[Cite as *State v. McMahon*, 2010-Ohio-2055.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-06-008
	:	O P I N I O N
- vs -		5/10/2010
	:	
ROBERT L. McMAHON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 05CR10129

David B. Bender, Fayette County Prosecuting Attorney, 110 East Court Street, 1st Floor, Washington C.H., Ohio 43160, for plaintiff-appellee

Robert L. McMahon, #A506-107, Ross Correctional Institution, P.O. Box 7010, Chillicothe, Ohio 45601, defendant-appellant, pro se

POWELL, J.

{¶1} Defendant-appellant, Robert L. McMahon, appeals the decision of the Fayette County Court of Common Pleas denying his motion to withdraw his guilty plea to the offense of trafficking in drugs.

{¶2} Appellant pled guilty in 2005 to trafficking in drugs, a felony of the second degree. According to the record, appellant's guilty plea was offered one day after a mistrial

was declared in his jury trial, when the jury reportedly could not reach a unanimous verdict. At the same plea hearing, appellant also pled guilty to nine counts of a felony sex offense. Appellant was sentenced at that time to six years in prison for the trafficking offense as part of an agreed sentence.

{¶3} In October 2008, appellant filed a motion to withdraw his plea to the trafficking offense. Appellant argued that he should be permitted to withdraw his plea because he was not correctly notified about postrelease control and his trial counsel was ineffective, given that appellant is innocent of the charge.

{¶4} The trial court denied the motion without an evidentiary hearing, finding no manifest injustice warranted withdrawal of the plea. Appellant now appeals, pro se, presenting three assignments of error.

{¶5} Crim.R. 32.1 provides that 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.

{¶6} The party moving to withdraw his plea of guilty postsentence bears the burden of establishing a manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. A manifest injustice is a fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the requirements of due process. *State v. Moncrief,* Franklin App. No. 08AP-153, 2008-Ohio-4594, ¶11. A postsentence motion to withdraw a plea is allowable only in extraordinary cases. *Smith* at 264.

{¶7} Crim.R. 32.1 does not prescribe a time limitation on filing a motion, but an undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion. *Smith*, paragraph three of the

syllabus, 264.

{¶8} Further, a trial court need not hold an evidentiary hearing on every postsentence motion to withdraw a guilty plea. *State v. Degaro,* Butler App. No. CA2008-09-227, 2009-Ohio-2966, ¶13. A defendant must establish a reasonable likelihood that a withdrawal of his plea is necessary to correct a manifest injustice before a trial court must hold an evidentiary hearing on his motion. Id.

{¶9} Appellate review of the trial court's denial of a motion to withdraw a guilty plea is limited to whether the trial court abused its discretion. *State v. Powell*, Clermont App. No. CA2009-05-028, 2009-Ohio-6552, ¶10; *Moncrief*, 2008-Ohio-4594 at ¶12. An abuse of discretion implies that the trial court acted unreasonably, arbitrarily, or unconscionably.

{¶10} To facilitate a discussion of appellant's arguments, we will first address appellant's third assignment of error.

{¶11} Assignment of Error No. 3:

{¶12} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS, AS A RESULT OF TRIAL COURT'S ORDER 'OVERRULING' MCMAHON'S MOTION TO WITHDRAW HIS GUILTY PLEA, WHEN THE RECORD ITSELF SUPPORTED THE DEFENDANT'S ACCUSATIONS THAT HE MISINFORMED OF THE MAXIMUM PENALTIES OF ("P.R.C.") SANCTIONS./ AND WHERE (HE) MCMAHON ASSERTED THAT HIS GUILTY PLEA WAS NOT MADE KNOWINGLY, VOLUNTARILY, OR INTELLIGENTLY, AS A RESULT OF INEFFECTIVE COUNSEL." [SIC]

{¶13} Appellant argues that his plea was not knowingly, voluntarily, and intelligently made because the trial court failed to notify him of the maximum penalties. Appellant's specific argument is that he was misinformed about the mandatory nature of the three-year postrelease control period he was required to serve on the trafficking offense.

{¶14} Before a trial court can accept a guilty plea to a felony charge, it must explain to the defendant that he is waiving certain constitutional and nonconstitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶13; *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶30-31; Crim.R. 11(C)(2).

{¶15} When advising a defendant of his constitutional rights, the trial court must strictly comply with Crim.R. 11(C)(2), but only substantial compliance is required for nonconstitutional rights. *Veney* at ¶14-18; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, ¶19-26. An advisement on postrelease control, if it is applicable, falls under one of the nonconstitutional rights about which a defendant must be informed. *Sarkozy* at ¶22-26 (mandatory postrelease control is part of the maximum penalty).

{¶16} Under this standard, a slight deviation from the text of the rule is permissible; so long as the totality of the circumstances indicates that a defendant subjectively understood the implications of his plea and the rights he was waiving. *Clark* at ¶31.

{¶17} When a trial judge does not substantially comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court partially complied or failed to comply with the rule. *Clark* at ¶32. If the trial judge partially complied, by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect. Id.; see also *Sarkozy* at ¶23. The test for prejudice is whether the plea would have otherwise been made. Id.

{¶18} When appellant was sentenced in 2005 for the offense at issue in this appeal, he was subject to a mandatory postrelease control period of three years. See R.C. 2967.28.[1]

{¶19} The signed waiver and plea form instructed appellant that he "may receive the following additional penalties: * * * post-release supervised control not to exceed three

1. We cite the version of the statutes applicable to appellant's sentencing.

years."

{¶20} At the plea hearing, the trial court told appellant that postrelease control would be "mandatory," and on a "felony two can be up to 36 months."

{¶21} The record indicates that the plea form for the trafficking offense misinformed appellant about postrelease control. The trial court's colloquy correctly informed appellant both that he was subject to mandatory postrelease control and the consequences of violating postrelease control, but incorrectly indicated that he could serve "up to 36 months" of postrelease control. See *State v. Jones*, Mahoning App. No. 06 MA 17, 2009-Ohio-794, ¶12 ("up to three years" language indicates that the offender may be subject to less than three years of postrelease control).

{¶22} Therefore, it appears that the trial court partially complied with the requirements of Crim.R. 11 in reference to the notification of postrelease control. *State v. Lang*, Cuyahoga App. No. 92099, 2010-Ohio-433, ¶11-14 (partial compliance when trial court informed defendant that he may receive postrelease control up to three years when defendant was subject to a mandatory five-year term); see *State v. Garrett*, Summit App. No. 24377, 2009-Ohio-2559, ¶17-18 (vacation of plea where trial court completely failed to tell defendant about postrelease control is distinguished from cases where trial court misinformed defendant about length of term or whether mandatory or discretionary); cf. *State v. McKissic*, Cuyahoga App. Nos. 92332, 92333, 2010-Ohio-62, (trial court substantially complied in advising defendant about postrelease control despite its failure to advise him that he could be subject to up to one-half of the stated prison term).

{¶23} With partial compliance, the plea may be vacated only if appellant demonstrates a prejudicial effect, and, as we previously noted, the test for prejudice is whether the plea would have otherwise been made. *Clark*, 2008-Ohio-3748 at ¶32.

{¶24} A review of the record indicates that appellant was notified that postrelease

control was part of his sentence, even if done incorrectly. Appellant also pled guilty at the same plea hearing to nine counts of a felony sex offense, and was told that, as part of the agreed sentence, he would receive a prison term on those offenses to run consecutively to the instant offense. It is particularly significant that appellant will serve five years mandatory postrelease control when he is released from prison based on the felony sex offenses to which he pled.

{¶25} The plea agreement involving the two cases to which appellant pled guilty resulted in less prison time than he was eligible to serve. Appellant was in the unique position of observing the state's case against him with regard to the trafficking offense, as the case was tried the previous day to a jury. Appellant could have required the state to again try to prove its case against him, but did not. It is logical to infer that appellant viewed the plea and sentencing agreement as a favorable alternative. Finally, we note that the record demonstrates no indication that postrelease control was of particular concern or import to appellant. See *Lang* at ¶14.

{¶26} Given all the factors listed above, appellant's request to withdraw his plea four years after it occurred can only be reasonably explained as a change of heart, and not based upon the fact that appellant was misinformed that he had a three-year term of mandatory postrelease control under the trafficking offense. See *Lang* at ¶14; *State v. Gravely* (Feb. 20, 1997), Cuyahoga App. No. 70837, 1997 WL 72137.

{¶27} Accordingly, we find that appellant has failed to show that he was prejudiced by the misinformation he received in regard to his postrelease control during his plea. Appellant failed to show the manifest injustice necessary to entitle him to withdraw his plea on this basis, and we find no abuse of discretion by the trial court in this regard. We will address appellant's arguments relative to ineffective assistance of counsel under the first and second assignments of error. Appellant's third assignment of error is overruled.

{¶28} Assignment of Error No. 1:

{¶29} "THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHT UNDER THE STATE AND FEDERAL CONSTITUTIONS AS A RESULT OF THE TRIAL COURT'S JUDGMENT REFUSING TO CORRECT A MANIFEST INJUSTICE, BASED ON THE DEFENDANT'S SHOWING OF A COLORABLE CLAIM OF ACTUAL-FACTUAL-INNOCENCE." [SIC]

{¶30} Assignment of Error No. 2:

{¶31} "THE TRIAL COURT PREJUDICIALLY VIOLATED THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS, AS GUARANTEED BY THE UNITED STATES CONSTITUTION, WHEN: (1) THE DEFENDANT DEMONSTRATED A COLORABLE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, THAT LED TO HIS INVOLUNTARY GUILTY PLEA[,] AND (2) AS A RESULT OF THE TRIAL COURT'S FAILURE TO A CONDUCT AN EVIDENTIARY HEARING, WHEN ALL OF THE RECORD EVIDENCE SUPPORTED THE DEFENDANT'S CLAIMS FOR RELIEF." [SIC]

{¶32} Appellant argues that his trial counsel was ineffective because he failed to file certain pretrial motions and did not challenge certain evidence at his trial, which, as we previously noted, ended in a mistrial. Appellant spent a significant portion of his motion providing a narration of and then refuting the evidence that he claims was presented at his trial.[2]

{¶33} A plea of guilty waives the right to claim that one was prejudiced by ineffective assistance of counsel, except to the extent that such ineffective assistance made the plea less than knowing, intelligent, and voluntary. *State v. Bene,* Clermont App. No. CA2005-09-

2. Appellant attached a number of documents to support his appellate argument, including an affidavit from Chad Eggleton. The record reveals that the Eggleton affidavit was not attached to the motion to withdraw his guilty plea and the Eggleton affidavit and other issues were not argued to the trial court in appellant's motion. Therefore, we consider only those issues raised with the trial court in appellant's motion to withdraw his plea. See *State v. Davis* (Apr. 20, 1999), Vinton App. No. 98CA523, 1999 WL 249716.

090, 2006-Ohio-3628, ¶26.

{¶34} When the alleged error underlying a motion to withdraw a guilty plea is ineffective assistance of counsel, the movant must show that (1) his counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, he would not have pled guilty. See *State v. Xie* (1992), 62 Ohio St.3d 521, 524, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Heath,* Warren App. No. CA2006-03-036, 2006-Ohio-7045, ¶8.

{¶35} Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See *Strickland* at 690.

{¶36} Appellant challenges his trial counsel's failure to file pretrial motions. The failure to file a motion to suppress, for example, does not constitute per se ineffective assistance of counsel. *State v. Madrigal,* 87 Ohio St.3d 378, 389, 2000-Ohio-448. The failure to file a motion to suppress amounts to ineffective assistance only when the record demonstrates that the motion would have been successful if made. *State v. Brown,* Warren App. No. CA2002-03-026, 2002-Ohio-5455, ¶11.

{¶37} Appellant supports his arguments regarding his trial counsel's efforts both before and during trial with his recitation of the evidence presented at trial. Appellant generally argues that certain hearsay statements should have been excluded. Appellant provides no transcript for the trial court or this court to consider his arguments in regard to a motion to suppress. Accordingly, the record does not demonstrate that the motion to suppress would have been successful, in support of appellant's claim for ineffective assistance. See *Moncrief*, 2008-Ohio-4594 at ¶11 (defendant seeking to withdraw a postsentence guilty plea bears the burden of establishing manifest injustice based on specific facts either contained in the record or supplied through affidavits attached to the motion).

{¶38} Appellant also argues that trial counsel forced him to plead guilty. However, the record indicates that appellant told the trial court that no additional promises were made other than the plea and sentence agreement, that no threats were made, and that he was satisfied with his trial counsel's assistance and advice. *Moncrief* at ¶14, 23. Appellant was aware of his trial counsel's actions or inactions at the time of his plea. The fact that appellant did not complain about any of these alleged deficiencies until four years after his conviction adversely affects appellant's credibility and militates against the granting of the motion. *Smith*, 49 Ohio St.2d at paragraph three of the syllabus.

{¶39} We have reviewed all of the pertinent arguments presented by appellant in his motion to withdraw his plea and set out separately in his three assignments of error. We find none of them has merit.

{¶40} We previously found no prejudice to appellant on the postrelease control notification and therefore, appellant fails to make the required showing of prejudice for his ineffective assistance claim on that issue.

{¶41} Appellant has not shown that he would not have pled guilty, absent his trial counsel's alleged ineffectiveness on any of the points argued to the trial court. Appellant has failed to show that his guilty plea was anything but knowingly, intelligently, and voluntarily made. We do not find that the trial court abused its discretion in denying appellant's motion to withdraw his plea; nor do we find that the trial court erred in not holding a hearing, as appellant has failed to show a manifest injustice. See *State v. Balch*, Portage App. No. 2008-P-0014, 2008-Ohio-6780, ¶88 (appellant failed to demonstrate that his counsel's performance with regard to the plea proceedings was deficient or that the alleged deficiency resulted in prejudice).

{¶42} Appellant's first and second assignments of error are overruled.

{¶43} We note that the sentencing transcript for the trafficking offense indicates that

appellant was correctly informed of his mandatory term of postrelease control of three years, but the sentencing entry states that appellant "will be subject to a period of supervision by the Adult Parole Authority up to a term of three (3) years." Accordingly, appellant's sentence on the trafficking offense is vacated and this matter is remanded for a de novo sentencing hearing. See R.C. 2967.28; cf. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph one of the syllabus (for criminal sentences imposed prior to July 11, 2006, in which a trail court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing in accordance with decisions of the Ohio Supreme Court).[3]

{¶44} Judgment is affirmed in part, reversed in part, and remanded for resentencing.

YOUNG, P.J., and BRESSLER, J., concur.

3. We acknowledge that *State ex rel. Pruitt v. Cuyahoga Cty. Court of Common Pleas*, Slip Opinion No. 2010-Ohio-1808, while involving a petition for a writ of mandamus, could portend a manner of resolving these cases different from that employed here.

[Cite as *State v. McMahon*, 2010-Ohio-2055.]