[Cite as *State v. O'Connell*, 2011-Ohio-652.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-L-030**
- vs -	:	
THOMAS A. O'CONNELL, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 000195.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Rhys Brendan Cartwright-Jones, 42 North Phelps Street, Youngstown, OH 44503-1130 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Thomas A. O'Connell, Jr., appeals from a judgment of the Lake County Court of Common Pleas which denied his motion to withdraw his guilty plea regarding the state's charge that he violated the terms of his community control sanctions. As Mr. O'Connell failed to set forth facts showing he was precluded from entering a knowing and intelligent plea by his counsel's allegedly deficient performance, he has not demonstrated the "manifest injustice" necessary to establish a post-sentence motion to withdraw his guilty plea. Therefore, we affirm the judgment of the court.

{¶2} **Substantive Facts and Procedural History**

{¶3} In 2006 and 2007, Mr. O'Connell, a full-time police officer employed by the Greater Cleveland Regional Transit Authority and a part-time officer with the Geneva-on-the-Lake Police Department, obtained multiple prescriptions for pain medications for his back pain from different doctors. The state, by a bill of information, charged him with four counts of deception to obtain a dangerous drug, in violation of R.C. 2925.22. The state accused him of improperly obtaining 77 narcotic prescriptions from 13 different doctors.

{¶4} Mr. O'Connell moved for intervention in lieu of conviction pursuant to R.C. 2951.0441(B). On June 6, 2007, the trial court held a hearing on the motion. After the court advised him of his rights as a criminal defendant, Mr. O'Connell pleaded guilty to four counts of deception to obtain a dangerous drug; two of them were felonies of the fourth degree and the other two were felonies of the fifth degree.

{¶5} As part of the plea colloquy he was asked what formed the basis of the information. Mr. O'Connell explained that he had injured his back and saw several different doctors. He specifically stated that he "didn't tell them that [he] went, who [he] had seen relative to the pain."

{¶6} The court granted his motion for intervention in lieu of conviction. Instead of sentencing him to a prison term, the court imposed three years of community control sanctions, placing him under the supervision of the Lake County Adult Probation Department. The court ordered him to obtain a pain management plan with a single pain management doctor who will prescribe any needed medications. The transcript reflects the following statement by the court:

{¶7} "You will obtain with a medical practitioner a specific plan of pain management with a specific pain management physician *who will prescribe any medications that are necessary for you*.

{¶8} "You will have one dentist and one pharmacist at a time." (Emphasis added.)

{¶9} In addition, the court ordered him to complete the "Glenbeigh" program, attend at least three AA meetings a week, and submit himself to periodic screens for drugs.

{¶10} Regarding the "one-doctor" requirement, the court's judgment entry stated, in pertinent part:

{¶11} "The Court further orders that the defendant successfully comply with all of the conditions of the following intervention plan:

{¶12} "1. Defendant shall enter into a pain management plan.

{¶13} "2. Defendant shall have one (1) doctor for his pain management plan.

{¶14} "3. Defendant shall take all medications as prescribed.

{¶15} "4. Defendant shall have one (1) doctor, one (1) dentist and one (1) pharmacist."

{¶16} Subsequently, the state learned that between January 7, 2008 and April 2, 2008, Mr. O'Connell received and filled prescriptions for Oxycodone (Percocet) from Dr. Demangone, his pain management doctor, and for Hydrocodone (Vicoden) from Dr. Patel, his long-time doctor. Mr. O'Connell claimed he obtained the prescription from Dr. Patel for an aggravated rotator cuff injury.

{¶17} Consequently, on October 8, 2008, the state filed a motion to terminate the community control sanctions, alleging Mr. O'Connell violated the terms of his intervention plan by receiving prescriptions for pain medications from multiple doctors.

{¶18} The court held a hearing on the state's motion the following day, during which Mr. O'Connell explained he interpreted the "one-doctor" condition as allowing him to have one "pain management" doctor for his back but allowing him to go to his long-term doctor for other health issues he may have, such as the pain from his shoulder injury. Mr. O'Connell's intervention included a contract by which he agreed to inform his pain management physician of any other medications he received; however, the record of his pain management physician, Dr. Demangone, indicated that Mr. O'Connell failed to advise him of the prescription received from Dr. Patel. Thus, Mr. O'Connell was terminated from the program. Mr. O'Connell claimed that "he did not understand the guidelines for pain management" and that he was "trying to follow the rules"; however, at the hearing he waived his right to a probable cause as well as a final hearing, and instead pleaded guilty to the charge of community control sanctions violation. The court sentenced him to a jail term of 45 days and imposed four years of community control sanctions.

{¶19} Fourteen months after his guilty plea was entered, Mr. O'Connell filed a motion to withdraw his guilty plea to the charge of community control sanctions violations, pursuant to Crim.R. 32.1. In the affidavit attached to Mr. O'Connell's motion, he stated that he entered into the pain management program for the pain relating to a severe back injury, but shortly afterward he injured his shoulder. He contacted his pain management doctor, Dr. Demangone, who advised him to contact his long-term

physician, Dr. Patel, for treatment of his shoulder. Dr. Patel prescribed him pain medication for his shoulder. Dr. Demangone was apparently not made aware that Dr. Patel prescribed pain medication for Mr. O'Connell.

{¶20} In his motion to withdraw his guilty plea, Mr. O'Connell argued the conditions imposed by the court could be interpreted as permitting one doctor for pain management and another for other health issues, and therefore, his obtaining pain medication for his shoulder injury from Dr. Patel did not violate the terms of his community control sanctions. He alleged that a variety of injuries he suffered necessitated visits to more than one doctor. He contended his plea was not knowing and intelligent because his counsel failed to explain the circumstances of the case in terms he could understand and because his attorney failed to do the "research necessary to obtain a favorable result."

{¶21} The trial court denied his motion, finding that defense counsel's performance was "not deficient" and that Mr. O'Connell's plea was "knowing, voluntary, and intelligent," and therefore, Mr. O'Connell failed to demonstrate manifest injustice required for a withdrawal of his guilty plea.

{¶22} Mr. O'Connell now appeals, raising a single assignment of error for our review:

{¶23} "The trial court abused its discretion in denying Mr. O'Connell's Crim.R. 32.1 petition without a hearing."

{¶24} **Standard of Review**

{¶25} An appellate court reviews a trial court's decision on a motion to withdraw a plea under an abuse-of-discretion standard. *State v. Francis*, 104 Ohio St.3d 490,

2004-Ohio-6894, ¶32. A Crim.R. 32.1 motion is addressed to the sound discretion of a trial court. *State v. Madeline* (Mar. 22, 2002), 11th Dist. No. 2000-T-0156, 2002 Ohio App. LEXIS 1348, *8, citing *State v. Xie* (1992), 62 Ohio St.3d 521, paragraph two of the syllabus. "The good faith, credibility, and weight of a defendant's assertions in support of his motion are to be resolved by a trial court." *Madeline* at *8, citing *State v. Gibbs* (June 9, 2000), 11th Dist. No. 98-T-0190, 2000 Ohio App. LEXIS 2526, *6

{¶26} An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶27} **Law and Analysis**

{¶28} Mr. O'Connell's sole contention on appeal is that the trial court abused its discretion in denying his post-sentence motion to withdraw a guilty plea without a hearing.

{¶29} Crim.R. 32.1 states:

{¶30} "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."

{¶31} "Pursuant to Crim.R. 32.1, to withdraw a guilty plea after the imposition of sentence, a defendant bears the burden of demonstrating that such a withdrawal is necessary to correct a manifest injustice." *Madeline* at *7, citing *State v. Kerns* (July 14, 2000), 11th Dist. No. 99-T-0106, 2000 Ohio App. LEXIS 3202. "A post-sentence Crim.R. 32.1 motion to withdraw a guilty plea is granted only in extraordinary cases to

correct a manifest injustice." *Madeline* at *7-8, citing *State v. Smith* (1977), 49 Ohio St.2d 261, 264. A manifest injustice is a "clear or openly unjust act." *State v. Walling*, 3d Dist. No. 17-04-12, 2005-Ohio-428, ¶6.

{¶32} Regarding whether a hearing would be required on a post-sentence motion to withdraw a guilty plea, this court stated the following in *State v. Gibson*, 11th Dist. No. 2007-P-0021, 2007-Ohio-6926:

{¶33} "While a trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of a guilty plea if the request is made before sentencing, the same is not true if the request is made after the trial court has already sentenced the defendant." Id. at ¶32, quoting *State v. Wilkey*, 5th Dist. No. CT2005-0050, 2006-Ohio-3276, ¶25, citing *State v. Xie* (1992), 62 Ohio St.3d 521, paragraph one of the syllabus. "In those situations where the trial court must consider a post-sentence motion to withdraw a guilty plea, a hearing is only required if the facts alleged by the defendant, and accepted as true, would require withdrawal of the plea." *Gisbson* at ¶32, quoting *Wilkey* at ¶25, citing *Xie*. "An evidentiary hearing on a post-sentence motion to withdraw a guilty plea 'is not required if the facts as alleged by the defendant, and accepted as true by the court, would not require that the guilty plea be withdrawn.'" *Gibson* at ¶33, quoting *Wilkey* at ¶26, citing *State v. Patterson*, 5th Dist. No. 2003CA00135, 2004-Ohio-1569.

{¶34} On appeal, Mr. O'Connell argues he did not violate the terms of his community control sanctions because he reasonably interpreted the conditions to mean that he could only go to only one physician for pain management for his back problems but that he would also be allowed to go to his long-term physician, Dr. Patel, for other

medical issues. He argues compliance would be impossible, given his medical needs, if the terms are interpreted as requiring him to see only one doctor.

{¶35} The trial court's instructions regarding the terms of Mr. O'Connell's community control sanctions appear to be straightforward, both at the hearing and in the sentencing entry -- he was to have one doctor, one dentist, and one pharmacist. Mr. O'Connell's own interpretation, that he could have one doctor relating to his *back* pain and one for all other health issues, is not a reasonable interpretation. More importantly, there can be no doubt that Mr. O'Connell knew from the outset that his criminal charges stemmed from obtaining drugs from multiple doctors without telling those doctors of the prescriptions by other physicians. A fundamental part of his intervention was his contract with the pain management physician by which he agreed to inform the physician of any other medical treatment he received. Simply put, he broke that contract, engaged in the same conduct that first brought him into to the criminal justice system, and thus lost his chance to avoid a felony record.

{¶36} *In any event*, the record also reflects Mr. O'Connell chose not to pursue his defenses at the termination hearing; instead, he waived the probable cause and final hearings and pleaded guilty to the charge of community control sanctions violation. It was only in his motion to withdraw guilty plea filed more than a year later that he claimed his plea was not voluntarily and intelligently made because his counsel failed to explain to him "the circumstances in terms he could easily understand" and that his counsel failed to do the "research necessary to obtain a favorable outcome." Essentially, Mr. O'Connell claims his plea was not knowing, intelligent, or voluntary because he was denied effective assistance of counsel.

{¶37} **Whether Alleged Ineffective Assistance of Counsel Precluded Defendant from Entering a Knowing and Intelligent Plea**

{¶38} A properly licensed attorney is presumed to have rendered competent assistance. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. "In the context of a guilty plea, the standard of review for ineffective assistance of counsel is whether: (1) counsel's performance was deficient; and (2) the defendant was prejudiced by the deficient performance in that there is a reasonable probability that, but for counsel's error, the defendant would not have pled guilty." *State v. DelManzo*, 11th Dist. No. 2009-L-167, 2010-Ohio-3555, ¶33, citing *Madeline* at *9-10. The defendant carries the burden to prove ineffective assistance of counsel. *Madeline* at *10.

{¶39} "The mere fact that, if not for the alleged ineffective assistance of counsel, the defendant would not have entered a guilty plea is *not* sufficient to establish the requisite connection between the guilty plea and the ineffective assistance." (Emphasis sic.) *Madeline* at *10, citing *State v. Sopjack* (Dec. 15, 1995), 11th Dist. No. 93-G-1826, *11. "Rather, ineffective assistance of trial counsel is found to have affected the validity of a guilty plea when it precluded a defendant from entering his plea knowingly and voluntarily." Id., citing *Sopjack*.

{¶40} At the termination hearing, Mr. O'Connell told the court he took the terms of his community control sanctions to mean he was allowed to see one doctor for the pain management for his back and to see his long-term doctor for all other health issues. He, however, conceded his interpretation was purely subjective, as reflected in the following colloquy:

{¶41} "THE COURT: Did anybody tell you that was the interpretation?

{¶42} "THE DEFENDANT: No, sir.

{¶43} "THE COURT: That was the interpretation you selected?

{¶44} "THE DEFENDANT: Yes, sir."

{¶45} The court asked Mr. O'Connell, "[d]o you understand what it is that the probation department claims that you did wrong while on probation," to which he answered "yes." The court also advised him that he had the right to a probable cause hearing and a hearing on the merits regarding the allegation of community control sanctions violation, and that the state was required to prove by sufficient evidence his violation. Furthermore, the transcript reflects the following representation made by the defense counsel to the court:

{¶46} "Your Honor, my client understands the nature of the charge against him and the allegation that he violated the terms of his pain management program. I've explained to him that he has a right to contest the allegations through a probable cause and/or final hearing in this matter. He's indicated to me that he desires to acknowledge his guilt, plead guilty in the matter and it's his desire today to proceed to sentencing at this time and waive his right to the probable cause and final hearings that he's entitled to."

{¶47} Despite the record showing he voluntarily pleaded guilty to the charge of violating his community control sanctions, Mr. O'Connell now claims his attorney's ineffective assistance precluded him from entering a voluntary and intelligent plea.

{¶48} "A claim that a guilty plea was induced by ineffective assistance of counsel must be supported by evidence where the record of the guilty plea shows it was voluntarily made." *Delmanzo* at ¶36, citing *State v. Malesky* (Aug. 27, 1992), 8th Dist. No. 61290, 1992 Ohio App. LEXIS 4378, *4378. "A naked allegation by a defendant of

a guilty plea inducement, is insufficient to support a claim of ineffective assistance of counsel, and would not be upheld on appeal unless it is supported by affidavits or other supporting materials, substantial enough to rebut the record which shows that his plea was voluntary." *Delmanzo* at ¶37, quoting *Malesky*.

{¶49} "[A]n allegation of a coerced guilty plea involves actions over which the State has no control. Therefore, the defendant must bear the initial burden of submitting affidavits or other supporting materials to indicate that he is entitled to relief. Defendant's own self-serving declarations or affidavits alleging a coerced guilty plea are insufficient to rebut the record on review which shows that his plea was voluntary. A letter or affidavit from the court, prosecutors or defense counsel alleging a defect in the plea process may be sufficient to rebut the record on review and require an evidentiary hearing." *Delmanzo* at ¶39, citing *State v. Kapper* (1983), 5 Ohio St.3d 36, 38.

{¶50} Here, our review of Mr. O'Connell's affidavit submitted in connection with his motion to withdraw the guilty plea shows the affidavit concerns primarily his claim that he interpreted the community control sanctions conditions as allowing him to seek treatment and obtain pain medication from his long-term doctor for shoulder pain unrelated to his back pain. Regarding his allegation that his attorney failed to provide effective assistance, which precluded him from entering a knowing and intelligent plea, he merely made the following general statements:

{¶51} "I did not at the time fully understand what exactly what [sic] was happening regarding my case, due to my Attorney's failure to explain the circumstances in terms in which I could easily understand. *** I trusted him completely which I now understand was simply a mistake. *** There are many aspects of this case that need to

be and or needed to be thoroughly examined by my Attorney and despite the fact that I did request that this review take place, he simply never took the time to do so nor did he take the time to do the research necessary to obtain a favorable outcome."

{¶52} Mr. O'Connell failed to allege facts demonstrating what his counsel could and should have explained to him to make his plea knowing and voluntary, and how he was precluded from doing so by the alleged failure by counsel. His broad statement claiming deficient assistance of counsel is insufficient to rebut the record which does provide ample evidence that his plea was knowingly, voluntarily, and intelligently made.

{¶53} Finally, we note that "[a]lthough there is no time limit for filing a Crim.R. 32.1 motion, an undue delay between the occurrence of the alleged cause for the withdrawal of the plea and the filing of a Crim.R. 32.1 motion is a factor that affects the credibility of a defendant and weighs against allowing a defendant's plea to be withdrawn." *Madeline* at *8, citing *Smith*, paragraph three of the syllabus. Mr. O'Connell's delay in filing his motion to withdraw his guilty plea was cited by the trial court as a factor affecting the credibility of his claim.

{¶54} An evidentiary hearing is only required when the facts alleged by the defendant would require the guilty plea be withdrawn. After review, we conclude Mr. O'Connell has not demonstrated the kind of "manifest injustice" necessary to establish a post-sentence motion to withdraw a guilty plea. When combined with the fact that Mr. O'Connell filed his post-sentence motion at such a late juncture, 14 months after his guilty plea and sentence, we are unwilling to conclude, under the facts of this case, that the trial court's decision to deny the motion without a hearing was an abuse of

discretion. The assignment of error is without merit.

{¶55} The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.