

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

RICHARD T. PHELAN

Defendant-Appellant

: JUDGES:

:

: Hon. W. Scott Gwin, P.J.

: Hon. William B. Hoffman, J.

: Hon. Patricia A. Delaney, J.

:

: Case Nos. 18-CA-57

: 18-CA-64

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O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of  
Common Pleas, Case No. 18-CR-00015

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

March 8, 2019

APPEARANCES:

For Plaintiff-Appellee:

BILL HAYES  
LICKING COUNTY PROSECUTOR

CLIFFORD J. MURPHY  
20 North Second St., 4th Floor  
Newark, OH 43055

For Defendant-Appellant:

RICHARD T. PHELAN, Pro Se  
Inmate # 742-303  
Chillicothe Correctional Institute  
P.O. Box 5500  
Chillicothe, OH 45601

*Delaney, J.*

{¶1} Defendant-Appellant Richard T. Phelan appeals the June 20, 2018 and July 10, 2018 judgment entries of the Licking County Court of Common Pleas. Plaintiff-Appellee is the State of Ohio.

### **FACTS AND PROCEDURAL HISTORY**

{¶2} On December 12, 2017, the Licking County Grand Jury returned a five-count superseding indictment against Defendant-Appellant Richard T. Phelan, charging him with: (1) Aggravated Vehicular Assault, a third-degree felony in violation of R.C. 2903.08(A)(1)(a); (2) Vehicular Assault, a fourth-degree felony in violation of R.C. 2903.08(A)(2)(b); (3) OMVI, a first-degree misdemeanor in violation of R.C. 4511.19(A)(1)(a)(G)(1)(a)(i); (4) OMVI, a first-degree misdemeanor in violation of R.C. 4511.19(A)(1)(j)(x)(G)(1)(a)(i); and (5) Felonious Assault, a second-degree felony in violation of R.C. 2903.11(A)(2).

{¶3} The charges against Phelan were based on an incident that occurred on July 17, 2017. While Phelan was operating his 2013 Dodge Ram Pickup in Licking County, Ohio, he deliberately sped up and crashed into the rear of a 2010 Dodge Caliber operated by K.E. The force of the impact caused the Dodge Caliber to flip over. The truck went off the roadway into a ditch, which witnesses observed Phelan attempt to drive out of the ditch. As a result of the collision, the State alleged K.E. suffered serious physical harm in which she suffered bruising over her body; injuries to her right arm from broken glass; nerve damage to her right elbow preventing her from lifting heavy objects or turning her elbow; PTSD requiring counseling; and nerve damage to her right hip affecting her ability to remain stationary. As a result of her injuries, K.E. missed two weeks of work.

After the accident, Phelan advised the investigating police officers he had smoked PCP before driving his vehicle. His statement was recorded on one of the officer's body cameras. The officers took a statement from Phelan's passenger in which she stated that prior to accelerating the vehicle and hitting the Dodge Caliber, Phelan made a statement about being "Jesus" and both of them going to meet "God" now.

{¶4} Phelan entered a plea of not guilty to the charges. On September 6, 2017, Phelan filed a motion to enter a plea of not guilty by reason of insanity. Upon investigation, the trial court denied the motion on November 2, 2017.

{¶5} Phelan appeared for a change of plea hearing on February 23, 2018. The State agreed to dismiss Count Five, Felonious Assault and Phelan agreed to enter a plea of guilty to the remaining charges. The transcript of the change of plea and sentencing hearing was filed on June 7, 2018. The trial court conducted the plea colloquy and the court accepted Phelan's guilty pleas as being knowingly, voluntarily, and intelligently given. The trial court merged the four remaining counts for sentencing purposes and the State elected to sentence Phelan on Count One, Aggravated Vehicular Assault. The trial court sentenced Phelan to a mandatory term of three years in prison.

{¶6} Phelan did not file a direct appeal of his sentence. Phelan attempted to file a delayed appeal, but this Court denied Phelan's motion.

{¶7} On May 2, 2018, Phelan filed a motion to withdraw his guilty plea. In his motion, he argued he was told by his counsel that K.E. suffered serious injuries as a result of the incident. Phelan stated he did not learn until after his plea from his insurance company that K.E. did not suffer any broken bones, only "bumps and bruises." He argued

he would not have entered a guilty plea if he had been properly advised by his counsel of the nature of K.E.'s injuries.

{¶8} The trial court denied Phelan's motion to withdraw his plea on June 20, 2018. Phelan filed a motion for reconsideration, which the trial court denied on July 10, 2018. Phelan filed appeals of the June 20, 2018 and July 10, 2018 judgment entries, which this Court considers together herein.

### **ASSIGNMENTS OF ERROR**

{¶9} Phelan raises two Assignments of Error:

{¶10} "I. INEFFECTIVE ASSISTANCE OF APPELLANT'S TRIAL COUNSEL AMOUNTED TO A "MANIFEST INJUSTICE.

{¶11} "II. THE LOWER COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANTS [SIC] PLEA WITHDRAWAL."

### **ANALYSIS**

{¶12} We consider Phelan's two Assignments of Error together because they are interrelated. Phelan argues the trial court erred in denying his post-sentence motion to withdraw his guilty plea. We disagree.

{¶13} Crim.R. 32.1 states as follows: "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."

{¶14} Our review of a trial court's decision under Crim.R. 32.1 is limited to a determination of whether the trial court abused its discretion. *State v. Caraballo*, 17 Ohio St.3d 66, 477 N.E.2d 627 (1985). In order to find an abuse of that discretion, we must

determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). “ \* \* \* [T]he good faith, credibility and weight of the movant's assertions in support of the [Crim.R. 32.1] motion are matters to be resolved by [the trial] court.” *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph two of the syllabus (1977).

{¶15} A Crim.R. 32.1 motion is not a challenge to the validity of a conviction or sentence, and instead only focuses on the plea. *State v. Hill*, 5th Dist. Stark No. 2015 CA 00036, 2015-Ohio-3312, ¶ 17 citing *State v. Bush*, 96 Ohio St.3d 235, 773 N.E.2d 522, 2002–Ohio–3993, ¶ 13. Ineffective assistance of counsel can form the basis for a claim of manifest injustice to support withdrawal of a guilty plea pursuant to Crim.R. 32.1. See *State v. Dalton*, 153 Ohio App.3d 286, 292, 2003–Ohio–3813, ¶ 18. However, under the “manifest injustice” standard, a post-sentence withdrawal motion is allowable only in extraordinary cases. *State v. Aleshire*, 5th Dist. Licking No. 09–CA–132, 2010–Ohio–2566, ¶ 60, citing *Smith, supra*, at 264. Furthermore, “ \* \* \* if a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe. \* \* \* ” *State v. Peterseim*, 68 Ohio App.2d 211, 213, 428 N.E.2d 863 (8th Dist.1980), quoting *Kadwell v. United States* (C.A.9, 1963), 315 F.2d 667.

{¶16} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. See, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, “a court must indulge a strong presumption that counsel's conduct falls within the wide

range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ “ *Id.* at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶17} “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689. The question is whether counsel acted “outside the wide range of professionally competent assistance.” *Id.* at 690.

{¶18} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this “actual prejudice” prong, the defendant must show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

{¶19} Phelan plead guilty to one count of Aggravated Vehicular Assault, in violation of R.C. 2903.08(A)(1)(a), and one count of Vehicular Assault, in violation of R.C. 2903.08(A)(2)(b). R.C. 2903.08(A) states, “No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person or another's unborn in any of the following ways: \* \* \*.” “Serious physical harm to persons” means any of the following:

- (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
- (b) Any physical harm that carries a substantial risk of death;

- (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
- (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
- (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

R.C. 2901.01

{¶20} Phelan contends his counsel was ineffective for his failure to inform Phelan of the nature of K.E.'s injuries. Phelan argues K.E.'s injuries did not constitute "serious physical harm" pursuant to R.C. 2901.01 because she did not break any bones – she merely suffered "bumps and bruises," according to the information provided by an insurance company. Phelan argues that if he had known the nature of K.E.'s injuries, he would not have entered a plea of guilty to the charges.

{¶21} The State contends it provided discovery to Phelan including medical records, photographs, and the victim's statement. The State provided a statement of facts at the change of plea and sentencing hearing. The record shows that K.E.'s injuries included nerve damage to her elbow and hip, causing her lasting pain and restrictions in her movement. K.E. missed two weeks from work as a result of her injuries. Pursuant to R.C. 2901.01, serious physical harm includes physical harm that involves acute pain of such duration as to result in substantial suffering or any degree of prolonged or intractable pain. Further, it includes any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity. Under

these parameters, we find Phelan failed to meet the first threshold of the *Strickland* test to show incompetence by Phelan's counsel as to Phelan's knowledge of the harm suffered by K.E. While Phelan argues K.E. did not suffer serious physical harm because the accident he caused did not break her bones, R.C. 2901.01 does not limit serious physical harm to only broken bones. Phelan's counsel properly considered the statutory guidelines as to "serious physical harm."

{¶22} Phelan's arguments do not demonstrate an extraordinary case where manifest injustice will occur if he is not permitted to withdraw his guilty plea. The trial court was within its discretion to deny Phelan's post-sentence motion to withdraw his guilty plea and deny Phelan's motion for reconsideration.

{¶23} Phelan's first and second Assignments of Error are overruled.

### **CONCLUSION**

{¶24} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.,

Gwin, P.J. and

Hoffman, J., concur.