[Cite as *State v. Porter*, 2012-Ohio-940.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-514
v.	:	(C.P.C. No. 10CR-523)
Maurice L. Porter,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 8, 2012

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Kirk A. McVay, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Maurice L. Porter ("appellant"), appeals from the May 16, 2011 judgment of the Franklin County Court of Common Pleas sentencing him to six years of imprisonment for pleading guilty to two counts of kidnapping, without specification, in violation of R.C. 2905.01. For the following reasons, we affirm.

{¶ 2} On January 28, 2010, appellant was indicted on two counts of aggravated robbery with specification, first-degree felonies in violation of R.C. 2911.01; two counts of robbery with specification, second-degree felonies in violation of R.C. 2911.02; two counts of felonious assault with specification, second-degree felonies in violation of R.C. 2903.11; two counts of kidnapping with specification, first-degree felonies in violation of R.C. 2905.01; and one count of tampering with evidence with specification, a third-degree

felony in violation of R.C. 2921.12. On February 1, 2010, appellant pled not guilty to all charges in the indictment.

{¶ 3} On January 10, 2011, after several continuances, this matter came on for trial. Prior to trial commencing, Attorney Clayton Lopez ("Lopez") indicated that appellant expressed an issue regarding his legal representation. Lopez indicated that appellant no longer wished that Lopez represent him because they "had some run-ins in the past about the case and what [appellant's] options are or [Lopez's] evaluation of those options." (Tr. 3.) Lopez also indicated that appellant was not completely comfortable with going forward, and that appellant "wishe[d] to have new counsel appointed for a new approach or a new, for lack of a better word, a new set of eyes on the case, to see if there is something else another attorney might be able to do for him." (Tr. 4.)

{¶ 4} Further, appellant stated that he and Lopez do not see "eye to eye" and have verbal disputes about Lopez's representation and the things appellant needs. (Tr. 4.) Appellant also stated that:

> [Lopez] is not trying to do what I want him to do. I tried to get him to bring up certain issues. He has his theory and his logic of what is going on. I feel that is not in my best interests [sic].

(Tr. 4.) Then, the trial court inquired whether appellant was a lawyer, had gone to law school, knew the rules of evidence, or knew the rules of criminal procedure. Appellant responded "no" to the trial court's questions. The trial court then asked appellant "[d]o you understand there may be certain things that you want Mr. Lopez to bring up that might be detrimental to you from a legal perspective, and that might infringe on your constitutional rights?" (Tr. 5.) Appellant responded, "[y]es, I am aware of that. I don't think that is the issue." (Tr. 5.) Appellant further expressed that he felt the issues were that Lopez did not want to represent appellant, appellant had lost trust in Lopez, and appellant did not feel comfortable going to trial with Lopez.

{¶ 5} Upon listening to appellant's reasons for wanting different counsel, the trial court concluded:

> The question I have to answer is whether Mr. Lopez is competent and whether he is effective as your counsel, and there is nothing that you have shared with the court today that leads me to believe that he is not competent or not effective.

> The fact that you don't necessarily like him is not a prerequisite for him representing you here in this matter.
>
> There has not been a complaint before this court before regarding [Lopez's] ability to represent you effectively. I find it slightly ironic that this issue would be raised on the day this matter is set to go forward with trial. So given the state of the law in this issue, given what you have told me today, I am not going to appoint different counsel for you in this matter. We will proceed with the trial as it is set on today, and Mr. Lopez will continue to be your counsel.

(Tr. 7.) The record indicates that trial did not commence on January 10, 2011 because the trial court granted appellant's motion for continuance.

{¶ 6} On April 19, 2011, this matter, again, came on for trial. Prior to trial commencing, the trial court wanted to go over any plea offer tendered by the state. The state indicated that there were several different offers tendered, including a couple kidnappings with a firearm specification, in which appellant would not have to cooperate, and a kidnapping count with a four-year sentence if appellant agreed to cooperate and testify in this case. Lopez informed the trial court that he discussed the latest plea offers with appellant but that appellant wished to proceed to trial. Lopez also stated that he advised appellant regarding the potential maximum penalty on the underlying charges and that "the offer is a good offer and he should seriously consider it." (Tr. 10.)

{¶ 7} The trial court then addressed appellant directly regarding the plea offer and the charges in the indictment:

> THE COURT: A kidnapping, a felony of the first degree, with a joint recommendation of a sentence of four years. Do you understand that offer, sir?
>
> [APPELLANT]: Yes, ma'am.
>
> THE COURT: Do you understand, sir, if you decide to reject the offer and to exercise your constitutional rights to a trial, you have been charged with a nine-count indictment, do you understand that?
>
> [APPELLANT]: Yes, Your Honor.

> THE COURT: Do you understand that you have been charged with two counts of aggravated robbery, both felonies of the first degree?
>
> [APPELLANT]: Yes.
>
> THE COURT: And that those counts of robbery are with specifications?
>
> [APPELLANT]: Yes.
>
> THE COURT: Do you understand that you have been charged with two counts of robbery with specifications, both felonies of the second degree?
>
> [APPELLANT]: Yes, ma'am.
>
> THE COURT: Do you understand that you have been charged with two counts of felonious assault with specifications, both felonies of the second degree?
>
> [APPELLANT]: Yes, ma'am.
>
> THE COURT: Do you understand that you have been charged with kidnapping with specifications in two counts, both felonies of the first degree?
>
> [APPELLANT]: Yes, ma'am.
>
> THE COURT: Do you understand that you have been charged with tampering with evidence with specification, one count, a felony of the third degree?
>
> [APPELLANT]: Yes, ma'am.

(Tr. 10-12.) After addressing each count in the indictment, the trial court then began to address the minimum and maximum penalties associated with each count. At that time, appellant's counsel requested a moment to speak with his client and the trial court took a recess.

{¶ 8} Upon resumption of the hearing, the state indicated as follows:

> [Appellant] entered a general plea of not guilty at arraignment. It is my understanding that he now wishes to withdraw his previously entered not guilty plea and plead guilty to count seven of the indictment, kidnapping, a felony of the first degree, a violation of Revised Code 2905.01,

> without a gun specification; and count eight, also kidnapping F-1, also without a gun specification.
>
> It is further my understanding that [appellant] was made aware that the maximum possible penalty for each of these counts is ten years imprisonment and/or a $20,000 fine; and finally that he understands there is a presumption of prison because of the kidnapping offense that he will be subject to post-release control; and subject to the court's acceptance of this plea, the state would ask for a nolle of counts 1, 2, 3, 4, 5, 6, and 9 and all specifications.
>
> I have an entry of guilty plea form that appears to be signed by all parties[.]

(Tr. 15-16.)

{¶ 9} As part of the plea colloquy, pursuant to Crim.R. 11, the trial court inquired into whether appellant entered into these pleas freely, voluntarily, and with a full understanding of his legal rights. During questioning, appellant acknowledged the following:

> (1) He was 29 years old.
>
> (2) He lived in Columbus, Ohio.
>
> (3) He was a United States citizen.
>
> (4) He can read and write the English language.
>
> (5) He completed the 11th grade.
>
> (6) He was not under the influence of any drugs, alcohol, or prescription medication.
>
> (7) He discussed the charges against him with his attorney.
>
> (8) He had no questions about those charges.
>
> (9) He was satisfied with the advice, counsel, and representation that his attorney provided.
>
> (10) No one promised him anything or threatened him to get him to plead guilty.
>
> (11) He was currently not on community control or post-release control.

(12) He signed both pages of the two-page entry of guilty plea form, wherein he pled guilty to two counts of kidnapping, without specification, in violation of R.C. 2905.01. The forms summarized the charges to which he pled guilty, the possible maximum sentences for the same, the presumption in favor of a prison term, the possibility of post-release control and consequences for violating the same, and the rights he was giving up by pleading guilty. By signing the form, appellant acknowledged he understood the same.

(13) He discussed these forms with his attorney.

(14) He did not have any questions about anything on these forms.

(15) He understood that, if the trial court accepted his guilty pleas as to counts 7 and 8, both counts of kidnapping and both felonies of the first degree without the specifications, the maximum penalties could be ten years of incarceration as to each count, and/or a fine up to $20,000 on each count.

(16) He understood that, if the trial court imposed a prison sentence, he would be subject to a mandatory five years of post-release control, and if he violated the terms of post-release control, the parole authority could extend its period of supervision beyond the mandatory five years or return him to prison for those violations.

(17) He understood that, if the trial court imposed a prison sentence, he would be subject to a mandatory five years of post-release control.

(18) He understood that the law establishes a presumption in favor of prison for the offenses to which he was entering a guilty plea.

(19) He understood that the trial court has the option of imposing a community control or probation sanction as his sentence on either count.

(20) He understood that whether the trial court imposes prison or community control is completely up to the court's discretion.

> (21) He understood that, if the trial court imposed a prison sentence, it could impose those sentences either consecutively or concurrently.
>
> (22) He understood the difference between the terms consecutive and concurrent and that the maximum sentence that could be imposed consecutively would be 20 years of incarceration, and the maximum sentence that could be imposed concurrently would be 10 years of incarceration.
>
> (23) He understood that, if the case went to trial, the state would have to prove his guilt beyond a reasonable doubt.
>
> (24) He understood that he would have a right to a jury trial of 12 people or that, if he gave up that right, the court could decide his case.
>
> (25) He understood that he would have a right to face and question the state's witnesses or confront his accusers.
>
> (26) He understood that he would have a right to compel or call witnesses to come to court and testify on his behalf.
>
> (27) He understood that he would have the right to testify on his own behalf or remain silent and that his silence could not be used against him.
>
> (28) He understood that he would have a right to appeal a guilty verdict to a higher court.

(Summarized from Tr. 17-22.) The trial court then inquired:

> THE COURT: Is it your decision today to waive or to release and give up all of the rights that we have just discussed?
>
> [APPELLANT]: Yes, ma'am.

(Tr. 22.) The prosecutor read the facts into the record, and the trial court asked:

> THE COURT: As to counts 7 and 8, both counts of kidnapping, both felonies of the first degree without specification, sir, what are you pleas?
>
> [APPELLANT]: Guilty.

(Tr. 24-25.) The trial court, accepting appellant's guilty pleas, then found appellant guilty as to counts 7 and 8 of the indictment and dismissed counts 1, 2, 3, 4, 5, 6, 9, and all specifications.

{¶ 10} On May 4, 2011, appellant filed a motion to withdraw his pleas. In his motion, appellant contended that he no longer wished to enter a plea of guilty because he has ADHD and was "unable to comprehend what was happening on April 19, 2011, the date of the plea." (*See* Motion to Withdraw Plea[s], 2.) Further, appellant contended that "counsel tricked him into the plea[s] as he feels he did not realize what he was pleading to and what the implications of [those] plea[s] were." (*See* Motion, 2.) In his motion, appellant also reasserted his innocence. (*See* Motion, 2.) That same day, Lopez filed a motion to withdraw as counsel.

{¶ 11} On May 12, 2011, the trial court held a hearing on appellant's motion to withdraw his pleas. Lopez indicated that appellant wished to withdraw his guilty pleas because he felt that he was duped by Lopez into entering a plea and that he was pressured into entering the pleas. Appellant also mentioned that he had some issues with Attention Deficit Disorder ("ADD") or Attention Deficit Hyperactivity Disorder ("ADHD") and was unable to comprehend what was going on the morning of the plea hearing. The trial court then took the following testimony with regard to appellant's educational background:

> THE COURT: All right. So, again, your name is Maurice Porter. How old are you, sir?
>
> [APPELLANT]: I am 29.
>
> THE COURT: And tell me about your educational background. Did you graduate from high school?
>
> [APPELLANT]: No. At 12th grade I was incarcerated in Michigan. I moved here in 2005.
>
> THE COURT: I just asked about your education. So you completed through the 11th grade?
>
> [APPELLANT]: Yes. I am in school—I was in school before this case took place.
>
> THE COURT: When you say you were in school, were you taking college-level courses?

> [APPELLANT]: No. I was studying to get my GED and also attending Everest.
>
> THE COURT: You were attending Everest. You were studying to get your GED.
>
> [APPELLANT]: Yes, ma'am.

(Tr. 31-32.) Further, the trial court inquired with regard to appellant's understanding of the entry of guilty plea form:

> THE COURT: All right. Do you recall having a conversation with this court on the record regarding this plea form?
>
> [APPELLANT]: Yes. I was also in a conversation with him.
>
> THE COURT: I just want you to answer yes or no.
>
> [APPELLANT]: I remember, yes, ma'am, I do.
>
> THE COURT: Do you remember having a conversation with me?
>
> [APPELLANT]: Yes.
>
> THE COURT: Do you remember me asking you about the information on this form?
>
> [APPELLANT]: Yes, I do.
>
> THE COURT: Do you remember me asking you whether you discussed this form with Mr. Lopez?
>
> [APPELLANT]: Yes, I do. Not—
>
> THE COURT: This is just yes or no. Do you remember me asking you that?
>
> [APPELLANT]: Yes, I do.
>
> THE COURT: Do you remember telling me that you had discussed this form with Mr. Lopez?
>
> [APPELLANT]: Yes. Because I was trying to get out—
>
> THE COURT: It is just yes or no. Do you remember telling me you discussed this form with Mr. Lopez?

> [APPELLANT]: Yes.
>
> THE COURT: Do you remember telling me, sir, that you understood everything that was contained on this form?
>
> [APPELLANT]: Yes, I remember that.
>
> THE COURT: Do you remember telling me that you were satisfied with the advice, counsel, and representation that you had received from Mr. Lopez?
>
> [APPELLANT]: Yes, I remember telling you that.
>
> THE COURT: All right. Do you recall this court asking you if you wanted to give up all of your constitutional rights as it related to a jury trial of this matter, the right to confront your accusers, the right to testify, the right to remain silent if you chose to do so, the ability to have a guilty verdict appealed to a higher court. Do you remember having that conversation with me?
>
> [APPELLANT]: Yes.
>
> THE COURT: Do you remember telling me that you wanted to give up all of those rights?
>
> [APPELLANT]: Yes.

(Tr. 32-34.) In addition, the trial court specifically inquired with regard to appellant's reasons for requesting to withdraw his guilty pleas:

> THE COURT: All right. Why don't you then tell me, Mr. Porter, why it is that you would like for this court to accept your withdrawal of guilty plea today?
>
> * * *
>
> [APPELLANT]: A lot of conflictions in the case that Mr. Lopez is not willing to be argumentative about. I understand that he is my legal representation, supposed to give me the best legal knowledge that he wants, but the fact in black and white, there is a lot of conflictions.
>
> THE COURT: Let me stop you. I will give you an opportunity to speak, but what I need for you to understand is that this is not the trial, so if you are going to present

evidence, this is not the appropriate forum. You need to tell me why it is that this court should withdraw the guilty plea. If there was something that happened, some misinformation, some right not explained to you, that is what I need to know. This is not the forum in which the court will consider evidence.

[APPELLANT]: The information that I was given that I was going to receive probation.

* * *

THE COURT: * * * I am going to ask you to turn to page 12 of the transcript at line 17. Do you see where we are? Page 12, line 17.

* * *

THE COURT: I asked you, do you understand that the law establishes a presumption in favor of prison for the offenses to which you are entering a guilty plea? Do you see a response? Yes, ma'am.

[APPELLANT]: Yes.

* * *

THE COURT: The court asked you, do you understand that whether the court imposes prison or community control is completely up to this court's discretion, it is my decision. Do you see that question?

[APPELLANT]: Yes.

THE COURT: Your response was, yes, ma'am.

[APPELLANT]: Yes, ma'am.

THE COURT: What else would you like to share with me?

[APPELLANT]: The reason I need to be—I go to school, I attend school, I attend Everest. I am not going to be able to attend school if I plead out to these two kidnappings. I was attending school way before this case, I even caught this case, got involved with individuals in this case. I am innocent. * * *

* * *

[APPELLANT]: My life, I feel like if I go to prison, I am not going to be able to do what I desire to. I want to be a medical assistant. I am not in the neighborhood causing confusion. * * *

* * *

THE COURT: You said that you were studying at Everest before all of this happened.

[APPELLANT]: Yes.

THE COURT: What were you studying?

[APPELLANT]: Medical.

THE COURT: Medical what?

[APPELLANT]: Just medical assistance.

THE COURT: Medical assisting?

[APPELLANT]: Yes.

THE COURT: What classes were you taking?

[APPELLANT]: I didn't start class. I was about to. I had two classes.

THE COURT: Well, you just told me that you were a student at Everest.

[APPELLANT]: I am enrolled in Everest, but I go to Dominican. Dominican is where I go to.

* * *

THE COURT: What classes are you taking?

[APPELLANT]: GED, math.

THE COURT: Are you currently taking those classes?

[APPELLANT]: I am on hold due to this right here.

> THE COURT: When was the last time that you were in class?
>
> [APPELLANT]: I think like February.
>
> THE COURT: How were your studies going?
>
> [APPELLANT]: Good. I only need six points to attain my GED.
>
> * * *
>
> [APPELLANT]: That is something I have been working on. The Everest thing, the Everest, they won't let me in. I was going to start Everest, but they informed me, like, I think when I got out it was April 19. I called the lady. She asked me how it was going. I said I pled out to two kidnappings. Basically, she is, like, you can't plead out to that. You have to somehow get out of it, because you won't get funded government, they won't give you no financial aid.

(Tr. 37-38; 40; 71-73.)

{¶ 12} Also, upon being questioned by the prosecutor regarding listening to the plea offer, appellant testified, under oath, as follows:

> [PROSECUTOR]: So you weren't listening when I stated it on the record and the court went over it with you?
>
> [APPELLANT]: I am speaking to him and you at the same time. I have dyslexia. I cannot hold three conversations or two conversations at once. Some people can. I have this on record in school, special ed, mental institutions, everything because of this problem.
>
> [THE COURT]: A problem with dyslexia?
>
> [APPELLANT]: Dyslexia, my behavior. I have ADHD. It is a known fact, if you go to Michigan and look up my transcripts in school on up through me being an adult, I am classified in prison—the judge even ordered me to take mediation when I was in Michigan. Therefore, I am trying to hold a conversation with yourself, [the prosecutor], Mr. Lopez, and the judge. That is kind of impossible.
>
> * * *

> [THE PROSECUTOR]: When the judge talked directly to you, weren't you paying attention to the judge?
>
> [APPELLANT]: Yes. At the same time I was also speaking with him also, Mr. Lopez.
>
> * * *
>
> [THE COURT]: * * * Mr. Porter, I am not a doctor, but I know that dyslexia relates to—it is a reading disorder where you transpose numbers and you read them in an improper sequence. At page ten of your transcript the court asked you specifically at lines two and three, do you read and write the English language? Are you there with me?
>
> [APPELLANT]: Yes.
>
> THE COURT: Do you see your response is yes?
>
> [APPELLANT]: Yes.
>
> [THE COURT]: Why did you not at that point inform the court, sir, that you were dyslexic?
>
> [APPELLANT]: Because I am ashamed to let people know. Dyslexia is not only as far as reading and writing, also understanding things in a different way than some people understand things. I don't understand. He even his self will tell you my people, my family at home have to explain things over and over again, at least twice for me to understand what you saying. You could say something to me and ask me just basically, yes, I understand, but as fully the merit of understanding it, what is your meaning behind it, okay, yes, I said, yes, I do know how to read and write in English, but not all—
>
> [THE COURT]: Did this court instruct you, sir, to answer these questions in any specific way?
>
> [APPELLANT]: No.

(Tr. 62-66.)

{¶ 13} Appellant's counsel testified, under oath, that he communicated every plea offer ever given with appellant, discussed the entry of guilty plea form with appellant, and

made no promises to appellant regarding probation, although they discussed the possibility of probation. (Tr. 83-85.)

{¶ 14} The state also indicated that:

> Mr. Dearwester (phonetic), who was the identifying witness on [appellant], one of the two victims in this case who was available, ready and able to testify on March 8, now has warrants against him, and the state is unable to locate him at this time. So that there would be damage to the state's case should this court allow [appellant] to withdraw his guilty plea, and the state has absolute reason to believe that [appellant] is aware of Mr. Dearwester's problems, which is another factor in his decision to further play games with the system.

(Tr. 86.)

{¶ 15} Upon listening to testimony from appellant, appellant's counsel, and the state, the trial court denied appellant's motion to withdraw his guilty pleas, stating:

> There are several factors that this court must consider in deciding whether it will accept withdrawal of a plea, including but not limited to whether the accused was represented by highly competent counsel. This court finds that Mr. Lopez is highly competent counsel. He has practiced in this courthouse for a number [of] years. He has practiced in this courtroom specifically on several occasions. His representation has always been well thought out and with an aim towards doing what is in the best interests of his clients. So I find that [appellant] has had highly competent counsel.
>
> The court must also consider whether the accused was given a full Criminal Rule 11 hearing before the plea. I have provided [appellant] with a copy of that colloquy. He admits that he gave those responses to the court during his Criminal Rule 11 hearing, and the court found after the plea that the plea was entered knowingly, intelligently, and voluntarily.
>
> We have held a hearing on the motion. The court has given full and fair consideration to [appellant's] motion. There is also the criterion of whether the accused understood the nature of the charges and possible penalties. This court took the extraordinary step of going through not only the plea offer with [appellant], but also the possible penalties that he would face if he were convicted during a trial of this matter.
>
> I will say to you, [appellant], I think that this is the last-minute tactic, sir. I think that you understand that the

> rubber has now met the road, and I think that this is a delay. I think if this court were to grant your motion, it would cause substantial damage to the state's case because of your delays.
>
> I find that you have had, again, competent counsel. There is nothing that Mr. Lopez could have done that would have given you any more information about what your options were. You did not indicate to this court during its Rule 11 colloquy that you had issues with reading. You have indicated to the court that you were studying for your GED. Even in that conversation you did not mention the fact that your GED tutor had to provide you with special assistance with your math classes. In fact, you were only six points away from being successful on that test.
>
> You have not provided this court with any legitimate basis for accepting a withdrawal of your plea. So for all of the reasons outlined by this court, that motion is going to be denied.

(Tr. 91-93.)

{¶ 16} On May 13, 2011, the trial court sentenced appellant to six years' imprisonment as to count 7, and six years' imprisonment as to count 8, to run concurrently with one another. In addition, the trial court credited appellant with 32 days of jail time.

{¶ 17} On June 10, 2011, appellant filed a timely notice of appeal, setting forth the following assignments of error for our consideration:

> [I.] THE TRIAL COURT ABUSED ITS DISCRETION IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION BY DENYING DEFENDANT-APPELLANT'S PRESENTENCE MOTION TO WITHDRAW HIS PLEA[S].
>
> [II.] THE APPELLANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO CONSITUTION WHEN THE TRIAL COURT DENIED DEFENDANT-APPELLANT'S MOTION TO WITHDRAW PLEA[S].

{¶ 18} In his first assignment of error, appellant argues that the trial court abused its discretion by denying appellant's presentence motion to withdraw his pleas, in violation of appellant's right to due process of law under the Fourth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 10. (*See* appellant's brief, 3.) In support of this argument, appellant contends that the trial court incorrectly dismissed his Dyslexia as merely a disability relating to a person's ability to read, and challenged appellant's failure to disclose this disability when asked if he had any trouble reading, without probing into the manifestations of Dyslexia in appellant's ability to understand his pleas. Appellant further contends that the trial court failed to inquire into the impact of Dyslexia and ADHD on appellant's ability to accurately receive and perceive questions put forth to him, to process those questions logically, and to respond accurately in light of conversations held between appellant, appellant's counsel, and the prosecutor during the plea hearing. In response, the state argues that the trial court did not abuse its discretion in denying appellant's motion to withdraw his guilty pleas because: (1) the trial court thoroughly reviewed the guilty plea form and appellant's rights; (2) appellant's counsel indicated that appellant understood the plea; (3) the guilty plea form, signed by appellant, informed appellant about the rights he was waiving and potential penalties; (4) appellant asked no questions of the trial court or his counsel regarding the plea; and (5) appellant had a change of heart because he learned that the plea would affect his ability to go to school. (*See* appellee's brief, 3.)

{¶ 19} Crim.R. 32.1 governs the withdrawal of guilty pleas, stating:

> 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.

{¶ 20} Further, "[a] defendant does not have an absolute right to withdraw a guilty plea before sentencing." *State v. Powell*, 10th Dist. No. 01AP-891, 2002 WL 553565 (Apr. 16, 2002), at *3. "The decision to grant or deny a pre-sentence motion to withdraw a guilty plea is within the sound discretion of the trial court." *Id.*, citing *State v. Xie*, 62 Ohio St.3d 521 (1992). An abuse of discretion occurs where a trial court is "unreasonable,

arbitrary or unconscionable" in reaching its decision. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (1983).

{¶ 21} In *Powell*, we stated that "[t]he trial court acts within its discretion in overruling a motion to withdraw a guilty plea where: (1) the accused is represented by highly competent counsel; (2) the accused was afforded a full hearing before he entered his plea; (3) the accused is given a hearing on the motion to withdraw; and (4) the court fairly considered the motion to withdraw." *Id*. at *3.

{¶ 22} Here, as grounds for withdrawing his guilty pleas, appellant stated that he had ADHD and was unable to comprehend what was happening on April 19, 2011, and that counsel tricked him into the pleas and he did not realize what he was pleading to and the implications of those pleas. (*See* Motion to Withdraw Plea[s], 2.) However, for the following reasons, we believe that the records of both the guilty plea hearing and the hearing on appellant's motion to withdraw affirmatively refute these assertions.

{¶ 23} We are guided by the Second District Court of Appeal's reasoning in *State v. Wallace*, 2d Dist. No. 18018, 2000 WL 569947 (May 12, 2000), wherein the Second District faced an analogous situation concerning a presentence motion for withdrawal of a guilty plea. In *Wallace* at *1, the appellant entered guilty pleas to felonious assault, assault on a peace officer, and possession of cocaine. In exchange, the state agreed to make no recommendations concerning the appellant's sentence. *Id*. The day after entering his guilty pleas, the appellant contacted his attorney and stated that "he was having second thoughts and wanted to withdraw his guilty pleas." *Id*. However, the appellant's attorney advised him to "think about it," before withdrawing his pleas. *Id*. On the date of sentencing, the appellant's attorney informed him that the trial court would likely impose a six-year sentence upon him, and, after stating "that was more than he was looking for," the appellant insisted that his attorney move to withdraw his guilty pleas. *Id*. The appellant's attorney moved to withdraw the appellant's guilty pleas and also requested permission to withdraw from the case. *Id*. The trial court appointed new counsel, held an evidentiary hearing on the appellant's motion to withdraw, and subsequently denied the motion. *Id*.

{¶ 24} As grounds for withdrawing his guilty pleas, the appellant, in *Wallace*, claimed that "he was pressured by defense counsel into pleading guilty and that his

learning disabilities and inability to read made it difficult for him to understand what transpired at the plea proceeding." *Id*. at *2. In affirming the trial court's denial of the appellant's motion to withdraw, the Second District stated:

> The evidence presented at the hearing on [the appellant's] motion to withdraw his guilty pleas reveals that, although [the appellant] suffers from learning disabilities, he is not mentally retarded. [The appellant] does understand matters that are adequately explained to him, and he understands the adversarial judicial process, in part because of his extensive prior experience. Moreover, [the appellant] is competent to assist in his own defense.
>
> * * *
>
> After examining the record from the guilty plea proceeding and the hearing held on [the appellant's] motion to withdraw his pleas, we agree with the trial court that [the appellant] failed to demonstrate a legitimate basis for withdrawal of his guilty pleas. It appears that [the appellant's] true reason for wanting to withdraw his guilty pleas was a change of heart that was prompted by the length of the sentence that his attorney told him the court would likely impose. That is clearly not a legitimate basis for withdrawal when [the appellant] understood, as [the appellant] did at the time he entered those guilty pleas, the minimum and maximum sentences that could be imposed upon him and that no particular length of sentence had been promised to induce him to enter the pleas.

Id. at *2-3.

{¶ 25} In the present matter, we find that, at the April 19, 2011 plea hearing, the trial court complied with all of the requirements set forth in Crim.R. 11(C)(2) and, in doing so, made certain that appellant understood the various rights he was giving up and the consequences of his decision to plead guilty to two counts of kidnapping. During the plea colloquy, the trial court inquired as to appellant's age, education, ability to read and write the English language, and satisfaction with counsel. (Tr. 17-18.) Further, the trial court inquired as to appellant's understanding of the two-page entry of guilty plea form, including whether appellant signed the forms voluntarily and discussed the forms with counsel. (Tr. 18-19.) In addition, through further questioning, the trial court determined that appellant understood the maximum penalties associated with pleading guilty to two counts of kidnapping; that, if the trial court imposed a prison sentence, he would be

subject to a mandatory five years of post-release control; that the law establishes a presumption in favor of prison; that the trial court had the option of imposing a community control or probation sanction as his sentence; that it is under the trial court's discretion as to whether to impose prison or community control; and that the prison sentence could run either consecutively or concurrently. (Tr. 19-21.) Finally, the trial court inquired as to whether appellant understood each of his rights, including the right to require the state to prove his guilt beyond a reasonable doubt, the right to a jury trial, the right to confront witnesses, the right to compel or call witnesses to testify, the right to testify on his own behalf, the right to remain silent, and the right to appeal a guilty verdict to a higher court. (Tr. 21-22.) Based upon the foregoing testimony, we believe that appellant entered into his guilty pleas knowingly, intelligently, and voluntarily.

{¶ 26} Further, the evidence presented at the May 12, 2011 hearing on appellant's motion to withdraw his guilty pleas demonstrates that appellant was represented by highly competent counsel, was afforded a full hearing before he entered his plea, was given a hearing on his motion to withdraw, and that the trial court fairly considered appellant's motion to withdraw. *See Powell*, 2002 WL 553565, at *3.

{¶ 27} First, based upon Lopez's testimony, we find that, prior to appellant pleading guilty, Lopez discussed the entry of guilty plea forms with appellant and appellant understood the forms.

> THE COURT: All right. Mr. Lopez, did you have an opportunity to discuss this form with [appellant]?
>
> MR. LOPEZ: Yes, Your Honor.
>
> THE COURT: Did it seem to you that he understood the information that was contained on this form?
>
> [MR. LOPEZ]: Yes, Your Honor.
>
> THE COURT: Did he raise any questions about any of the information on this form?
>
> [MR. LOPEZ]: No, Your Honor.
>
> THE COURT: Did he indicate to you during your conversation that he wanted to enter a plea of guilty as specified on this entry of guilty plea form?

[MR. LOPEZ]: Yes, Your Honor.

(Tr. 84-85.) In addition, the trial court acknowledged Lopez to be highly competent counsel because he practiced in the courthouse and in that particular courtroom for a number of years, and "[h]is representation has always been well thought out and with an aim towards doing what is in the best interest of his clients." (Tr. 91.) We find nothing in the record to refute the trial court's finding regarding Lopez's competency as appellant's counsel.

{¶ 28} Second, based upon the transcript of the April 19, 2011 plea hearing, and our prior detailed discussion regarding the Crim.R. 11 plea colloquy, we find that the trial court afforded appellant a full hearing prior to appellant entering his guilty pleas and that appellant entered into those guilty pleas knowingly, intelligently, and voluntarily.

{¶ 29} Third, based upon the record, we find that, on May 12, 2011, the trial court afforded appellant a hearing on his motion to withdraw guilty pleas.

{¶ 30} Fourth, based upon the record, we find that the trial court fairly considered appellant's motion to withdraw. At the hearing, the trial court allowed appellant to fully express his reasons for wanting to withdraw his guilty pleas, including his assertions regarding Dyslexia and ADHD. At that time, the following discussion ensued:

> THE COURT: Let me interrupt * * * I am not a doctor, but I know that dyslexia relates to—it is a reading disorder where you transpose numbers and you read them in an improper sequence. At page ten of your transcript the court asked you specifically at lines two and three, do you read and write the English language? Are you there with me?
>
> [APPELLANT]: Yes.
>
> THE COURT: Do you see your response is yes?
>
> [APPELLANT]: Yes.
>
> THE COURT: Why did you not at that point inform the court, sir, that you were dyslexic?
>
> [APPELLANT]: Because I am ashamed to let people know. Dyslexia is not only as far as reading and writing, also understanding things in a different way than some people understand things. I don't understand. * * * You could say

> something to me and ask me just basically, yes, I understand, but as fully the merit of understanding it, what is your meaning behind it, okay, yes, I said, yes, I do know how to read and write in English * * *.
>
> THE COURT: Did this court instruct you, sir, to answer these questions in any specific way?
>
> [APPELLANT]: No.

(Tr. 65-66.) Also, the trial court gave appellant a copy of the transcript from the April 19, 2011 plea hearing, which allowed appellant to refresh his recollection regarding the trial court's explanation regarding the maximum penalties for pleading guilty to kidnapping and appellant's waiver of rights if he were to plead guilty to those counts. (Tr. 35-37.) During questioning, appellant admitted that he thought he was going to be sentenced to probation, and that, if he pleaded guilty to kidnapping, he would not be able to complete his education at Everest because he would no longer qualify for government funding. (Tr. 38-40.) Further, appellant indicated that he learned this information subsequent to pleading guilty on April 19, 2011 and that, upon hearing that appellant pled guilty to two counts of kidnapping, the woman at Everest stated "you can't plead out to that. You have to somehow get out of it." (Tr. 72-73.) However, "[a] defendant is not entitled to withdraw his guilty plea merely because he has changed his mind or because he has learned that he will receive a harsher sentence than he had subjectively expected." *Powell* at *3, citing *State v. Lambros*, 44 Ohio App.3d 102 (8thDist.1988). Appellant also admitted that he is not a novice to this system because, in 2005, he went through the system on a grand theft auto charge, pled out to probation, and had his rights explained to him at that time. (Tr. 51-52.) We also note that the record is void of any evidence that appellant did not understand the consequences of his guilty pleas.

{¶ 31} Based upon the record before us, we agree with the trial court that appellant understood the nature of the charges and possible penalties, had competent counsel, and failed to provide any legitimate basis for the withdrawal of his guilty pleas. Therefore, we find no abuse of discretion on the part of the trial court in denying appellant's motion to withdraw his guilty pleas.

{¶ 32} Appellant's first assignment of error is overruled.

{¶ 33} In his second assignment of error, appellant argues that he was denied his right to the effective assistance of counsel, pursuant to the Sixth Amendment to the United States Constitution and the Ohio Constitution, Article I, Section 10. (*See* appellant's brief, 7.) In support of this argument, appellant asserts that his trial counsel failed to conduct a prompt investigation with regard to the circumstances surrounding appellant's "disability" and failed to present complete and accurate evidence of appellant's "disability" to the trial court. (*See* appellant's brief, 9-10.) In response, appellee argues that appellant's counsel did not have a duty to investigate claims that had no merit, such as appellant's sudden claims of Dyslexia and ADHD, when the record contains no proof that appellant "truly suffered from any disorder that impacted his ability to understand the proceedings." (*See* appellee's brief, 9.)

{¶ 34} The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel. *State v. Banks*, 10th Dist. No. 10AP-1065, 2011-Ohio-2749, ¶ 12, citing *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441 (1970). Courts use a two-part test to evaluate claims of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-42 (1989). "First, the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id*. " 'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.' " *Bradley* at 142, quoting Strickland, 466 U.S. at 691; *see also United States v. Morrison*, 449 U.S. 361, 364-65, 101 S.Ct. 665 (1981). In order to warrant reversal, "[t]he 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.

{¶ 35} In performing the first part of the ineffective assistance of counsel analysis, "[t]he defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy." *Banks* at ¶ 13, citing *State v. Smith*, 17 Ohio St.3d 98, 100 (1985). Further, "in the context of guilty pleas, the prejudice element, focuses on whether counsel's

constitutionally ineffective performance affected the outcome of the plea process." *State v. Armstead*, 138 Ohio App.3d 866, 870 (10thDist.2000.) Specifically, " 'to satisfy the second, or "prejudice," requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *State v. Carter*, 10th Dist. No. 00AP-1356, 2001 WL 893529 (Aug. 9, 2001), quoting *Armstead* at 870.

{¶ 36} First, although appellant claims that Lopez failed to investigate the circumstances surrounding his alleged Dyslexia and ADHD, in order to properly present this information to the trial court, there is no evidence in the record, prior to appellant's motion to withdraw his guilty pleas, that appellant suffered from these conditions. At the April 19, 2011 plea hearing, appellant never indicated that he had difficulty reading or understanding the entry of guilty plea form. In addition, appellant never indicated that he had difficulty understanding the trial court's questioning regarding the maximum penalties associated with pleading guilty to two counts of kidnapping or the waiver of his constitutional rights. In fact, the record shows that the trial court spent considerable time discussing these issues with appellant in order to determine that appellant knowingly, intelligently, and voluntarily entered into the guilty pleas, and appellant never expressed apprehension or concern regarding not being able to follow or comprehend this information.

{¶ 37} Second, upon appellant's instruction, Lopez filed a motion to withdraw appellant's guilty pleas on May 4, 2011, and, in that motion, Lopez informed the trial court that appellant wished to withdraw his guilty pleas, in part, due to ADHD and the inability to comprehend what happened at the April 19, 2011 plea hearing. (*See* Motion to Withdraw Plea[s], 2.) Further, Lopez requested an oral hearing in order for appellant to further state his reasons for wanting to withdraw his guilty pleas.

{¶ 38} Third, at the May 12, 2011 hearing on the motion to withdraw, Lopez stated that he did not go into a lot of detail in the motion to withdraw due to attorney/client privilege, but that appellant "feels that he was duped by me into entering a plea, that he was pressured into entering the plea[s] * * * [and] he also mentioned some issues with ADD or ADHD, that he was unable to comprehend what was going on that morning." (Tr. 28.) However, when the trial court allowed appellant to explain his reasons for wanting to

withdraw his guilty pleas, appellant did not inform the court about Dyslexia or ADHD but indicated that he believed he would get probation and that the woman at Everest told appellant that he would not be able to get government funding for school. (Tr. 38-41; 72.) Appellant only spoke about Dyslexia and ADHD when pressed by the prosecutor and the trial court about paying attention during the plea hearing. (Tr. 62-65.) As such, Lopez informed the trial court about appellant's concerns regarding Dyslexia and ADHD, but the trial court did not believe the validity of these concerns due to appellant's testimony on the issue.

{¶ 39} Therefore, based upon the foregoing, the record does not support appellant's claim that Lopez's performance was deficient.

{¶ 40} Finally, in arguendo, even if Lopez's representation was deficient on some level, the record does not support that appellant was prejudiced. *See Strickland*, 466 U.S. at 687. Appellant has failed to demonstrate that there is a reasonable probability that, but for Lopez's alleged failure to conduct a prompt investigation with regard to the circumstances surrounding appellant's "disability," or Lopez's alleged failure to present complete and accurate evidence of appellant's "disability" to the trial court, appellant would not have pled guilty and would have insisted on going to trial. *See Armstead* at 870. First, at the plea hearing on April 19, 2011, there is no evidence that Lopez had any knowledge regarding appellant's alleged disabilities and, therefore, it stands to reason that at this stage in the plea process, Lopez could not have performed a prompt investigation into appellant's alleged disabilities or informed the trial court regarding this issue.[1] Second, once appellant decided to plead guilty to counts 7 and 8 of the indictment, he did not indicate any hesitation due to an inability to comprehend the terms of the plea. (Tr. 14-26.) In fact, at the plea hearing, appellant admitted that he discussed the charges against him with Lopez and that he was satisfied with Lopez's advice and representation. (Tr. 18.) As such, even if Lopez knew of appellant's alleged disabilities at the time of the

[1] If appellant were to allege that Lopez had knowledge of his ADHD prior to the plea, because there is no evidence in the record, such allegation might, if timely and appropriate, be addressed through the post conviction relief process. "Although designed to address claimed constitutional violations, the postconviction relief process is a civil collateral attack on a criminal judgment, not an appeal of that judgment." *State v. Murphy*, 10th Dist. No. 00AP-233, 2000 WL 1877526 (Dec. 26, 2000), at *2 , citing *State v. Steffen*, 70 Ohio St.3d 399 (1994). "It is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record of the petitioner's criminal conviction." *Id*., citing *State v. Jackson*, 64 Ohio St.2d 107 (1980).

plea hearing and informed the trial court regarding the same, the record is void of any evidence that appellant would not have pled guilty and would have insisted on going to trial.

{¶ 41} Further, as to whether the outcome would have been different at the May 12, 2011 hearing on appellant's motion to withdraw his guilty pleas, there is no evidence that the trial court's decision to deny appellant's motion would have changed had Lopez investigated appellant's alleged disabilities and presented this information to the trial court. The record shows that Lopez informed the trial court that appellant "mentioned some issues with ADD or ADHD, [and] that he was unable to comprehend what was going on that morning, and those were the reasons for my understanding at this point for the withdrawal of the plea[s]." (Tr. 28.) Further, the trial court allowed appellant to expound, for quite some time, regarding ADHD and Dyslexia, as well as any other reasons appellant proffered for wanting to withdraw his guilty pleas. (Tr. 63-66.) However, after holding a full hearing on appellant's motion and listening to appellant's testimony regarding his reasons for wanting to withdraw his guilty pleas, the trial court still concluded that appellant did not provide the court "with any legitimate basis for accepting a withdrawal of [his] plea[s]." (Tr. 93.) Therefore, based upon the trial court's strong words regarding there being no legitimate basis for accepting a withdrawal of appellant's guilty pleas, even if Lopez had conducted an investigation into appellant's alleged disabilities and made an additional argument to the trial court, there is no evidence that the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694.

{¶ 42} Therefore, based upon the record, we cannot find appellant's counsel's representation ineffective.

{¶ 43} Appellant's second assignment of error is overruled.

{¶ 44} Having overruled both of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and TYACK, JJ., concur.
