ohio-4337, ¶ 20, citing *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶ 25. At the hearing in the case sub judice, undisputed evidence was presented that proved Tao was not the person that entered a plea of no contest to OVI. Rather, Lu entered a plea posing as Tao. Moreover, uncontroverted testimony was presented that proved that Tao was not the driver of the vehicle. Again, the evidence proved that Lu was the actual offender. Given the evidence presented to the trial court, there is no possible way Tao made a plea knowingly, intelligently, or voluntarily.

Even though the trial court admitted that Tao was not the driver or the person that entered a plea in the case, it nonetheless refused to grant Tao's motion to withdraw his plea. Although the court stated that manifest injustice would exist if two people were convicted of the same OVI offense, the court apparently deemed an innocent person being convicted not to be a manifest injustice. The court based its decision on its conclusion that Tao participated in a fraud on the court when he failed to report Lu's masquerade to either the court or police. Nonetheless, the evidence clearly established that Tao was not the person that entered a plea of no contest to OVI and was not the person driving the vehicle. Whether or not Tao committed a fraud on the court is irrelevant to the analysis of

whether Tao entered the plea in this case. Given the extraordinary facts of this case, such a conclusion is unreasonable.

Therefore, we sustain Tao's first and second assignments of error.

Accordingly, for the aforementioned reasons, it is the order of this court that the Judgment Entry of the Findlay Municipal Court be, and hereby is, reversed. Costs are assessed to Appellee for which judgment is hereby rendered. This cause is remanded to the trial court for further proceedings consistent with this judgment entry and for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this judgment entry to the trial court as the mandate prescribed by App.R. 27, and serve a copy of this judgment entry on each party to the proceedings and note the date of service in the docket as prescribed by App.R. 30.

JUDGE

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DATED: NOVEMBER 9, 2015
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